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THE FEDERAL JUDICIAL DISTRICT AS "COMMUNITY" IN OBSCENITY CASES

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Few problems have plagued the courts in the last decade with greater persistence than those associated with obscenity.

The concept of obscenity varies from place to place and from time to time, and since it is essentially a subjective concept, it also tends to vary from person to person. The development of a concept of "community standard" recognizes that diverse viewpoints exist and has resulted in the consideration by courts of the concept of obscenity in light of a local standard rather than a national one. It has also incidentally relieved the Supreme Court of the United States from consideration of obscenity matters on a case-by-case basis—an approach which has been neither practical nor possible for that Court to adopt.

The community standard, however, merely shifts the burden of inquiry. It is now the local trier of fact, either judge or jury, which must consider this question in the light of local factors. While reducing the arena from a national to a local one may end the search for a national standard and make the judicial problem manageable, it may at the same time make the creative problem nearly impossible. A film producer or an author or a painter must either bind himself to the most restrictive local standard in order to avoid litigation or be prepared to defend himself in the inumerable and ill-defined "communities" that may each seek to determine the question of obscenity.

The obvious solution is to define "community" in a manner that will create a reasonably limited number of forums in which this question may be litigated without returning to a "national standard."

This paper is limited to an examination of the community standard formulation announced by *Miller v. California* and its companion cases[1] and further explained in *Hamling v. United States*[2] and

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1. Miller v. Calif., 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. Calif., 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8 MM. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973). These cases will be collectively referred to as *Miller*.

2. 418 U.S. 87 (1974).

Jenkins v. Georgia.[3] Emphasis is placed upon the validity of denominating a federal judicial district a "community" for purposes of determining such a standard,[4] and on the effect of such a determination upon subsequent state prosecutions.

I. Development of the Community Standard

The concept of "contemporary community standards" was first articulated by Judge Learned Hand in *United States v. Kennerley*.[5] Expressing his dissatisfaction with the then prevailing "most susceptible person" test of *Regina v. Hicklin*,[6] Judge Hand wrote:

> Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> Nor is it an objection, I think, that such an interpretation gives

3. 418 U.S. 153 (1974).

4. This specific problem was presented to the United States District Court for the Southern District of Ohio, Western Division at Dayton, in Cinema Associates, Ltd. v. City of Oakwood, 417 F. Supp. 146 (S.D. Ohio 1976). In that case, pursuant to a criminal complaint, a copy of the motion picture being shown at defendant's theater, *The Last Tango in Paris*, was seized. The film had been declared not obscene as a matter of law by Chief Judge Timothy S. Hogan, United States District Court for the Southern District of Ohio, Western Division at Cincinnati, in United Artists v. Leis, No. C-1-74-244 (S.D. Ohio, filed Jan. 23, 1975). Based on the analysis set out below, this author, sitting as trial judge, determined in *Cinema Associates* that a federal judicial district is a community and that Judge Hogan's holding in *United Artists* is binding within the Southern District of Ohio.

The artistic merit or lack thereof of *The Last Tango in Paris* was not at issue in *Cinema Associates*. Whether it appealed to a prurient interest or whether it possessed any socially redeeming features was for a trier of fact. The only question was whether the issue could be raised more than once in the same judicial district.

The definition of "community" properly should be made at a level higher than the district court. However, *Cinema Associates* was not appealed. It remains then for another day and another case to dispose of the issue, but until such time, *Cinema Associates* may be of some assistance to other courts faced with the same problem.

5. 209 F. 119 (S.D.N.Y. 1913).

6. L.R. 3 Q.B. 360 (1868).

> to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. . . .[7]

The Supreme Court adopted the *Kennerley* community standard rationale without elaboration as part of the fundamental obscenity test of *Roth v. United States*.[8] However, *Roth* did not define the extent of the community; consequently there arose widespread disagreement concerning its geographical boundaries. With the exception of the Fifth Circuit case, *United States v. Groner*,[9] nearly all federal courts chose a national community.[10] State courts were divided among national,[11] statewide,[12] local,[13] and variable[14] communities.

Since the Supreme Court could not marshal an obscenity majority after *Roth*, the confusion was insoluable. The opinions of Justice Brennan and Chief Justice Warren in *Jacobellis v. Ohio*[15] are indicative of the split in thinking in this area. Justice Brennan,

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7. 209 F. at 121.

8. 354 U.S. 476 (1957). The inquiry is to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U.S. at 489.

9. 479 F.2d 577 (5th Cir.), *vacated and remanded*, 414 U.S. 969 (1973). The Supreme Court ordered that the case was to be reconsidered in light of *Miller*. On remand the conviction was affirmed, 494 F.2d 499 (5th Cir. 1974).

