CONSTITUTIONAL LAW—OBSCENITY—NEW FIRST AMENDMENT STANDARDS


IT HAS BEEN OVER fifteen years since the Supreme Court embarked on its precarious course of determining the Constitutional boundaries for control of obscenity by the state and federal governments. The Court's first attempt to define the meaning of obscenity and ultimately determine the Constitutional protection afforded this expression was in Roth v. United States.1 What has followed can only be characterized as a series of irreconcilable conflicts and discrepancies that have left the law in this area in total confusion.2 Recently, the Court in Miller v. California3 has again attempted to provide "concrete guidelines to isolate 'hard core' pornography from expressions protected by the first amendment."4 Unfortunately, this optimism may be premature when this decision is examined in light of past experience.

The appellant Marvin Miller conducted a mass mailing campaign to advertise the sale of illustrated material. He was convicted under California Penal Code Section 311.25 for sending in the mail unsolicited brochures advertising four books and a film. These brochures consisted primarily of pictures and drawings explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed.6 The Supreme Court rejected the guidelines used by the State of California to distinguish obscenity from protected speech and on remand, directed the lower court to apply a new test for obscenity designed to effect prosecution for materials which depict "hard core" sexual conduct.7

From the facts presented, the Supreme Court could have decided the case on the basis of upholding the state's interest in protecting the sensibilities of unconsenting adults or exposure to juveniles.8 This interest

4 Id. at 2617.
5 CAL. PENAL CODE § 311.2(a) (West 1970).
7 Id. at 2615-22.
has consistently been found to be a legitimate concern of the state even among those justices who now call for a new approach to the problem of obscenity. However, the majority of the Court uses this opportunity to attempt to redefine standards which can be used to distinguish obscenity from constitutionally protected expression. These new standards are purported by the Court to be more concrete than those in the past.

Before discussing the particular rationale of the Miller decision, it is important to examine briefly the historical context in which this recent decision must be interpreted. In Roth the Court first developed what has now been termed the two-level approach to obscenity. Upholding the constitutionality of section 1461 of the federal obscenity statute, the Court states that obscenity is not protected by the first amendment. In support of this conclusion historical precedent was cited to show that the unconditional phrasing of the first amendment was not intended to protect all types of expression and that obscenity was consistently excluded from its protection. The Court proceeded to distinguish obscenity from protected speech as being a form of expression "utterly without redeeming social value."

The difficult task, however, is not describing obscenity in the abstract and distinguishing it from protected speech, but rather the development of a functional standard to be used by legislatures and eventually the courts. In Roth a majority of only five justices agreed that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interests."

Justice Black and Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity, see, e.g., Ginzberg v. United States 383 U.S. 463, 476-82 (1966) (dissenting opinion); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (concurring opinion); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting opinion). Justice Harlan, however, feels that the Federal Government may control hard-core pornography while the states may ban any material that treats sex in a fundamentally offensive manner, Jacobellis v. Ohio, 378 U.S. 184, 204 (1964) (dissenting opinion). Justice Stewart regarded hard-core pornography as the limit of both federal and state power, see, e.g., Ginzberg v. United States, 383 U.S. 463, 499 (1966) (dissenting opinion); Jacobellis v. Ohio, 378 U.S. 184, 197 (1966) (concurring opinion).
However, even the majority in *Roth* failed to remain in agreement when forced to apply their test to material presented for review. The Court continually demonstrated the need to refine the definition of what is obscene and make it more precise. In *Memoirs v. Massachusetts*, Justice Brennan developed a new standard in an effort to clarify his decision in *Roth*. This test which has gained the most popularity in recent years consists of three parts:

(a) the dominant theme of the material taken as a whole appeals to 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.

But this test has never gained the support of more than three justices and even Justice Brennan now concedes that the test is inadequate.

Important questions concerning substantive points of law which in the abstract seemed to be answered by the proposed tests became common ground for disagreement and confusion. The court was unable to maintain a consistent approach to obscenity when confronted with issues involving whether a national rather than a local community standard should be applied; whether pandering alone could cause a publication to be termed obscene; or finally, whether the strong countervailing interest of protecting a person's privacy within his home prevents the state from telling him what books he may read or what films he may watch.

