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NOTES

MILLER, JENKINS, AND THE DEFINITION OF OBSCENITY

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INTRODUCTION

Obscenity is not protected speech. This is the basic idea behind the decisions of the United States Supreme Court on obscenity. In reaching this conclusion, the Court employs a "two level" theory of the First Amendment.[1] According to this theory, the First Amendment protects speech, but not a class of communications which are "utterly without redeeming social importance," a class which includes obscenity.[2]

It is frequently argued that distribution of obscene material should not be prohibited because there is no causal relation between the reading or viewing of obscene material and antisocial conduct, an argument which goes to the merits of obscenity. So long as obscenity remains a class of speech without redeeming social importance, this argument is largely irrelevant. Unless a communication is within the class of speech protected by the First Amendment, the communication is subject to the state's police power.

Thus, under the two level theory of the First Amendment used by the Court in obscenity cases, the important question is, "What is obscene?" With obscenity defined, the constitutional limits on the state's power to regulate and supress it are clear: "To sustain state power to exclude material defined as obscenity . . . requires only that we be able to say that it was not irrational. . . ."[3]

The Court has had great difficulty in discovering a definition which reliably separates obscene from non-obscene material. *Miller v. California*[4] purports to be a major step in making concrete the constitutional definition of obscenity. The purpose of this note is to analyze Miller's definition of obscenity in relation to the definitions of obscenity contained in the current Montana law.

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1. Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 10. Krislov, *From Ginzburg to Ginsburg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 177-178. Note, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 160, 162 n. 19.

2. Roth v. United States, 354 U.S. 476, 484 (1957).

3. Ginsberg v. New York 390 U.S. 629, 641 (1968). *See* also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

4. Miller v. California, 413 U.S. 15 (1973).

THE PRE-MILLER DECISIONS

Obscene material deals with sex.[5] One commentator describes obscenity as "daydream material divorced from reality, whose main or sole purpose is to nourish erotic fantasies or as the psychiatrists say, psychic autoeroticism."[6] He describes "hard core" obscene material by adding the element of "grossly shocking" to the above definition.[7] Although this definition may be helpful in understanding what is obscene, it clearly is not a sufficient basis for determining whether or not particular material is protected by the First Amendment.

Three major Supreme Court decisions have attempted to precisely define obscenity: *Roth v. United States*,[8] *Memoirs v. Massachusetts*,[9] and *Miller v. California*.[10] *Roth* provided the first definition of obscenity:

> Whether to the average person, applying contemporary community standards, the dominant theme or the material taken as a whole appeals to prurient interest.[11]

The central concept of the *Roth* definition formed the first element of the expanded definition in *Memoirs*:

> (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.[12]

The *Miller* definition is a variation of the *Memoirs* definition. In order to understand *Miller*, it is first necessary to understand the basic concepts involved in each of the three elements of the *Memoirs* definition. For convenience those elements will be hereinafter referred to as "prurient appeal," "patent offensiveness," and "utterly without redeeming social value."

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5. In *Miller*, Chief Justice Burger notes that "obscene" as defined in Webster's New International Dictionary (unabridged, 3rd ed. 1969) is substantially broader than the meaning of the term as used by the Court. He finds the term "pornography" more appropriate to refer to what the Court has used "obscene" to mean. In this note, however, they will be used interchangeably. *Id.* at 18, n. 2.

6. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN L. REV. 5, 65 (1960). Hereinafter cited as Lockhart and McClure.]

7. *Id.* at p. 66.

8. Roth v. United States, *supra* note 2.

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

10. Miller v. California, supra note 4.

11. Roth v. United States, *supra* note 2 at 489.

12. Memoirs v. Massachusetts, *supra* note 9 at 418.

Prurient Appeal

The appeal to prurient interest was held in *Roth* to be ". . .a shameful or morbid interest in nudity, sex, or excretion,. . . ." or an interest in material "having a tendency to excite lustful thoughts. . . ."[13] This explanation of the prurient appeal element suggests that the obscene nature of material is to be judged by its *effect* on people.

