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Art, Obscenity and the First Amendment

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The United States Supreme Court generally provides an accurate reflection of the times. In the late 1980s a political strain of conservatism found voice in such issues as abortion and discriminatory labor practices. This climate may be receptive to limitations on first amendment freedom of expression as witnessed by the recent Mapplethorpe controversy discussed later in this article. Even so, the first amendment does not constitute an unbridled license for freedom of expression. Clearly, an artist may not damage private or public property in the name of artistic expression. Injury to private property would constitute a trespass, enabling the owner to enjoin the activity and recover damages from the artist; damage to public property is usually a crime under the laws of the applicable jurisdiction. Moreover, the laws against obscenity, defamation, invasion of privacy, and speech and conduct likely to cause a breach of the peace provide limits, albeit evolving ones, within which constitutionally protected expression must fall.

Although the Supreme Court has endeavored to deal with the problem, it has never provided a concise definition of obscenity. In 1957, obscenity was held by the Supreme Court to be outside of the protection of the first amendment in *Roth v. United States*.[1] In affirming a conviction of a New York publisher and distributor of books, photographs, and magazines for violating a federal obscenity statute by mailing and advertising obscene materials, the Court attempted to set a standard for defining obscenity—that is, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[2] A final consideration of the allegedly obscene material was whether it had

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1. 354 U.S. 476 (1957). In its holding, the Court rejected the test of Regina v. Hicklin, 3 L.R. - Q.B. 360 (1868), which required a judging of the material according to the effect of an isolated excerpt on particularly susceptible persons.

2. *Roth*, 354 U.S. at 489.

"even the slightest redeeming social importance."[3] If it did, the material was constitutionally protected. In a subsequent case,[4] the Court in 1964 held that the standards in *Roth* were national rather than community standards.

In 1966, in *Memoirs v. Massachusetts*,[5] the Attorney General of Massachusetts sought to have the book *Fanny Hill* declared obscene. The Supreme Court refused to do so, holding that the mere risk that a work may be exploited by panderers because of its pervasive treatment of sexual matters is not sufficient to make it obscene. Rather, to establish obscenity, the prosecution had to prove three separate elements: first, the dominant theme of the material taken as a whole appeals to a prurient interest in sex; second, the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and third, the material is utterly without redeeming social value.[6] However, in 1973 the *Memoirs* test was modified substantially, and the national interpretation of standards was overruled.

In *Miller v. California*,[7] the appellant had been convicted under California law for unsolicited mailing of obscene material. He had conducted a mass mailing campaign to advertise the sale of illustrated "adult" material. The Supreme Court noted that the context of review was limited, involving the interest of a state to prohibit the dissemination of obscene material when its distribution carries the "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[8]

However, nearly eight years after the *Memoirs* decision, the Court, unhappy with the abstract nature of the guidelines established for determining obscenity, decided to try again. Thus, the *Miller* court held that whether a work is adjudged obscene depends on whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and the work, taken as a whole, lacks serious literary, artistic, political, or sci-

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3. *Id.* at 484.
4. Jacobellis v. Ohio, 378 U.S. 184, 192-93 (1964).
5. 383 U.S. 413 (1966).
6. *Id.* at 418.
7. 413 U.S. 15 (1973).
8. *Id.* at 19.

entific value.[9]

From those new guidelines emerged two significant revisions in the constitutional standards. First, the Court totally rejected the *Memoirs* requirement that a work must be "utterly without redeeming social value" in order to be obscene.[10] The Court also concluded that the *Memoirs* test too readily permitted an opportunity for the exploitation of obscene works:

> Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.[11]

Second, the Court promulgated the local community standard guideline, so that a work not considered obscene in one state or county or town may constitutionally be considered obscene in another. The Court opined:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[12]

The community-standards guideline, however, did not provide the states with free rein to set their own standards of obscenity, nor was that the Court's intention. As the Court made clear, only materials depicting sexual conduct can be limited by obscenity regulation.[13] Although the Court did not attempt to propose specific regulatory guidance for states faced with conforming their obscenity statutes to the *Miller* guidelines, it did provide several examples that could be regulated by state law: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated [and]

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9. *Id.* at 24.
10. *Id.* at 25-26 (quoting *Memoirs*, 383 U.S. at 419).
11. *Id.*
12. *Id.* at 32-33.
13. *Miller*, 413 U.S. at 24.

patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of the genitals."[14]

The Court also made it clear that it considered only hard-core pornography obscene and, therefore, subject to regulation by the states. The Court characterized its holding in *Miller* and its companion cases,[15] known as the *Miller* "quintuplets,"[16] as insuring that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[17]

The years after *Miller* have found the state courts wrestling with the new standards for determining obscenity. Some of the great difficulties posed for the states have been in attempting to define what constitutes a community for the purposes of ascertaining its moral standards[18] and in drafting a state statute to comply with the Supreme Court's specificity requirement.[19] In addition, courts have grappled with the extent of the discretion permitted communities in determining what is obscene.

