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FIRST AMENDMENT—OBSCENITY

Marks v. United States, 430 U.S. 188 (1977).
Smith v. United States, 97 S. Ct. 1756 (1977).
Splawn v. California, 97 S. Ct. 1987 (1977).
Ward v. Illinois, 97 S. Ct. 2085 (1977).

The Supreme Court this past term decided four cases dealing with various aspects of the ability of federal and state government to punish the transport and sale of obscene materials. In *Ward v. Illinois*[1] the Court held that the Illinois obscenity statute,[2] as interpreted by the Illinois Supreme Court, satisfied the specificity requirements of *Miller v. California*[3] and, therefore, was not unconstitutionally vague. In *Splawn v. California*[4] the Court affirmed the relevance of the circumstances of sales and distribution to a prosecution for the sale of obscene material. In *Smith v. United States*[5] the Court ruled that a state legislature's decision not to prohibit the sale of obscene materials to adults did not constitute a conclusive definition of contemporary community standards in that state[6] and did not circumscribe the ability of the federal government to prosecute, in that state, a violation of the federal statute prohibiting the mailing of obscene materials.[7] In *Marks v. United States*[8] the Court held that the standards announced in *Miller v. California*[9] were not to be applied retroactively to the extent that such retroactive application is to the detriment of a defendant in a criminal case.

The Court heard these four cases in order to consider issues left unresolved in *Miller v. California* and companion cases.[10] In *Miller* the Court held that a trier of fact in an obscenity case must determine:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin , supra,* [408 U.S. 229] at 230 [(1972)], quoting *Roth v. United States, supra,* [354 U.S. 476] at 489 [(1957)]; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[11]

Miller "marked a significant departure"[12] from the previous holdings of the Court governing obscenity. Prior to *Miller,* in *Memoirs v. Massachusetts,*[13] a plurality opinion of the Court declared that "[a] book cannot be proscribed unless it is found to be *utterly* without redeeming social value."[14] The Court in *Miller* decided that the "*utterly* without redeeming social value"

[1] 97 S. Ct. 2085 (1977).
[2] ILL. REV. STAT. ch. 38, § 11-20 (1971). See note 52 *infra*.
[3] 413 U.S. 15 (1973).
[4] 97 S. Ct. 1987 (1977).
[5] 97 S. Ct. 1756 (1977).
[6] The importance of state and local community standards in obscenity cases was declared in Miller v. California, 413 U.S. 15 (1973). In *Miller* the Court held, *inter alia*, that in determining whether something is obscene the trier of fact should determine "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, [408 U.S. 229] at 230 [(1972)], quoting *Roth v. United States, supra*, [354 U.S. 476] at 489 [(1957)]." 413 U.S. at 24. The Court went on to hold that the "contemporary community standards" to be applied need not be national standards, but rather, that application of state standards was constitutionally acceptable. *Id.*
[7] 18 U.S.C. § 1461 (1970). *See* note 47 *infra*.
[8] 430 U.S. 188 (1977).
[9] 413 U.S. 15 (1973).
[10] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), (the ability of states to prohibit the distribution of hard core pornography to consenting adults); Kaplan v. California, 413 U.S. 115 (1973) (whether unillustrated books could be constitutionally banned as obscene); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973) (holding, *inter alia*, that although Stanley v. Georgia, 394 U.S. 557 (1969), created a constitutional right to possess obscene materials, there was no corresponding right to import such materials); United States v. Orito, 413 U.S. 139 (1973) (the ability of the federal government to prohibit the interstate transport of obscene materials in light of Stanley v. Georgia, 394 U.S. 557 (1969)).
[11] 413 U.S. at 24.
[12] 413 U.S. at 194.
[13] 383 U.S. 413 (1966) (plurality opinion).
[14] *Id.* at 419 (emphasis in original) (hereinafter referred to as the *Memoirs* standard).

test or *Memoirs* standard was unworkable and placed an impossible burden upon the prosecution.[15] The *Miller* Court abandoned the *Memoirs* standard and adopted a test for obscenity which included a determination of "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[16]

Miller, in addition to broadening the types of works which could be declared obscene,[17] required that obscenity laws, or definitive interpretations of those laws, define proscribed material.[18] This specificity requirement was formulated in order to provide dealers in questionably obscene material with fair notice of possible criminal prosecution.[19]

