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# Constiutional Law—Obscenity: Supreme Court Looks to Local Standards in Determining Obscenity

CONSTITUTIONAL LAW—OBSCENITY: *Supreme Court Looks to Local Standards in Determining Obscenity*

In one of a series of obscenity cases decided on June 21, 1973,[1] the Supreme Court promulgated new standards for the delineation of those sexually explicit materials which are not deemed within the purview of first amendment guarantees. Facing the task of defining that which may well be indefinable,[2] the Court formulated parameters of first amendment protection for sexually oriented expression. For the first time since its initial explication of obscenity standards in *Roth v. United States*,[3] a majority of the Court was able to agree on a test for the determination of what "constitutes obscene, pornographic materials subject to regulation under the state's police power."[4] The Court articulated these new standards for the identification of obscene materials in *Miller v. California*.[5] In this five to four decision, the Court established standards "more concrete than those in the past"[6] and effectively returned the enforcement of pornography laws to the discretion of state and local governments.[7]

## THE INTRACTABLE OBSCENITY PROBLEM

Since the initial holding in the *Roth* case that obscene material is not worthy of first amendment protections,[8] the Court has been plagued by a divergence of individual viewpoints resulting in an inability to formulate stable and manageable standards for the division of sexually explicit expression into protected and nonprotected categories. As Mr. Justice Harlan observed:

> The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.[9]

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1. The Supreme Court decided five obscenity cases on June 21, 1973. Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973); United States v. 12 200-ft. Reels of Super 8 mm Film, 93 S. Ct. 2665 (1973); United States v. Orito, 93 S. Ct. 2674 (1973); Kaplan v. California, 93 S. Ct. 2680 (1973).
2. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
3. 354 U.S. 476 (1957).
4. Miller v. California, 93 S. Ct. 2607, 2614 (1973).
5. 93 S. Ct. 2607 (1973).
6. *Id.* at 2612.
7. *See* notes 67-72 *infra* and accompanying text.
8. 354 U.S. at 485.
9. Interstate Circuit v. Dallas, 390 U.S. 676, 707 (1968) (Harlan, J., concurring and dissenting).

The *Roth* decision initiated an obscenity test which attempted to identify obscene material by inquiring:

> whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.[10]

In the aftermath of the *Roth* determinations, the Court struggled to devise a viable approach to the obscenity problem. Grappling with what has been called the "intractable obscenity problem,"[11] the individual Justices went their separate ways on standards for implementation of the *Roth* criteria and, indeed, as to its very propriety.

Misters Justice Black and Douglas steadfastly adhered to the premise that government is without power to regulate or control the citizenry's freedom of expression on the basis of any obscenity test.[12] Both Justices would preclude the federal government from placing any type of burden on the first amendment guarantees of speech and expression.[13]

The most frequently adhered to test for the identification of obscenity was adopted by Mr. Chief Justice Warren, Mr. Justice Fortas and Mr. Justice Brennan, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.[14] This plurality opinion announced that under the *Roth* definition three elements must coalesce:

> 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.[15]

Even the Justices who articulated the *Memoirs* adaptation of the

10. 354 U.S. at 489.

11. Interstate Circuit v. Dallas, *supra* at 704 (Harlan, J., concurring and dissenting).

12. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 467, 482 (1966) (dissenting opinions); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (concurring opinion).

13. *E.g.*, Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2663 (1973) (Douglas, J., dissenting); Roth v. United States, 354 U.S. 476, 508 (1957) (Douglas and Black, JJ., dissenting).

14. 383 U.S. 413 (1966).

15. *Id.* at 418.

*Roth* test failed to agree on the parameters of the *Memoirs* criteria. The three element test formulated by the *Memoirs* plurality produced disagreement on the nature and extent of "contemporary community standards,"[16] and failed to provide viable criteria for the identification of unprotected sexual expression in all situations.[17]

Distinguishing the nature of the power possessed by federal as opposed to state authorities, Mr. Justice Harlan propounded differing obscenity standards for each level of government.[18] Mr. Justice Harlan found federal authority to regulate sexually oriented expression to be "incidental to its other powers."[19] As such, federal restrictions on first amendment guarantees were seen to be constitutionally limited to the regulation of "hard-core" pornography.[20] Juxtaposed with this restricted role of the federal government were the state and local authorities who "bear direct responsibility for the protection of the local moral fabric."[21] Mr. Justice Harlan would allow the states a degree of latitude not available to the federal government. The states would not be prohibited from:

> banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.[22]

Declaring that he had "stomached past cases for almost ten years without much outcry,"[23] Mr. Justice Clark expounded the view that "evidence of social importance is relevant to the determination of the ultimate question of obscenity."[24] This social importance test was not considered to be a separate and distinct constitutional test. Any evidence of such social importance was to be considered "together with evidence that the material in question appeals

16. *Compare* Jacobellis v. Ohio, 378 U.S. 184, 192 (1964) (Brennan, J., joined by Goldberg, J.) *with id.* at 200 (Warren, C.J., joined by Clark, J., dissenting).

17. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (obscenity for juveniles); Mishkin v. New York, 383 U.S. 502 (1966) (prurient appeal defined in terms of a deviant sexual group).

18. *See* A Quantity of Books v. Kansas, 378 U.S. 205, 215 (1964) (dissenting opinion joined by Clark, J.)

19. Roth v. United States, 354 U.S. 476, 496 (1957) (separate opinion).

20. Ginzburg v. United States, 383 U.S. 463, 493 (1966) (dissenting opinion).

21. Roth v. United States, 354 U.S. 476, 496 (1957) (separate opinion).

22. Jacobellis v. Ohio, 378 U.S. 184, 204 (1964) (dissenting opinion).

23. Memoirs v. Massachusetts, 383 U.S. 413, 441 (1966) (dissenting opinion).

24. *Id.*

to prurient interest and is patently offensive."[25]

Mr. Justice Stewart contended that both federal and state authorities are constitutionally limited to the regulation of "hard-core" pornography.[26] In response to Chief Justice Warren's query: "who can define hard-core pornography with any greater clarity than obscenity?"[27] Mr. Justice Stewart remarked that perhaps he might never succeed in intelligibly defining hard-core pornography but that he "know[s] it when [he] sees it."[28]

In the view of Mr. Justice White, the social importance criteria was not an independent test for obscenity "but is relevant only to determining the predominant prurient interest of the material."[29] Mr. Justice White would find a publication obscene if the predominant theme of the material appeals to prurient interests "in a manner exceeding customary limits of candor."[30]

Amidst such a divergency of views, the Court began in *Redrup v. New York*[31] a policy whereby convictions for the dissemination of sexually oriented materials were summarily reversed when at least five members of the Court, applying their separate tests, found the materials to be within the class of protected expression under the first amendment. The Court's utilization of *per curiam* reversals and denials of certiorari as the means of dealing with obscenity cases obscured the rationale of these decisions.[32] These techniques also gave an air of arbitrariness to the Court's obscenity rulings.[33] This *Redrup* policy of *per curiam* reversals and denials of certiorari was employed by the Court for six years and was determinative in the disposition of thirty-one obscenity cases.[34] At no time during this period did the Court offer any justification for such a policy "beyond the necessity of circumstances."[35] In the absence of a consensus as

25. *Id.*

26. *See, e.g.,* Ginzburg v. United States, 383 U.S. 463, 497 (1966) (dissenting opinion); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion).

27. *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (dissenting opinion).

28. *Id.* (concurring opinion).

29. Memoirs v. Massachusetts, 383 U.S. 413, 462 (1966) (dissenting opinion).

30. *Id.* at 460-61.

31. 396 U.S. 767 (1967).

32. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2647 (1973) (Brennan, J., joined by Stewart, J. & Marshall, J., dissenting).

33. *Id.*

34. A listing of the cases handled by the Court in this fashion can be found at *id.* n.8.

35. *See* Walker v. Ohio, 398 U.S. 463 (1970).

to the bounds of legitimate utilization of sexual exposition as a vehicle of expression, the Court had become an "unreviewable board of censorship for the fifty states, subjectively judging each piece of material."[36] The *Miller* obscenity standards terminate the Court's practice of summary reversals and bring a degree of stability to an area which has proved most resistant to the structuring of stable and manageable criterion.

