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Obscenity: Hamling v. United States, 418 U.S. 87 (1974), Jenkins v. Georgia, 418 U.S. 153 (1974)

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OBSCENITY

Hamling v. United States, 418 U.S. 87 (1974)
Jenkins v. Georgia, 418 U.S. 153 (1974)

Hamling v. United States[1] and *Jenkins v. Georgia*[2] represent the Supreme Court's most recent encounter with the problem of obscenity. One year before the Court decided these cases, the Justices reevaluated obscenity standards in *Miller v. California* and its companion cases.[3] This note will explore *Hamling* and *Jenkins* in the light of *Miller*, examining the decisions to see if *Miller* has made the obscenity question more manageable.[4]

The *Miller* decision has been the subject of considerable controversy. With this decision, the Supreme Court majority had hoped substantially to withdraw itself from the task of reviewing obscenity cases on a case-by-case basis. The Court's purpose in *Miller* was to "set out concrete guidelines to isolate 'hard core' pornography from expression protected by the first amendment . . . [in order] to provide positive guidance to the federal and state courts alike. . . ."[5]

Miller lays out the following test to set constitutional limits on obscenity regulation:

> [W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct . . . specifically defined by applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political, or scientific value.[6]

Hamling and *Jenkins* demonstrate how the Court has applied its *Miller* standards.

Petitioners in *Hamling* prepared an illustrated version of the Presidential Report of the Commission on Obscenity and Pornography for sale to the public. The illustrations were graphic depictions of various sexual acts described in the report. Petitioners also prepared an advertising brochure for the book, including a full page of pictures of individuals engaged in various heterosexual and homosexual acts.[7] Both the book and the brochure were

[1] 418 U.S. 87 (1974).

[2] 418 U.S. 418 (1974).

[3] Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

[4] Before *Miller*, the basic test for judging whether or not a work was obscene or constitutionally protected speech came from Memoirs v. Massachusetts, 383 U.S. 413 (1966). Under *Memoirs*, in order for an allegedly obscene book to be denied first amendment protection, it had to be proven that the book passed these three tests:

> (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.

Id. at 418.

These tests generated enormous problems in litigation, a fact recognized by both the majority and minority sides in the new decisions. A majority of the present court, consisting of the Nixon appointees and Mr. Justice White, were able to agree on a new test. That test is set forth in Miller v. California, 413 U.S. 15, 24.

For a discussion of the law of obscenity before *Miller*, and how *Miller* changed that law, see Note, *Pornography*, 64 J. CRIM. L. & C. 399 (1973).

[5] 413 U.S. at 29.

[6] *Id.* at 24.

[7] The court of appeals gave this description of the photographs in the brochure:

> The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their

sent through the mails.

Petitioners were indicted on charges of mailing and conspiring to mail the obscene book and advertisement in violation of 18 U.S.C. § 1461.[8] They were convicted of the charge regarding the advertisement. The jury was unable to reach a verdict as to the counts of the indictment dealing with the book itself. The Court of Appeals for the Ninth Circuit affirmed the conviction,[9] as did the Supreme Court.

The petitioners were convicted before the Court decided *Miller,* but their appeal was in progress when *Miller* was handed down. In *Hamling,* the Court said:

> The principal question presented by this case is what rules of law shall govern obscenity convictions that occurred prior to the date on which this Court's decision in *Miller v. California, supra,* and its companion cases were handed down, but which had not at that point become final.[10]

The trial court in *Hamling* used the definition of obscenity found in *Memoirs v. Massachusetts,*[11] the leading case in the area prior to *Miller.* Under the *Memoirs* test, the accused could not be convicted of obscenity unless the material involved was "utterly without redeeming social value." [12] *Miller* represents a more relaxed view of this standard, banning work which, "taken as a whole, lacks serious literary, artistic, political, or social value." [13]

In *Hamling,* the Court noted as a general principle that it will apply a change in the law which occurs while the case is on direct review.[14] The reinterpretation of the obscenity standard in *Miller* must be applied to this case, said the Court, if it would serve to benefit the petitioners.[15] The petitioners conceded that, because *Miller* presents a broader definition, no benefit will inure to them by the application of the standards dealing with social value.