10. *See, e.g.*, United States v. Ginzburg, 383 U.S. 463 (1966), *aff'd*, 338 F.2d 12 (3d Cir. 1964), *rehearing denied*, 384 U.S. 934 (1966); Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966); United States v. Davis, 353 F.2d 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966). *See also* cases cited in Comment, *The Geography of Obscenity's "Contemporary Community Standard,"* 8 WAKE FOREST L. REV. 81, 81-82 (1971).

11. *See, e.g.*, State v. Childs, 252 Ore. 91, 447 P.2d 304 (1968), *cert. denied*, 394 U.S. 931 (1969); Hudson v. United States, 234 A.2d 903 (D.C. Ct. App. 1967); State v. Smith, 422 S.W.2d 50 (Mo. 1967), *cert. denied*, 393 U.S. 895 (1968); State v. Locks, 97 Ariz. 148, 397 P.2d 949 (1964); State v. Hudson City News Co., 41 N.J. 247, 196 A.2d 225 (1963).

12. *See, e.g.*, Hunt v. State, 475 S.W.2d 935 (Tex. Crim. App. 1972); Court v. State, 51 Wisc. 2d 683, 188 N.W.2d 475 (1971), *vacated and remanded*, 413 U.S. 911 (1973) (for further consideration in light of *Miller*), *aff'd*, 63 Wisc. 2d 570, 217 N.W.2d 676 (1974); People v. Butler, 49 Ill. 2d 435, 275 N.E.2d 400 (1971).

13. *See, e.g.*, Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972), *vacated and remanded*, 413 U.S. 912 (1973) (for further consideration in light of *Miller*), *aff'd*, 214 Va. 490, 201 S.E.2d 798 (1974), *rehearing denied*, 414 U.S. 881 (1973); Jones v. City of Birmingham, 45 Ala. App. 86, 224 So. 2d 922 (1969), *cert. denied*, 284 Ala. 731, 224 So. 2d 924 (1969), *cert. denied*, 396 U.S. 1011 (1970).

14. *See, e.g.*, In re Grannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968) (indicating that differing standards may be appropriate for "purely local" activity than for nationally distributed material); City of Newark v. Humphres, 94 N.J. Super. 384, 228 A.2d 550 (Essex County Ct. 1967) (distinguishing between live performances and printed materials).

15. 378 U.S. 184 (1963).

announcing the decision of the Court but writing only for himself and Justice Goldberg, quoted at length from *Kennerley*[16] and then stated:

> It seems clear that in this passage Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large;. . . the public, or people in general." Thus, he recognized that under his standard the concept of obscenity would have a "varying meaning from time to time"—not from county to county, or town to town.
>
> We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution. . . . It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the smallest local "community" that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one "community" holding it to be outside the constitutional protection. . . .
>
> It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. . . . It is, after all, a national Constitution we are expounding.[17]

Chief Justice Warren, joined in dissent by Justice Clark, rejected the contention that a national standard could be proved, or would be appropriate even if proved.

> It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well

16. 209 F. 119 (S.D.N.Y. 1913).
17. 378 U.S. at 193-95.

> result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.[18]

A corollary of the disagreement concerning choice of the appropriate community was the variation in proof required to demonstrate the standards of that community. Courts which chose national or statewide communities generally required expert or other testimony to establish community standards.[19] Through such testimony, the prosecution had to establish a variance from the standard or it failed to make its case. However, some jurisdictions permitted determination based solely on an evaluation by the trier of fact of the material or conduct in question.[20] Courts selecting local communities, however defined, were inclined to defer to the trier of fact as the "metaphysical embodiment"[21] of the community and to consider such trier competent to decide the obscenity issue without assistance.[22]

Those courts which allowed the trier of fact to proceed upon its intuitive sense of contemporary community standards were on unsound ground in at least three respects. First, such an approach operated to shift to the defendant the burden of introducing expert evidence to prove lack of obscenity, rather than to maintain the normal burden imposed by the Constitution upon the prosecution. Second, it invited and encouraged the trier of fact to find obscene such material or conduct which was personally repulsive or subjectively offensive.[23] Third, and most important, it denied appellate

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18. *Id.* at 200-01.

19. *In re* Grannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968); Hudson v. United States, 234 A.2d 903 (D.C. Ct. App. 1967); United States v. Klaw, 350 F.2d 155 (2d Cir. 1965); State v. Hudson City News Co., 41 N.J. 247, 196 A.2d 225 (1963). The *Grannini* court explained this requirement as: "relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct." 69 Cal. 2d at 574, 446 P.2d at 543, 72 Cal. Rptr. at 663.