The ability of the Court to formulate a majority view on the obscenity issue can be attributed to the recently increased rate of attrition among the Justices and the resulting Presidential appointments to the Court. Chief Justice Warren Burger articulated the majority opinion. Joining the Chief Justice were the other three members of the Court nominated by President Nixon and Mr. Justice White.[37] Filing a separate dissent, Mr. Justice Douglas suggested that there are no constitutional guidelines for defining a class of sexually oriented expression that may be suppressed by government. Mr. Justice Douglas proposed a constitutional amendment as a means of achieving the ends sought by the majority.[38] Mr. Justice Brennan was joined in a dissent by Mr. Justice Stewart and Mr. Justice Marshall. These three Justices reluctantly concluded that none of the available formulas provide for a sufficient degree of specificity and clarity to "prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech."[39] Mr. Justice Brennan proposed the dropping of all prohibitions on sexually explicit expression except those designed to protect juveniles and adults who choose to avoid exposure to such materials.[40]

## THE MILLER STANDARD

The Appellant in the *Miller* case was appealing from a conviction pursuant to California Penal Code §311.2 (a) for knowingly distributing obscene material.[41] The Appellant had caused the unso-

36. Miller v. California, 93 S. Ct. 2607, 2614 n.3 (1973).
37. *Id.* at 2610.
38. *Id.* at 2627.
39. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2657 (1973) (dissenting opinion).
40. *Id.* at 2642.
41. CAL. PENAL CODE § 311.2 (a) (West 1970) provided at the time of the alleged commission of the offense that:

> 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,

licited mailing of five advertising brochures containing descriptive printed material accompanied by pictures and drawings "depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed."[42] California Penal Code §311 was structured to incorporate the three stage obscenity test enumerated by Mr. Justice Brennan in the plurality opinion of the *Memoirs* case.[43] In initiating the formulation of a new standard for the identification of obscene expression, the *Miller* Court rejected the *Memoirs* criteria as being unworkable and as having been abandoned even by its author.[44]

The *Miller* decision affirmed the *Roth* determination that there exists an unprotected class of sexually explicit expression which is not worthy of first amendment protection.[45] The majority found it demeaning to equate the "free and robust exchange of ideas and political debate with the commercial exploitation of obscene materials."[46] Any failure to distinguish between intercourse in ideas and exploitation of sex is a "misuse of the great guarantees of free speech and free press. . . ."[47] and would sanction indifference to the "grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[48] The *Miller* majority specifically rejected the "utterly without redeeming social value"[49] test as a constitutional standard for the identification of obscene materials.[50] The Court also dismissed the "social importance"[51] concept as

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prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

CAL. PENAL CODE § 311 (West 1970) provided:

As used in this chapter:

(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.

42. Miller v. California, 9 S. Ct. 2607, 2611 (1973).
43. *See* note 41 *infra*.
44. Miller v. California, 93 S. Ct. 2607, 2614 (1973).
45. *Id.*
46. *Id.* at 2620.
47. Breard v. Alexandria, 341 U.S. 622, 645 (1951).
48. Miller v. California, 93 S. Ct. 2607, 2620 (1973).
49. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966).
50. 93 S. Ct. at 2615.
51. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966).

being too unworkable and ambiguous to qualify as a constitutional criteria.[52]

Realizing the "inherent dangers in undertaking to regulate any form of expression,"[53] the *Miller* Court restricted governmental regulation of sexual expression to those materials which depict or describe physical sexual contact or explicit sexual acts.[54] Once it has been established that the materials in question are vulnerable to governmental regulation, the inquiry turns to a determination of whether the materials are to be classified as protected or unprotected (obscene) expression. The definition of obscenity espoused by the *Miller* Court finds sexually explicit materials to be unworthy of first amendment protections when, taken as a whole, they appeal to prurient interests in sex and lack any serious literary, artistic, or scientific value while portraying sexual conduct in a patently offensive manner.[55] With the purpose of providing basic guidelines for implementation of this new obscenity criteria, the *Miller* majority propounded three inquiries intended to provide the trier of fact with the requisite tools to separate obscenity from other sexually explicit but constitutionally protected expression.

