Movie Day at the Supreme Court
"I Know It When I See It":
A History of the Definition of Obscenity

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What is "obscene" under U.S. law has plagued our courts for the last fifty years. Many people don't realize that in our society, which trumpets free speech, that there are many restrictions on speech, including restrictions on adult or sexual images and words – or "obscene" materials. Other forms of unprotected or regulated speech include: speech which creates a clear and present danger of imminent lawless action; speech which contains narrowly predefined "fighting words"; written or spoken untruths (libel, slander, fraud) which may be punished by civil suit; speech which is false or deceptive advertising; speech which threatens others; and speech with restrictions justified because the government can demonstrate a "narrowly tailored" "compelling interest".

"Obscene" speech is "unprotected" speech as ruled by the Supreme Court. "Unprotected speech" means speech that does not enjoy First Amendment protection and may even be criminal to express.

In 1964, Justice Potter Stewart tried to explain "hard-core" pornography, or what is obscene, by saying, "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . "[i] This quote, and the intent behind it, are well known as summarizing the irony and difficulty in trying to define obscenity. For at least fifty years, the Supreme Court has been struggling with defining what speech is "obscene".

It is surprising that the difficulty in defining obscenity in our history did not fully begin until the mid-1900's. Supreme Court Justice Brennan, who served from 1956 to 1990, who was one of the great, and often liberal, legal minds of the 20th century, attempted repeatedly to define obscenity. The task was much more daunting than he had anticipated.

Background

The book The Brethren, by Watergate reporter Bob Woodward, outlines the behind-the-scenes battles of the Supreme Court during the 1960's and 1970's and provides an interesting background to the obscenity cases decided during that period. The most important case during that time was *Miller v. California*, which still defines obscenity today.

The Brethren describes Supreme Court "movie day" – when the law clerks and the Justices sat down to eat popcorn and see the porn films for the cases awaiting decisions. Justice Hugo Black, who served from 1937 to 1971, always refused Movie Day by saying "if I want to go see that film, I should pay my money." Justice Black and Justice William Douglas, who served from 1939 to 1975, at the time were the only two Justices who believed that speech should be entirely free of restrictions.

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[1] Readers are cautioned not to rely on this article as legal advice as it is no substitution for a consultation with an attorney in your state. Based on jurisdiction and time, the law varies and changes.

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According to The Brethren, the law clerks who drafted the Justices' opinions created the following short hand for how their bosses decided if material was obscene:

> *Justice Byron White's Definition*: "no erect penises, no intercourse, no oral or anal sodomy. For White, no erections and no insertions equaled no obscenity."
>
> *Justice Brennan's Definition, The Limp Dick Test*: "no erections. He was willing to accept penetration as long as the pictures passed what his clerks referred to as the 'limp dick' standard. Oral sex was tolerable if there was no erection."
>
> *Justice Stewart's Definition, The Casablanca Test*: " ' . . . I know it [obscenity/pornography] when I see it.' In Casablanca, as a Navy lieutenant in World War II and watch officer for his ship, Stewart had seen his men bring back locally produced pornography. He knew the difference between that hardest of hard core and much of what came to the Court. He called it his 'Casablanca Test'."[ii]

These were the opinions of the more liberal Justices.

The First Definition

In 1957, Brennan crafted the first Supreme Court legal definition of obscenity in the case of *Roth v. United States*. Although indirectly addressed in the law to this point, *Roth*'s formal legal holding on pornography was a case of first impression for the US Supreme Court. Brennan held that the First Amendment did not protect obscene materials.

The definition of obscenity set forth in *Roth* was:

> Speech which " . . . to the average person, applying contemporary **community standards**, the dominant theme of the material, **taken as a whole**, appeals to **prurient interest**" and which is "**utterly without redeeming social importance**"[iii].

By 1964, lower courts had misapplied the *Roth* standard resulting in many cases for Court review. Thus, the Court tried to clarify this standard by adding another requirement for obscenity in later opinions – that the material "go substantially beyond customary limits of candor in description or representation." The Court also clarified that the "community" referred to in the definition was as the national, not local, community[iv]. This clarification resulted in a more liberal definition of obscenity going forward.

The Second and Current Definition

The tide turned more conservatively on free speech and sex when two liberal elements – Chief Justice Earl Warren, an Eisenhower appointee, resigned in 1969 and Black, a Roosevelt appointee, resigned in 1971. President Nixon appointed two replacements, Chief Justice Warren Burger and Justice William Rehnquist, along with two other appointees Justice Harry Blackmum and Justice Lewis Powell. With the arrival of Rehnquist and Burger, the Court opinions on obscenity became more conservative.