20. People v. Butler, 49 Ill. 2d 435, 275 N.E.2d 400 (1971); United States v. Wild, 422 F.2d 34 (2d Cir. 1970), *cert. denied*, 402 U.S. 986 (1971), State v. Smith, 422 S.W.2d 50 (Mo. 1967), *cert. denied*, 393 U.S. 895 (1968); People v. Fitch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S. 2d 1 (1963).

21. *In re* Grannini, 69 Cal. 2d at 576, 446 P.2d at 544, 72 Cal. Rptr. at 664.

22. United States v. Groner, 479 F.2d 577 (5th Cir.), *vacated and remanded*, 414 U.S. 969 (1973) (for further consideration in light of *Miller*), *aff'd*, 494 F.2d 499 (5th Cir. 1974); Jones v. City of Birmingham, 45 Ala. App. 86, 224 So. 2d 922, *cert. denied*, 284 Ala. 731, 224 So. 2d 924 (1969), *cert. denied*, 396 U.S. 1011 (1970); City of Newark v. Humphres, 94 N.J. Super. 384, 228 A.2d 550 (Essex County Ct. 1967).

23. In *In re* Grannini, 69 Cal. 2d at 574-75, 446 P.2d at 543, 72 Cal. Rptr. at 663, the

courts any meaningful opportunity to review the propriety of evidence upon which an obscenity determination rested. Absent evidence in the record concerning standards to be applied, appellate courts could not conduct the independent analysis needed for effective review.

Conversely, courts which demanded objective proof of some standard were confronted with the practical difficulties of determining who was qualified to present the requisite evidence.[24] The problem was especially acute in those jurisdictions requiring a national standard since, as Judge Jerome Frank stated, "[W]e do not know, with anything that approximates reliability, the 'average' American public opinion on the subject of obscenity."[25] To the extent that citizens of any state reflect the same diversity of opinion found nationally, his statement applies with equal force to jurisdictions which apply statewide standards.

II. The Federal Judicial District as "Community"

After its decision in *Roth v. United States*,[26] the Court found itself unable to fashion a set of rules which commanded the support of a majority of its members. Thereafter, the Court undertook, beginning with *Redrup v. New York*,[27] to decide obscenity cases on a case-by-case basis in per curiam opinions which offered no explanation.

In *Miller v. California*[28] the Supreme Court took the first steps toward easing the burden of defining obscenity which it had borne virtually alone since *Roth*. In its haste to be free of this responsibility, however, it neglected to provide the certainty and predictability so needed in the law of obscenity. This neglect not only prevented state and lower federal courts from assuming their share of the burden of determining obscenity *vel non*, but also denied potential defendants the opportunity to know with any degree of certainty whether a contemplated action was or was not illegal.

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court stated: "We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards . . . . To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror."

24. *See* Note, *The Use of Expert Testimony in Obscenity Litigation*, 40 Wis. L. Rev. 113 (1965); Comment, *Expert Testimony in Obscenity Cases*, 18 Hastings L.J. 161 (1966).

25. Roth v. Goldman, 172 F.2d 788, 796 (2d Cir. 1949).

26. 354 U.S. 476 (1957).

27. 386 U.S. 767 (1967). The Court disposed of 31 cases in this manner. For a list of them *see* Paris Adult Theater I v. Slaton, 413 U.S. 49, 82-83 n.8 (1973) (Brennan, J., dissenting).

28. 413 U.S. 15 (1973).

The opinion in *Miller* had three important consequences. First, it vested greater and essentially unreviewable discretion in the trier of fact to define the community against whose standards the prurient interest and patent offensiveness of a work was to be measured.[29] Second, it held that only descriptions or depictions of sexual conduct specifically defined by state or federal law could be subject to a finding of obscenity.[30] Finally, it discarded the "utterly without redeeming social value" test adopted by the plurality opinion in *Memoirs v. Massachusetts*[31] and limited the first amendment privilege to works which, taken as a whole, had serious literary, artistic, political, or scientific value.[32]

Miller ended any speculation, at least in state obscenity cases, that the community standard is to be determined with reference to a national community.[33] Quoting with approval from Chief Justice Warren's dissent in *Jacobellis*,[34] the majority explained:

> Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. . . .
>
> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [Citations omitted]. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[35]

The Court did not, however, prescribe which of the alternative communities is to be the basis for the decision of the trier of fact. The language of the opinion supported selection of either a statewide or local community, but the Court gave no guidance as to its preference. In addition, the majority did not indicate whether the national standard survived for purposes of obscenity actions in the federal courts.

