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I

There are few conclusions concerning American politics with which all political scientists agree. This observation is especially so when the wisdom involved is not so obvious as to be common knowledge among non-political scientists as well. One such notion, which is now generally accepted by students of politics and generally rejected or unknown by laymen, is that the judiciary is a political institution, subject to many of the same pressures and processes as are all other political institutions, responsible for allocating many of our societal values, and, in so doing, creating a substantial portion of our public policy.

Having spent most of their time and expertise unraveling the realities of the judicial process, political scientists have made less than a significant contribution toward aiding the courts in the formulation of their policy choices. In the following analysis, we shall try to support the proposition that the judicial policy regarding obscenity has been untenable for fourteen of its eighteen years, and only by reverting to the policy of its four year hiatus of 1967 to 1971,

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or by opting out of the area altogether, can the judiciary hope to deal effectively with the obscenity issue.

Necessary to a viable Supreme Court policy is the understanding, acceptance, and implementation of that policy by other courts. How those other courts treat Supreme Court policy is instructive in evaluating the problems of a particular Supreme Court policy. Our analysis starts with the evolution of Supreme Court obscenity policy up to the 1973 case of *Miller v. California.*[1] We then seek to measure the disparity among state court reactions to that policy[2] on the basis of three variables: a) the use of the term "community standards," b) the effect of *Redrup v. New York,*[3] and c) the issue of expert testimony. Finally, we look at the current Supreme Court policy to ascertain whether our findings can be expected to hold true as the state courts continue to deal with the obscenity issue in the light of the *Miller* case.

II

In constitutional law the term "obscenity" refers generically to speech, writing, cinematography and, most recently stage production,[4] which deal with sex[5] in such a way as to put such forms of expression outside the First Amendment's protection. Any discussion of the Supreme Court's treatment of the obscenity issue necessarily begins with *Roth v. United States* (and its companion

1. Miller v. California, 413 U.S. 15 (1973). Our analysis stops at Miller because of the convenient break it represents in the evolutionary process, and because it is still too early to systematically measure lower court reaction to Miller.

2. We conducted our research among the 376 cases listed under the Roth v. United States citation in *Shephard's United States Citations* for the six regional Reporters; the cases reported were from June, 1957 through June, 1973, inclusive. Under each state's citations, we read and analyzed the first two, middle two, and last two cases. If there were fewer than six cases listed for a state, then all were used. This sampling method was employed because it provided a view of the state courts' treatment of obscenity in a time sequence. Thus, as the Supreme Court modified *Roth* over the years, we could determine what modifications, if any, the judiciaries were making.

3. Redrup v. New York, 386 U.S. 767 (1967).

4. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

5. In State v. Jackson, 224 Or. 337, 356, 356 P.2d 495, 503 (1960) the Oregon Supreme Court stated the generally accepted notion that, "As a matter of federal constitutional law it is now clear that obscenity is restricted to sexual matters." However, not untypical is the expansion of the term "sex" to those matters classified as obscene in the COLORADO CRIMINAL CODE: " 'obscene' means . . . a lustful or morbid interest in nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse. . . ." COLORADO REVISED STATUTES (1973), Vol. 8, COLORADO CRIMINAL CODE, Title 18, Article 7, sec. 18-7-101.

case of *Alberts v. California*).[6] This decision came as something of a surprise to students of American constitutional law since it marked a major departure from the well-established "clear and present danger rule"[7] by simply excluding obscenity from First Amendment protection without explaining why.[8] The basic holding of *Roth* was that "obscenity is not within the area of constitutionally protected speech or press."[9] After stipulating the preferred right of freedom of speech and press, the Court, per Justice Brennan, made its first attempt at defining what obscenity is and, thus, when that preferred right may be legislatively curtailed. The test for obscene material became: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[10]

6. 354 U.S. 476 (1957). Though the Court heard its first case in this area, Doubleday and Co. v. New York, 335 U.S. 848, in 1948, it was not until 1957 that the Court wrote its first opinion dealing with obscenity, Butler v. Michigan, 352 U.S. 380, followed four months later by *Roth* and *Alberts*. *Roth* involved a federal obscenity statute and *Alberts* involved the California state obscenity statute. For purposes of this paper no distinction is made between federal and state cases dealt with by the Supreme Court. Only one Justice, Justice Harlan, would have made a distinction between the First Amendment right to free speech and the Fourteenth Amendment right to free speech. Besides the fact that Justice Harlan left the Court in 1971, he was never able to convince his colleagues that such a distinction should be made. *See infra* note 51 for Justice Harlan's rationale.

Although the *Roth* case represented the first time that the Supreme Court officially held obscenity to be beyond the pale of First Amendment protection, obscenity had been treated as a special form of speech both politically and judicially for many years before *Roth*. Every state, as well as Congress, had passed anti-obscenity statutes well before 1957.

7. In Schenck v. United States, 249 U.S. 47, 52 (1919) the Supreme Court set forth a test for determining whether speech would be protected by the First Amendment:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

8. As pointed out in a 1966 law journal note, the almost cavalier exclusion of obscenity from First Amendment protection had never been justified by the Court on any ground other than precedent dating back to Victorian England. Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966).

9. 354 U.S. at 485.

10. 354 U.S. at 489. In *Roth*, at 484, the Court seemed to summarize its definition of obscenity and, at the same time, put a limit on it, by saying:

> [i]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

In the subsequent "FANNY HILL" case, the caveat that the material be ut-

Rather than limiting the question of whether a book or movie has forfeited its First Amendment protection because the Court interprets it to be obscene, *Roth* expanded the question to include a determination of what is an "average person," what are the "contemporary community standards," what is a "prurient interest" and does the work under review appeal to it. The Court, in trying to define the parameters of its new limitation on the First Amendment, found itself creating a new lexicon—and one with little precision. For example, probably realizing that many lower court judges would be seeing the word "prurient" for the first time, the *Roth* writers set forth definitions of it such as:

> [m]aterial having a tendency to excite lustful thoughts. Itching; longing; uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . .[11]

Besides the fact that the *Roth* formula raised many more questions than it answered, the area was further blurred in that the Court's opinion was joined by only a bare majority.[12] Two justices wrote separate concurring opinions, and two strongly dissented.[13] Typically, Justice Harlan's opinion pointed out some of the inevitable pitfalls of the majority opinion. Besides implying his dissatisfaction with what appears to be an overly simplistic classification of the literature that will not be afforded protection under the First and Fourteenth Amendments, Harlan's lament suggests the deeper concern that any judicial determination of obscenity *vel non* will require more evidence than merely the item in issue and the judge's or jury's interpretation of the *Roth* definition. Thus, Justice Harlan in 1975 raised the question of what part expert testimony should play in making such a "constitutional judgment of the most sensitive and delicate kind."[14]

Shortly after the *Roth* opinion was handed down, the Supreme Court was asked to tidy it up. In two cases decided in 1959, the Court held respectively that a state licensing agency could not refuse to issue the license needed to show a film simply because the film portrayed an idea or theme which the agency deemed immoral,[15] and that a state law making it illegal for any person to

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terly without redeeming social value became incorporated into the Court's definition of obscenity. *See infra.*

11. 354 U.S. at 487, note 20.