In *Jenkins v. Georgia*,[20] the Supreme Court reversed the conviction of the manager of a theater in Albany, Georgia, for showing the film *Carnal Knowledge*, which the trial jury deemed to be obscene. The Supreme Court rejected the state of Georgia's argument that the trial jury's determination of the issue is conclusive. The Court stated:

> Even though questions of appeal to the 'prurient interest' or of 'patent offensiveness' are 'essentially questions of fact' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that 'the First Amendment values applicable to the

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14. *Id.* at 25.

15. *Miller* had four companion cases: Paris Adult Theatre I v. Slaton, 413 U.S. 49, *injunction aff'd*, 231 Ga. 312, 201 S.E.2d 456 (1973), *cert. denied*, 418 U.S. 939 (1974); Kaplan v. California, 413 U.S. 115 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-ft. Reels of Super 8MM Film, 413 U.S. 123 (1973).

16. L. DUBOFF, THE DESKBOOK OF ART LAW 258 n.1 (1977 & Supp. 1984).

17. *Miller*, 413 U.S. at 27.

18. *See, e.g.*, Davison v. State, 288 So. 2d 483 (Fla. 1973), *stay denied*, 415 U.S. 943 (1974).

19. *See, e.g.*, Papp v. State, 281 So. 2d 600 (Fla. 4th Dist. Ct. App. 1973) *vacated*, 298 So. 2d 374 (Fla. 1974).

20. 418 U.S. 153 (1974).

> 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' (citation omitted) but we made it plain that under the holding 'no one will be subject to prosecution for sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct . . . .'[21]

The Court also noted that where hard-core pornography is involved, the states can define obscenity in terms of local community standards either specifically or by referring the issue to the understanding of the local jury. Since, in the Court's view, the motion picture *Carnal Knowledge* did not involve the public depiction of hard-core sexuality for its own sake and for commercial gain, made punishable by *Miller*, the conviction could not stand.[22]

Many of the appellate decisions following *Miller* appear to focus on the method of determining community standards. A number of jurisdictions appear to prefer statistical evidence. For example, it was found that a Texas trial court had erroneously excluded a Harris County theater operator's statistical evidence of community patronage of *Deep Throat* (a film comparable to that shown by the defendant). The evidence was offered as circumstantial evidence of contemporary community standards.[23] Nevertheless, the question of a work's obscenity rests on the local standards of the community in which the work is located or displayed. Thus, a "fine-art multiple"[24] produced in an edition of 200 and marketed nationwide may be subject to as many as 200 local community standards, as well as the federal standard under the Comstock Act[25], which makes it a criminal act to mail or broadcast obscene material.

The method of marketing a work of art may also be of special significance in determining whether it is obscene . If pandering is present, the work will most likely be considered obscene. Pandering is defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."[26] Thus, it

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21. *Id.* at 160.
22. *Id.* at 161.
23. Keller v. State, 606 S.W.2d 931 (Tex. Crim. App. 1980). *See also*, People v. Nelson, 88 Ill. App. 3d 196, 410 N.E. 2d 476 (1980).
24. These are artworks such as lithographs, etchings, engravings, and silkscreens.
25. 18 U.S.C. § 1461 (1988).
26. Pinkus v. United States, 436 U.S. 293, 303 (1978).

is conceivable that a jury may determine that a work of art has some slight artistic value, but, nevertheless, find the dealer in whose gallery it is exhibited guilty because the artwork was solely advertised and promoted as sexually provocative.[27]

The Court has restricted the application of obscenity statutes when the materials in question are privately possessed. In *Stanley v. Georgia*,[28] the Court held that although public dissemination of obscene materials may be regulated, states cannot make private possession of those materials a crime.[29] However, the Court did draw narrow boundaries around the zone of privacy afforded by *Stanley*. In *United States v. 12 200-Ft. Reels of Super 8MM Film*,[30] decided at the same time as *Miller*, the Court held that the importation of obscene materials can be regulated even if those materials are intended solely for private use. This case involved the forfeiture of allegedly obscene motion pictures that had been seized at the time of their entry into the United States. By virtue of Court decisions, a gallery open to the public cannot with impunity possess or display obscene works.[31] It is conceivable that the possession of such works in an artist's studio—from which works may be sold—may also be constitutionally unprotected.

