MILLER v. CALIFORNIA

SUPREME COURT OF THE UNITED STATES
413 U.S. 15
June 21, 1973
[5 - 4]

OPINION: Chief Justice Burger/White/Blackmun/Powell/Rehnquist...Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating *California Penal Code §311.2 (a)*...by knowingly distributing obscene matter...causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police. At the time of the commission of the alleged offense,...§§311.2 (a) and 311 of the California Penal Code read in relevant part:

> "§311.2 (a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, **any obscene matter** is guilty of a misdemeanor. . . .
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> §311. (a) **'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance**...

While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon **unwilling recipients** who had in no way indicated any desire to receive such materials. **This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles**. *Ginsberg v. New York.*[1] **It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.**

...In *Roth v. United States*[2], the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy..." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment...

Nine years later, in *Memoirs v. Massachusetts*, the Court veered sharply away from the *Roth* concept and...articulated a new test of obscenity. The plurality held that under the *Roth* definition "...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 standards relating to the description or representation of sexual matters; and

(c) the material is utterly without redeeming social value."

...While *Roth* **presumed** "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it **must be affirmatively established** that the material is "*utterly* without redeeming social value." Thus,...the *Memoirs* plurality...called on the prosecution to prove a negative, *i. e*., that the material was "*utterly* without redeeming social value" -- **a burden virtually impossible to discharge** under our criminal standards of proof...

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power...This is not remarkable, for in the area of

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[1]Case 1A-S-14 on this website.

[2]Case 1A-S-10 on this website.

freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression...

The basic guidelines...must be: **(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.** We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs v. Massachusetts*...

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. **At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.** For example, **medical books for the education of physicians...** necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Justice Brennan...has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression. *Paris Adult Theatre I v. Slaton*[3]. Paradoxically, Justice Brennan indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law...We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Justice Douglas contends...**Justice Douglas now stands alone**...

To require a State to structure obscenity proceedings around evidence of a *national* "community

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[3]Case 1A-S-24 on this website.

standard" would be an exercise in futility...

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards or to the instructions of the trial judge on "statewide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments...

Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. Chief Justice Warren pointedly commented in his dissent in *Jacobellis v. Ohio:*

> "...when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards -- not a national standard, as is sometimes argued. I believe that there is no provable 'national standard'...This Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one. **We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.**

One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; **civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.**

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "*utterly* without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," not "national standards." *...Vacated and remanded.*

DISSENT: Justice Douglas...Today we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

...My Brother Stewart in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable." But even those members of this Court who had created the new and changing standards of "obscenity" could not agree on their application...Some condemn it if its "dominant tendency might be to 'deprave or corrupt' a reader." Others look not to the content of the book but to whether it is advertised "to appeal to the erotic interests of customers." Some condemn only "hardcore pornography"; but even then a true definition is lacking. It has indeed been said of that definition, "**I could never succeed in defining it intelligibly, but I know it when I see it.**" *Jacobellis v. Ohio.*

...[Under these vague tests established today,] how...can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

...My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned.

...If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and over again. But at least a criminal prosecution brought at that juncture would not violate the time honored void-for-vagueness test...To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

Did you follow that? In other words, if obscenity is not protected speech, Justice Douglas would not permit punishment for disseminating it unless and until the specific publication has already been adjudicated to be obscene and a defendant thereafter disseminates that same publication. He suggests that only then will men be able to know if what they are doing is criminal in nature. Of course, with that entree comes the side dish of fiction because it presumes that persons who publish such material will be watching all jurisdictions around the country for every publication so that they will then know the law. True, it is better notice than nothing, but practically, there is little difference from the current scheme.

...There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises

a ban...

DISSENT: Justice Brennan/Stewart/Marshall...[Not provided].