This inability of the Court to agree on some standard which could provide the means to separate obscenity from sexually oriented but constitutionally protected speech resulted in the practice of "per curiam" reversals where a majority of five justices each applying his own standard

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18 Id. at 418.
19 Paris Adult Theatre v. Slaton, 93 S. Ct. 2628, 2659 (Brennan, J., dissenting).
reversed prior convictions for dissemination of obscene material. In effect this seems to be an endorsement of Justice Stewart's concurring opinion in Jacobellis where he admits that it is futile for him to define what material he considers obscene but that "[h]e knows it when [h]e sees it." This reliance by the Court on some vague standard to isolate and totally suppress obscenity can only lead to a serious chilling effect on our constitutionally protected first amendment rights. Even Chief Justice Burger, the author of the majority opinion in Miller, admits that the Court has failed in the past to provide an adequate standard. The question remains whether the Miller test is unique in this respect or merely another attempt which will compound mistakes in the past and seriously infringe upon protected freedoms in the future.

The California criminal obscenity statute in issue in Miller incorporates the three-part test developed by Justice Brennan in Memoirs. The Court rejects this test as being inadequate and seems to rely on a reaffirmation of Roth as the source for its new standard. The criticism directed at the decision in Memoirs is that it veered sharply away from the Roth concept. Specifically, the Court attacks the incorporation in the Memoirs test of the requirement that the material be "utterly without redeeming social value."

Justice Burger distinguishes between the presumption in Roth that obscenity is utterly without redeeming social value and the requirement in Memoirs that to prove obscenity it must be affirmatively established that the material is utterly without redeeming social value. Social importance, according to Justice Burger's interpretation of Roth, is not an independent test of obscenity but is relevant only in determining the predominant prurient interest of material. Therefore, the majority of the Court formulated a new test of obscenity which affirms the fundamental proposition of Roth, that obscenity is not protected by the first amendment, but rejects the utterly without-redeeming-social-value test of Memoirs. This new test requires the trier of fact to adhere to the following guidelines:

24 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
26 The test of CAL. PENAL CODE § 311, 311.2 (West 1970) is quoted by the Court at 93 S. Ct. 2607, 2611 (1973).
28 Id. at 2613-14. Chief Justice Burger seems to adopt the reasoning of Justice Harlan and Justice White concerning the social value test in Memoirs, see, e.g., Memoirs v. Massachusetts, 383 U.S. 413, 459, 461 (1966) (Harlan, J., and White, J., dissenting).
(a) Whether the average person applying contemporary community standards would find the work taken as a whole appeals to prurient interest;
(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
(c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.29

Except for the third criterion requiring the work taken as a whole to have serious literary, artistic, political or scientific value, the new standard on its face, is similar to the Roth-Memoirs test. However, two additional changes concerning the application of this new test clearly distinguish it from past attempts by the Court to define obscenity. First, emphasis was placed on the use of depictions of physical conduct in state obscenity statutes to define what may be termed patently offensive.30 This would enable the trier of fact to call upon concrete examples on which to base his decision as well as provide adequate notice of what expressions will be considered criminal.

Secondly, the Court rejects any attempt to apply a national community standard in determining what may be considered prurient. The majority of the Court concludes that this country is too large and diverse to expect some abstract national standard to apply equally in all cases. In practice, the Court points to continued use of a local community standard, despite the requirements in Memoirs of a national standard.31

These changes are significant since they indicate a recognition by the Court that a new approach is needed. However, instead of showing an understanding of the difficulties inherent in the Roth approach, the Court merely restates the Roth-Memoirs test while adding its own influence to make the test more restrictive. The past has shown that obscenity is a term of considerable vagueness. Continued attempts by the Court over the last fifteen years to confine what is obscene to precise definitive guidelines has failed. Obscenity statutes have not only failed to give adequate notice of what conduct is obscene but their vagueness allows censors to infringe upon constitutionally protected rights.32