Since, in obscenity cases, the Supreme Court considers the rights and the interests of the state and offended viewers, as well as the rights of the speaker, performer or exhibitor works displayed to a captive or unwilling audience are more likely to be deemed constitutionally unprotected than are those not so displayed. In *Close v. Lederle*,[32] decided in 1970, a federal court of appeals held that where there is, in effect, a captive audience, people have a right to protection against "assault upon individual privacy" short of legal obscenity.[33] The plaintiff in the case—the well-known painter Chuck Close, then an art instructor at the University of Massachusetts—exhibited his paintings on the walls of a corridor in the student union. The exhibition, involving clinically explicit nudes, proved to be controversial and was removed after five of the twenty-four days scheduled for its display. The plaintiff, claiming that his constitutional rights were invaded, sought to have the space

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27. *See, e.g.*, Splaun v. California, 431 U.S. 595, 598 (1977); Hamling v. United States, 418 U.S. 87, 130 (1974); Ginzberg v. United States, 383 U.S. 463, 470 (1966).

28. 394 U.S. 557 (1969).

29. *Id.* at 568. *See also*, United States v. Reidel, 402 U.S. 351 (1971).

30. *12 200-ft. Reels*, 413 U.S. at 123.

31. *See, e.g.*, *Slaton*, 413 U.S. at 49; *Orito*, 413 U.S. at 139.

32. 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970).

33. *Close*, 424 F.2d at 990.

made available for his exhibit for the equivalent of the unexpired period. In dismissing the complaint, the federal appellate court drew an analogy between visual speech and pure speech:

> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper about *Lady Chatterley's Lover*, or in a novel submitted in a creative writing course, take on a very different coloration if they are bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree.[34]

"Freedom of speech," the Court continued, "must recognize, at least within limits, freedom not to listen."[35] Because the paintings were displayed in a passageway regularly used by the public, including children, the Court reasoned that the university officials could consider the primary use of the corridor as a public thoroughfare, with the public, in effect, a captive audience. Therefore, the officials had a right to afford protection against assault on individual privacy.[36]

In a similar vein and citing the decision in *Close*, a Massachusetts federal district court in 1988 upheld a regulation banning nude bathing at a Cape Cod national park.[37] The court held the regulation did not infringe upon the first amendment rights of women to bathe in the nude to protest their exploitation by American society, and noted, "not only is a public beach an unlikely and unnecessary showcase for nude expression, but also nudity there significantly intrudes upon others who did not seek it out and may be offended by it."[38]

In an exhibition of artwork depicting nudity or sexual conduct, consideration should also be given to minors. Works that are not obscene may, nevertheless, be regulated by states to the extent appropri-

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34. *Id.* (citing Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1058 (1969)).

35. *Id.* at 991.

36. *But see* Cohen v. California, 403 U.S. 15, 21 (1971), which has since limited the application of the captive-audience theory to those instances in which "substantial privacy interests are being invaded in an essentially intolerable manner." However, as subsequently noted in Sefick v. City of Chicago, 485 F. Supp. 644, 651 (N.D. Ill. 1979), the "facts of *Close* are such that the action of the university might well be justifiable even in light of *Cohen*."

37. Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988).

38. *Id.* at 294.

ate to protect minors.[39] A New York statute, for example, prohibits the sale to a minor of any artwork depicting nudity, sexual conduct or sadomasochistic abuse.[40]

The denouement of the recent Mapplethorpe controversy took its cue from the Supreme Court's guidelines for obscenity as found in *Miller*. In the Mapplethorpe matter, a storm of protest arose throughout much of Congress in reaction to exhibitions of works by two provocative photographers. These exhibitions were presented by two federally funded groups. The two arts organizations—the Institute for Contemporary Art at the University of Pennsylvania and the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina—subsidized, in part, by the National Endowment for the Arts, sponsored respective photograph exhibitions of the work of Robert Mapplethorpe and Andres Serrano. The work of Mapplethorpe, which included homoerotic scenes, and the work of Serrano, which included a depiction of a plastic crucifix submerged in the artist's urine, were found by some members of Congress to be sacrilegious or indecent. Indeed, Senator Jesse Helms proposed modifying an Interior Department appropriations bill to include restrictions that would bar federal arts funds from being used to "promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion."[41] The Helms measure would have also barred grants for artwork that "denigrates, debases or reviles a person, group or class of citizen on the basis of race, creed, sex, handicap, age, or national origin."[42] Although the North Carolina Republican's amendment was originally adopted by the Senate in July of 1989, it was later rejected by Congress in September, 1989.[43]