There was no similar lack of clarity in the Court's treatment of the need for expert or other relevant testimony to establish the community standard. Simply put, such testimony is not required. The prosecution need only produce the challenged material or offer

29. 413 U.S. at 31-34.
30. *Id.* at 24, 27.
31. 383 U.S. 413 (1966).
32. 413 U.S. at 24-25.
33. 413 U.S. at 31.
34. 378 U.S. at 200-01.
35. 413 U.S. at 31-32.

evidence of the conduct in question.[36] The trier of fact may then evaluate it in accordance with its prejudices free from any responsibility to predicate its finding upon objective proof in the record. While the defendant may choose to introduce expert testimony to support his position,[37] it is clear that the trier of fact has no obligation to give any weight to such testimony.

The consequences discussed above in Part I therefore became law as a result of the Court's decision. Further, though it discarded the concept of national community, at least in state prosecutions, the precise reach and meaning of its holding remained for further explication.

One year later, in *Jenkins v. Georgia*[38] and *Hamling v. United States*,[39] the Court took on the task of filling the holes in *Miller*. *Jenkins* held that a state court trier of fact may, but is not required to, apply the standards of a hypothetical statewide community in lieu of the national standards rejected by *Miller*.[40] Indeed, a state need not specify any particular geographical community, and a trier of fact need only be apprised of its duty to apply the standards of an undefined "contemporary community."

Hamling dispelled any wishful thinking that *Miller* reached only state court cases.[41] Applying the reasoning of *Jenkins*, the Court reaffirmed that a trier of fact

> is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.[42]

The Court found no merit in the claim that federal legislation requires a national standard of enforcement and observed no constitutional infirmity in subjecting federal defendants to the same variances in criminal liability suffered by state defendants.[43]

The *Hamling* opinion defined the community for federal obscenity prosecutions as the area from which the jurors are drawn;

36. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973); Kaplan v. California, 413 U.S. 115, 121 (1973).
37. Cases cited note 36 *supra*.
38. 418 U.S. 153 (1974).
39. 418 U.S. 87 (1974).
40. 418 U.S. at 157.
41. 418 U.S. at 104.
42. *Id.* at 104-05.
43 *Id.* at 106.

i.e., the federal judicial district in which the case is tried.[44] Although at first blush this appears to impose upon federal triers of fact a defined geographical community not similarly applied to restrict state triers of fact, close examination reveals no substantial difference. The language of the opinion merely reiterates what theoretically occurs under *Miller*: triers of fact draw on their knowledge of the community from which they are selected—be it local or state community or federal judicial district—and the standards of that community are thereby brought to bear upon the decision.

The effect of *Miller* and its progeny has been to subject sexually oriented material to an inarticulated and virtually unknowable "crazy quilt" of varying community standards. Absent a controlling state determination of the standard of obscenity, each county or city prosecutor is free to proceed against the display of any sexual material under any standard which he elects to utilize. Further, it is conceivable and perhaps likely that contiguous counties or appellate districts will differ in their standards. Add to this the possibility that the material may be challenged for a violation of a federal statute in any division of the federal district courts, and the plight of the distributor of the material becomes absurd.[45] Multiply this example by fifty states and ninety federal judicial districts, and its consequences are reminiscent of "Alice's Adventures in Wonderland."

The ultimate outcome is that vendors and producers of sexually explicit material will be exposed to the vagaries of conflicting intra-jurisdictional and inter-jurisdictional standards. The risk of expensive and embarrassing law suits will likely result either in compelling regional or national distributors to gear their appeal to the lowest common denominator of tolerance or in voluntarily restricting the distribution of their material to relatively "safe" communi-

44. The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

Id. at 105-06.

45. Since 18 U.S.C. § 3237(a) (1970) permits federal obscenity prosecutions to be brought in any federal judicial district throughout which allegedly obscene material passes in transit, as well as where it is produced or distributed, prosecutorial forum shopping could conceivably result in the finder of fact passing upon the legality of material which is not even available in its community. The courts should invoke the transfer provisions of Rule 21(b), FED. R. CRIM. P. to prevent such unjustifiable proceedings.

ties. In either case, their first amendment rights will have been "chilled" as effectively as by formal government censorship. Inevitably, *Miller*'s broad deterrent influence will inhibit production or circulation of serious literary, artistic, or political works which include sexual elements.[46]

Motion pictures are especially vulnerable to this type of censorship since they are extremely costly to produce and display, and require extensive exhibition to be financially successful.[47] *Jenkins* itself reached the Supreme Court after the petitioner's conviction for exhibiting the film, *Carnal Knowledge*, in Albany, Georgia, had been affirmed by the Georgia courts. In spite of its wide critical acclaim and the Academy Award winning performance of its leading actress, the film was declared obscene in the community of Albany and indeed, in the entire state of Georgia. That such a verdict could be rendered, much less upheld, is indication enough of what lies ahead. Unless the Supreme Court intends to conduct an independent review of every film found obscene in every community in the nation—a most remote possibility given the intent and nature of *Miller*—film makers will be constantly called upon to defend their art but with little likelihood of success.