29 Id. at 2615.
30 Id. at 2615, the Court suggested possible examples of what a state statute could define for regulation under the second part of the new standard.
   (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
   (b) Patently offensive representations of masturbation, excretory functions, and lewd exhibitions of the genitals.
31 Id. at 2618.
32 The due process clause of the fourteenth amendment requires that all criminal laws provide fair notice of what the state commands or forbids, see, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926).
changes incorporated in this test do not reduce this element of vagueness but rather enhance the threat of suppression by the state of expression that is constitutionally protected by the first and fourteenth amendments.

The rejection of the social value test is not a reaffirmation of the reasoning in Roth as maintained by the majority of the Court, but rather is itself a sharp break with the conceptual basis of Roth. The key element which allows the Court in Roth to read obscenity out of the first amendment is the lack of the slightest redeeming social value. In attempting to draw the distinction between protected and unprotected speech the Court in Roth states the following:

All ideas have even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interest. But implicit in the history of the first amendment is the rejection of obscenity as utterly without social redeeming importance.33

It is clear from the wording that the presence of social value must save any material from being termed obscene.

To hold otherwise would result in a rejection of the traditional principles that form the basis of the protection afforded under the first amendment. The first amendment is viewed as a tool to achieve social good by advancing knowledge and discovering truth. Knowledge can be gained only by hearing all sides of an issue “even ideas hateful to the prevailing climate of opinion.”34 To suppress these expressions would only conceal the real problems that plague a changing society by diverting the public’s attention away from critical issues. The result is a stultification of new ideas and thinking which in turn causes frustration in a society that is forced to re-evaluate its attitudes because of changing circumstances.35

The new standard may be easier to prove but this does not lessen the vagueness inherent in the wording. On the contrary, by limiting the first amendment protection to expressions of serious literary, artistic, political or scientific value, the Court increases the danger of infringing upon protected expression simply by increasing the kinds of speech which may be termed obscene. The final decision must still be a personal value judgment of a majority of the Court which may vary from justice to justice.

The Court’s use of physical depictions as examples to state legislators of what can be termed patently offensive sexual conduct may provide an

34 Id.
element of definiteness and predictability but only at the risk of extraordinary abuse. The Court is correct in assuming its traditional role of final arbitrator between the people as a whole represented by their legislators and the individual. However, in this capacity it is important for the Court to maintain constant surveillance to assure regularity in applying legislative-made law. A common fault of those statutes which have been struck down for vagueness is their inherent permissiveness which allows the state great latitude in its operation. The result is an erratic application of the law which is responsive only to the whims and prejudices of those in authority. The Supreme Court has consistently interfered in these cases to provide a buffer zone around constitutionally protected rights.

In the present case the incorporation of per se rules alone while providing adequate notice fails to relate clearly to the particular obscene subject matter intended to be prohibited. Supplemental tests will be needed to prevent expressive works which may have social value from being termed obscene merely because they depict the human body engaging in certain sexual acts. Without these additional guidelines the state can exercise its complete discretion in confiscating material containing these physical depictions.

Even conceding the validity of the physical conduct test to pictorial material, there remains the problem of distinguishing obscenity from protected textual material. The Court fails to offer any guidance beyond mere descriptive phrases. Hopefully this will not amount to a license to confiscate material simply for describing sexual conduct in print.

Finally, the Court opens the door to widespread abuse by allowing the trier of fact to apply a local community standard in deciding the prurient and offensive nature of expression. While the Court may be correct in criticizing past attempts to apply an abstract national standard as unrealistic, the proposed alternative does not diminish the risk of

36 Miller v. California, 93 S. Ct. 2607, 2618 (1973). This conception of the role of the Supreme Court was shaped in its decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 303 (1816).
37 The place of the Supreme Court in our political structure has been the subject of unending comment and controversy. For additional source material concerning various approaches to this problem see Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 905 n. 24 (1963).
infringing upon protected expression. By not specifically defining what is meant by a local community standard it may be feasible for a trier of fact to draw upon a state, county, or municipal standard. This means that a person's freedom to enjoy expression may be dependent upon the particular geographical area of the country in which he lives. Ultimately, the fear of criminal conviction could cause a chilling effect on material in localities where it would not be considered obscene. Therefore, the public may be barred from access to material which the state could not constitutionally suppress directly.