The petitioners in *Marks v. United States*[20] were charged with violation of two federal obscenity statutes.[21] The acts upon which these charges were based occurred prior to the Court's decision in *Miller*. The petitioners unsuccessfully argued in the district court[22] that the jury be instructed according to the standards of obscenity laid down in *Memoirs*.[23] The trial court, instead, applied the standards announced in *Miller,* stating that "[t]he *Miller* group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the defendants were constructively aware."[24] The United States Court of Appeals for the Sixth Circuit affirmed the decision[25] and noted that the *Memoirs* standard "had never been approved by a plurality of more than three Justices at any one time"[26] and that the material was obscene regardless of the standard used by the trial court.[27]

The Supreme Court reversed, disagreeing with the findings of both the district court and the court of appeals. The majority opinion[28] of the Court, noting the difference between *Miller* and *Memoirs,* held that a retroactive application of the broader definition of obscenity used in *Miller* would deprive the petitioners of due process. The Court observed that, due to the broad language of the federal obscenity statutes, defendants in federal obscenity cases are particularly vulnerable to shifts in judicial interpretations of the statute. In order to accord dealers in "dicey" materials fair notice the Court ruled that the due process clause[29] precluded the retroactive application of the standards announced in *Miller* to the extent that such retroactive application would impose criminal liability for conduct occurring prior to *Miller*.

The Court also rejected the contention of the court of appeals that the holding of *Memoirs* could be ignored because it had never been approved by more than a plurality of three Justices. The Court noted that, in addition to the three Justices who adopted the *Memoirs* standard,[30] three other justices concurred in the decision on broader grounds.[31] The Court ruled that the holding of the *Memoirs* Court should be seen as the "position taken by those Members who concurred on the narrowest grounds."[32] The Court held, therefore, that *Memoirs* was the law until *Miller* was decided. The Court went on to hold that the ruling of the court of appeals that the material was obscene, regardless of the standards used by

[15] 413 U.S. at 22.

[16] *Id.* at 24.

[17] 413 U.S. at 194.

[18] 413 U.S. at 27.

[19] *Id.* at 27.

[20] 413 U.S. 188.

[21] 18 U.S.C. § 1465 (1970) in relevant part provides:
Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.
18 U.S.C. § 371 (1970) in relevant part provides:
If two or more persons conspire either to commit any offense against the United States or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[22] United States v. Marks, 364 F. Supp. 1022 (E.D. Ky. 1973).

[23] See text accompanying notes 15–16 *supra*.

[24] 364 F. Supp. 1022, 1027 (E.D. Ky. 1973).

[25] 520 F.2d 913 (6th Cir. 1975).

[26] *Id.* at 919–20.

[27] *Id.* at 921.

[28] The Court's opinion was written by Justice Powell and joined by Burger, C.J., Blackmun, Rehnquist, and White, JJ. Brennan, Stewart, Marshall, and Stevens, JJ., filed separate opinions in each of the four obscenity cases decided last term, and in *Marks*, they concurred in part and dissented in part.

[29] U.S. CONST. amend. V.

[30] Warren, C. J., Brennan and Fortas, JJ.

[31] Black and Douglas, JJ., concurred on the ground that the government has no power to suppress the expression of ideas. Stewart, J., concurred on the ground that the government only has the power to suppress hard core pornography.

[32] 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

the jury, was an inadequate substitute for a determination by a properly instructed jury.[33]

In *Splawn v. California*[34] the Court affirmed the 1971 conviction[35] of the petitioner, who was charged with the sale of two reels of obscene film in violation of the California obscenity statute.[36] Petitioner raised several points in challenging his conviction. The major challenge was based on the charge instructing the jury to consider the circumstances surrounding the sale and distribution of the films in determining their obscenity *vel non*. The petitioner's challenge to the introduction of evidence surrounding the sale and distribution of the materials rested on two contentions, both of which were rejected by the Court.

