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Obscenity: Determined by Whose Standards?

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CASE COMMENTS

OBSCENITY: DETERMINED BY WHOSE STANDARDS?*

Miller v. California, 93 S. Ct. 2607 (1973)

Appellant was convicted of violating California law[1] for mailing to unwilling recipients unsolicited, sexually explicit advertisements deemed obscene by a jury applying contemporary California standards. On appeal, appellant contended that application of state rather than national standards violated the first and fourteenth amendments.[2] In vacating the California appellate court's affirmance of conviction and remanding the case for reconsideration in light of a new definition of obscenity,[3] the United States Supreme Court HELD, in interpreting state statutes obscenity is to be determined by applying contemporary community standards rather than national standards.[4]

Although freedom of speech and freedom of the press are protected by the first and fourteenth amendments,[5] expressions categorized as lewd, obscene, profane, libelous, and insulting have long been held to be of such slight social value as not to merit protection.[6] While the Court has consistently maintained that obsecenity is beyond the pale of constitutional protection, its attempts to define obscenity and set forth standards for applying its definition have been both inconsistent and unclear.[7] The early leading standard of obscenity allowed a work to be judged by evaluating the appeal of isolated excerpts of that work to particularly susceptible persons.[8] While

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1. CAL. PENAL CODE §311 (West 1970). This statute essentially incorporated the old obscenity test formulated in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

2. 93 S. Ct. 2607, 2619 (1973).

3. The Court enunciated a new requirement that state statutes designed to regulate obscene materials must be strictly limited to works depicting or describing sexual conduct in such a way that the works, taken as a whole, appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way, and do not have serious literary, artistic, political or scientific value. *Id.* at 2614-15. This comment deals only with the standards to be used in evaluating materials in the context of this new definition of obscenity and not with the evolution or merits of the definition itself. The full opinion for the instant case discusses the definition, as does Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2642 (1973) (Brennan, J., dissenting).

4. 93 S. Ct. at 2622. Justice Brennan, with whom Justices Stewart and Marshall joined, dissented; Justice Douglas dissented separately.

5. *E.g.*, Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); Gitlow v. New York, 268 U.S. 652, 666 (1925).

6. *E.g.*, Roth v. United States, 354 U.S. 476, 484-85 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

7. *See* Tucker, *The Law of Obscenity — Where Has It Gone?*, 22 U. FLA. L. REV. 547 (1970).

8. This was the English standard enunciated in Regina v. Hicklin, [1868] 3 Q.B. 360.

some American courts adopted this standard,[9] the Supreme Court in *Roth v. United States*[10] rejected this test, sanctioning instead the idea that material was not obscene unless under "contemporary community standards" the dominant theme of the material as a whole appealed to the prurient interest of the average person.[11] Although the *Roth* opinion did not specifically state what community was to furnish these contemporary standards, it did indicate approval of the trial court's instruction stating that the standards of the local jurors were to be used.[12]

Then, in *Manual Enterprises, Inc. v. Day*[13] the Court seemed to change its stance by holding that certain magazines were not so patently offensive that they violated current national community standards of decency. This switch from a local to a national community standard was later clarified by Justice Harlan, who explained the national standard was meant only for cases involving a direct federal interest, such as the nationwide dissemination of literature through the United States mail.[14]

Manual Enterprises was nevertheless relied upon in *Jacobellis v. Ohio*,[15] which held without qualification that contemporary community standards of the nation as a whole should be used in applying the test for obscenity.[16] Writing for the Court in *Jacobellis*, Justice Brennan expressed the view that a determination of obscenity was a delicate constitutional issue requiring

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9. *E.g.*, United States v. Smith, 45 F. 476, 477 (E.D. Wis. 1891); United States v. Harmon, 45 F. 414, 417 (D. Kan. 1891); United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889).

10. 354 U.S. 476 (1957).

11. *Id.* at 489.