12. Justices Burton, Clark, Frankfurter, and Whittaker joined in Justice Brennan's opinion.

13. Chief Justice Warren concurred in the result on narrower grounds; Justice Harlan rejected the Court's reasoning although he partially concurred in the result; Justices Black and Douglas dissented.

14. 354 U.S. at 498.

15. Kingsley International Picture Corp. v. Regents, 360 U.S. 684 (1959).

sell obscene literature was violative of the Fourteenth Amendment for its failure to include the element of *scienter* or knowledge on the part of the seller.[16]

It took only five years for the Court to start on what was to amount to a long-range series of incremental modifications of the *Roth* rule. The door was opened in 1962 in the case of *Manual Enterprises, Inc. v. Day*.[17] Here the Court, per Justice Harlan, concluded that inherent in the judicial definition of obscenity is "a quality that we shall hereafter refer to as 'patent offensiveness' . . . ."[18]

Far from being settled, the obscenity question faced the Court again in 1964, this time in *Jacobellis v. Ohio*.[19] Again, per Justice Brennan, the Court refined its earlier test for obscene material. Now we were told that the "contemporary community standards" aspect of the *Roth* test meant national rather than local community standards.[20] Further, the requirement that the material in question must have an "utter lack of redeeming social importance" in order to be held obscene was given emphasis. Thus, Justice Brennan, in a case decided shortly after *Jacobellis*,[21] could sum up his new test for obscenity by claiming that three elements must coalesce:

> It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community (national) standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[22]

However, this formula, like the one in *Roth*, lacked the consensus of the whole Court. Only Justice Goldberg[23] was willing to endorse Brennan's opinion in *Jacobellis*, although four other members of the Court concurred with the result in separate opinions.[24]

16. Smith v. California, 361 U.S. 147 (1959).
17. 370 U.S. 478 (1962).
18. *Id.* at 482.
19. 378 U.S. 184 (1964). [Hereinafter cited as Jacobellis.]
20. *Id.* at 195.
21. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of Massachusetts, 383 U.S. 413 (1966). [Hereinafter cited as Memoirs v. Massachusetts.]
22. *Id.* at 418.
23. The seat vacated by Justice Goldberg is now held by Justice Blackmun.
24. Justices Black and Stewart wrote separate opinions concurring in

Another case decided in 1966 was *Ginzburg v. United States.*[25] Brennan, again speaking for the Court, added the "pandering" rule to the already complex discussion of obscenity. Actually, the concept involved in *Ginzburg* was not new, but had been introduced in the *Roth* case by Chief Justice Warren in his concurring opinion. Warren said:

> The defendants . . . were engaged in the business of purveying textual or graphic matters openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the state and Federal Governments can constitutionally punish such conduct.[26]

Brennan adopted the Warren rationale, not as an alternative to his earlier formulation, but as a further factor to be considered in determining whether or not the material in question meets the test of obscenity. He accomplishes this incorporation by stating:

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.[27]

With this decision, obscenity becomes a variable concept, insofar as that which otherwise is not obscene is adjudged to be obscene if it is marketed in the manner proscribed by the Court. The unsurprising fact is that four justices dissented in *Ginzburg*;[28] and some of the justices who silently concurred did not agree with Brennan's reasoning, as they pointed out in other cases.[29]

As of 1967, the Court was hopelessly split, with at least four different opinions having been expressed and none claiming a majority. It was in that year, however, just when the Court seemed least able to cope with the problem, that a turning point seemed to be reached.

Based on a 1967 per curiam decision, *Redrup v. New York*,[30] the Court granted certiorari for several obscenity cases and then, without hearing argument, found all the works in question not to be

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the result. Justice Douglas joined Black's opinion and Justice White concurred without opinion.

25. 383 U.S. 463 (1963).
26. 354 U.S. at 495-96.
27. 383 U.S. at 475-76.
28. Justices Black, Douglas, Harlan and Stewart.
29. *E.g.*, Justice Clark dissenting in Memoirs v. Massachusetts, 383 U.S. 413 (1966).
30. 386 U.S. 767 (1967).

obscene. It was a highly irregular procedure. *Redrup* seemed to signify the Court's throwing up its hands after ten years of frustration in trying to formulate legislation judicially in the area of obscenity. The *Redrup* opinion seemed to remove the Court from the moral labyrinth it had worked itself into, and return the Court to the more mechanical task of applying the "clear and present danger" test. The single opinion for the Court, joined in by all but two justices,[31] represented the greatest degree of uniformity yet exhibited in this field. The per curiam opinion dismissed the charges of obscenity stating that:

> In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it . . . And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States* . . . .[32]

The Supreme Court did not overtly overrule *Roth* in the *Redrup* case, but seemed to substitute the new three-pronged test for the previous definitional approach. In the two years immediately following *Redrup*, the Supreme Court reversed twenty-nine lower federal and state court decisions which found literature and movies obscene.[33] Most of these reversals were without opinion—a simple *Redrup* citation was given.

The first full reaffirmation of *Redrup* came in 1968 with the important case of *Ginsberg v. New York*.[34] The Court upheld a New York statute that prohibited the selling to minors of some pictures

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31. Justices Harland and Clark dissented on the procedural ground that the writs of certiorari were improvidently granted, rather than on the substantive issue of the merits of the opinion.

32. Redrup v. New York, 386 U.S. 767, 769 (1967).

33. In Commonwealth v. La Londe, 447 Pa. 364, 370, 288 A.2d 782, 785 (1972) the Pennsylvania Supreme Court cites twenty-nine United States Supreme Court cases which "reversed obscenity convictions and determinations involving various kinds of expression (books, photomagazines, films, etc.) on the authority of its cryptic per curiam opinion in *Redrup v. New York*." And a 1969 law journal article cites thirty-five cases, occurring less than two years after *Redrup*, which obscenity convictions were reversed by citing *Redrup* as either controlling or as a key factor in the reversal. *See* Teeter, Jr. and Pember, *The Retreat from Obscurity: Redrup v. New York*, 21 HASTINGS L.J. 175, 183 (1969).