The first contention was that consideration of the circumstances surrounding the sale of the materials violated the petitioner's first amendment right of free speech. The majority opinion rejected this contention, stating: "There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene."[37] The Court based this decision on its holdings in *Ginzburg v. New York*[38] and *Hamling v. United States*.[39] The Court, in both *Ginzburg* and *Hamling*, held that evidence of the circumstances surrounding sales and distribution was relevant to a determination of obscenity *vel non*.[40]

The petitioner's other claim maintained that, at the time that the petitioner committed the acts for which he was prosecuted, evidence of pandering to prurient interests was not relevant to a determination of obscenity *vel non*. The petitioner based this contention on the case of *People v. Noroff*.[41] The petitioner interpreted

[33] 430 U.S. at 196–97 n.11.

[34] 97 S. Ct. 1987 (1977).

[35] The petitioner's conviction was affirmed by the California First District Court of Appeal. The state supreme court denied review. The United States Supreme Court granted certiorari, vacated the judgment and remanded for consideration in light of *Miller v. California*. Following the remand the court of appeals again affirmed the conviction, the state supreme court denied a motion for a rehearing, and the United States Supreme Court again granted certiorari, 429 U.S. 997 (1977).

[36] CAL. PENAL CODE § 311.2 (1970) which states, in relevant part:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

[37] 97 S. Ct. at 1990.

[38] 383 U.S. 463 (1966). The Court, in *Ginzburg*, upheld the petitioner's conviction for violation of the federal obscenity statute. 18 U.S.C. §1461 (1964); see note 46 *infra*. The prosecution at the petitioner's trial assumed that the petitioner's publications, standing alone, might not be obscene. The prosecution, therefore, charged that the material in question was obscene in the context of the circumstances of production and sale. The petitioner challenged his conviction and the Court stated that: "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity." 383 U.S. at 465–66. The Court noted that: "Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." 383 U.S. at 475–76.

[39] 418 U.S. 87 (1974). In *Hamling* the Court affirmed the petitioner's conviction for violation of the federal obscenity statute. 18 U.S.C. § 1461 (1970); see note 46 *infra*. The petitioner challenged his conviction on several grounds, including whether the jury was improperly instructed to consider the manner of distribution and circumstances of production in determining whether the petitioner had mailed obscene matter. The Court held, *inter alia*, that instructions to the jury to consider the circumstances surrounding the sale and distribution of the material in question "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." 418 U.S. at 130.

[40] 383 U.S. at 470; 418 U.S. at 130.

[41] 67 Cal. 2d 791, 63 Cal. Rptr. 575, 433 P.2d 479 (1967). The defendant in *Noroff* was charged with possessing obscene matter for distribution. The trial court, rejecting the state's claim that the material was obscene on its face, ruled that the material in question fell within the constitutional protection of the first and fourteenth amendments. The prosecution, it must be noted, did not charge that the petitioner committed the offense in the context of the circumstances of sale and distribution. Rather, the prosecution recognized that the only relevant issue was the obscenity of the magazine per se. The California Supreme Court affirmed the ruling of the trial court and rejected the argument, advanced for the first time on appeal, "that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering'

Noroff as holding that evidence of the circumstances surrounding sale and distribution was not admissible in a determination of obscenity *vel non*. The petitioner argued that, under *Noroff*, evidence of pandering to prurient interests should not have been used against the petitioner and that, but for the passage of the statute which specifically permitted[42] consideration of the circumstances surrounding sale and distribution, evidence of pandering could not have been admitted at the petitioner's trial. The petitioner's argument concluded that allowing the jury to consider evidence of pandering, solely on the basis of the enactment of the California statute, amounted to an *ex post facto* enactment and, therefore, was a violation of the petitioner's constitutional rights.[43]

The Court rejected petitioner's claim and, instead, accepted the interpretation placed upon *Noroff* by the California courts. The California Court of Appeals did not read *Noroff* as dealing with the use, in a determination of obscenity *vel non*, of evidence of the circumstances surrounding sale and distribution. Rather, the California court saw *Noroff* as "'rejecting the concept of pandering non-obscene material as a separate crime'"[44] under California law. Therefore, according to the California court's interpretation of *Noroff*, evidence of pandering to prurient interests was admissible in obscenity trials both before and after the passage of the statute which explicitly stated that such evidence was admissible and application of the statute to the petitioner was not an *ex post facto* enactment.