However, petitioners charged that their conviction for violation of national standards denied them the benefit of *Miller.* In *Miller,* the trial court used the standards of the State of California. In *Hamling,* the trial court used national standards. The petitioners claimed that *Miller* requires the use of standards of a smaller geographical area. The Court rejected this contention, saying that the use of a statewide standard, though warranted by *Miller,* is not required as a matter of constitutional law.[16] No material prejudice to the petitioners is found. Said the Court:

> This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insen-

faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina. 481 F.2d at 316–17.

[8] 18 U.S.C. § 1461 (1970) says in pertinent part: Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . .

. . . [e]very written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or by section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . .

[9] 481 F.2d 307 (9th Cir. 1973).

[10] 418 U.S. at 98.

[11] 383 U.S. 413 (1966).

[12] *Id.* at 418.

[13] 413 U.S. at 24.

[14] *See* Bradley v. School Board of Richmond, 416 U.S. 696, 716–21 (1974); Linkletter v. Walker, 381 U.S. 618, 627 (1965); United States v. Schooner Peggy, 1 Cranch 103 (1801).

[15] 418 U.S. at 102.

[16] *Id.* at 104.

> sitive person or group. . . . The District Court's instruction in this case, including its reference to the standards of the 'country as a whole,' undoubtedly accomplished this purpose.[17]

Thus, while the Court prefers the use of "community standards" rather than "national standards," viewing the instruction as a whole, they found no reversible error therein.

Petitioners also raise the argument that 18 U.S.C. § 1461 is unconstitutionally vague because it does not specifically refer to the conduct described in *Miller*. The Court struck down this argument, noting that the statute has been construed as "limited to the sort of 'patently offensive representations or description of that specific hard core sexual conduct given as examples in *Miller v. California*.'" [18] *Miller* did not establish new criminal acts which before the decision were not proscribed by 18 U.S.C. § 1461. Rather, *Miller* added a "clarifying gloss" to the statute.[19]

The indictment involved here charges the petitioners only in the statutory language of § 1461. They claimed that the indictment gave them inadequate notice of the charges against them, alleging vagueness in the term "obscene." The Court held that "obscenity" is a term of art, "sufficiently definite in legal meaning to give a defendant notice of the charge against him." [20] Moreover, said the Court, "We think the 'knowingly' language of 18 U.S.C. § 1461, and the instructions given by the district court in this case satisfied the constitutional requirements of scienter." [21] Defendants' belief as to the obscenity or non-obscenity of the material is irrelevant. It is sufficient that the prosecution show that the defendant had knowledge of the contents, nature and character of the distributed material.[22]

The Court found no error in the trial court's exclusion of allegedly comparable materials. Petitioners had called four expert witnesses to testify as to relevant community standards.[23] The district court disallowed the additional evidence, finding it merely cumulative, and of "no probative value in comparison to the amount of confusion and deluge of material that could result therefrom." [24] The Supreme Court upheld this finding, noting the considerable latitude of the district court in such rulings. The Court found irrelevant the fact that the other materials may have been available on newsstands, or had second-class mailing privileges, or had been judicially determined to be non-obscene.

Petitioners alleged error in the district court's jury instruction concerning the prurient appeal of the brochure and the report. The trial judge told the jury "it could consider whether some portions of those materials appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person." [25] Petitioners complained that the jury was allowed "to measure the brochure by its appeal to the prurient interest not only of the

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[17] *Id.* at 107.

[18] *Id.* at 113. The Court here is quoting from United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973).

[19] 418 U.S. 87 at 116.

[20] *Id.* at 118.

[21] *Id.* at 123.

[22] *See* Rosen v. United States, 161 U.S. 29 (1896). In *Rosen*, the Supreme Court held that a forerunner of 18 U.S.C. § 1461. (1970) gives the defendant adequate notice. Said the Court:

> The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or the belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated.

161 U.S. at 41–2.

[23] One such witness was Miss Virginia Carlson, a student at San Diego State University. She was to testify as to local community standards. Says the Court:

> She had undertaken a 'Special Studies' course with her Journalism professor, Mr. Haberstroh, who was also offered by petitioners as an expert witness at the trial. Miss Carlson had circulated through the San Diego area and asked various persons at random whether they thought 'adults should be able to buy and view this book and material.'