34. 390 U.S. 629 (1968). It is important to distinguish this case from Ginzburg v. United States, 383 U.S. 463 (1963).

or publications which were "harmful to minors."[35] *Ginsberg*, like *Redrup*, appeared to depart from the *Roth* test (which, though qualified in later cases, was never specifically abandoned by the Court), especially since Justice Brennan was again writing for the Court. As pointed out by one observer, the diversion from *Roth* was threefold:

> Under *Roth* the ultimate determination of obscenity *vel non* of any particular material was to be made by the Supreme Court; but in *Ginsberg* the Court held that the determination is to be made by the state legislature—at least when obscenity with respect to minors is at issue—subject only to the requirement that the Court must find the legislature's judgment rational. Moreover according to *Roth*, obscenity was to be determined by reference to a national standard; but under *Ginsberg*, which permitted the definition of obscenity for minors to be made by the several state legislatures, variations from state to state in the definition of obscenity for minors are encouraged. Finally, while under *Roth*, the harmfulness of the obscene material was irrelevant, the *Ginsberg* Court approved the definition of obscenity for minors in terms of harm.[36]

That the Supreme Court probably did not mean *Ginsberg* to be read merely as an addendum to the *Roth* rule, that is, merely as an exceptional circumstance dealing with children, is evidenced by the fact that the Court went out of its way to use the "variable obscenity" concept, and reliance on conduct:

> [T]he Court's stress in *Redrup* on the conduct of the defendant rather than on the nature of the material indicates that it may finally be heeding the warning given by Chief Justice Warren, ten years earlier in *Roth* that "it is not the book that is on trial; it is a person. The conduct of the defendant is the central issue not the obscenity of a book or a picture." By making conduct of the defendant the central issue in many obscenity cases, the Court is to some extent relieving itself of its unenviable censorial chores. . . .[37]

In effect, what the Court seems to have done in *Ginsberg* is to revert back to the traditional "clear and present danger" test to determine when material is no longer protected by the First Amendment; or, in *Roth* terms, when material is obscene. In so doing, the Court is on safer grounds. No longer the supercensor, it need merely weigh the clear and present danger of the material causing serious harm against the harm in abridging the defendant's First Amendment rights. In *Ginsberg*, the scales tipped in favor of protecting minors from the material in question.[38]

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35. 1 LAWS OF N.Y. 1066 as amended N.Y. PENAL LAW, sec. 235.20, 235.21.

36. Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICHIGAN LAW REVIEW 185, 196 (1970).

37. Teeter, Jr. and Pember, *supra* note 33, at 189.

38. Justice Douglas wrote a dissenting opinion in *Ginsburg* in which he was joined by Justice Black.

Finally, in the 1969 case of *Stanley v. Georgia*,[39] the Supreme Court further diluted the *Roth* rationale and took another step toward treating obscenity like any other case involving freedom of speech and press. Here, the Court was presented with some film taken from Petitioner's home. The fact that the film was pornographic was stipulated and not in issue. However, the Court held that the state could not prohibit the possession of this material by Petitioner in the privacy of his home: "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[40]

The Court, in *Stanley*, seems again to have been involved in the weighing of interests process. Here, the First Amendment rights and the right of privacy prevailed over the interest of the state in protecting its citizens from the abuses of pornography. Even though the Court claims that *Stanley* does not impair *Roth* and the cases following it, it seems clear that the Court, at least for the time being, had embarked on the new path (new for obscenity cases—traditional for other free speech cases) of balancing the competing interests to determine the difference between legal obscenity and illegal obscenity and using as the counterweight the concept of harm.[41] However, it must be said that even as late as the *Stanley* opinion, the Court was seriously divided on the issue of obscenity and how to treat it.[42]

The Black-Douglas approach, which has been consistent since *Roth*, is that "the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct) . . . ." Ginzburg v. United States, 383 U.S. 463, 476 (1963) (dissenting opinion). And since the First Amendment is made applicable to the states through the Fourteenth Amendment, the states too have "vast power to regulate conduct but no power at all . . . to make the expression of views a crime." Mishkin v. New York, 383 U.S. 502, 518 (1966).

39. 394 U.S. 557 (1969).

40. *Id.* at 568.

41. The Court in *Stanley* argues that the obscenity in question is protected by the First and Fourteenth Amendments from government regulation because of *Stanley*'s right to privacy.

42. The opinion of the Court in *Stanley* was written by Justice Marshall. It was joined by Justice Douglas and Harlan; it was not joined by Justices Stewart, Brennan, and White, all of whom concurred on other grounds. Justice Douglas and Black were unrelenting in their view that free speech, as protected by the First and Fourteenth Amendments, entails all speech and writing not tantamount to action. Justice Harlan was still of the opin-

For schematic purposes, we might label the early development of obscenity doctrine in the Supreme Court as Phase 1 and include in this phase all those cases beginning with *Roth* and ending with *Ginzburg*. Phase 1 is characterized by a Supreme Court hopelessly split in its views, struggling to patch together a workable definition of obscenity by which lower courts might be guided in their determinations on this issue. The Justices' approach was one of experiment and incremental changes in their working definition. A second phase could be said to have begun with *Ginzberg*. This was a transitional phase between Phase 1 and Phase 3, and it used the notion of variable obscenity to achieve the transition. A third phase began with *Redrup* and could be said to include the *Ginsberg* and *Stanley* cases. Phase 3 extended the variability test adopted in Phase 2 to the three types of obscenity which would be constitutionally proscribed: a) pandering; b) obscenity available to minors; and c) obscenity so obtrusive as to be unavoidable by those undesirous of exposure to it.

While Phase 1 lasted from 1917 to 1966, and Phase 2 from 1966 to 1967, Phase 3 lasted from 1967 to 1971. Whether because of the drastic changes in the Court, starting with President Nixon's replacement of Chief Justice Warren and Justice Fortas with Warren Burger and Harry Blackmun in 1969 and 1970, or because of the justices' sense of morality, or because of public pressure, including anti-court rhetoric from candidate Nixon in 1967 and President-elect Nixon in 1968, the Court slipped out of Phase 3 and into Phase 4 in 1971.

Phase 3 came to a halt beginning with *United States v. Reidel*.[43] This case represents the logical sequence to *Stanley*. Reidel took out the following newspaper advertisement:

> IMPORTED PORNOGRAPHY—LEARN the true facts before sending money abroad. Send $1.00 for our fully illustrated booklet. You must be 21 years of age and so state. . . .[44]

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ion that the states are not bound by the limits of the First Amendment, Pointer v. Texas, 380 U.S. 400, 408-9 (1965), and could therefore be given broad discretion in their obscenity laws. He would set as his test for federal regulation of obscenity whether the material is "hard core pornography," Memoirs v. Massachusetts, 383 U.S. 413, 457 (1966) (dissenting opinion). Justice Stewart, while still paying homage to *Roth*, also accepted the standard of hard core pornography. (The fact that the "hard core" standard results in the same problems raised by the *Roth* formula is suggested by Justice Stewart when he promised that although he was unable to define the hard core, he would know it when he saw it, Jacobellis v. Ohio, 378 U.S. 184, 197.) Justice Brennan presents the enigma of having written the opinions in the seemingly contradictory cases of *Roth* and *Ginsberg*; and still to be heard from on the issue are Chief Justice Burger and Justices Blackmun, Powell and Rehnquist.