Under these circumstances, creative ideas which even peripherally involve sexual material will, regardless of merit, be left to wither on the vine. In a sharp dissent from the *Jenkins* decision in the Supreme Court of Georgia, Justice Guntner wrote:

> My experience with this one case teaches me that the "alarm of repression" was validly sounded [by Justice Brennan's dissent in Paris Adult Theatre I]; . . .
>
> If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.[48]

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46. *See* N.Y. Times, Dec. 19, 1973, § 2, at 3, col. 6; *id.*, Aug. 21, 1973, at 38, col. 1.

47. The film, *The Last Tango in Paris*, has been subjected to prosecution or threats of prosecution in several jurisdictions. On at least five occasions, United Artists has responded by seeking federal injunctive and declaratory relief or has challenged the constitutionality of the applicable statute. Success in the district courts has been mixed: United Artists v. Leis, No. C-1-74-244 (S.D. Ohio, filed Jan. 23, 1975) (held not obscene as a matter of law); United Artists v. Gladwell, 373 F. Supp. 247 (N.D. Ohio 1974) (injunction granted based on strong probability that a hearing upon the merits would result in a finding of non-obscenity); United Artists v. Wright, 368 F. Supp. 1034 (M.D. Ala. 1974) (prior restraint statute declared to be unconstitutional); United Artists v. Harris, 363 F. Supp. 857 (W.D. Okla. 1973) (three judge court, relief denied); United Artists v. Proskin, 363 F. Supp. 406 (N.D.N.Y. 1973) (relief denied pending New York Court of Appeals' construction of the statute).

48. 230 Ga. 726, 734-35, 199 S.E.2d 183, 188 (1973).

Ironically, it may well be that the true pornographers and smut merchants will actually profit, if not prosper from *Miller*. The publicity generated by a finding of obscenity in Omaha may contribute to increased audiences in Los Angeles, and the low-budget nature of these films permits them to reap sufficient returns without the unrestricted national exhibition critical to legitimate cinema.

In terms of uniform and predictable application, the present state of the law of obscenity is thoroughly deficient. Although recent verdicts in seemingly diverse communities indicate that there exists widespread tolerance of even "hard core" sexual material,[49] unbridled discretion on the part of the trier of fact, with its potential for arbitrariness and uncertainty, is a threat to first amendment freedoms. *Miller* requires that a finding of obscenity be predicated upon both violation of the community standard and lack of serious value. However, unless the trier of fact is sophisticated or extremely tolerant, it is likely that the distinction between these elements will be ignored, and protected expression will be suppressed. The Supreme Court has apparently decided that it is willing to accept such a risk as the price of relieving itself of the "intractable obscenity problem."[50] Perhaps, as with *Jenkins*, the Court will rejoin the fray to correct obvious abuses of the first amendment, but it clearly has not committed itself to this course, and would seem to prefer to avoid it.

III. Effect of the "Federal Judicial District Community" on Subsequent State Prosecutions

In *Miller* and subsequent cases the Court did not have occasion to address the perplexing questions of federal jurisdiction and federal-state comity which its holdings created. Those cases reached the Court after criminal trials by jury, and the decisions reflect that posture. *Hamling*, while indicating that a federal judicial district is the proper "community" for purposes of federal obscenity prosecutions,[51] does not reach the situation where a party threatened with state prosecution seeks injunctive or declaratory relief in the federal district court. Nor does it reach the more intriguing question of

49. *See* cases cited in Pines, *The Obscenity Quagmire*, 49 Cal. St. B.J. 509, 561 (1974), involving *Deep Throat*, *Behind the Green Door*, and *Devil in Miss Jones*.

50. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

51. 418 U.S. at 105-06. *See* United States v. Marks, 520 F.2d 913 (6th Cir. 1975) for an explicit acceptance of a federal judicial district as a community; and United States v. Various Articles of Obscene Merchandise, 363 F. Supp. 165 (S.D.N.Y. 1973) for an implicit acceptance. *See also* United States v. Groner, 479 F.2d 577, 583 (5th Cir. 1973) for a pre-*Miller* statement to the same effect.

whether a district court's holding that a particular item is not obscene in a city or county within the district thereby forecloses challenge to that item in state courts within the district.