Pandering

In order to determine the likely effect of sexual material upon persons, the Court considers not only the nature of the material itself but the way in which the material is advertised as well. Advertising is used effectively to change consumer reactions to a wide variety of products. The Court has recognized that advertising may be used effectively to change the reactions of purchasers of sexual material as well. In *Ginzburg v. United States*,[14] the Supreme Court upheld the conviction of Ralph Ginzburg for mailing material which violated the federal statute at issue in *Roth*. The Court found Ginzburg engaged in "the sordid business of pandering" — an effort to sell his publications by promoting them as appealing to the prurient interests of his customers.[15] The Court viewed as particularly significant the places Ginzburg applied for mailing privileges, and the content of his advertising brochures, in reaching its decision that *Eros, Liason*, and *The Housewife's Handbook on Selective Promiscuity* were obscene.[16] The Court in *Ginzburg* assumed that the material was not obscene outside the context of its distribution. This does not mean, however, that material may be classified as obscene simply because it is advertised as being obscene. Pandering is a two-part concept: (1) the method of selling material must be deliberately designed to imply that it is erotically arousing in a way which would satisfy the Roth requirement of "prurient appeal," and (2) the material must lend itself to exploitation by panderers by pervasively treating sex and sexual matters.[17] The Court has held that pandering can only be used as a test in close cases, and has noted that evidence of pandering can be used to justify the conclusion that material is utterly without social value.[18]

13. Roth v. United States, *supra* note 2 at 487, n. 20.
14. Ginzburg v. United States, 383 U.S. 463 (1966).
15. *Id.* at 467.
16. Ginzburg applied to Intercourse and Blue Ball, Pennsylvania for mailing privileges before finally obtaining one from Middlesex, New Jersey. *Id.* at 467, 468. The advertising brochure contained an introduction to the *Housewife's Handbook* which emphasized the sexual imagery of the book. *Id.* at 469.
17. *Id.* at 471, 474.
18. Memoirs v. Massachusetts, *supra* note 4 at 420.

Variable Obscenity

Not all American people react in the same way to material dealing with sex. Thus in stipulating that sexual material was to be judged on the basis of its effect upon people, the Court was committed to choosing among these people to determine upon whom the effect was to be measured. Some courts in this country had followed the old English case of *Regina v. Hicklin*[19] and chose the persons in society most susceptible to the corrupting influence of sexual material. *Roth* rejected this test, stating that the character of material was to be determined with reference to average persons.[20]

More recently the Court has refined this notion of average persons into the "variable obscenity" concept. This concept requires a determination of the primary "audience" to whom the material is to be distributed, and a determination of its effect upon the average person within that audience in order to decide whether or not the material is obscene.[21] Material is obscene when it appeals to the prurient interest of the average person within that audience.[22]

Contemporary Community Standards

A person's domicile may be an important factor influencing his reaction to sexual material. Ever since *Roth*, commentators have speculated on what the Court meant by the phrase "applying contemporary community standards." Conceivably, the Court could determine whether material would have prurient appeal on the basis of its effect on those *within a particular local community* to which the material is distributed. There are, however, strong arguments against the Court taking differing community standards into account.[23] Thus the Court could conceivably adopt a national stan-

19. Regina v. Hicklin, L.R.3 Q.B.360 (1868). *See Roth, supra* note 2 at 489, n. 25.

20. Roth v. United States, *supra* note 2 at 489.

21. *See* Lockhart and McClure, *supra* note 6 at 78-79.

22. The Court has found material distributed to a clearly defined deviant sexual group obscene on the basis of its appeal to the members of that group. Mishkin v. New York, 383 U.S. 502 (1966). See Magrath, *supra* note 1, at 37-40. The Court has also allowed the prurient appeal of material to be determined on the basis of its effect upon minors. Ginsberg v. New York, *supra*, note 2.