43. 402 U.S. 351 (1971).

44. *Id.* at 353.

In *Reidel* it was argued that the Comstock Act,[45] which prohibits the knowing use of the mails for the delivery of obscene matter, could not stand in the face of *Redrup* and *Stanley*. *Stanley*, it was asserted, would be a dead letter if one was so restricted in his ability to receive obscene literature in the privacy of his residence. Furthermore, *Redrup* supported Reidel's right to advertise, since the admittedly obscene material was not directed at children, nor was it directed at an unwilling public, nor was it pandered.

Nevertheless, in a 7 to 2 opinion, per Justice White, the Court reversed the lower court ruling, finding the Comstock Act unconstitutional, and reasserted the Phase 1 line of cases. Although not overruling any case overtly, *Reidel* effectively scuttled the Phase 3 "balancing of interest" test set forth in *Redrup* and *Stanley*, and reasserted the definitional approach of *Roth*.

The demise of the variable obscenity notion and the return to *Roth* was furthered in *United States v. Thirty Seven Photographs*.[46] In this case Martin Luros' thirty-seven obscene pictures (obscene under any definition of obscenity) were seized by custom officials while he was bringing them into the country. Luros, and a three-judge district court, claimed that the statute proscribing the mere possession of obscenity by one entering the country[47] was unconstitutional. The district court relied on *Stanley* in its holding that the government may not make the purely private possession of obscenity a crime.

The Supreme Court solidified Phase 4 by reversing the lower court, albeit by a divided court without a majority opinion.[48] It would seem that the three dissenting Justices (Black, Douglas, and Marshall) and a concurring Justice (Stewart) were cognizant of the Court's shift from Phase 3 to Phase 4 when they expressed their inability to comprehend the legal differences between obscenity possessed in the privacy of one's home and in the privacy of one's suitcase. In Justice Black's view, *Thirty Seven Pictures* together with *Reidel* will cause *Stanley v. Georgia* to be recognized as good

45. 18 U.S.C. sec. 1461.
46. 402 U.S. 363 (1971).
47. 19 U.S.C. sec. 1305.
48. Justice White wrote the opinion of the Court, joined by Chief Justice Burger and Justices Blackmun and Brennan. Justice Harlan wrote a concurring opinion.

law only "when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[49]

When Justices Powell and Rehnquist replaced Justices Black and Harlan in 1972, it seemed that Phase 4 would be the longest lasting phase of all. However, on June 21, 1972, the Supreme Court, in a 7 to 2 decision, handed down its opinion in *Miller v. California*,[50] which seems to have presented us with Phase 5 of the obscenity story.

III

We turn now to the state court's reaction to the Supreme Court's treatment of obscenity prior to *Miller v. California*. The *Roth* decision opened up a Pandora's box for the lower courts, due to its vagueness and its need for interpretation. One aspect of the *Roth* formula raised a particularly serious constitutional problem: how can our constitutional system, which posits the Constitution and its Amendments as the supreme law of the land, tolerate a situation wherein a book can be said to be constitutionally protected in one community and subject to censorship in another, both communities having as their legal basis the same Constitution? This dilemma existed after *Roth* when many followers of the Court opted, with Justice Harlan, for interpreting "contemporary community standards" to mean at least state and perhaps local standards.[51] There was little question that, without a national standard as the operating rule, uniformity in determinations of a particular work would be unlikely.[52]

The Supreme Court faced the issue of which community's standards were to be followed in the 1964 case of *Jacobellis v. Ohio, supra.* Prior to 1964, there existed decisions from lower state courts which

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49. 402 U.S. at 382.

50. 413 U.S. 15 (1973).

51. In *Roth*, Justice Harlan (concurring-dissenting opinion) stated, at 505-6,

> Different states will have different attitudes toward the same work of literature. The same book which is freely read in one state might be classed as obscene in another [citing examples]. And, it seems to me, that no overwhelming danger to our freedom is likely to result from the suppression of a borderline book in one of the states, so long as there is no uniform nationwide suppression of the book, and so long as other states are free to experiment with the same or bolder books.

52. Thus, prior to the Supreme Court's specific treatment of this problem, and prior to 1964 when the Supreme Court declared it non-obscene, Grove Press Inc. v. Gerstein, 378 U.S. 577, Henry Miller's *Tropic of Cancer* received a varied treatment by the courts. It was found obscene in California, Connecticut (Hartford), New York (state), and Florida. It was found non-obscene in Massachusetts and Illinois (Cook County).

supported three different theories. In *State v. Miller*,[53] the Supreme Court of Appeals of West Virginia held the local community to be the relevant measure for determining standards of decency. Just prior to *Jacobellis*, the Wisconsin Supreme Court held that the community referred to in *Roth* was the various states.[54] At about the same time, the New Jersey Supreme Court was defining community to mean the entire country.[55]

It was in the face of this discrepancy in state court interpretations that the Supreme Court granted certiorari in *Jacobellis*. Each of the possibilities had serious shortcomings, and the Supreme Court was true to form in splitting up with not even a plurality[56] as regards the issue of community standards.[57]

Justice Brennan, in the judgment for the Court, came out strongly for a national standard:

> We thus reaffirm the position taken in *Roth* to the effect that the

53. 145 W. Va. 59, 112 S.E.2d 472 (1960).

54. McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

55. State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963).

56. Justice Brennan wrote the opinion of the Court and was joined by only Justice Goldberg; Justice White concurred in the judgment without opinion; Justices Black and Douglas joined in a separate concurring opinion and Justice Stewart wrote a concurring opinion as well, while Chief Justice Warren and Justice Clark joined in dissenting and Justice Harlan wrote his own dissenting opinion. This alignment of the court maintained, in large part, the pre-*Jacobellis* confusion as regards community standards.

