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Constitutional Law- Obscenity Redefined

Constitutional Law—OBSCENITY REDEFINED—*Miller v. California*, 93 S. Ct. 2607 (1973).

When Sir Charles Sidlye exhibited himself nude on a balcony in 1663,[1] he undoubtedly did not know his eccentric conduct would foreshadow what has become one of the most troublesome areas of constitutional law.[2] The failure of the Supreme Court to provide clear constitutional guidelines for anti-obscenity legislation[3] has occasioned confusion among state and federal authorities,[4] has precipitated a flood of litigation burdening the Court with the task of reviewing a mass of sexually explicit materials to determine what is and is not obscene,[5] and has engendered widespread criticism of the Court's policy in this area of law.

In the recent decision of *Miller v. California*,[6] the Supreme Court of the

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1. Sir Charles Sidlyes Case, 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663), was the first reported common law case on obscenity. For a concise survey of the historical development of obscenity law from its common law roots see Smith, *Obscenity: From Hicklin to Hicklin?* 2 U. RICH. L. NOTES 289 (1967).

2. *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2642 (1973) (Brennan, J., dissenting); Interstate Circuit Inc. v. Dallas, 390 U.S. 676, 704-705 (1968) (Harlan, J., concurring and dissenting).

3. The Supreme Court has tried to provide a workable definition for obscenity but, to the chagrin of frustrated legislators, has repeatedly failed. *See* notes 15, 23 *infra*. In recent years, however, the Court appears to have been avoiding the issue:

> [W]e have managed the burden of deciding scores of obscenity cases by relying on *per curiam* reversals or denials of *certiorari*—a practice which conceals the rationale of decision and gives at least the appearance of arbitrary action by this Court. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2652 (1973) (Brennan, J., dissenting).

4. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2652 (Brennan, J., dissenting); Scuncio v. Columbus Theatre Inc., 108 R.I. 613, 277 A.2d 924 (1971).

The importance of the issue of obscenity is realized by the fact that Congress has passed at least 20 obscenity statutes since 1942 and that all the states have comparable laws. These laws are supported by agreements with over 50 nations. Annot., 5 A.L.R. 3d 1158, 1161 (1966).

The Virginia General Assembly passed its first obscenity statute in 1848. Ch. 8, § 7 [1847-1848] Acts of the General Assembly of Va. 110. The law remained basically the same until its constitutionality was successfully challenged in Goldstein v. Commonwealth, 200 Va. 25, 104 S.E.2d 66 (1958). As a result, the Assembly passed a new and more comprehensive statute. VA. CODE ANN. §§ 18.1-22.7-36.3 (1960). The new law was initially praised as the best that could be hoped for under the then illusive judicial guidelines. *See* Harrington, *The Evolution of Obscenity Control Statutes*, 3 WM. & MARY L. REV. 302, 308-10 (1962); Smith, *supra* note 1 at 304; Comment, *The Law of Obscenity in Virginia*, 17 WASH & LEE L. REV. 322 (1960).

5. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2652 (1973) (Brennan, J., dissenting). *See* Walker v. Ohio, 398 U.S. 434 (1970) (Burger, C.J., dissenting).

6. Miller v. California, 93 S. Ct. 2607 (1973). The *Miller* ruling is the key decision among five companion cases which dealt with the question of obscenity. Kaplan v. California, 93 S. Ct. 2680 (1973) (material in book form with no pictorial content found obscene); United States v. Orito, 93 S. Ct. 2674 (1973) (obscenity cannot enter stream of commerce even for receiver's private use); United States v. 12 200-Ft. Reels of Super 8MM. Film, 93 S. Ct. 2665

United States has renewed its effort to fill this constitutional vacuum by redefining obscenity to provide what the Court believes to be "concrete guidelines to isolate 'hardcore pornography' from expression protected by the First Amendment."[7]