23. For example, 18 U.S.C. § 1461 allows persons using the mails to be prosecuted for the offense of mailing obscenity in any federal district through which the mailed material travels. As Justice Brennan, dissenting in *Hamling v. United States*, ___ *U.S.* ___, *94 S. Ct. 2887, 2921 (1974) notes:*

> Because these varigated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people. . . . Thus, the people of many communities will be "protected," far beyond government's constitutional power to deny them access to sexually oriented materials.

dard. In the past the justices disagreed over which standard to apply.[24]

Although the *Roth* Court defined obscenity by its effect upon persons, it was concerned that important literary works might be declared obscene using the "effect test." One basis for its concern was lower federal and state courts' reliance upon the old English case of *Regina v. Hicklin*[25] which declared that material could be found obscene if isolated parts of the work, considered independently, were obscene. Rejecting this test, the Court held that only if the dominant theme of the work *considered as a whole* were obscene could the work be denied constitutional protection. The Court retained this concept in the *Memoirs* and *Miller* decisions.[26]

Patent Offensiveness

The second element of the *Memoirs* definition of obscenity was first referred to in *Manual Enterprises v. Day*.[27] Mr. Justice Harlan, expressing concern that "worthwile works of literature, science, or art" might be determined obscene if judged solely by their prurient appeal, found implicit in the *Roth* definition of obscenity the requirement that the material also portray sex in a patently offensive way.[28] Obscene material as defined in *Manual Enterprises* thus has the curious characteristic of simultaneously attracting and offending. The patent offensiveness element was retained in both *Memoirs* and *Miller*, although it was very significantly changed in *Miller*.[29]

Utterly Without Social Value

The third and last element of the *Memoirs* definition of obscenity provided the basis for the Court's decision in that case. *Memoirs of a Woman of Pleasure*, a novel more commonly known as *Fanny Hill*, was determined obscene by a Massachusetts court in a civil proceeding against the book.[30] The trial court found it to be without social value. The Supreme Judicial Court of Massachusetts in upholding the judgment of the trial court commented that although

24. Jacobellis v. Ohio, 378 U.S. 184, 192 (1964) (Opinion of Brennan, J.); *Id.* at 200 (Opinion of Warren, C.J.).

25. Regina v. Hicklin, *supra* note 19.

26. Memoirs v. Massachusetts, *supra* note 9 at 418. Miller v. California, *supra* note 4 at 24.

27. Manual Enterprises v. Day, 370 U.S. 478 (1962).

28. *Id.* at 482.

29. See discussion accompanying note 46 infra.

30. ANNOTATED LAWS OF MASSACHUSETTS (1968) C. 272, § 28C directs the attorney general to bring an information or petition in equity against allegedly obscene books which are being sold or are intended to be sold within the state.

the book may have had some minimal literary value, it had no social importance.[31] In a plurality opinion,[32] the Supreme Court did not consider whether the book satisfied the first two elements of the three-part test articulated in that opinion. It found that the Massachusetts supreme court had erred by stating that works of some minimal social value may be declared obscene. Mr. Justice Brennan asserted that material had to be utterly without redeeming social value before it could be declared obscene, and that the social importance of the work could not be counterbalanced by a finding that the other two elements of the definition were satisfied. He noted, however, that evidence of pandering could be used to justify a decision that a work was utterly without social value.[33]

Justice Clark's dissent in *Memoirs* revealed a fundamental disagreement over the definition of obscenity among five of the justices composing the majority in *Ginzburg* and *Mishkin*, decided the same day as *Memoirs*.[34] Clark argued that although *Roth* contained statements that obscenity is worthless and utterly without social value, these statements were never intended to be an independent element of the definition of obscenity.[35]