57. Even though the Brennan opinion in *Jacobellis* cannot technically be said to be the opinion of the Court, inasmuch as it was joined in by less than a majority, some experts interpreted it to be binding. One such expert, Thomas Barth, conducted research for his doctoral dissertation to determine how the "attentive public" viewed the Supreme Court's obscenity decision. One method he used was to ask members of the "attentive public" questions about specific Supreme Court cases to arrive at some conclusions as to whether these cases were being accurately perceived. One such question designed to test the respondent's knowledge of *Jacobellis* was whether "local community standards should be used in the determination of obscenity". Operating on the assumption that in *Jacobellis* "the *Court* explained that the use of the term 'community standards' meant 'national' standards", Barth considered a yes answer wrong and a no answer correct. Ironically (since his assumption was in error), Barth concluded, partially on the basis of the answers to the above-stated question, that "there exists at the local level a low level of perception of Supreme Court . . . policy on obscene literature." *See* Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 JOURNAL OF PUBLIC LAW 308 *and passim* (1968).

> constitutional status of an allegedly obscene work must be determined on the basis of a national Constitution we are expounding.[58]

Nevertheless, Justice Goldberg was the only other member of the Court to join Brennan's opinion. In fact, Chief Justice Warren and Justice Clark, in their concurring opinion, strongly favored a smaller community:

> 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.[59]

Given the split in the Supreme Court, at least one federal court and one state court could conclude that the question of a national versus a state versus a local community standard had not been settled prior to 1973.[60]

Shortly after the *Jacobellis* decision a national standard was adopted in the courts of Arizona,[61] Connecticut,[62] Indiana,[63] Louisiana,[64] Missouri,[65] New Jersey,[66] Ohio,[67] Rhode Island,[68] and South Carolina.[69] Some of these state courts opting for a national standard did so contrary to their stated belief that such a standard was constitutionally inappropriate.[70] We thus find nine state courts fol-

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58. Jacobellis v. Ohio, 378 U.S. 184 (1964).

59. *Id.* at 200.

60. In Reed Enterprises, Inc. v. Clark, 278 F. Supp. 372, 383 (D.D.C. 1967), the Court said, "The question of national versus community or other standards has not yet been determined . . . ." And in Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972), the Virginia Supreme Court said, "The Supreme Court has not ruled on the question whether the standard for judging obscenity should be a community or national standard." In the former case the Court did not find it necessary to decide the question, and in the latter case the Court opted for a local standard.

61. State v. Locks, 97 Ariz. 148, 397 P.2d 949 (1964).

62. State v. Keyhole Publishing Co., 214 A.2d 838 (Cir. Ct. of Conn. 1965).

63. Stroud v. State, 257 Ind. 204, 273 N.E.2d 842 (1971).

64. State v. Gulf State Theatres of Louisiana, 270 So. 2d 547 (La. 1972).

65. State v. Vollmar, 889 S.W.2d 20 (Mo. 1965).

66. State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963).

67. State *ex rel.* Sensenbremer v. Adult Book Store, 26 Ohio App. 2d 183, 271 N.E.2d 13 (1971).

68. In Re Seven Magazines, 107 R.I. 540, 268 A.2d 707 (1970).

69. State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970).

70. After suffering with the infirmities of the national standard rule for several years, the Arizona Supreme Court registered its frustration with the rule: Maintaining its obligation to conform to *Jacobellis*, the state court again affirmed that a national standard must be used but added that the United States Supreme Court is the only court that can practically (and authoritatively) say what the national standard is to be. NGC Theatre Corp. v. Mummert, 107 Ariz. 484, 488, 489 P.2d 823, 826-27 (1971). The national standard was criticized even more overtly by an Ohio court which felt compelled to use it:

lowing the Brennan-Goldberg decision in *Jacobellis*, even though they are not all in agreement with that decision, and even though at least as many Supreme Court Justices opted for a different standard, albeit in a concurring opinion.

In our sample of state cases, there was in the time period between *Jacobellis* and *Miller v. California* a similar number of states which used either a state or local standard[71] as those which used the national standard.

TABLE 1
ADOPTION OF A NATIONAL VERSUS A STATE OR LOCAL COMMUNITY STANDARD IN OBSCENITY CASES[a]

	Federal Courts	State Courts
National Standard	7	9
State/Local Std.	1	9
Total No. of Cases	8	18

[a] Based on sample of cases cited in *Shepard's United States Citations* under 354 U.S. 476.

The general rationale for these nine courts in adopting a state or local standard was simply that they believed their standard to be the better and, absent a majority of five on the Supreme Court which says otherwise, they were free to follow their conviction. In

The only absolutely accurate way of determining national community standards would be by a plebecite at which every elector was required to vote. This of course, is impractical if not impossible.

While it would seem more in keeping with our federal system to permit the determination of contemporary community standards relating to the description or representation of sexual matters to be determined upon a state-by-state basis rather than a national basis, *we are required to apply (in keeping with the deciding-minority view)* a national standard rather than a state standard. (Emphasis supplied.) State *ex rel.* Sensenbremer v. Adult Book Store, 26 Ohio App. 2d 183, 271 N.E.2d 13 (1971).

71. Five state courts used a state standard:

In Re Gianinni, 69 Cal. 2d 563, 446 P.2d 535 (1968), *cert. denied* 295 U.S. 910 (1969); People v. Bloss, 27 Mich. App. 687, 184 N.W.2d 299 (1970), *rev'd* 402 U.S. 938 (1971); Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475 (1971); People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971); State v. Henry, 250 La. 682, 198 So. 2d 889 (1967).

Four state courts used a local standard:

Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965), *rev'd* 386 U.S. 767 (1967); Felton v. City of Pensacola, 200 So. 2d 842 (Fla. App. 1967); Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972); State v. Miller, 145 W. Va. 70, 112 S.E.2d 472 (1960).

Gent v. State, the Arkansas Supreme Court expressed its attitude thusly:

> Appellants for reversal rely upon the more recent case of *Jacobellis v. State of Ohio* [citations omitted] and assert that this case makes clear that the "contemporary community standards" mentioned in *Roth* actually refers to a "national" community, rather than a local community. We cannot accept this contention, since it does not appear that five judges, constituting a majority of the court agreed upon the "national community" standard.
>
> * * *
>
> We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it. . . .[72]

It appears, therefore, that at least some state courts which chose to follow the state or local standard, at least rhetorically, did not view themselves as defying the Supreme Court. Rather, they felt that it was within their judicial prerogative to make such a determination in the absence of a majority of the Supreme Court Justices deciding otherwise.

Significantly, the federal courts which have addressed themselves to this issue seem to have decided overwhelmingly in favor of a national standard. Four federal circuit courts of appeals[73] and three federal district courts[74] would apply a national standard, and only one federal district court[75] opted for a state standard. The discrepancy between state courts' and federal courts' reaction to *Jacobellis* is shown in Table 1.