Marvin Miller was convicted of mailing sexually explicit materials to unwilling recipients in violation of California law.[8] The trial court instructed the jury to assess the material in accordance with the contemporary community standards of the state of California. Miller appealed to the Superior Court of California urging that the use of state rather than national standards violated the first amendment. The Supreme Court, in affirming the Superior Court's decision concluded that nothing in the first amendment compels a jury to consider unascertainable national standards when attempting to determine whether certain materials are obscene.[9]

Miller is a landmark decision because it significantly alters two of the determinants formerly contained in the Court's definition of obscenity. National standards[10] are replaced by local standards as a determinant of community tastes, and the utterly without redeeming social value test is altered to the effect that works taken as a whole, which include prurient and patently offensive depictions of sexual conduct, need only lack a minimum of serious, literary, artistic, political or scientific value to be obscene.[11]

(1973) (importation of obscenity for private use prohibited); Paris Adult Theatre I v. Slaton 93 S. Ct. 2628 (1973) (obscene films not constitutionally immune though exhibited to consenting adults only).

7. Miller v. California, 93 S. Ct. 2607, 2617 (1973). The Court confines the scope of state legislation to material involving sexual conduct and further stipulates that such conduct must be specifically defined by statute. *Miller* also gives two examples of acceptable definitions:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representation or descriptions of masturbation, excretory functions and lewd exhibition of the genitals. *Id.* at 2615.

The Court proceeds to pronounce the new guidelines for the jury:

> (a) [W]hether "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
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> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 2615.

8. CAL. PENAL CODE § 311.2(a) (West 1970).

9. Miller v. California, 93 S. Ct. 2607, 2619 (1973).

10. The use of national standards meant that the jury was to consider the sensibilities of the nation as a whole when deciding whether or not certain material was obscene. Jacobellis v. Ohio, 378 U.S. 184 (1964). Comparable to the reasonable man in tort law, national standards theoretically objectified the test for obscenity. Realistically viewed, however, such standards have imposed a more liberal test.

11. The utterly without redeeming social value test prohibited a jury from finding certain

The idea of community standards as a determinant of obscenity was first advanced by Judge Learned Hand in *United States v. Kennerley*.[12] Judge Hand's contribution to providing standards for pornography was recognized in *Roth v. United States*[13] wherein the Supreme Court incorporated community standards into an attempted comprehensive definition of obscenity. *Roth* left many questions unanswered—the most burdensome being the meaning of "community."[14] An attempt to provide the answer was made in a later Supreme Court case in which it was decided that community standards would be nationwide;[15] however, since this ruling was only supported by a plurality of the Court, the geographical sphere of community remained uncertain and federal and state authorities remained without definitive constitutional guidelines.[16]

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matter obscene if it contained the least amount of social importance even though all the other elements of obscenity were present. Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966). The purpose of the test was to safeguard legitimate freedom of expression and, understandably, the net effect has been to make the prosecution's case harder.

12. 209 F. 119, 120-21 (S.D.N.Y. 1913). In Judge Hand's opinion, community standards were meant to represent "the average conscience of the time" which engenders "general notions about what is decent" but which necessarily has "a varying meaning from time to time". *Id.* at 121.

13. 354 U.S. 476 488-89 (1957). *Roth* was the landmark case on obscenity prior to *Miller*. *Roth* rejected the common law standard set down in Queen v. Hicklin, [1868] L.R. 3 Q.B. 359, which judged material by the effect of an isolated excerpt upon particular susceptible persons, and replaced it with the test:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. Roth v. United States, 354 U.S. 476,489 (1957).

Prurient interest was defined as "material having a tendency to excite lustful thoughts" *Id.* at 487 n.20. *See also* ALI MODEL PENAL CODE § 251.4 (1) Obscene Defined (Official Draft 1962).

14. Virginia's amended obscenity statute exemplifies the divergence in interpretations of *Roth*. VA. CODE ANN. § 18.1-227 (1960). The statute replaces the *Roth* yardstick of "contemporary community standards" with "the degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought." *Id.* § 18.1-236.3 (8) (b). Apparently, the Assembly thought the use of county, and even city standards was consistent with *Roth*. *See* Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972). *Contra*, TEX. ANN. PENAL CODE art. 527 § 3 (1963) ". . . the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas".