The following month the Senate approved and sent a proposed bill to the President to sign into law which, while less stringent than the proposed Helms measure, nevertheless restricted, for the first time in the United States, federal arts financing on the basis of content.[44]

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39. Ginsberg v. New York, 390 U.S. 629, 637-43 (1968).
40. N.Y. PENAL LAW § 235.21 (McKinney 1980 & Supp. 1989).
41. *See* N.Y. Times, July 26, 1989, § 1, at 1 (city ed.).
42. *Id.*
43. *See* N.Y. Times, Oct. 8, 1989, § 1, at 27.
44. *Id.*

Under the new law, federal monies are barred for:

> materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sado-masochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.[45]

Additionally the new legislation requires that the chairman of the National Endowment for the Arts and a council review all art financed through the hundreds of subgrants made each year—and that a commission be established to review the Endowment's grant-making procedures and standards. In determining whether the standards require change, the criteria to be considered include the *Miller* guidelines for determining obscenity.[46]

As noted, passage of the new legislation marks the first time Congress placed a limitation on arts grants on the basis of content. The irony of such limitation becomes breathtaking when viewed against the backdrop of change in the conception of censorship in certain other nations. In the Soviet Union, shifts in what is permitted to be seen, particularly on the stage and in film, are apparently striking enough to warrant the phrase "full-frontal glasnost."[47] In France, where there is little private patronage of the arts and where the Ministry of Culture and Communication is accordingly the "cultural monarch," there is virtually no censorship at all, and the French Parliament generally approves appropriations for the arts without scrutinizing the fine print.[48] In West Germany, to cite still another example, the federal government, largely in reaction to the atrocious misuse of the arts under Nazi rule, has little voice in how its appropriations are used. There, neither politicians nor churches involve themselves in the arts. It is their belief that the "labeling of a work as pornographic or casting a judgment of it as non-art inevitably backfires."[49]

This growing tendency of governments abroad to recognize and even subsidize as art an increasingly diverse array of expression forces

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45. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 304 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 741.

46. *Id.*

47. *See* N.Y. Times, Aug. 13, 1989, § 2, at 1.

48. *Id.* at 6.

49. *Id.*

the compelling question: Will the new legislation in the United States, with all its restrictions, quell some of creativity's greatest impulses and harbinger the stillbirth, rather than the realization, of what might have been some of American's finest art?

Author's Note:

At the time this article went to print, the new restrictive arts legislation had already been tested. While it did not, in this case, prevail, it caused a skirmish between the communities of art and politics and made headlines for weeks throwing into sharp focus the issue of whether the United States Government would continue to provide financial support to art without legislative intervention. In this particular situation, the National Endowment for the Arts, as a result of the new law, withdrew its sponsorship on November 8, 1989, of a New York City art show about AIDS entitled, *Witnesses: Against Our Vanishing.* John E. Frohnmayer, the new chairman of the NEA, in suspending a $10,000 grant to Artists Space, the nonprofit gallery in the TriBeCa section of Manhattan which commenced its exhibition of the show Thursday, November 16, 1989, originally gave as his reason for the Endowment's withdrawal of support the fact that the exhibition was making a political statement in violation of the spirit, if not the letter, of the law.[50] The exhibition includes images of homosexual acts, and the show's catalogue contains derogatory comments about such public figures as John Cardinal O'Connor, the Roman Catholic Archbishop of New York Representative William E. Dannemeyer, Republican of California, and Senator Jesse Helms, Republican of North Carolina.

When, in the ensuing days, Mr. Frohnmayer's decision evoked a storm of criticism from public figures in the arts as well as lawyers, artists, arts advocates, and educators,[51] he subsequently asserted that his decision to withdraw support was, rather than on any political rationale, based on "an erosion of the artistic focus" in the show.[52] Under continuing heavy protest, including a decision by Leonard Bernstein, the composer and conductor, to refuse the National Medal of Arts award,[53] the NEA chairman on November 16 reversed himself and agreed to restore the $10,000 grant to the gallery for the exhibi-

50. *See* N.Y. Times, Nov. 9, 1989, § 1, at 1 (city ed.).
51. *See* N.Y. Times, Nov. 14, 1989, § 3, at 20 (city ed.).
52. *Id.*
53. *See* N.Y. Times, Nov. 16, 1989, § 3, at 26 (city ed.).

tion—provided that the monies not be used to pay for the show's catalogue.[54]

54. *See* N.Y. Times, Nov. 17, 1989, § 1, at 1 (city ed.).

This article only touches on some of the first amendment issues the artist, dealer, and collector must confront. For a detailed analysis of these and other first amendment issues, *see* Lerner & Bresler, ART LAW—THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS ch. 7 (1989).