418 U.S. at 108, n.10.

[24] Hamling v. United States, 418 U.S. at 125.

[25] *Id.* at 128.

average person but also of a clearly defined deviant group." [26] The Supreme Court found that this is permissible:

> Our decision in *Mishkin v. New York,* 383 U.S. 502 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, *i.e.,* whether the 'dominant theme of the material taken as a whole appeals to a prurient interest in sex,' consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups.[27]

Thus, the jury can consider the prurient appeal of the material both to the average person and to a clearly defined deviant group.

Finally, the Court found no merit in petitioners' objections to the district court's pandering instruction. The judge told the jury that in applying the *Memoirs* test, if they found the case to be close, they could "also consider whether the materials had been pandered, by looking to its '[m]anner of distribution, circumstances of production, sale, . . . advertising . . . [and] editorial intent. . . .'" [28] The Supreme Court held that this was a proper instruction. Said the Court:

> The District Court's instruction was clearly consistent with our decision in *Ginzburg v. United States,* 383 U.S. 463 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition is applied.[29]

Mr. Justice Brennan voiced a strong dissent. He noted that, although the government has the power to regulate the distribution of sexually oriented materials, the first and fourteenth amendments deny the government power wholly to suppress their distribution. Said Mr. Justice Brennan:

> Since amended 18 U.S.C. § 1461, as construed by the Court, aims at total suppression of distribution by mail of sexually oriented materials, it is, in my view, unconstitutionally overbroad and therefore vague on its face.[30]

[26] *Id.*
[27] *Id.*
[28] *Id.* at 130.
[29] *Id.*
[30] *Id.* at 142 (Brennan, J., dissenting).

Mr. Justice Brennan set out other reasons for reversal. First, he argued that it is impermissible to apply a "local" standards construction to the federal obscenity statute. Under such construction, "the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials." [31] Further, he noted that legislative history indicates that Congress intended a national standard.[32] The "local" standards construction, said Mr. Justice Brennan, "necessarily renders the constitutionality of amended § 1461 facially suspect under the First Amendment." [33]

Mr. Justice Brennan disagreed with the Court's assessment of the national standards jury instruction as harmless error. The national standard lies at the heart of the instructions. Said Mr. Justice Brennan:

> [T]he trial judge made 'national' standards the central criterion of the determination of the obscenity of the brochure. He referred to 'national' standards in his instructions no less than 18 times. . . .[34]

Because Mr. Justice Brennan felt the Court's construction demands an application of local standards, and that the instructions about a national standard materially affected the deliberations of the jury, he charged that the petitioners had been denied due process. The petitioners were prepared to offer proof as to local standards, had they known that standard was to be

[31] *Id.* at 144 (Brennan, J., dissenting).
[32] *Id.* at 143 n.1 (Brennan, J., dissenting). Mr. Justice Brennan says here:
> The legislative history of § 1461 gives not the slightest indication that the application of local standards was contemplated. Indeed, the remarks of an early sponsor of the provision indicate that application of a national standard was intended:
> 'If there be a trial in this country or anywhere else of an obscene character—of that character that a report of it would corrupt the morals of the youth and the *morals of the country generally*—then I do not think the United States should provide the means to circulate that kind of literature in whatever paper or in whatever book it may be published.' 4 Cong. Rec. 696 (1876) (remarks of Rep. Cannon) (emphasis added).

[33] *Id.* at 145 (Brennan, J., dissenting).
[34] *Id.* at 145–46 (Brennan, J., dissenting).

applied.[35] The trial court held such evidence inadmissible.

The trial procedure violated petitioners' right to due process in another way as well, said Mr. Justice Brennan:

> They were tried upon a charge of violating 'national' standards and their convictions are affirmed as if they were tried for violating 'local' standards.... The least to which petitioners are entitled is vacation of their convictions and a remand for a new trial.[36]

In the second case, *Jenkins v. Georgia,* appellant showed the film "Carnal Knowledge" in a movie theatre in Albany, Georgia. He was convicted of the crime of distributing obscene material. The Georgia statute involved here employs a *Memoirs* test, defining obscene materials as being "utterly without redeeming social value." [37]

The Court reaffirmed its position in *Hamling* that defendants convicted prior to the *Miller* decisions, "but whose convictions were on direct appeal at that time should receive any benefit available to them from those decisions." [38] They held that "Carnal Knowledge" is not obscene under the *Miller* formulation, and that the first and fourteenth amendments required reversal here.