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In the summer of 1973, the Court decided a group of pornography/obscenity cases that set the standards for the future of pornography. In his Dissent in one of these cases, Justice Brennan wearily admitted:

> "Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[v]

Unfortunately, this realization came too late and without support from the majority of the Court.

Thus, in 1973, in *Miller v. California*, Justice Burger announced the second definition of obscenity – the majority position of the Court, and the definition which, more or less, is still in effect today. It is as follows:

"(a) whether the '**average person**, applying contemporary **community standards'** would find that the work, **taken as a whole**, appeals to the **prurient interest**,

(b) whether the work depicts or describes, in a **patently offensive** way, sexual conduct specifically defined by the applicable state law, and

(c) whether the work, taken as a whole, **lacks serious** literary, artistic, political, or scientific value."

This holding specifically replaced the old test and also held that **community standards** could be local rather than national. This change swung the pendulum back toward a more conservative definitions of "obscenity" by local, some times rural communities.

As many had complained that these rulings were so vague that they were impossible to comply by those trying to obey the law, the Court set forth examples of what was "hard core", or that which the Court considered obscene and illegal. The Court's list of illegal acts was as follows:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[vi]

<u>Clarifications and Today's Definition</u>

Since *Miller*, the Court has clarified and explained aspects of the *Miller* standard:

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- Jurors are to apply the standards of the area "from which he comes for making the required " decision[vii] as the "**community standards**" for obscenity;

- "[A]ppeals to the **prurient interest**" means that which appeals to "shameful or morbid interests" in sex, but not that which incites normal lust[viii], and includes materials designed for and primarily disseminated to a deviant sexual group (for example, sadists) which appeals to the prurient interests of that group[ix];

- "**[A]verage person**" includes both sensitive and insensitive adult persons, but does not include children[x];

- **Serious artistic, political, or scientific value, using a national standard**, is required for a finding that something is not obscene and a finding of some artistic, political or scientific value does not preclude a finding that a work is obscene[xi].

Additionally the Court has created a sort of middle category of materials – "**indecent**" materials which are protected speech. Indecent materials are defined as those which show "nonconformance with accepted standards of morality." [xii] After reviewing the above, most persons, including lawyers, remain confused about what is and is not legally permissible.

The Definition of Child Pornography

In *Ferber* in 1982, the Court held that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" because:

- "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and therefore that narrowly tailored government interests may restrict such speech as stated in the initial definitions of restricted speech above.
- "The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."
- "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal through the Nation."
- "The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis."
- "Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions"

The Court then declared a more conservative *Miller* standard applicable for child pornography:

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"A trier of fact need not find that the material appeals to the **prurient interest** of the **average person**; it is not required that sexual conduct portrayed be done so in a **patently offensive** manner; and the material at issue need **not be considered as a whole**."[xiii]

Conclusion

What persons in the sex industry typically fail to understand is how conservative the legal standards for pornography are and how vulnerable to prosecution they truly are due to these vagaries. One reading of the personal obscenity tests of the liberal justices of the past makes that clear.

What the *Miller* test outlines is the outer most limits on banning sexual speech. Thus, nearly all legislation at the both state and federal level, simply copies the Miller test into its language since substitution of even a single word can result in the law being held unconstitutional. The result is that application of the *Miller* test – what "prurient", "patently offensive", or having "social, artistic or scientific value" is, and what the local standard are for such decisions – rests squarely in the hands of the juries of each state. In the end, the Court concluded that this decision was one that must be made by each state, not the Supreme Court.

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[i] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)
[ii] *The Brethren*, Bob Woodward and Scott Armstrong, (Simon & Schuster, 1979), p. 193-200.
[iii] Roth v. United States, 354 U.S. 476, 477, 489 (1957)
[iv] Jacobellis v. Ohio, 378 U.S. 184, 192-193 (1964)
[v] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973)
[vi] Miller v. California, 413 U.S. 15, 24-25 (1973)
[vii] Hamling v. United States, 418 U.S. 87, 105 (1974)
[viii] Brockett v. Spokan Arcades Inc., 472 U.S. 491 (1985)
[ix] Miskin v. New York, 282 U.S. 502 (1966)
[x] Pinkus v. United States, 436 U.S. 293, 298-299 (1978)
[xi] Pope v. Illinois, 481 U.S. 497 (1987)
[xii] FCC v. Pacifica, 438 U.S. 726, 741 (1978)
[xiii] New York v. Ferber, 458 U.S. 747, 757-766 (1982)

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