12. *Id.* at 489-90. Chief Justice Warren added support to this view in his concurring opinion, emphasizing that the obscenity of a particular work had to be considered in the context of its setting because varying conclusions as to its quality might be reached in different environments. *Id.* at 495. For cases illustrating various "communities" used to furnish standards for determining obscenity, *see, e.g.*, Marcus v. Search Warrant, 367 U.S. 717 (1961) (striking down as unconstitutional a state's procedure permitting searching official to use his discretion in determining what items were obscene); Alexander v. United States, 271 F.2d 140, 146 (8th Cir. 1959) (placing primary responsibility for determining obscenity upon United States district court jury); United States v. Padell, 262 F.2d 357 (2d Cir. 1958), *cert. denied*, 359 U.S. 942 (1959) (recognizing United States district court jury as proper community to decide obscenity question); Eastman Kodak Co. v. Hendricks, 262 F.2d 392, 397 (9th Cir. 1958) (predicting the Supreme Court would in future be more tolerant of state obscenity restrictions than of federal obscenity statutes); Capital Enterprises, Inc. v. City of Chicago, 260 F.2d 670 (7th Cir. 1958) (acknowledging city censors' right to determine obscenity); Rachleff v. Mahon, 124 So. 2d 878, 881 (1st D.C.A. Fla. 1960) (accepting a court's ability to determine obscenity in declaratory judgment proceeding); People v. Richmond County News, Inc., 9 N.Y.2d 578, 580-81, 175 N.E.2d 681, 682, 216 N.Y.S.2d 369, 370 (1961) (adopting view that appellate court is not bound by opinion of trier of facts as to the obscenity of a publication, but instead should make its own appraisal of the publication); Excelsior Pictures Corp. v. Regents of the Univ. of New York, 3 N.Y.2d 237, 144 N.E.2d 31, 165 N.Y.S.2d 42 (1957) (illustrating power of the New York Department of Education to determine obscenity in issuing licenses for motion pictures).

13. 370 U.S. 478 (1962).

14. *See* Memoirs v. Massachusetts, 383 U.S. 413, 457 (1966) (Harlan, J., dissenting).

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

16. *Id.* at 194-95.

independent appellate review of all factual material.[17] He saw particular danger in a local standard's potential for creating a chilling effect on imaginative, free thinking publishers, who might be reluctant to risk criminal conviction for testing variations in tastes among different locales. Therefore, he believed local standards would result in indirect restriction of the public's access to material that states could not otherwise constitutionally suppress.[18]

The *Jacobellis* dissent[19] contended the standards should be those of a true community, not a hypothetical national community, and that Supreme Court review of obscenity decisions should be limited to the question of whether sufficient evidence existed on the record to support the lower court's decision.[20] The dissent reasoned that for the Supreme Court to sit as a "Super Censor" independently reviewing the facts of each obscenity case was both impractical and inappropriate.[21]

The *Jacobellis* decision spawned severe criticism from many quarters,[22] with most critics pointing out that the national standard was advocated by only two members of the Court[23] and agreeing with the dissent that no real national standard existed. Critics further argued that insistence upon independent factual review for obscenity cases would be inconsistent with the concept of appellate review and would place an intolerable administrative work load on the Court.[24] In addition, some lower courts, also realizing that only two of the prevailing six Justices had advocated a national community standard in *Jacobellis,* refused to apply a national standard in obscenity cases.[25]

In retrospect the critics' predictions that the Supreme Court's workload would become intolerable under its decision to make de novo reviews of all obscenity cases reaching the Court seem well-founded.[26] In spite of a sig-

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17. *Id.* at 190.

18. *Id.* at 194.

19. Chief Justice Warren, joined by Justice Clark, dissented; Justice Harlan dissented separately.

20. Jacobellis v. Ohio, 378 U.S. 184, 203 (1964) (Warren, C.J., dissenting).

21. *Id.*

22. *See, e.g.,* O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on* Jacobellis v. Ohio, 40 NOTRE DAME LAW. 1 (1964); Semoche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation,* 13 U.C.L.A.L. REV. 1173, 1179 (1966); 16 S.C.L. REV. 639, 642 (1964).

23. Justice Brennan's opinion in *Jacobellis* was joined only by Justice Goldberg. The other four prevailing Justices concurred separately, neither joining Justice Brennan's opinion nor addressing the issue of national versus local standards.

24. O'Meara & Shaffer, *supra* note 22, at 6-7.

25. *E.g.,* Gent v. State, 239 Ark. 474, 486, 393 S.W.2d 219, 226 (1965), *rev'd,* 386 U.S. 767 (1967) (used contemporary community standards of city in which magazines were distributed to determine whether magazines were obscene); Davison v. State, 251 So. 2d 841 (Fla. 1971) (held standard for identifying obscenity was community standard within geographic limits of jurisdiction in which case was brought to trial).

26. *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2651-52 (1973) (Brennan, J., dissenting).

nificant refinement of the *Roth* definition of obscenity in 1966,[27] the flood of obscenity litigation continued,[28] prompting some Supreme Court Justices to press for a means of applying the definition that would permit the Court to lighten the burden it had shouldered by insisting on independent review of obscenity cases.[29]

The instant holding—that obscenity is to be determined by applying contemporary community standards—rests primarily on the ground that the United States is now simply too large and diverse for a single abstract formulation of standards.[30] The Court said it was unrealistict to expect the people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas or New York City.[31] This reasoning is questionable, since the Constitution itself is a single formulation of principles applicable to all diverse elements of the country.