15. Jacobellis v. Ohio, 378 U.S. 184 (1964) did not resolve the ambiguity over "community standards." There was no Court opinion and only four Justices focused on the question. Justices Brennan and Goldberg agreed on nationwide standards. Chief Justice Warren, joined in his dissent by Justice Clark, proposed a local test. The law remained uncertain. *See* Seaton, *Obscenity: The Search for a Standard*, 13 KAN. L. REV. 117 (1964).

16. Up until *Miller*, a majority of federal jurisdictions had been using national standards. *See* United States v. 35 MM. Motion Picture Films, 432 F.2d 705 (2d Cir. 1970); United States v. A Motion Picture Film, 404 F.2d 196 (2d Cir. 1968); Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966); Meyer v. Austin, 319 F.Supp. 457 (M.D. Fla. 1970); United States v. One Carton Positive Motion Picture Film, 247 F. Supp. 450 (S.D.N.Y. 1965), *rev'd*,

Roth also left uncertain the question of whether or not certain matter had to be found utterly without redeeming social value to be obscene.[17] The social value of pornography was first considered by the Supreme Court in 1942.[18] Later *Roth* described obscenity as utterly without redeeming social importance, but did not indicate if it had the intention of including such a test as a requisite to finding obscenity.[19] Subsequently, the Court noted that obscene matter was precluded from first amendment protection for the very reason that it was utterly without redeeming social importance.[20] Finally, a plurality held the social value criterion to be a required element of the *Roth* test.[21]

The use of national, rather than local, standards and the requirement that works had to be judged valueless to be obscene, made conviction on an obscenity charge difficult. This resulted in an increased flow of hard-core pornography. *Miller* reacts to this result by discrediting and abandoning these determinants of obscenity.

Miller's argument against the utterly without redeeming social value test is threefold: first, the test is not and has never been constitutional

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367 F.2d 889 (1966). *But see* United States v. Groner ___ F.2d ___ (CA 5 1973); Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated for improper jurisdiction*, 401 U.S. 200 (1971); United States v. West Coast News Co., 30 F.R.D. 13 (W.D. Mich. 1962). State jurisdictions had been about evenly divided on the issue. For the exhaustive list of cases and comment thereon see Barber, *The Geography of Obscenity's "Contemporary Community Standard"*, 8 WAKE FOREST L. REV. 81, 82 (1971); 1971 WASH. U.L.Q. 691, 693 n.14 (1971).

17. *Compare* Attorney Gen. v. Book Named "Tropic of Cancer", 345 Mass. 11, 184 N.E.2d 328 (1962) *with* People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).

18. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

19. 354 U.S. 476, 484 (1957).

20. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

21. Memoirs v. Massachusetts, 383 U.S. 413 (1966).

The plurality held:

> A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each . . . criteria is to be applied independently . . . . *Id.* at 419.

The revised Virginia obscenity statute did not include the social value element of *Memoirs*. VA. CODE ANN. § 18.1-227 (1960). Nevertheless, the Supreme Court of Appeals of Virginia recognized that Virginia courts were bound by the United States Supreme Court's obscenity standards, expressly including the utterly without redeeming social value test. House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572, 575 (1969). Upon review, it was held that the statute was not unconstitutional because the interpretation of Virginia's highest court was as definitive as if the statute was amended by legislation. Grove Press, Inc. v. Evans, 306 F. Supp. 1084 (E.D.Va. 1969). *Miller's* rejection of this component of *Memoirs* however, should have the effect of negativing *Grove* leaving the constitutionality of the statute once more at issue. For a survey of proposed changes in Virginia's obscenity law see Comment, *Proposed Changes in Statutory Regulation of Obscenity in Virginia*, 57 VA. L. REV. 1636 (1971).