Initially, a query must be made as to "whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interests."[56] With this initial directive to the jury, the Court was affirming a concern originally expressed in *Mishkin v. New York*.[57] To the extent that the material is not directed towards a definable deviate group, the impact thereof is to be judged on the basis of an average person with normal sensitivities and susceptibilities. Seemingly the most far-reaching aspect of this first element of the new obscenity definition is the Court's finding that the utilization of the prevailing standards of the forum community satisfies all constitutional requisites. The use of a national community standard as proposed in *Jacobellis v. Ohio*[58] by Mr. Justice Brennan and Mr. Justice Goldberg was rejected by the *Miller* majority as constitutionally unnecessary and

52. 93 S. Ct. at 2615.
53. 93 S. Ct. at 2614.
54. *Id.*
55. *Id.*
56. 93 S. Ct. at 2615.
57. 383 U.S. 502 (1966).
58. 378 U.S. 184 (1964).

fundamentally unsound.[59] Concluding that a national community standard would produce an absolutism of imposed uniformity, the Court found it:

> 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.[60]

The *Miller* Court could find nothing in the first amendment which mandates "hypothetical and unascertainable"[61] national standards for obscenity determinations. A jury ruling that a particular piece of material appeals to prurient interests in sex is a finding of fact and our nation is simply

> too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming the pre-requisite consensus exists.[62]

It is merely an acceptable consequence of the jury system that juries may reach differing results as to the obscene nature of materials. The fact that juries can differ as to factual determinations of whether the material appeals to prurient interests does not conclusively indicate that constitutional rights have been abridged.[63] To require local juries to make judgments on the basis of some abstract formulations of a national standard is to place a severe burden on state prosecution of obscenity cases.[64]

On the same day that the *Miller* case was decided, the Court ruled in *Paris Adult Theatre I v. Slaton*[65] that the jury was in the best position to make the factual determinations as to what constitutes the forum communities' local standards.[66] As such, it is not error for the prosecution to fail to present any expert affirmative testimony that the materials are obscene.[67] The contested materials

59. 93 S. Ct. at 2618.
60. *Id.* at 2619.
61. *Id.*
62. *Id.* at 2618.
63. *Id.* at 2616 n.9; Roth v. United States, 354 U.S. 476, 492 n.30 (1957).
64. Miller v. California, 93 S. Ct. 2607, 2613 (1973).
65. 93 S. Ct. 2628 (1973).
66. *Id.* at 2634.
67. *Id.*

need only be presented to the jury for the application of local community standards as conceived of by the individual jurors.[68] The *Slaton* decision does reserve judgment, however, on the extreme case where the contested materials are directed at "such a bizarre deviant group"[69] that the experience of the trier of fact would not render it qualified to judge the prurient nature of the materials.

The second guideline established for the trier of fact is an inquiry as to whether the contested materials "depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[70] Specificity was the Court's primary concern under this second criterion. In placing the central responsibility for the regulation of obscene matter with state and local authorities, the *Miller* Court instructed the states to formulate regulatory schemes which graphically delineate that which is to be suppressed.[71]

Rejecting the role of statute drafter, the *Miller* Court encouraged renewed legislative efforts aimed at the promulgation of obscenity statutes which meet these new specificity requirements.[72] However, by way of example, the Court did present two definitional standards which meet the new criteria. Statutory language such as:

> 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 exhibitions of the genitals.[73]

would satisfy this specificity criteria. If a statute is written or construed to meet this level of accuracy, the first amendment protections applicable to the states through the fourteenth amendment are "adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[74] The *Miller* majority cited the obscenity statutes of

68. *Id.*
69. *Id.* n.6.
70. Miller v. California, 93 S. Ct. 2607, 2615 (1973).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

Oregon and Hawaii as examples of legislation which complies with the specificity requisites enumerated in this second guideline.[75]

The third element of the *Miller* obscenity standard replaces the "utterly without redeeming social value" test suggested by the *Memoirs* plurality. The third inquiry is whether the material taken as a whole has "serious literary, artistic, political or scientific value."[76] Central to the Court's third criterion is the distinction between commerce in ideas and the commercial exploitation of sexual materials for commercial gain. The *Miller* majority found that the first amendment protects only those sexually oriented materials which have serious literary, artistic, political or scientific value. Any other determination, said the Court, would make a mockery of that which the first amendment was meant to protect.[77] The Court found that such a criterion precludes a jury determination of obscenity for medical and other educational tests,[78] while easing the virtually insurmountable burden faced by the prosecution under the redeeming social value test.[79]

## A Look at the New Standard

The determination by the *Miller* majority that patently offensive depictions or descriptions of prurient sexual conduct must possess serious literary, artistic, political or scientific value to warrant first amendment protection will predictively do little to dispel the Court's critics. Indeed, the four dissenting Justices will provide the Court's detractors with much ammunition on the obscenity issue.