The Court sought to clarify the scope of "community standards." *Miller,* said the Court, merely approved of statewide standards; it did not mandate their use. The Court here approved the trial court's jury instructions as to standards to be applied. The jury was instructed to apply "community standards" without specifying what "community." Juries can rely on their own community standards in making an evaluation, "and the States have considerable latitude in framing statutes under this element of the *Miller* decision." [39] Describing state options, the Court said:

> A State may choose to define an obscenity offense in terms of 'contemporary 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.*[40]

Thus, the geographical area involved in defining "community standards" may vary from municipal to national without causing the majority to object on constitutional grounds. Still, the Court decided to reverse the conviction on the ground that the film was not obscene under the *Miller* standards. The Court said that nothing in the film was "patently offensive," a requirement under *Miller. Miller* gives examples of such material: "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." [41] This is not an exclusive catalogue of obscenity, said the Court, but there was nothing in the film sufficiently similar to justify treating the film as patently offensive. Said the Court:

> [I]t would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'[42]

Once again, Mr. Justice Brennan filed a separate opinion, this time concurring with the result.[43] He reiterated his criticism of the *Miller* standards first expressed in his dissent to *Paris Adult Theatre I v. Slaton,*[44] a *Miller* companion case. Mr. Justice Brennan said the *Miller* standards fail to take the Court out of the business of defining obscenity on a case-by-case basis. Mr. Justice Brennan quoted his *Paris* dissent:

> [S]ince the status of sexually oriented materials will necessarily remain in doubt until final decision by this Court, the new approach [*Miller*] will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is

[35] *Id.* at 150 (Brennan J., dissenting).
[36] *Id.* at 152 (Brennan, J., dissenting).
[37] GA. CODE ANN. § 26-2101 (b) (1972).
[38] Jenkins v. Georgia, 418 U.S., 153, 155 (1974).
[39] *Id.* at 157.
[40] *Id.*
[41] *Id.* at 160.
[42] *Id.*
[43] *Id.* at 162 (Brennan, J. concurring).
[44] 413 U.S. 49, 73 (Brennan, J., dissenting).

> used to justify the outright suppression of any material that is asserted to fall within its terms. [*Paris Adult Theatre I v. Slaton,* 413 U.S. at 100–101].[45]

Justice Brennan noted that the Court alone could make a conclusive finding of the obscenity *vel non* of the film. He again echoed his criticism voiced a year earlier in his *Paris* dissent, saying that under the *Miller* test, material is not conclusively obscene until five members of the Court, "applying inevitably obscure standards, have pronounced it so." [46]

Quoting further from *Paris,* Mr. Justice Brennan said:

> Because of the attendant uncertainty of such a process and its inevitable institutional stress upon the judiciary, I continue to adhere to my view that, 'at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents.' *Paris Adult Theatre I v. Slaton,* 413 U.S. at 113 (Brennan, J., dissenting).[47]

Calling the Georgia obscenity statutes "constitutionally overbroad and therefore facially invalid," [48] Mr. Justice Brennan concurred with the Court's reversal of Jenkins' conviction.

It seems that, at least to some extent, Mr. Justice Brennan's words in *Paris* have come back to haunt the Court's majority. It is quite possible that *Jenkins* will be only the first in a continuing series of cases demanding of the Court continued case-by-case determinations of obscenity. Even if *Jenkins* represents an extreme case, not likely to be repeated, there is still the possibility of a chilling effect on expression caused by the public's reactions to *Miller.*

[45] Jenkins v. Georgia, 418 U.S. 163 (Brennan, J., concurring).
[46] Id. at 164–65 (Brennan, J., concurring).
[47] *Id.* at 165 (Brennan, J. concurring).
[48] *Id.*