Considerations of equity and comity preclude federal courts from issuing declaratory judgments concerning matters pending in state criminal proceedings.[52] Similarly, unless there is bad faith enforcement of state laws or danger of great and immediate irreparable harm, federal courts may not enjoin pending state criminal proceedings.[53] Such considerations, however, are no obstacle to the grant of federal declaratory relief when state prosecution is threatened but not yet initiated.[54] All that is necessary in the latter instance is a sufficient actual controversy to meet the constitutional requirement of a "case or controversy."

If the federal judicial district is a community for purposes of adjudicating obscenity questions, as *Hamling* suggests, then material deemed protected in one instance should be immune from all subsequent attacks within the district. Were it otherwise, material would be subjected to various standards within a single community, a result arguably not contemplated by the *Miller* Court. The issue has not been directly before the Supreme Court,[55] and among past and present members of the Court there has been substantial disagreement concerning the res judicata and stare decisis effects of declaratory judgments upon state courts and prosecutors. Since, as a practical matter, establishing the federal judicial district as a community is significant only if the jurisdiction of the district court exists and its decrees have some binding or precedential value, it is necessary to examine the law in this area.

A. *The Res Judicata Effect*

Concurring in *Steffel v. Thompson*,[56] Justice White anticipated that a holding of immunity from prosecution on constitutional grounds would be accorded res judicata effect in any later prosecu-

52. Samuels v. Mackell, 401 U.S. 66, 72-73 (1971).

53. Younger v. Harris, 401 U.S. 37, 48-49 (1971).

54. Steffel v. Thompson, 415 U.S. 452, 462-63 (1974). The Court did not reach the question of injunctive relief, but arguably it would be available if the traditional equity requirements are met. *Steffel* involved threats of criminal trespass prosecution for distribution of anti-war leaflets on private property.

55. The traditional rule, which is probably no longer valid, is stated at 46 AM. JUR. 2d *Judgments* § 620 (1969) as:

> A judgment of a civil court is not binding upon a court in which a criminal case is being tried, and a judgment rendered in a civil action is not admissible in a subsequent criminal prosecution where the judgment is offered for the purpose of proving facts adjudicated thereby, although exactly the same questions are in dispute in both cases.

56. 415 U.S. 452 (1974).

tion of the same conduct and suggested that there may be additional undefined circumstances in which the judgment should be considered "more than a mere precedent bearing on the issue before the state court."[57] He also disagreed with the proposition that a federal court, having rendered a declaratory judgment, is powerless to enjoin a later state prosecution contrary to the federal declaration.[58] White's conclusions are supported by dictum in the Court's opinion in *Samuels v. Mackell*.[59] There Justice Black wrote that, since the Declaratory Judgment Act[60] provides for post-judgment enforcement by the district court of its order, declaratory judgments might serve as the basis for subsequent injunctions to "protect or effectuate"[61] the declaration. Moreover, he continued, the declaratory relief alone had "virtually the same practical impact as a formal injunction would."[62] This rationale is consistent with the legislative intent behind the Act[63] and with the constitutional prohibition against advisory opinions.[64]

Conversely, Justice Rehnquist, joined in concurrence by Chief Justice Burger in *Steffel*,[65] viewed federal declaratory judgments as having only persuasive influence on state prosecutors,[66] and disputed the availability of injunctions to enforce compliance with such declarations.[67] Rehnquist expressly declined to discuss the res judicata effect of declaratory judgments, but offered the opinion that their stare decisis effects would be less influential in state courts than in ensuing proceedings within the same federal jurisdiction.[68]

It appears that White and Black have the better of this argument, if for no other reason than that Rehnquist's approach would reduce declaratory judgments in this context to mere exercises in futility and render the Declaratory Judgment Act an instrument of doubtful constitutionality.[69] In addition, Rehnquist's opinion evi-

57. *Id.* at 477.
58. *Id.*
59. 401 U.S. at 72.
60. 28 U.S.C. §§ 2801-02 (1970).
61. 28 U.S.C. § 2283 (1970).
62. 401 U.S. at 72.
63. 415 U.S. at 466-68.
64. *See* Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1865-66, for an expanded explanation of this point.
65. 415 U.S. at 478.
66. *Id.* at 482.
67. *Id.* at 480-81.
68. *Id.* at 482 n.3.
69. *Cf.* Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts*, 46 S. CAL. L. REV. 803 (1973).

dences a misunderstanding of the congressional purpose in providing an effective alternative to injunctive relief.[70]

Taking the approach advocated by White and Black, however, does not in itself provide a definite answer to the question posed at the inception of this section.[71] Assuming that a declaratory judgment has res judicata effect, it will normally operate to bar or collaterally estop relitigation of the determined issue only by those who had been parties to the declaratory suit.[72] Even in jurisdictions which permit a defendant to invoke the conclusive effect of a judgment rendered in a suit to which he was not party, the plaintiff must have been party to the prior suit.[73] Thus, under the orthodox concept of res judicata and collateral estoppel, only the potential prosecutor and defendant in an obscenity action will be bound by the declaration. Even in more liberal jurisdictions, the prosecutor against whom res judicata is asserted by a "stranger" in a subsequent action, must have been the potential prosecutor in the declaratory suit.