Even this "earnest and well-intentioned"[80] effort by the five member majority to bring a semblance of stability to a most unsettled area is wrought with difficulties. The vexing problem central to any obscenity determination is the creation of a constitutional definition for a concept which is never mentioned or even alluded to in the Constitution or Bill of Rights.[81] Anything less than a complete abandonment of efforts at regulation of commercial exploita-

75. *Id.* n.6; *see, e.g.*, Oregon Laws 1971, c. 743, art. 29 §§ 255-262, and Hawaii Penal Code, tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, pp. 126-129, art. 9, Pt. II.

76. 93 S. Ct. 2607, 2615 (1973).

77. *Id.* at 2620.

78. *Id.* at 2616.

79. *Id.* at 2613.

80. *Id.* at 2623 (Douglas, J., dissenting).

81. *Id.*

tion of sexual materials will not quiet some of the Court's critics.[82] But if it is assumed that obscene material can be regulated by state and local authorities in the exercise of their police powers, then the problem becomes one of separating protected from nonprotected expression. The argument is made that the task of dividing obscenity from other forms of sexual but constitutionally protected expression is an exercise in futility.[83] Problems of vagueness, fair notice and the chilling effect on the exercise of first amendment rights are seen as defeating any attempt at formulation of a constitutional line of demarcation between protected expression and obscenity.[84] But the Constitution does not require impossible standards:

> all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.[85]

The fact that there may exist marginal cases which require tough decisions as to which side of the line the materials belong is not "sufficient reason to hold the language too ambiguous to define a criminal offense."[86]

The prosecution's burden of proof under the *Memoirs* criteria was difficult to sustain.[87] The *Memoirs* test required the proving of a negative by the prosecution. A successful prosecution required a showing that the expression was "utterly without redeeming social value." A successful defense to an obscenity charge pursuant to the *Memoirs* rationale necessitated that the defendant simply show that the contested material contained the smallest fabric of social value. Although the *Miller* majority also espoused a test requiring the proof of a negative, the task confronted by prosecutors in obscenity cases should be substantially lessened. Under the third component of the *Miller* test, the material must be shown to lack "serious literary, artistic, political or scientific value."[88] Seemingly there can be a finding of obscenity even where the materials clearly contain some

82. *See, e.g.*, Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2642 (1973) (Brennan, J., joined by Stewart, J. and Marshall, J., dissenting).

83. *Id.*

84. *Id.*

85. United States v. Petrillo, 332 U.S. 1, 7-8 (1946).

86. Miller v. California, 93 S. Ct. 2607, 2617 n.10 (1973).

87. For a discussion of the prosecution difficulties under the *Memoirs* test, see *id.* at 2613.

88. 93 S. Ct. 2607, 2615 (1973).

social value provided that the prosecution is able to sustain the burden of proving that the value of the materials, measured by the standards of the forum community, are not sufficiently serious to warrant first amendment protection. Whether this reduced burden of proof will promote repression of expression by local crusading prosecutors cannot be determined at this early date. But what is assured is that the Court has effectively returned the responsibility for the policing of sexually explicit materials to state and local authorities.

With the implementation of the local forum community standard criteria, the *Miller* court has established a more manageable and discernable guideline for jury determinations. While some minimal danger to expression may still exist, the local standards carry no greater risk of repression then do national standards. Sounding the alarm of repression, opponents of local standards contend that only with a national standard will the evils of self-imposed censorship[89] and interference with the free flow of interstate commerce be avoided.[90] Local standards are seen as unacceptable in that the disseminators of sexually explicit materials will simply not distribute in certain areas in lieu of risking criminal conviction for being in violation of the communities' standard for obscenity. In actuality, the utilization of a national standard necessarily implies that sexual materials may not be available in certain localities because the materials are violative of the national standard while the locality's criteria may find the expression acceptable.[91] The *Miller* majority dismisses the alleged interference with the free flow of interstate commerce by observing that:

> Obscene material may be validly regulated by a state in the exercise of its traditional local power to protect the general

89. Concern has been expressed over the effect which varying local standards will have on publishers of national magazines and the film industry. ACLU staff counsel Joel Gora has warned:

> They can choose to stay out of certain states, and that is obnoxious from a First Amendment standpoint. Or, what's more likely, publishers might exercise a form of self-censorship and direct their films and books to the most conservative taste in their major markets.