If one only considers the size and diversity of our country, the adoption of a local community standard may seem appropriate. But these facts must be balanced against the protection afforded the individual by the first and fourteenth amendments. The Court attempts to reconcile these two considerations by assuming that the trier of fact, in drawing on a local community standard will be “guided always by limiting instructions on the law.” Unfortunately, the Court is unable to provide limiting instructions of law to assure an overall probability of definiteness and predictability.

Inevitably, the Court under both standards will have to resort to a case-by-case analysis of the disputed material. This approach in turn increases the chilling effect of an overbroad statute because of the absence of determinative obscenity standards and the commitment to a fact-oriented review. Besides the danger of self-censorship imposed by the threat of criminal prosecution, the prospect of costly litigation is a severe and persistent deterrent. Furthermore, the individual may be unsure that this costly procedure of litigating his constitutional claim will end in a reliable adjudication. Federal review of state judges and juries is seriously hampered when the court is forced to apply overbroad statutes to complex factual problems where an unilluminating record may conceal prejudices and discrimination. The result is a piecemeal approach that fails to provide a responsive judicial policy which lessens the chilling effect of an overbroad statute.

The answer to what Justice Harlan calls “the intractable obscenity problem” seems to be still in doubt. While the Court recognizes the need

45 Id. at 868-71.
for a change, it continues to treat obscenity as worthless unprotected expression. Perhaps the answer is not in simply interpreting the Roth decision to provide stricter standards but rather in re-evaluating the basic premise of Roth which reads obscenity out of the first amendment.

Justice Brennan, in his dissent in Paris Adult Theatre v. Slaton decided the same day as Miller, suggests that the Court should abandon its futile attempt to define obscenity and "probe the asserted state interest in curtailing unprotected sexually oriented speech." The emphasis should not be placed on the worthlessness of such materials but on the harm to social interests that obscene expression might induce. This would mean that obscenity would be treated as protected expression allowing constitutional standards to deal with the particular dangers posed by obscenity. Within this framework, draftsmen would be able to focus upon tangible harms caused to governmental interests by sexually oriented material and avoid the problems of overbroad statutes. Some possible areas of legitimate state interest may be in the protection of children and unconsenting adults.

Proponents of this approach are the first to admit that difficult questions remain unanswered. But the Constitutional framework upon which it is based seems to provide the means to narrow and structure the issues for decisions by the Court. The Miller Court, however, seems to prefer to narrow the protection afforded by the Constitution.

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46 93 S. Ct. 2628, 2659 (1973) (Brennan, J., dissenting).
47 It has been proposed that the basis for permissible state regulation of the harms caused by obscenity is the familiar substantive due process standard detailed with new precision, see Engdahl, Requiem for Roth: Obscenity Doctrine is Changing, 68 Mich. L. Rev. 185 (1969). Historic substantive due process requires the weighing of competing interests against the constitutional interest in safeguarding protected rights, so as to accommodate the necessities of security, peace, and order and preservation of other rights without defeating the essential purposes of any constitutionally protected right, see, e.g., Nebbia v. New York, 291 U.S. 502, 502-25 (1934); Hurtado v. California, 110 U.S. 516, 532 (1884). Justice Douglas takes a narrower approach. He insists that identical restraints on governmental suppression are imposed by the first amendment upon the national government, and, by the incorporation of first amendment into the fourteenth amendment, upon the states. Until those restraints are relaxed by constitutional amendment, he maintains, obscenity can be suppressed by any level of government no more readily than any other expression that is not demonstrably and sufficiently related to illegal action, Ginzberg v. New York, 390 U.S. 629, 650-71 (1968) (dissenting opinion).