Disagreement over the definition of obscenity was not confined to the issue of the independence of the "utterly without social value" element. Chief Justice Warren and Mr. Justice Brennan, two of the three Justices forming the *Memoirs* plurality, had previously clashed in *Jacobellis v. Ohio*[36] over whether community standards meant local or national community standards; the Chief Justice arguing for the former and Mr. Justice Brennan for the latter. As a result of the Justices' inability to agree on a single definition of obscenity, they resorted to either deciding the issue of the obscenity of the material before them in per curiam opinions, each justice applying the test he found acceptable, or avoiding that issue by deciding the case on other grounds.[37] In *Miller v. California*, for the

31. Memoirs v. Massachusetts, *supra* note 9 at 419.

32. Mr. Chief Justice Warren and Mr. Justice Fortas joined the opinion of the Court written by Mr. Justice Brennan.

33. Memoirs v. Massachusetts, *supra* note 9 at 420.

34. *Id.* at 441.

35. Mr. Justice White agreed with Mr. Justice Clark in a separate dissent. *Id.* at 461.

36. Jacobellis v. Ohio, *supra* note 24.

37. Magrath, *supra* note 1 at 56-57, finds no less than five different positions on obscenity existing after *Ginzburg, Memoirs,* and *Mishkin.* Both Black and Douglas assert obscenity is not unprotected speech; Brennan, Warren, and Fortas adopt the Memoirs test; Clark and White argue that "utterly without redeeming social value" is not an independent part of the obscenity definition; Harlan insists that federal power to regulate pornography is limited to "hard core" pornography, although he concedes more power to the states; Stewart confines the power of both state and federal governments to the regulation of "hard core" pornography. Stewart's earlier attempt to define what he meant by "hard core" pornography was somewhat unusual:

first time since *Roth*, a majority of the Court was able to agree on a single definition of obscenity.

MILLER V. CALIFORNIA

Miller, the defendant, had conducted a mass mailing campaign in an effort to sell four illustrated books entitled *Intercourse, Man-Woman, Sex Orgies Illustrated,* and *An Illustrated History of Pornography*, and a film entitled *Marital Intercourse*.[39] A Newport Beach restaurant manager and his mother received five brochures advertising the defendant's materials. The unsolicited brochures contained drawings showing persons engaged in various sexual acts with "genitals often prominently displayed."[40] The defendant was charged under a statute whose definition of obscenity was patterned after the *Memoirs* definition. The jury was instructed to apply, "contemporary community standards of the State of California" in determining whether the brochures were obscene. Miller was convicted of knowingly distributing obscene matter and his conviction was upheld without opinion by the California supreme court. The United States Supreme Court in affirming the conviction set new "concrete guidelines" for the separation of protected from unprotected materials. These guidelines use local standards for determining prurient interest and patent offensiveness, and reject the *Memoirs* requirement that material must be "utterly without redeeming social value" before it can be declared obscene.

The new "concrete" definition adopted by the Court was the following:

> (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 applicable state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[41]

For purposes of brevity these three elements will be referred to as

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I shall not today attempt further to define the kinds of material I understand to embraced within that shorthand description; . . . But I know it when I see it . . . Jacobellis v. Ohio, 378 U.S. 197 (1964).

He provided a more definite description of what he was referring to in *Ginzburg*, however. 383 U.S. 499 n. 3.

38. Miller v. California, *supra* note 4.
39. *Id.* at 18.
40. *Id.*
41. *Id.* at 24.

the "prurient interest" element, the " patent offensiveness" element, and the "serious value" element.

The *Miller* definition of obscenity is a variation of the definition contained in *Memoirs*.[42] The disagreement among the justices in *Memoirs* over whether "utterly without redeeming social value" should be an independent element of the definition of obscenity was resolved by the majority in *Miller*. The opinion stated that a determination of the social value of material should remain an independent element of the definition. The Court rejected, however, the *Memoirs* requirement that material be proven worthless before it could be declared obscene. That requirement, the Court said,

> 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.[43]

The Court then adopted the present element which allows works having some value, but not "serious value", to be classified obscene.[44]

Patent Offensiveness

Although the Court retained the patent offensiveness element found in *Memoirs*, it too was significantly altered. The Court emphasized:

> under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless those materials depict or describe patently offensive "hard core" sexual conduct. . . .[45]

To accomplish this objective, the Court required that the element of patent offensiveness be defined in terms of hard core sexual conduct. The Court offered the obscenity laws of Hawaii and Oregon as examples of laws defining this concept in terms of physical conduct.[46] The Court did not stipulate what conduct fell within the

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42. Memoirs v. Massachusetts, *supra* note 9 at 418.