law;[22] second, such a test forces prosecutors to affirmatively prove that certain matter is totally devoid of value—a near impossible task under criminal standards of proof;[23] third, the phrase utterly without redeeming social value is meaningless.[24] The first argument is addressed to the fact that the social value requirement came from a plurality opinion. By strict stare decisis, such a ruling would not establish valid precedent, but this technical procedural point alone does not warrant abandonment of the test. The second argument is valid to the extent that it is indeed difficult to prove the negative—that certain material has no social value. But, this burden is far from impossible.[25] The third argument is not without merit. The phrase utterly without redeeming social value may be nebulous and decisions based thereon are apt to be arbitrary.[26] Nevertheless, *Miller* ignores the fact that *Roth* justified precluding obscenity from first amendment protection on the specific ground that obscene materials were utterly lacking in social importance.[27] *Roth's* justification for the censorship of

22. Miller v. California, 93 S. Ct. 2607, 2613 (1973).

23. *Id.* Dissenting in a companion case, Justice Brennan noted that *Miller* does not explain how its new serious, literary, artistic, political or scientific value test will cure the problem of proving the negative in prosecuting cases. The Justice portended prosecutors will have the more difficult task of measuring a minimum of serious social value by some undefined standard and weighing it against the equally vague concepts of patent offensiveness and pruriency, the other two elements of the tripartite *Miller* test. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2655 (1973) (Brennan, J., dissenting).

24. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2635 (1973) (Brennan, J., dissenting).

25. Aware of the problem in 1966, the Court facilitated the prosecutor's case by providing that evidence of pandering might justify concluding certain material had no social value. Ginzburg v. United States, 383 U.S. 463, 467-70 (1966).

26. *Id.* at 480 (Black, J., dissenting).

27. Roth v. United States, 354 U.S. 476, 484 (1957). The Court has never adequately explained the reason for denying obscenity first amendment protection. *Chaplinsky* first dealt with the problem by dividing speech into two categories: that which was worthy of protection and that which was not. 315 U.S. 568 (1942). The types of speech in the unprotected category were "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words.'" *Id.* at 571-72. Obscenity, along with these other types of utterances, were denied protection on the ground that exposure to obscene materials lead to anti-social conduct. *Id.* at 572. *Roth* cited *Chaplinsky* as authority that obscenity was not protected by the first amendment, but disregarded the argument that obscenity caused anti-social conduct. Roth v. United States *supra* at 481; *see* REPORT OF THE COMMISSION ON PORNOGRAPHY AND OBSCENITY 27 (1970) (found no connection between exposure to obscene materials and commission of sex crimes). Since speech could only be proscribed if it fostered such conduct, *Roth's* abandonment of this argument necessarily implied that obscenity was something less than speech. Behind *Roth* was the idea that speech by definition communicated information containing social importance, whereas obscenity was a mere utterance which conveyed no value whatsoever. Thus, the Court came to the conclusion that the censorship of obscenity was completely justified because it was "utterly without redeeming social importance." Roth V. United States *supra* at 484. *Miller* affirmed *Roth* presumably because obscenity was worthless and therefore not protected. Defying logic, however, the same Court

obscenity is now rejected, on the ground that it has no meaning; however, the censorship still remains. Compounded by the fact that *Miller* affirmed *Roth*, this anomaly raises serious doubts as to the validity of excluding obscenity from protected areas of expression.[28]

Notwithstanding this criticism, *Miller* has decided that obscenity is to remain outside first amendment protection. Hence, the utterly without redeeming social value test should not be abandoned, for it is at least more clear than the uncertain test *Miller* has prescribed in its place. Under the old test, the jury had to decide that the material in question either did or did not have social value.[29] Instead, *Miller* suggests that the jury is competent enough to decide if a work has sufficient serious value in the fields of art, literature, politics, or science so as to negate its otherwise offensiveness and prurient appeal.[30] The new test is obviously more complex and confusing than the old, and thus leaves more room for arbitrary jury determinations in an area of law which already dangerously borders on infringment of first amendment rights.