There remains another test which some courts have applied, including courts in states which have opted for a national or a local standard in other cases. This test serves to get around the question of whether a national or local standard is required, but at the same time satisfies the adherents of the argument that the Constitution must be applied uniformly throughout the United States. This test would have the state court compare the alleged obscene material with similar works already passed on by the Supreme Court. If the Supreme Court found works which are apparently more obscene

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72. Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965).

73. United States v. "Language of Love", 432 F.2d 705 (2d Cir. 1970); Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); United States v. 392 Copies of Magazine Entitled "Exclusive", 373 F.2d 633 (4th Cir. 1967).

74. Neyer v. Austin, 319 F. Supp. 457 (M.D. Fla. 1970); United States v. One Carton of Positive Motion Picture Film, 247 F. Supp. 450 (S.D.N.Y. 1965); United States v. 392 Copies of Magazine Entitled "Exclusive," 253 F. Supp. 485 (D. Md. 1966).

75. Newman v. Connover, 313 F. Supp. 623 (N.D. Tex. 1970).

than those in question protected from censorship, then the state court would find the work in question not obscene. This is implicitly making use of a national standard without so stating. Our sample included three instances where a state court or judge made use of this comparative approach.[76] An example of this rationale is given by Justice Gillis in his concurring opinion in *People v. Billingsly*:

> In my view these books are obscene. They are, however, in the same class as many others found not to be "obscene in the constitutional sense" by the United States Supreme Court.
>
> I therefore concur in the results (holding these books not be obscene).[77]

The issue of whether a national standard or some other standard should apply provides some support for state court discretion in interpreting Supreme Court doctrine when the Supreme Court is badly split. What follows is an analysis of state court discretion on an issue which seems to have carried a substantial majority of the Court.

As pointed out above, the Supreme Court in 1967 seemed to have reached a crossroads on the issue of obscenity. For the previous ten years it had been plagued with an increasing number of obscenity cases and the Justices were no closer to agreement on how to define obscenity than when they first decided *Roth* in 1957. The Justices must have realized that their disagreement and vagueness on the issue was causing the lower courts serious problems in dealing with obscenity prosecutions, and perhaps resulting in criminal convictions for many people who, were the Supreme Court to hear their case, should not go to jail, but who could not afford the appellate process or simply were denied certiorari due to limits on the

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76. State v. Cox, 3 Wash. App. 700, 477 P.2d 198 (1971); State of Delaware v. Katz, 274 A.2d 448 (Del. 1971); People v. Billingsly, 20 Mich. App. 10, 173 N.W.2d 785 (1969).

77. 173 N.W.2d at 789. Some of the books which the Supreme Court held to be protected, citing *Redrup*, against which state courts were making their comparison, were: SEX LIFE OF A COP, Aday v. United States, 388 U.S. 447 (1967); ORGY CLUB, Mazes v. Ohio, 388 U.S. 453 (1967); SIN HOOKED, BAYOU SINNERS, LUST HUNGRY, SHAME SHOP, FLESHPOT, SHAME MARKET, SIN WARDEN FLESH AVENGER, A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967).

Court's time. Whatever the motivation, the Supreme Court, in 1967, handed down its decision of *Redrup v. New York.*

As suggested earlier, *Redrup* seemed to mark a turning point, because of the strong majority of seven justices who joined in it, and because of its adoption of the harm approach, traditionally called the "clear and present danger" approach, for obscenity cases. *Redrup*, although not specifically overruling *Roth*, seemed to be the new test, since the Supreme Court typically cited *Redrup* as sole authority for overruling many lower court obscenity cases in the following two years.[78]

The state courts were faced with the dilemma of deciding whether, in the absence of outright reversal of *Roth, Redrup* was controlling. On the basis of our sample of cases, an almost even split was found again between those state courts which concluded that *Redrup* altered the *Roth* line of cases and those which rejected *Redrup* as controlling.

One of the earliest state courts to adopt *Redrup* as controlling was the Pennsylvania Supreme Court in 1967 when, in holding the book *Candy* not obscene, it said:

> *Redrup* seems to signify the Court's final abandonment of its futile search for a definition of obscenity *vel non* . . .
>
> The importance of *Redrup* to obscenity litigation in general, and to the instant case in particular, is amply demonstrated by eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967. In each case the Court granted certiorari and summarily reversed an obscenity conviction citing *Redrup* as its sole authority [footnote omitted].[79]

Later, the Delaware Superior Court seems to have taken the *Redrup* decision to its logical conclusion by finding, on the basis of *Redrup*, that although the magazines under scrutiny were "definitely obscene . . . they were entitled to first amendment protection."[80] The Delaware Court then concluded that:

> Since *Redrup* and the line of cases based upon that decision, it is likely that even the worst hard-core pornography would be entitled to protection unless it was pandered, sold to children, or sold in such a way that it was thrust upon people who could not avoid being exposed to it.[81]

Besides the Delaware and Pennsylvania high courts, *Redrup* seemed to differ from and supersede *Roth* for the Washington Court

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78. *See supra* note 33.

79. Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 211-212, 233 A.2d 840, 852 (1967); U.S. *cert. denied*, 390 U.S. 948 (1968).

80. State of Delaware v. Katz, —Del. Super. —, 274 A.2d 448, 449 (1971).

81. *Id.* at 450.

of Appeals,[82] and at least for part of the Michigan Court of Appeals.[83]

There were four courts which felt that *Roth* was unaffected by the *Redrup-Stanley* line of cases, or what we have called Phase 3. In one case, later overruled by the Supreme Court, the Kentucky Court of Appeals dismissed *Redrup* for the ironic reason that each part of its three-part test had, on previous occasions, been concurred in by less than a clear majority, even though seven of the nine justices took part in the three-part test as expressed in *Redrup*.[84]

Similarly, the Supreme Courts of California,[85] South Carolina,[86] and Wisconsin,[87] concluded that Phase 3, or the *Redrup-Stanley* line of cases, left Phase 1, or the *Roth* line of cases, unimpaired. Part of the Michigan Court of Appeals was also of this view,[88] and the Illinois Court of Appeals, if not of this view prior to Phase 4, became of this view as of the case of *United States v. Reidel*.[89] Again, we are faced with a situation in which an almost equal number of state courts come down on diametrically opposite sides of what is a crucial constitutional question after the Supreme Court has spoken on the issue.

The issue of *Redrup*'s role in the obscenity area differs from the previous issue of national versus state or local standards, in that we are now dealing with a majority opinion. However, the failure of *Redrup* to overrule *Roth* overtly created an ambiguity to which the state courts were forced to react. We have seen that they could choose to follow either Phase, and did.[90]

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82. State v. Cox, 3 Wash. App. 700, 477 P.2d 198 (1971).