In *Smith v. United States*[45] the Court dealt with the relationship between the obscenity laws in a particular state and the ability of the federal government to prosecute violations of federal obscenity statutes. The petitioner was convicted, in the United States District Court for the Southern District of Iowa, for violation of a federal statute prohibiting the mailing of obscene materials.[46] The United States Court of Appeals for the Eighth Circuit affirmed the petitioner's conviction and the Supreme Court granted certiorari.[47]

The petitioner challenged his conviction on several grounds. One challenge was based on the fact that, at the time petitioner committed the acts upon which his conviction was based, Iowa had no statute proscribing the sale of obscene material to adults.[48] Petitioner unsuccessfully argued that the Iowa obscenity statute set out the relevant contemporary community standards in the state of Iowa. Petitioner also maintained that the prosecution had not proved that the materials at issue offended that standard.

In a plurality opinion[49] the Court rejected

of the magazine in question." *Id.*, 63 Cal. Rptr. at 576, 433 P.2d at 480. The California Supreme Court stated that: "[F]irst, the indictment did not charge the defendants with pandering; second, the state legislature has created no such crime." *Id.*

[42] CAL. PENAL CODE § 311(a)(2) (1970) states in relevant part:

> In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social value.

[43] U.S. CONST. art. 1, § 9, cl. 3.

[44] 97 S. Ct. at 1991 (quoting Petitioner's Brief, Appendix at ix, citing California Court of Appeals decision).

[45] 97 S. Ct. 1756 (1977).

[46] The statute states, in relevant part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [i]s declared to be unmailable matter and shall not be conveyed in the mails or delivered from any post office. . . . Whoever knowingly uses the mails for the mailing . . . of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1461 (1970).

[47] 426 U.S. 946 (1976).

[48] The petitioner was convicted for conduct which occurred between February and October, 1974. The Iowa statutes had, for many years prior to 1973, prohibited the mailing, sale, and distribution of any "obscene, lewd, indecent, lascivious or filthy" material. IOWA CODE §§ 725.5, 725.6 (1973). However, in light of *Miller v. California*, the Iowa Supreme Court ruled that a related Iowa obscenity statute was overbroad and vague. State v. Wendelstedt, 213 N.W.2d 652 (Ia. 1973). The United States Supreme Court also assumed that *Wendelstedt* invalidated §§ 725.5 and 725.6. The Iowa legislature, in 1974, repealed the existing obscenity statutes and enacted a specific statute which only proscribed the sale of obscene material to minors. IOWA CODE § 725.2 (1974). In 1976 the Iowa legislature enacted statutes, to take effect in 1978, that, once again, proscribe the sale of obscene materials to both adults and minors.

[49] The opinion was written by Blackmun, J., and joined by Burger, C.J., and Rehnquist and White,

these contentions and held that the ability of a state to proscribe or allow the dissemination of sexually explicit material has no conclusive effect upon the ability of the federal government to prohibit the mailing of such materials, even though such mailing was intrastate. The Court noted that, although local laws dealing with obscenity were relevant evidence of community standards, they were not conclusive of such standards nor binding upon the federal government.

The Court asserted several reasons for its holding that state laws are not conclusive evidence of the community standards. The Court noted that state obscenity laws may be affected by a possible desire to conserve prosecutorial resources or by a reliance on federal prosecution of such materials. The Court concluded that for these reasons Iowa's obscenity laws did not necessarily aid in determining the community standards concerning such materials. The Court also noted that the petitioner was prosecuted under a federal statute and that the question of whether the petitioner violated the statute was to be decided during the petitioner's trial in the federal courts and could not be determined by acts of the Iowa legislature.

Another challenge to petitioner's conviction was based on the *voir dire* questions submitted to the jury. The petitioner submitted to the trial court six proposed questions for *voir dire*. Five of these questions dealt with the jurors' understanding and knowledge of contemporary community standards in the Southern District of Iowa toward the depiction of sex and nudity. The trial court declined to ask these five questions.