Miller confines the concept of community to the locality rather than the nation as a whole.[31] The *sine qua non* of the Court's reasoning is that judgment of allegedly obscene material is indeed a question of fact to be decided by the jury,[32] and, moreover, is a subjective type of factual decision which is necessarily relative to the individual sensibilities of the juror who tends to reflect what is tolerable to the average person in the locality from which he is drawn.[33] The Court concedes that first amendment limitations on the states should not vary from community to community and thus

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found that the test for obscenity should not include the utterly without redeeming social value element because the phrase had no meaning. Miller v. California, 93 S. Ct. 2607, 2622 (1973). Instead, the Court ruled that materials lacking some undefined minimum of seriousness may be banned if a jury found them offensive. *Id.* at 2615. Thus *Miller* completely undermined the key to the conceptual basis of *Roth*—that obscenity was devoid of value and thus impliedly something less than speech. The new veil of censorship will inevitably cover what *Roth* found to be speech expressly protected by the first amendment.

28. *See* Miller v. California, 93 S. Ct. 2607, 2622 (1973). Preoccupation with the question of providing guidelines for finding obscenity precludes consideration of the more important question of whether or not obscenity should be denied first amendment protection. Two Justices of the Supreme Court have consistently held that it should not: *Id.* at 2624 n. 6 (Douglas, J., dissenting).

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

30. Miller v. California, 93 S. Ct. 2607, 2615 (1973).

31. It appears that the Court has also opted for local standards in trying violations of federal obscenity statutes. *See* United States v. 12-200 Ft. Reels of Super 8MM. Film, 93 S. Ct. 2665 (1973). This is certain to have the effect of hampering mail-order purveyors of pornography as in *Miller*. *See* 21 SW. L.J. 285, 290 (1967).

32. 93 S. Ct. 2607, 2618 (1973).

33. *See* O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1964).

obscenity should be uniformly precluded protection as a matter of constitutional law.[34] However, it asserts that the determination of what falls into this unprotected category of expression is not a question of law, but is solely a question of fact.[35] Accordingly, *Miller* reasons that, since decisions on obscenity consist of factual determinations which by nature differ according to local community tastes, the first amendment would not be infringed upon by allowing the same material to be banned in one community while accepted in another.[36]

Miller's argument in favor of local standards appears to be creditable.[37] If the meaning of obscenity can change from time to time,[38] then why not from place to place? Localities do differ in their cultural tastes and local standards are presumably easier to determine than supposititious national standards. However, *Miller's* treatment of obscenity as a question of fact relative to the parochial tastes of a jury facilitates abusive restriction of the right to legitimate freedom of expression.[39] For under *Miller*, state statutes, in order to be constitutional, need only meet the requisite of explicitness in describing sexual conduct. Thus, when prosecutions are brought under such potentially far-reaching laws, the question of guilt may rest solely on what a jury guesses the average person in its locality would find to be patently offensive, prurient and lacking serious, literary, artistic, political or scientific value.[40] It appears that one can no longer disseminate works on a nationwide scale portraying real life as it is lived by real people with any certainty that he will not be risking a criminal conviction.

The result reached in *Miller* makes conflict with legitimate freedom of expression appear inevitable. The underlying reason is that the Court does not choose to recognize that judging obscenity involves questions of constitutional law as well as questions of fact.[41] It was the Supreme Court that

34. 93 S. Ct. 2607, 2618 (1973).

35. *Id.*

36. *Id.* at 2616 n. 9. Chief Justice Burger believes that the nation is simply too big and diverse to require that a single standard be articulated. *Id.* at 2618.

37. *Miller* also puts forth a convincing argument in a footnote to the Court opinion. It suggests that local standards pose no greater threat to legitimate freedom of expression than national standards and balances the argument that local standards will prevent dissemination in risky areas by pointing out that national standards will pose the equally grave danger of banning materials found tolerable in some areas because they fail to pass a nationwide test. *Id.* at 2619 n. 13.