Typically, however, the requirements of the res judicata doctrine will not be met in obscenity cases. It is much more likely that in cases arising after a declaratory judgment that a piece of material is not obscene, the defendant but not the prosecutor will have been a party to the declaratory suit,[74] or neither will have been parties to such suit.[75] Nevertheless, in both of these situations the material will not differ from that which was the subject of the declaratory action. Arguably, extending the res judicata doctrine to estop prosecutions under these circumstances can be justified as merely avoiding repetitious attempts by the state to "convict" the material itself rather than its vendors. The state will not be deprived of the opportunity to present its case since presumably it will have been argued to the utmost by the prosecutor appearing in the declaratory action.[76] However such an interpretation of the doctrine would radically depart from present practice, and would be criticized as contrary to the spirit of *Younger v. Harris*.[77]

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70. 415 U.S. at 465-68.

71. *See* p. 31-32 *supra*.

72. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). *See generally* F. JAMES, CIVIL PROCEDURE, § 11.23 (1965).

73. Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964).

74. *E.g.*, the same film distributor, but accused in another county.

75. *E.g.*, the film exhibitor rather than the distributor is accused and in another county.

76. *See* Bernhard v. Bank of America National Saving and Trust Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

77. 401 U.S. 37 (1971).

Despite the questionable applicability of the res judicata doctrine to the situation where neither the accused nor the prosecutor was a party to the declaratory suit, there exist two other theories under which the declaratory judgment may be raised to defend against or halt state prosecution.

B. The Stare Decisis Effect

As noted above, White's opinion in *Steffel* speaks cryptically of circumstances in which a declaratory judgment ought to be regarded as having more than "mere" precedential influence upon the issue before a state court.[78] Presumably, he intended this statement to rebut Rehnquist's blanket assertion that the stare decisis effect of a federal declaration is less marked in state courts than in subsequent proceedings within the same federal district.[79] As a general statement of the effect of stare decisis Rehnquist's conclusion is correct, but is perhaps conservatively stated. Professor Moore states unequivocally: "While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless not binding, since the state court owes obedience to only one federal court, namely the Supreme Court."[80]

Declaratory judgments involving questions of statutory unconstitutionality are the ideal vehicles for a departure from a given traditional rule. In the case of a facially invalid statute or of conduct which cannot be constitutionally proscribed under any statute, there is no policy to be served by permitting state prosecution within the district after a federal court has determined unconstitutionality. Likewise, if a statute is voided as applied to a particular prospective defendant, all those similarly situated should be protected from prosecution. This latter case, however, will involve questions of fact not present in the former, and may require presentation of evidence in the state tribunal.

In the instance of a declaration that particular material is not obscene, the reliance upon stare decisis is simpler still. If the federal court has declared the statute per se unconstitutional, or has found the challenged material constitutionally protected, further prosecutions, either under the void statute or of the particular material, will serve no legitimate state interest. Because the material that is the subject of legal challenge will be unchanged, prosecution under a statute declared unconstitutional as applied will be as pointless as

78. 415 U.S. at 477.
79. *Id.* at 482 n.3.
80. 1 B. J. MOORE, FEDERAL PRACTICE ¶ 0.402[1] at 65 (2d ed. 1974).

a prosecution under a facially invalid statute. Further, since obscenity statutes are generally cut from a common mold, even prosecutions under different statutes or ordinances will not necessarily escape the reach of the declaratory judgment. In the latter instance, however, an evidentiary hearing may be necessary to determine the applicability of the federal declaration.

Giving declaratory judgments this additional measure of stare decisis effect would contribute much needed certainty, both to constitutionally based declaratory judgments in general, and to obscenity declarations in particular. This extension is limited and reasonable. However as with the res judicata changes proposed above, it represents a substantial modification of traditional concepts of the federal-state court relationship. As such, it will be decried as inconsistent with the policies of comity and federalism and ennunciated in *Younger*.[81]

C. *The Younger Effect*

A final approach is suggested by *Younger* itself. The *Younger* exception for bad faith enforcement of state laws[82] provides the means by which a defendant may obtain federal injunctive relief from state prosecutions in an obscenity case. In this situation the focus shifts from prosecutions contrary to a federal declaratory judgment that a given piece of material is not obscene to the relief available to convicted parties.