The Court held that the trial court properly declined to ask petitioner's questions, deciding that "[t]he particular inquiries requested by petitioner would not have elicited useful information about the jurors' qualifications to apply contemporary community standards in an objective way."[50] The Court went on to view the question of community standards to be similar to the question of "reasonableness." Although, the Court conceded, specific questions about a juror's participation and involvement in the community might be relevant, general questions of a juror's knowledge of contemporary community standards had no bearing on a juror's ability to hear petitioner's case.

The relevance of state law to petitioner's case and the issue of juror knowledge of community standards coalesce into a question of the nature of the evidence to be presented in obscenity cases. The prosecution, at petitioner's trial, presented no evidence of what the relevant community standards were. In order to meet the burden of proof laid out in *Miller v. California* the prosecution merely presented the materials covered by the indictment. Petitioner, on the other hand, attempted to gauge the jurors' knowledge of community standards in Iowa and also attempted to prove that the petitioner's materials did not offend the community standards. Petitioner unsuccessfully presented the jury with the Iowa laws dealing with sexually explicit materials and with examples of the sexually explicit materials which were available for purchase in Iowa. The Court, however, held that the jury was free to determine the relevant community standards in light of their own understanding of contemporary community standards regardless of the relevant state statute.

Ward v. Illinois[51] dealt with the exactitude which the Court requires of state obscenity statutes. The petitioner sold two sado-masochistic publications and was convicted, in 1971, for violation of the Illinois obscenity statute.[52] The petitioner's appeal was not heard until after the Supreme Court's decision in *Miller v. California*.[53] Despite the changes made by the *Miller* decision in the law governing obscenity prosecutions,[54] the Illinois Appellate Court for the Third District affirmed the petitioner's con-

JJ.. Powell, J., concurred in a separate opinion. Brennan, J., filed a dissent and was joined by Stewart and Marshall, JJ.. Stevens, J., filed a separate dissenting opinion.

[50] 97 S. Ct. at 1767.

[51] 97 S. Ct. 2085 (1977).

[52] The statute, in relevant part, states:

> A person commits obscenity when, with knowledge of the nature of content thereof . . . he: (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; . . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

ILL. REV. STAT. ch. 38, § 11-20 (1971).

[53] 413 U.S. 15 (1973).

[54] See text accompanying notes 74-77 *infra*.

viction.[55] The Illinois Supreme Court affirmed,[56] rejecting the petitioner's challenges to his conviction, one of which was that the Illinois obscenity statute did not meet the specificity requirements of *Miller*.[57] The Illinois Supreme Court held that its decision in *People v. Ridens*[58] interpreted the Illinois obscenity statute so that the statute met such specificity requirements.

The United States Supreme Court affirmed petitioner's conviction[59] despite various contentions made by the petitioner.[60] One of these contentions was that the Illinois statute failed to meet the specificity requirement of *Miller*. Absent such compliance the statute was unconstitutionally vague[61] because it failed to give the petitioner notice that he was dealing in proscribed materials. The Court rejected this claim, noting that, regardless of whether the Illinois statute met the requirements of *Miller*, the Illinois courts had given petitioner adequate notice that he was dealing in proscribed materials through their decisions in various obscenity cases.[62]

The petitioner also claimed that the materials upon which his conviction was based could not be constitutionally proscribed. Petitioner's argument was that the *Miller* decision's example of an adequately specific obscenity statute[63] was a complete description of those materials that could be constitutionally proscribed, that sado-masochistic materials were not included in *Miller*'s example of an adequately specific statute, and that, therefore, sado-masochistic materials could not be constitutionally proscribed. The Court rejected this claim, maintaining that *Miller*'s model statute was merely an example of the type of material which an obscenity statute could proscribe and the manner in which such material could be proscribed. The Court stated that the *Miller* example of an adequately specific statute was not meant to be an exhaustive list of all materials which could be proscribed and that the *Miller* decision had not intended to extend constitutional protection to flagellatory materials.[64]

The petitioner also contended that the Illinois statute did not meet the specificity requirement of *Miller*[65] and, consequently, was unconstitutionally overbroad.[66] The Illinois Supreme

[55] People v. Ward, 25 Ill. App. 3d 1045 (3d Dist. 1975).

[56] 63 Ill. 2d 437 (1976).