NEWSWEEK, July 2, 1973, at 21.

90. Petitioners in *Miller v. California* argued that adherence to a national standard was necessary in order to avoid unconscionable burdens on the free flow of interstate commerce. 93 S. Ct. 2607, 2619 n.13 (1973).

91. *See id.*

welfare of its population despite some possible incidental effect on the flow of such materials across state lines.[92]

Although the Court demanded that state and local statutory schemes clearly and succinctly delineate that which is prohibited, the Court's own attempt at specificity suffers from lack of precision. The phraseology "patently offensive" is seemingly as susceptible to vagueness and overbreath attacks as the *Roth-Memoirs* delineation. The only way that the *Miller* criteria can avoid these vulnerabilities is for state and local authorities to promulgate painstakingly specific obscenity regulations. Predictively, local authorities may simply incorporate the *Miller* majority's illustrative statutory language verbatim in the local regulatory scheme.[93] The local statute drafters must achieve that degree of specificity which will provide a person with ordinary intelligence fair notice of what is forbidden.[94] If the requisite level of specificity is achieved by the local statute drafters, the only remaining uncertainties will revolve around the juries' conceptualization and adaptation of the forum communities' criterion for measuring the offensiveness of the contested materials. Such uncertainty is equivalent to that risk borne by anyone charged with criminal misconduct and is inherent in the jury system.[95] To argue that this uncertainty in obscenity cases is not compatible with constitutional guarantees is to presume a preferred status for the disseminator of sexually explicit matter in the criminal process.[96] While the alleged obscenity offender is certainly guaranteed the same constitutional protections as anyone under prosecution for a criminal act, there is no reason for preferential treatment. Anyone charged with an obscenity violation is provided these same protec-

92. *Id.*; *see, e.g.*, Head v. New Mexico Board, 374 U.S. 424 (1963); Breard v. Alexandria, 341 U.S. 622 (1951).

93. On October 26, 1973, the City Council of Valparaiso, Indiana enacted Ordinance No. 48 which reads in relevant part:

> 110.01 Activity Prohibited. No person shall sell, lend, give away or offer to sell, lend or give away or in any manner exhibit any patently offensive representations or descriptions of masturbation, excretory funtions, lewd exhibition of the genitals, or of ultimate sexual acts, normal or perverted, actual or simulated, that taken as a whole appeals to the prurient interest, unless such representations or descriptions, taken as a whole, have serious literary, artistic, political or scientific value.

94. For a discussion of the vagueness problem see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

95. For a discussion of local community standards and the role of jury determinations in obscenity cases see O'Meara and Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAWYER 1 (1964).

96. *Id.* at 10.

tions when a jury, acting under proper instructions, makes its factual determinations. As with any criminal proceeding, the jury verdict in an obscenity case is subject to judicial supervisory control and review pursuant to the *Miller* criteria.[97]

## CONCLUSION

With the *Miller* decision, the Court has placed the burden of dealing with a most perplexing problem squarely on the shoulders of state and local authorities. Critics of the decision have expressed concern over the ability of local communities to administer the *Miller* standards while preserving fundamental first amendment guarantees.[98] Indeed, initial news media accounts indicate a growing activitist attitude amongst local prosecution authorities.[99] Whether there is justification for those who sound the alarm of repression will depend, in large measure, on the response of these officials to this newly created responsibility. The *Miller* majority has brought a semblance of stability and manageability to an area too long plagued by uncertainty and indecision. The success of the *Miller* standard in achieving that delicate balance between a society's legitimate concern for the welfare of its citizenry and the right of the individual within that society to express himself freely in accordance with constitutional guarantees[100] is now in the hands of those local officials, judges and juries who are charged with implementation of the *Miller* standard.

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97. *Id.* at 11.

98. *See, e.g.*, Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2642 (1973) (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

99. *See, e.g.*, NEWSWEEK, July 2, 1973, at 18; U.S. NEWS AND WORLD REPORT, July 2, 1973, at 35; TIME, July 2, 1973, at 44.

100. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C. J., dissenting).