43. Miller v. California, *supra* note 4.

44. Commentators disagree over whether this change in the definition will significantly affect obscenity trials in the future. Schoen, *Billy Jenkins and Eternal Verities: The 1973 Obscenity Cases*, 50 N.D. L. Rev. 567, 578 (1973); Zagel, *Supreme Court Review 1973*, 64 Journal of Criminal Law and Criminology, 381, 382 (1973); Buchanan, *Obscenity and Brandenburg: The Missing Link?*, 11 Houston L. Rev. 537, 559 (1974).

45. *Id.* at 57.

46. *Id.* at 24 n. 6.

"Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion. Hawaii Sess. Laws Tit. 37 § 1210(7) (1972).

category of "hard core" sexual conduct with the exception of the following two examples:

> (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.[47]

Local Community Standards

Even among the members of the plurality of *Memoirs* there was a disagreement, noted earlier, over the proper standards by which obscenity was to be defined. Mr. Jusice Brennan and Chief Justice Warren maintained different positions on the meaning of contemporary community standards. The *Miller* Court resolved this conflict by agreeing with Chief Justice Warren and ruled that local, not national standards were to be applied in determining whether material satisfies the prurient appeal and patent offensiveness elements.[48] It is "unrealistic" to expect jurors to be able to apply a national community standard, the Court argued.[49] Furthermore, the citizens of different states "vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[50]

Although the incorporation of local standards into the definition of obscenity made the task of juries easier, it appeared that the Court had severely limited its power to review obscenity decisions. According to a companion case, juries need not be presented with any expert testimony nor need they receive any evidence of obscenity beyond the mere viewing of the material involved.[51] Thus, the Court could conceivably receive on appeal cases which contain little evidence of local standards, severly handicapping any attempt to review a jury determination that material appealed to a prurient interest, and was therefore patently offensive. The Court, however, did not mention the serious value element when it was discussing local standards, raising the inference that serious value remained to be determined by national standards.[52] Although the Court could

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"Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification. ORE. REV. STATS. Art. 29 § 235(10) (1971).

47. *Id.* at 25.
48. *Id.* at 31-33.
49. *Id.* at 30.
50. *Id.* at 33.
51. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).
52. Note, *supra* note 1 at 169; Schoen, *supra* note 44 at 590.

thus review lower court decisions on the basis of this third element, the Supreme Court appeared to have seriously limited its own power to review obscenity cases by adopting local standards as controlling.[53]

Jenkins and Hamling

Two decisions following *Miller* substantially clarify the Court's use of the phrase "patently offensive," and reaffirm two important pre-*Miller* concepts.[54] The first decision, *Jenkins v. Georgia*, emphasized that the term "patently offensive" can only be applied to hard core sexual conduct. The impetus for the Court's examination of that term was a jury determination, that the film *Carnal Knowledge* was obscene. No jury could find the film patently offensive, the Court asserted, because the conduct depicted therein was not "hard core sexual conduct."[55] The Court justified this position by asserting that local communities are not free to determine for themselves what conduct is included within the category of "hard core sexual conduct."[56]

In *Miller* the Court gave two examples of what it meant by "hard core sexual conduct." In *Jenkins* the Court held that, "While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix *substantive constitutional limitations, deriving from the First Amendment*, on the type of material subject to such a determination" (emphasis added).[57] Moreover, the Court held that unless sexual material falls within either of the two examples articulated in *Miller*, or is "sufficiently similar to such material to justify similar treatment . . . ," the material cannot constitutionally be declared obscene.[58]