There have been a number of well reasoned law review articles in favor of "local standards". *See* Barber, *supra* note 16; O'Meara & Shaffer, *supra* note 33. *But see* Seaton, *Obscenity: The Search for a Standard*, 13 KAN. L. REV. 117 (1964).

38. United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913).

39. *See* 16 S.C.L. REV. 639, 642 (1964).

40. To appreciate the indefiniteness of case law definitions of obscenity see Note, *Obscenity—What is the Test?* 5 ARIZ. L. REV. 265 (1964).

41. *See* Justice Brennan's opinion in Jacobellis v. Ohio, 378 U.S. 184, 187-88 (1964).

denied obscenity protection in the first instance,[42] and in so doing, accepted the serious responsibility of preventing abuse of this critical exception to first amendment guarantees. The Court is thus obligated to insure that fundamental freedoms of speech and press are not abused in any case involving obscenity. This task undoubtedly necessitates dealing with questions of constitutional law of the most delicate kind.[43] *Miller* abandons this responsibility by construing the determination of obscenity to be a pure factual question relative to local community tastes. This circumvention of judicial duty will have the effect, not only of restricting the lower courts in deciding such issues,[44] but of eliminating the precaution of ultimate review by the Supreme Court.[45]

The majority of the Court in *Miller* made its decision in anticipation of tightening the reins on pornography, providing the proper authorities with clear guidelines for carrying out this design, and alleviating the Supreme Court's burden of reviewing a mass of pornography cases. Although it is too early to judge the success of *Miller's* intentions, the immediate impact has been one of mass confusion and vigorous reaction.[46] Legal authorities on both sides of the issue predict a landslide of litigation due to the uncertainty surrounding the decision.[47] Overzealous legislators construe *Miller* as a green light to establish tougher obscenity laws.[48] Publishers, booksellers and moviemakers vow that they will fight what they see as a broad assault on first amendment freedoms.[49] Some prosecutors predict the percentage of successful prosecutions will increase dramatically snowballing

42. *See* Roth v. United States, 354 U.S. 476 (1957).

43. Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring and dissenting).

44. If obscenity is viewed basically as a question of constitutional law, the trial judge may dispose of many cases before they get to the jury:

> The trial judge must apply the constitutional standards to the specific material, in the light of any factual findings supported by the evidence, for if in his judgment the material cannot constitutionally be supressed, then nothing remains for the jury's consideration. State v. Hudson County News Co., 41 N.J. 247, 252, 196 A.2d 225, 230 (1963).

However, if obscenity is viewed as a pure question of fact, the trial judge will have no choice but to defer to jury determination.

45. Seaton, *supra* note 37:

> The use of a "local" standard by a judge or jury in Kansas or New York, assuming one to be ascertainable, would eliminate meaningful review by the Supreme Court. The Justices in Washington lack the experience of Kansas or New York standards which local judges and juries would presumably possess. Since experience is such an important source for a decision on obscenity, the Court would simply have to defer to local determinations. *Id.* at 122.

46. N.Y. Times, June 23, 1973 at 1, col. 2.

47. *Id.* at 14, col. 1.

48. *Id.* at 1, col. 2.

49. *Id.* at 1, col. 4.

into massive law enforcement crackdowns, while others believe, in some areas, "local standards" will make the defendent's case even easier.[50] One state statute has already been ruled unconstitutional under the new standards.[51] At this point, all that can be safely said is that *Miller* will have unpredictable and far-reaching effects. At the risk of speculation, however, time will tell that *Miller* has failed to answer the hard questions it had anticipated and has unfortunately raised some harder ones.

G.J.S.

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50. *Id.* at 1, col. 3.

51. The ruling came from Judge Gellinoff in Redlich v. Capri Cinema published August 25, 1973 under New York County, Special Term Part 1. In this first major holding under *Miller*, the judge opined that the state statute was "overbroad in its provisions and therefore unconstitutional. . . ." The judge also noted that obscenity was to be determined by "contemporary community standards and not national standards". ___ N.Y.L.J. at 1 col. 4 (Aug. 15, 1973).