83. Dykema v. Bloss, 17 Mich. App. 318, 169 N.W.2d 367 (1969). *See* concurring opinion of Levin, J.

84. Cain v. Commonwealth, 437 S.W.2d 769 (Ky. 1969), *rev'd* 397 U.S. 319 (1970).

85. People v. Luros, 4 Cal. 3d 84, 480 P.2d 633 (1971); U.S. *cert. denied*, 404 U.S. 824 (1971).

86. State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970).

87. State v. Arnato, 49 Wis. 2d 638, 183 N.W.2d 29 (1971).

88. Dykema v. Bloss 17 Mich. App. 318, 169 N.W.2d 367 (1969). *See* concurring opinion of Danhof, J.

89. People v. Penney, 7 Ill. App. 3d 191, 287 N.E.2d 220 (1972). At 224 the Court stated, "The motion that the presence of one or more of the criteria enumerated in *Redrup* would henceforth have to be present before a constitutional determination of obscenity could be made lasted only until the case of United States v. Reidel (1971) 402 U.S. 351 . . . ."

90. A third possibility would have been to interpret Redrup as the Ap-

The final aspect of our analysis of the treatment of obscenity cases by the state courts involves the question of whether expert testimony is needed before a jury or judge can make its final determination of obscenity *vel non* of the work in issue. Given the relatively large number of esoteric findings which may go into the ultimate decision, such as "contemporary community standards" (regardless of whether national or state or local); "redeeming social value"; "patent offensiveness"; "prurient interest"; and "pandering", whether a court requires expert testimony, or at least some evidence beyond the sole admission of the work in question, may make a difference between a finding of obscenity and a finding of non-obscenity.

Typically, the Supreme Court has been vague on the need for expert testimony, but there seems to be a general reluctance by the Court to require it. Neither, however, has the Court denied its admissibility into evidence. Justice Harlan felt the Justices themselves were the only relevant experts in the obscenity area. He said in *Roth*:

> [T]he question whether a particular work is . . . [obscene] involves not really an issue of fact, but a question of constitutional judgment of the most sensitive and delicate kind. . . . In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.[91]

The superfluousness of expert testimony is further noted by Justice Stewart's contention in *Jacobellis* that only hard-core pornography can constitutionally be proscribed; and that although he could not intelligibly describe it, "I know it when I see it."[92]

The states have addressed themselves to the need for expert testimony, and, once again, they are seriously divided on the issue. Some of the state courts which have required such evidence are listed in a footnote in *Commonwealth v. La Londe*,[93] after this cryptic statement by Justice Eagen of the Pennsylvania Supreme Court:

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pellate Court of Illinois in People v. Penney did prior to *Reidel; see supra* note 89 and text. The court suggests that prior to Reidel, the criteria ennunciated in Redrup were additional requirements needed to find obscenity and, thus, even if the *Redrup* elements were present a court would still have to apply a definition of obscenity to determine whether the work lacked First Amendment protection. In essence, under this interpretation, Phase 3 would be applied and then Phase 1 would also have to be applied.

91. 354 U.S. at 498.
92. 378 U.S. at 197.
93. 447 Pa. 364, 288 A.2d 782 (1972).

> The requirement of evidence on the elements of obscenity has been adopted by several state and federal courts over the past few years, no doubt because it lends a measure of objectivity to the exquisite vagueness of the *Roth-Memoirs* test.[94]

Although Justice Eagen found a need for "evidence on the elements of obscenity," he stopped short of an unqualified requirement with the caveat that it may not be so required where the court was dealing with hard-core pornography. The assumption seems to be that, like Justice Stewart, the Pennsylvania Supreme Court knows hard-core pornography when it sees it, but it is not so confident about its perceptive abilities vis-a-vis less than hard-core pornography. A similar finding of the need for expert testimony to detect only hard-core pornography was made by the Supreme Court of Rhode Island,[95] and the District Court of Appeals of Florida.[96]

It appears, further, that some state courts' determination concerning the need for "evidence" may vary depending on which element of obscenity is in question. For example, the Supreme Courts of four states would require some evidence, other than the judges' or jurors' own perceptions of "contemporary community standards."[97] Other courts would require "enlightening testimony" on the concepts of "prurient appeal,"[98] "customary limits of candor,"[99] and "the three tests laid down in *Roth-Alberts*."[100] The rationale for all these findings may be summed up thusly:

> If expert testimony is not a requirement for a finding of obscenity, First Amendment rights would depend upon subjective determinations by juries or judges as the case may be. . . . This court does not feel that it is in a position to judge whether the film has a prurient appeal to the average man without expert testimony.[101]

The draftsmen of the Model Penal Code of the American Law Institute struggled with this question of "enlightening evidence"

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94. *Id.* at 787.
95. *In Re* Seven Magazines, 197 R.I. 540, 268 A.2d 707 (1970).
96. Mitchum v. State, 251 So. 2d 298 (Fla. 1971).
97. *In Re* Gianinni, 69 Cal. 2d 563, 446 P.2d 535 (1968), U.S. *cert. denied*, 295 U.S. 910 (1969); Duggan v. Guild Theatre, Inc. 436 Pa. 191, 258 A.2d 858 (1969); Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972); G.P. Putnam's Sons v. Callissi, 86 N.J. 82, 205 A.2d 913 (1964).
98. Ramirez v. State, 430 P.2d 826 (Okla. Crim. App. 1967).
99. G.P. Putnam's Sons v. Calissi, 86 N.J. 82, 205 A.2d 913 (1964).
100. Sanza v. Maryland State Board of Censors, 245 Md. 319, 226 A.2d 317 (1967); Keuper v. Wilson, 111 N.J. Super. 489, 268 A.2d 753 (1970).
101. Keuper v. Wilson, 111 N.J. Super. 489, 495, 268 A.2d 753, 756 (1970).

for obscenity cases. In their Tentative Draft of the Code they tried to accommodate both sides of the issue by not requiring expert evidence, but providing that, while both the trial and appellate courts were obliged to make an independent determination of the obscenity *vel non* of the material, these courts should be permitted, if not encouraged, to consider as evidence written submissions by behavioral scientists which might serve to enlighten them, and hence their determinations.[102]

Perhaps as much a commentary on the status of behavioral science as on the need for such "evidence," the Proposed Official Draft of the A.L.I.'s Model Penal Code omitted the tentative proposal concerning behavioral evidence. The omission is explained by the following terse comment in the Official Draft reporters' notes:

> The present version is much simplified and omits provisions to which most objections were raised, for judges to consult social scientists and for written submissions by these consultants.[103]

The Supreme Courts of South Carolina[104] and Wisconsin[105] seem to find expert testimony no more edifying than the critics of the Tentative Draft of the Model Penal Code. In *State v. Simpson* the Wisconsin Court said that "obscenity is not so elusive a concept as to require expert testimony."[106]