Therefore, a determination that material is patently offensive requires two steps, only one of which involves the use of a local community standard. The first step consists of determining whether the material describes or depicts conduct within the category of "hard core sexual conduct." That category is determined for *all* the states by the Supreme Court. The second step, taken only if the

53. "[I]t is difficult to imagine how an appellate court can effectively review a jury determination that a particular portrayal of sexual conduct appeals to prurient interest and is patently offensive according to state community standards." Note, *supra* note 1 at 168. One commentator speculated that the Court may have been attempting to limit its authority to pass judgment on state court determinations of obscenity. Schoen, *supra* note 44, at 584.

54. Jenkins v. Georgia, ___ U.S. ___, 94 S.Ct. 2750 (1974); Hamling v. United States, ___ U.S. ___, 94 S.Ct. 2887 (1974).

55. Jenkins v. Georgia, *supra* note 54 at 2755.

56. *Id.*

57. *Id.*

58. *Id.*

material satisfies the first, involves determining whether the "hard core sexual conduct" depicted or described is patently offensive. It is only at this point that local community standards become important.

By defining "patently offensive" in this manner, the Court dispels the fears of those who felt that local community standards would significantly impair its ability to review future obscenity cases.[59] The Court can review jury determinations that material is patently offensive by reviewing the first step of that determination, which is not based on local community standards. Since the Court may also review lower court decisions on the basis of whether or not the material involved has serious value,[60] the Court has two powerful avenues of review.

Recognizing that local standards are to be applied only after a jury determination that the material depicts or describes "hard core sexual conduct", it is not surprising that the Court gives the states wide discretion in charging the jury with respect to those local standards. The trial court in *Jenkins* simply told the jury to apply community standards without telling the jury from what geographical area they were to determine those standards. The United States Supreme Court expressly affirmed that instruction saying that:

> A state may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms as was done by California in *Miller*.[61]

The second decision after *Miller*, *Hamling v. United States*[62] is less helpful in defining "hard core sexual conduct," since there appears to be no question that the material involved fell within that category. The appellants in *Hamling* were individual and corporate defendants who had been engaged in the sale of an "illustrated version" of the report of the Commission on Obscenity and Pornography. They were convicted on charges of mailing and conspiring to mail obscene brochures advertising their publication. The brochures contained very explicit photographs of individuals and groups en-

59. See note 53 *supra*.

60. Note, *supra* note 1, at 169. Schoen, *supra* note 44, at 590.

61. Jenkins v. Georgia, *supra* note 54 at 2753. In *Hamling v. United States*, *supra* note 54, at 2901, the Court expanded further on what it meant by local standards:

> a juror is entitled to draw on [his] own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

62. Hamling v. United States, *supra* note 54.

gaged in a wide variety of normal and deviate sexual acts.[63]

The Court referred approvingly to two concepts utilized in pre-*Miller* decisions. The Court first rejected a contention that an instruction on "pandering" was in error.[64] Additionally, the Court affirmed an instruction allowing the jury to find that the material appealed to the prurient interest if they found that, taken as a whole, it appealed to the prurient interest of a clearly defined deviant sexual group.[65] This approach is an express approval of the concept of variable obscenity as it was applied in *Mishkin v. New York*.[66]

Opposition to the Miller Definition

The most significant challenge to the Miller Court's definition of obscenity comes in Mr. Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*,[67] a case accompanying *Miller*. Although this dissenting Justice accepted the majority's analysis of obscenity as unprotected speech, he argued for a fundamental change in the Court's position on obscenity regulation. After carefully analyzing the Court's attempts to define obscenity, including the attempt in *Miller*, he concluded that they were all intolerably vague.[68] He asserted that the vagueness of the obscenity definitions produced three difficulties: 1) criminal laws prohibiting distribution of obscenity fail to give fair notice to all of what is forbidden; 2) these laws produce a "chilling effect" upon protected speech; and 3) the enforcement of these laws produces "institutional stress." Mr. Justice Brennan found stress on the Supreme Court itself caused by the large number of cases which came up on appeal, and stress on the relationship between the state courts and the Supreme Court, caused by reversals of state courts' conscientious attempts to follow the Supreme Court guidelines.[69] In short, Brennan argued that since the Court has been unable to separate protected speech from unprotected obscenity, statutes suppressing obscenity must be subjected to the same test that other criminal laws infringing on the freedom of speech must meet — "some very substantial interest in suppressing such speech."[70] Although Brennan accepted in theory the two