Two additional unexpressed reasons underlying the principal decision are apparent from an examination of the history of obscenity litigation. First, the decision satisfies the legitimate demand for lessening the crushing administrative burden the Court has faced in deciding obscenity cases since *Jacobellis*.[32] At the same time it provides a long-needed opinion by a clear, cohesive majority of the Court[33] that can be relied on by lower courts deciding obscenity cases.

While the principal decision is thus of some practical value, the Court's failure to state clearly what boundaries identify a community for purposes of establishing contemporary community standards will undoubtedly create immediate national problems and produce a substantial volume of litigation. In finding "no constitutional error" in the California trial court's charge that the jury base its decision on that *state's* standards,[34] the Court seemed to indicate it would *accept* the individual state as a "contemporary community" but it was not clear from the holding that the Court necessarily considered the state the only measure of such a community. In other language

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27. In Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966), the Court said the *Roth* definition of obscenity, as elaborated in subsequent cases, required the presence of three independent elements: "(a) [T]he dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

28. *E.g.*, Rabe v. Washington, 405 U.S. 313 (1972); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968).

29. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 441, 455, 460 (1966) (Clark, Harlan, White, JJ., dissenting).

30. 93 S. Ct. 2607, 2618 (1973).

31. *Id.* at 2619.

32. *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2652 (1973) (Brennan, J. dissenting).

33. Chief Justice Burger's opinion was joined by Justices White, Blackmun, Powell, and Rehnquist. Also, it is significant that none of the four dissenting Justices expressed disagreement with the majority's view that contemporary community standards should not be national in scope.

34. 93 S. Ct. at 2619.

the Court said that the lay jurors drawing on standards of their communities would be the "ultimate factfinders" in determining precisely what appeals to the prurient interest or is patently offensive.[35] This statement at least implies that the Court would also accept identification of "community" as the area served by a trial court litigating a particular obscenity case.

Perhaps this interpretation of "community" as the locality trying a particular case is the standard the Court would prefer, for cetainly it could have held that obsecenity is to be determined by applying "contemporary *state* standards" had it so desired. Neverthless, it chose to retain the "contemporary community standards" phrase,[36] even though in common terms "community" is not necessarily synonymous with "state."[37] In addition, the argument the Court made concerning the inappropriateness of a national standard due to diversity of views in different parts of the country obviously can also be made with respect to different locations within any particular state. For example, it is possible that residents of metropolitan areas might consider material to be perfectly acceptable that would be found obscene by residents of smaller, more homogeneous areas of the same state.

Countering the *Jacobellis* rationale that application of local standards could prevent dissemination of materials due to sellers' unwillingness to test variations in local tastes,[38] the instant Court said the use of a national standard necessarily implied that materials not meeting the hypothetical national criteria but acceptable to residents of certain areas would nevertheless be barred from the people in those areas. The dangers in such a situation, the Court believed, were at least as great as those involved in permitting distribution in accordance with local tastes.[39]

Such an argument is merely negative in character and fails to answer the critical question of why the application of local standards is constitutionally correct. It is not enough for the Court to say only that local standards are no worse than national standards when the difference in application of standards could produce altered effects on fundamental first amendment freedoms. The instant decision has already produced reaction in the form of some indirect prior restraint[40] and has moved organizations such as the Motion

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35. *Id.* at 2618.

36. Perhaps retention of the "contemporary community standards" phrase arose from the Court's desire to adhere to the terminology in Roth v. United States, 354 U.S. 476, 489 (1957). See text accompanying note 11 *supra.*

37. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 460, 2228 (1961).

38. See text accompanying note 18 *supra.*

39. 93 S. Ct. at 2619 n.13. The Court borrowed this view from Justice Harlan, who earlier had pointed out what he believed was a far greater danger in a federal power to impose a blanket ban on a book than the power of one state to disallow the sale of a book acceptable in a neighboring state. Roth v. United States, 354 U.S. 476, 506 (1957) (Harlan, J., dissenting).

40. Plans to film *Last Exit to Brooklyn,* by Hubert Salby, Jr., a story of working-class homosexuality, were abruptly scrapped following announcement of the instant decision. The producer's explanation was: "We don't want to produce lawsuits, we want to produce pictures. . . . Nobody wants to make a picture today which is going to be rejected by 30 per cent of the communities in the United States." NEWSWEEK, July 23, 1973, at 45.