Perhaps the most illustrative rejection of the need for evidence other than the work involved, and the description which comes closest to describing the jury's decision-making process absent outside evidence, was set forth by Judge Bettman of the Cincinnati Municipal Court. That process, as stated by Judge Bettman, is as follows:

> That the material acts as an aphrodisiac can almost be determined physically. Although it must be tested by its effect on a person with average sex instincts, a judge or juror should be able to estimate that rather closely by the reaction he himself has to the material. . . . It is, I believe, as unambiguous and simple of application as any test which can be evolved.[107]

In this extraordinarily frank analysis, Judge Bettman brings to the surface what many other decisions on this issue tend to hide. For Judge Bettman, and presumably all those courts, including the Supreme Court, which diminish the value of expert testimony, a proper charge to a jury deliberating the obscenity *vel non* of a par-

102. Zeitlin v. Arnebergh, 59 Cal. 2d 901, 910, 31 Cal. Rtpr. 800, 806 (1963).
103. ALI MODEL PENAL CODE. Tentative Draft No. 6, § 207.10.
104. State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972).
105. State v. Simpson, 56 Wis. 27, 201 N.W.2d 558 (1972).
106. *Id.* at 564.
107. City of Cincinnati v. Walton, 167 Ohio St. 14, 26, 145 N.E.2d 407, 413 (1957).

ticular work might be: "Ladies and gentlemen of the jury, you must decide whether the work before you is obscene or not, and in the final analysis what is obscene is, to use the vernacular, whatever turns you on."

As with the questions of whether a national standard or a state or local standard must be used in determining whether a work is obscene, and whether *Redrup v. New York* modified *Roth-Alberts*, the Supreme Court gave the states little guidance as to whether expert testimony was needed in determining whether the various elements of obscenity were present. And, as with the previous issues, the state courts seemed to interpret the Supreme Court's decisions in the way which conformed most comfortably to their own judicial notion of what was required.

IV

The obscenity issue has been mismanaged by the Supreme Court for a longer consecutive period than probably any other single issue. If that, in itself, is not reason enough to abandon it, there are other compelling reasons for judicial restraint regarding obscenity.

The vague and circular language employed by the Court to define unconstitutional obscenity is, in part, the cause of judicial impotence in this area. However, vague language is endemic to the judicial process. If the courts can manage with "substantive due process," "preferred and fundamental rights" and the "necessary and proper" clause, they should have been able to manage with several key phrases adopted in the obscenity area. Apparently, there is more to the difficulties inherent in the obscenity issue than merely the problems of semantics.

One handicap of almost every one of the Supreme Court's obscenity decisions has been the multiple alignments among the justices themselves. Perhaps more significant than the impact of plurality opinions on the lower courts is the extent of the variety of principles involved. Is there such a thing as obscenity? If there is, what is it? Should it be beyond constitutional protection? If so, when? These are questions which have a continuum of answers. More importantly, our study suggests that the judiciary (and no doubt the public as well) is scattered all along the continuum.

Many great jurists have articulated the critical relationship be-

tween law and reason.[108] It would appear self-evident that a compelling reason for judicial abstention, or at least restraint, would be the inability of the courts to dispose of an issue reasonably. And yet, at least part of the obscenity issue has consistently been treated without consideration of reason. Of course, Chief Justice Warren was right when he said "there is no provable 'national standard' [of obscenity]."[109] What he failed to add, however, is that there is no provable state or local standard either. Surely no one could accurately cite a local standard of decency for New York City (even if we were to limit it to the single borough of Manhattan), or even for its Harlem, its Greenwich Village, its Wall Street, its East Side or its West Side. In truth, one would be presumptuous to try to define any standard of decency which goes beyond one's own value set. Besides the important practical role that the term "community standards" has played in the obscenity issue, the very fact that the courts have tried to define this term is significant because of the impossibility of the task and, hence, the resulting unreasonable solutions.

These problems of lack of consensus and unreasonable solutions have increased the tension between principle and expediency regarding obscenity. This tension has been relaxed only when the courts reverted to the harm approach of *Redrup*, or absented themselves completely, leaving the issue to the individual. As Alexander Bickel has pointed out, the unique and sustaining power of the Supreme Court is its ability to avoid that tension:

> The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, . . . "legitimate" legislation as consistent with principle. *Or it may do neither.* It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.[110]

We chose to limit our research to the state courts' treatment of pre-*Miller v. California* Supreme Court decisions for purposes of data collection. However, a look at the *Miller* rule and its subsequent treatment by the state courts leaves us pessimistic about the immediate future in this area.

Miller created the following three-level test to determine the obscenity *vel non* of a particular work:

> 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 de-

108. "Reason is the life of the law. . . ." Coke; FIRST INSTITUTE; p. 1; 1926. "The doing . . . is the business of the law." Llewellyn; THE BRAMBLE BUSH; p. 3; 1930.

109. 378 U.S. at 200.

110. A. Bickel; THE LEAST DANGEROUS BRANCH; p. 69; 1962.

> scribes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[111]

Other than defining community as a local rather than a national body, *Miller* represents little difference from the Phase 1 cases; and as suggested above, the existence of a local community standard is as dubious as the existence of a national standard.

As early as 1974, in *Jenkins v. Georgia*,[112] the Supreme Court overruled a state court's finding of obscenity which was ostensibly based on *Miller*.[113] The Georgia jury, using what it perceived to be the local standard of decency, found the movie *Carnal Knowledge* to be obscene. Once again, the Supreme Court was forced to overrule the state court on the basis of little else than the opinion of a majority of the justices that the movie was not obscene—whatever that word means.

Besides the failure of the Burger Court to deal effectively with the substance of the matter, the continued split among the justices is predictive of continued confusion and disparity among state courts' treatment of the obscenity issue. Justice Douglas is consistent in his belief that the government lacks the constitutional power to interfere with obscenity. Since *Miller*, three justices have adopted the harm approach of *Redrup*. Justice Brennan, author of several decisions in Phase 1, along with Justices Stewart and Marshall, has finally adopted the position that the government may not regulate obscenity, except when the regulation seeks to protect children, or when the regulation seeks to protect against distribution of material in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.[114] Chief Justice Burger is, therefore, faced with a consistent four-man minority in his attempt to apply the *Miller* rule; and he will, no doubt, find his current majority of five difficult to hold together from case to case. The question is, how much longer will it take the *Miller* majority to learn what Justices Brennan and Stewart took sixteen years to learn?

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111. 413 U.S. 15 (1973).
112. 418 U.S. 153 (1974).
113. Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973).
114. Paris Adult Theatre 1 v. Slayton, 413 U.S. 49 (1973) (dissenting opinion).