63. *Id.* at 2895.

64. The instruction limited the use of evidence of "pandering" by the jury to helping them decide the issue of obscenity if the case was close. This was quite proper under Ginzburg and its use here was affirmed by the Court. *Id.* at 2914.

65. *Id.* at 2913-14.

66. Mishkin v. New York, *supra* note 22.

67. Paris Adult Theatre I v. Slaton, *supra* note 3 at 70.

68. *Id.* at 84.

69. *Id.* at 87-93.

70. *Id.* at 103. Brennan rejects the unprovable assumptions contained in the Majority

level approach to the First Amendment as applied to obscenity, he asserted that in practice it could not be constitutionally employed.

Justice Douglas, in a separate dissent, reiterated the stand he has taken ever since *Roth*: that obscenity is protected speech.[71] He asserted that one of the bases for his opinion was the difficulty of reducing obscenity to precise definition. Since Justices Marshall and Stewart joined Mr. Justice Brennan's dissent in *Paris*, it is possible to conclude that four members of the Court say obscenity may not be treated as unprotected speech.

THE MONTANA LAW

Montana presently has two statutes prohibiting the distribution and display of obscenity.[72] The broader of the two, REVISED CODES OF MONTANA 1947, § 94-8-110, is intended to prevent obscene material from falling into the hands of juveniles and to prevent the commerical distribution of obscene material to adults. This statute allows material to be classified obscene if:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest, that is, a shameful or morbid interest in violence, nudity, sex, or excretion; and
> (b) the material is patently offensive because it affronts contemporary community standards relating to the descriptions or representations of sexual matters; and
> (c) the material is utterly without redeeming social value.[73]

The definition is almost verbatim from *Memoirs*. A brief reexamination of the changes made by *Miller* and *Jenkins* will be helpful to ascertain the constitutionality of section 94-8-110. Although the *Miller* Court rejected the "utterly without redeeming social value" element, it did so because it desired to give prosecutors a better chance of obtaining obscenity convictions, not because it was unconstitutionally vague.[74] Since the "utterly" test, if anything, is more burdensome than the *Miller* "serious value" test, it can do no more than restrict the suppression of obscene material in this state to less than the constitutional maximum and thus in itself should not render the statute unconstitutional.[75] The Supreme Court in

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opinion as being insufficient to meet this test.

71. *Id.* at 114. Brennan in a footnote indicated some sympathy for Douglas' position that obscenity is protected speech, however he chose not to base his rejection of the Court's former position on that theory. *Id.* at 85 n. 9.

72. REVISED CODES OF MONTANA, §§ 94-8-110, 94-8-110.1 (1947), [hereinafter cited as R.C.M. 1947].

73. R.C.M. 1947, § 94-8-110(2).

74. *See* Miller v. California, *supra* note 43.

75. Hamling v. United States, *supra* note 54 at 2907.

Miller and *Jenkins* also required that all statutes suppressing obscenity define "patently offensive" in terms of specific hard core sexual conduct, as in the examples given by the Court in *Miller*.[76] Our statute does not. However it is constitutionally acceptable for state courts to authoritatively construe their statutes to be limited to hard core sexual conduct.[77] The "local community standard" aspect of *Miller* and *Jenkins* should pose no problem for section 94-8-110. Since our statute does not specify whether a national community or local community standard is to be applied, it can easily be construed to conform to *Miller*.[78]

The other important Montana statute dealing with obscenity is section 94-8-110.1. The operation of this statute is restricted to material which is publicly displayed. The definition employed is specifically designed to define what is obscene for minors:

> any pictorial, three-dimensional or other visual representation of a person or portion thereof of the human body that predominantly appeals to the prurient interest in sex, and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors . . . .

The definition is similar to that approved by the Supreme Court in *Ginsberg v. New York*.[79] The prurient appeal requirement of section 94-8-110.1 should now be construed to require a determination based upon some standard other than a national standard. The third element of the definition should cause section 94-8-110.1 no more constitutional problem than its counterpart in section 94-8-110.

The interesting question concerning section 94-8-110.1, one not yet answered by the Supreme Court, is how the definition of "patently offensive" is to be altered to conform to *Miller* and *Jenkins*. The Court in *Ginsberg* allowed more material to be deemed "patently offensive" for minors than what is "patently offensive" for

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76. *See* discussion accompanying note 57.

77. Miller v. California, *supra* note 4 at 24 n. 6.

78. Note that the language employed by § 94-8-110 in its definition of obscenity is sufficiently broad that it can be interpreted to allow the use of the variable obscenity concept as used in *Mishkin* and *Ginsberg*. That is, the prurient appeal of material arguably can be determined by its effect upon clearly defined deviant sexual groups and juveniles within the broad language of § 94-8-110. Note also that (1)(f) expressly makes "pandering" an offense:

> . . . (f) advertises or otherwise promotes the sale of obscene materials represented or held out by him to be obscene.

This section on its face does not limit the offense of pandering to cases in which it is a close question as to whether material is or is not obscene. To be consistent with the *Ginzburg* definition of pandering it should be so limited.

79. Ginsberg v. New York, *supra* note 3 at 632-33.

adults.[80] Therefore, the Court should allow state statutes regulating the distribution of sexual material to minors to contain broader, more inclusive definitions of hard core sexual conduct than the examples contained in *Miller*. Precisely what sexual conduct should be included in the category of "hard core sexual conduct" as applied to minors is at this point unclear.

CONCLUSION

The present definition of obscenity adopted by the Court contains three elements articulated in *Miller*. In order to declare material obscene, juries must find it to possess the characteristics contained in each of those three elements. The dominant theme of the material must appeal to the prurient interest of people within the local community. The material must represent or describe "hard core sexual conduct" as that term was defined in *Miller* and *Jenkins*. The physical conduct described or represented must be patently offensive to people within the local community. Finally, the material taken as a whole must be without serious literary, artistic, political or scientific value determined according to national standards.

The present Montana statutes contain definitions of obscenity which are not in conformance with the latest standards articulated by the Supreme Court. If amended or authoritatively construed to define the term "patently offensive" in terms of specific hard core sexual conduct, the statutory definitions should be within the boundaries of the United States Constitution.[81]

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80. The standard used by the trial court in *Ginsberg* was, "'. . .patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors . . .'". *Id.*

81. Author's Note: The 1975 Montana Legislature passed a bill amending R.C.M. 1947 §§ 94-8-110 and 94-8-110.1. Senate Bill No. 250, introduced by Senator Thiessen, replaces the definition of obscenity in § 94-8-110 with the following:

(2) A thing is obscene if:

(A) It is a representation or description of perverted ultimate sexual acts, actual or simulated, or

(B) It is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated, or

(C) It is a patently offensive representation or description of masturbation, excretory functions, or lewd exhibition of the genitals, and

(D) Taken as a whole the material:

(I) Applying contemporary Montana standards, appeals to the prurient interest in sex,

(II) Portrays conduct described in (A), (B), or (C) above in a patently offensive way, and

(III) Lacks serious literary, artistic, political or scientific value.

This language appears to be taken virtually verbatim from the *Miller* decision. The definition is acceptable under the standards set in *Miller* and *Jenkins*. The definition contained in § 94-8-110.1 remains unchanged.