Younger held that pending state prosecutions may not be enjoined by the federal courts unless the proceedings have been undertaken in bad faith.[83] An obscenity prosecution contrary to a federal declaration would seem to be precisely this sort of proceeding. In the words of the Supreme Court in *Dombrowski v. Pfister*, it is not begun "with any expectation of securing valid convictions."[84] This is so because any conviction resulting from such prosecution, even should it not be reversed upon state appellate review, surely will not survive a habeas corpus petition filed in the district court which issued the declaratory judgment. The futility of the state's effort removes any justification based on its legitimate law enforcement interest in the prosecution.

This *Younger* alternative is also not without it disadvantages. Unlike res judicata and stare decisis it is a direct federal interfer-

81. 401 U.S. at 43-45.
82. *Id.* at 48-49.
83. *Id.*
84. 380 U.S. 479, 482 (1965), *quoted in* Younger v. Harris, 401 U.S. at 48.

ence with state judicial processes. Also, it requires a separate proceeding in the federal court rather than presentation of an affirmative defense in the state court. Justice Rehnquist, in *Steffel*, foresaw the attempt to avoid *Younger* in this manner, and expressed his opinion

> that continued belief in the constitutionality of the statute by state prosecutorial officials would not commonly be indicative of bad faith and that such allegations, in the absence of highly unusual circumstances, would not justify a federal court's departure from the general principles of restraint discussed in *Younger*.[85]

Rehnquist's objection aside, this approach is apparently now available to federal courts. Ironically, of the three routes discussed above it is the one most disruptive of state proceedings and the least easily implemented. Clearly, some application of res judicata or state decisis is preferable to a federal injunction. The comparatively minor intrusion which results from giving federal declaratory judgments res judicata or stare decisis effect is more consistent with the principles of *Younger* and with the constitutional and practical necessity of according declaratory judgments a measure of finality.

IV. CONCLUSION

Certain factual peculiarities cast doubt upon the reliability of the *Hamling* precedent. *Hamling* involved an unusually small judicial district[86] consisting of only one division, a single seat of court, and only two counties. It is open to question whether the Supreme Court would have found a community to exist in a district of multiple divisions each consisting of numerous counties ranging from rural to highly urban, and perhaps further subdivided into several seats of court.[87] The presumption that triers of fact are drawn from and represent the entire district would not be valid in this situation, and this would appear to fatally undermine the Court's rationale.[88] Further, applying the *Hamling* rule to the twenty-six federal judi-

85. 415 U.S. at 483-84.

86. 28 U.S.C. § 84(d) (1970).

87. For example, the Southern District of Ohio encompasses 48 counties, some nearly 200 miles apart, and has permanent seats of court in three cities. 28 U.S.C. § 115(b) (1970). It includes four large cities as well as sparsely populated farming and mining areas.

88. 418 U.S. at 105, 106. *See* note 44 *supra* for a quotation from the opinion setting forth this rationale. This concept of community is also supported by the declaration of national policy in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1972). That section states that:

> It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

cial districts which consist of an entire state[89] opens the possibility that a federal court could completely preclude any state court consideration of a particular piece of material simply by the federal court's declaration that the material was not obscene. This result does not comport with *Miller*, and it seriously violates the policy of federal-state comity.

The problem of defining the concept of community has no definitive solution and there will be none until the Supreme Court is presented with and chooses to hear a case developing this issue. Until that time the federal courts must apply the law of *Hamling* and must do so in all circumstances where the concept of "community" is critical. Thus, when issuing a declaratory judgment of non-obscenity, a district court should explicitly state that its order binds the entire district "community." State prosecutors will thereby be on notice that proceedings adverse to the declaration may either be subject to the assertion of a defense of res judicata or stare decisis or may be enjoined by the district court as within the bad faith exception to *Younger*.

Admittedly this procedure is less than ideal, but until the Supreme Court sees fit to provide additional guidance in this sensitive area of first amendment freedoms, federal courts have a responsibility to contribute greater certainty and predictability to the law in this area. The prescription outlined above advocates the subordination of jurisdictional orthodoxy to the overriding need to protect first amendment rights.

89. *See, e.g.*, 28 U.S.C. §§ 82, 85, 86, 87, 91 (1970). In addition to these 26 states, the District of Columbia and Puerto Rico each constitute a judicial district. 28 U.S.C. §§ 88, 119 (1970).