[57] 413 U.S. 15 (1973). *Miller* held, *inter alia*, that in order for obscene material to be proscribed it must depict conduct which is specifically defined in the applicable state law. The Court went on to give an example of a sufficiently specific obscenity statute, stating that:

> It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> (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.

Id. at 25.

[58] 59 Ill. 2d 362 (1974). The history of *People v. Ridens* is complex. First, the defendants were convicted of violation of the Illinois obscenity statute. ILL. REV. STAT. ch. 38, § 11-20 (1969). (See note 52 *supra*.) Their convictions were then affirmed by the Illinois Supreme Court. People v. Ridens, 51 Ill. 2d 410 (1972). The United States Supreme Court vacated and remanded the cause for further consideration in light of *Miller v. California*. 413 U.S. 912 (1973). The Illinois Supreme Court, upon further consideration, held that the Illinois obscenity statute was not unconstitutionally vague, was not unconstitutionally overbroad, and was in keeping with the United States Supreme Court's ruling in *Miller*. 59 Ill. 2d 362 (1974). The Illinois Supreme Court, therefore, affirmed the defendants' conviction. The petitioner in *Ward v. Illinois* challenged the finding of the Illinois Supreme Court that the Illinois obscenity statute was in keeping with the decision in *Miller*.

[59] The Court's opinion was written by White, J., and joined by Burger, C.J., Rehnquist, Powell, and Blackmun, JJ..

[60] It must be noted that the petitioner challenged his conviction on two levels. The petitioner maintained that the Illinois statute was not in keeping with the United States Supreme Court's decision in *Miller* and that the Illinois statute violated provisions of the United States Constitution. Therefore, the Court's holding in *Ward* is formulated both in terms of the constitution (the petitioner's vagueness and overbreadth arguments are constitutional in nature) and in terms of the Court's decision in *Miller* (the petitioner's specificity argument was based on a claim that the Illinois statute failed to comply with the requirements of the *Miller* decision).

[61] When a statute is unconstitutionally vague it violates the due process clause of the fourteenth amendment.

[62] People v. Sikora, 32 Ill. 2d 260 (1965); Blue Island v. DeVilbiss, 41 Ill. 2d 135 (1969); Chicago v. Geraci, 46 Ill. 2d 576 (1970).

[63] See note 57 *supra*.

[64] 97 S. Ct. at 2089.

[65] See note 57 *supra*.

[66] The overbreadth argument differs from the vagueness argument in that the overbreadth doctrine

Court, in *People v. Ridens*,[67] held that the Illinois obscenity statute met the specificity requirements of *Miller* and was constitutional. The Illinois decision in *Ridens*, however, left unclear whether the Illinois Supreme Court merely interpreted the Illinois statute, as written, as being in keeping with the specificity requirements of *Miller* or whether the Illinois court adopted, as an exclusive limitation on the Illinois statute, the example given in *Miller*.

The United States Supreme Court held that the Illinois court adopted, as a limitation upon the Illinois statute, *Miller*'s example of an adequately specific statute. The Court went on to hold that the Illinois court's adoption of the example set out in *Miller* gave the statute the specificity required by *Miller* and, therefore, the statute was not unconstitutionally overbroad.[68]

The Court also held that the Illinois statute was not unconstitutionally overbroad despite the absence of an exhaustive list of the sexual conduct the depiction of which may be held obscene. The Court stated that the Illinois statute was not overbroad if the Illinois courts recognized "the limitations of the *kinds* of sexual conduct which may not be depicted or represented under the obscenity laws."[69] The Court noted that recognition of the limitations upon the kind of materials which may be proscribed was deemed adequate in the Court's decisions regarding the federal obscenity statute.[70]

The Court's efforts in all of the obscenity cases handed down last term can be seen as an attempt to build a unified, coherent body of law dealing with the proscription of sexually explicit materials. The decisions are all attempts to clarify the *Miller* decision, the cornerstone of recent federal obscenity law. Yet, despite the Court's efforts, the obscenity rulings have met severe criticisms from within the Court. These criticisms go to the general constitutional issues as well as the facts of the specific cases.

Justices Brennan, Stewart, Marshall and Stevens, in each of the obscenity decisions handed down, voiced basic opposition to the current state of the laws dealing with obscene materials. These four Justices issued separate opinions in each of the obscenity decisions. These opinions expressed deep misgivings about the constitutionality of current obscenity laws.

Justice Stevens' basic stance toward current obscenity laws was voiced in his opinion in *Marks*,[71] in which he maintained that the criminal prosecution in question was constitutionally impermissible. The unconstitutionality of such prosecution is grounded, according to Justice Stevens, in the fact that first amendment values are implicated in the proscription of obscene materials, in the inconsistency of punishing a defendant for providing a party with materials which the party has a constitutional right to possess,[72] and in the fact that evenhanded en-

"involves scrutiny to determine whether a statute is too sweeping in coverage—and if so, invalid on its face. . . . The doctrine focuses directly on the need for precision in drafting to avoid conflict with the first amendment rights." Note: *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) (footnotes omitted). The vagueness doctrine, on the other hand, deals with whether a statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Conally v. General Construction Co., 269 U.S. 385, 391 (1926).

[67] 59 Ill. 2d 362 (1974).

[68] 97 S. Ct. at 2090.

[69] *Id.* at 2091 (emphasis in original).

[70] The Court interpreted the federal obscenity statutes in light of *Miller* in Hamling v. United States, 418 U.S. 87 (1974). The Court held, *inter alia*, that the broad language of the federal obscenity statutes was limited by the Court's decision in *Miller*, that the federal obscenity statute need not be interpreted as requiring proof of uniform national standards, and that defendants who were convicted prior to the *Miller* decision but whose cases were on direct review at the time *Miller* was decided were entitled to any benefit of the constitutional principles enunciated by *Miller*.

[71] It is significant to note the position taken by Justice Stevens. This was his first opportunity to fully express his views on the current state of the law governing obscenity prosecutions. Justice Stevens' opinions last term place him firmly in opposition to the actions taken by the Court in this area. Therefore, despite Justice Douglas' retirement, the entire current framework for deciding obscenity cases is maintained by the narrowest of margins. A shift in the Court's personnel could lead to a total abandonment of *Miller* and its progeny. The *Miller* decision itself was the product of such a shift: four of the five justices who joined the *Miller* decision (Burger, C.J., Powell, Rehnquist, and Blackmun, JJ.) were not on the Court when *Memoirs* was decided.

[72] The Court, in Stanley v. Georgia, 394 U.S. 557 (1969), held that the possession of obscene material for personal benefit could not be constitutionally proscribed.

forcement of current obscenity laws is impossible because of the intolerably vague nature of the current obscenity laws.

The most fundamental type of disagreement with the Court's obscenity decisions was also voiced by Justices Brennan, Stewart and Marshall. The position taken by Justices Brennan and Stewart is consistent with their views in *Miller*. They maintain that "at least in the absence of distribution to juveniles or obstructive 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."[73] In keeping with the above position Justices Stewart and Brennan maintained, in all of the obscenity cases decided last term, that each of the challenged obscenity statutes was constitutionally overbroad. This conclusion was based on the fact that each of the challenged statutes proscribed the sale or distribution of obscene materials to *all* persons, including consenting adults. According to Justices Brennan and Stewart, such broad proscription goes beyond the constitutional ability of state and federal government to deal with such materials.

Justice Marshall voiced similar misgivings about the constitutionality of current obscenity statutes. Justice Marshall, who joined Justices Brennan and Stewart in *Miller* and *Slaton*, also joined their dissenting opinions in *Marks*, *Smith* and *Splawn*. These three members of the Court, therefore, have consistently maintained that the first and fourteenth amendments prohibit the state and federal government from proscribing the sale and distribution of sexually explicit materials to consenting adults.

The positions taken by Justices Stevens, Marshall, Brennan and Stewart are fundamental criticisms of the Court's actions last Term. Their criticisms transcend any specific holding of the Court and are constitutionally well founded. The Court, in *Miller*, appeared to inject some precision into the law governing obscenity prosecutions. This Term's obscenity decisions, however, seem to renege on the promise, held out by *Miller*, that "these specific prerequisites will provide fair notice to a dealer in such material that his public and commercial activities may bring prosecution."[74]

Last Term's obscenity decisions must be viewed in light of the three part test enunciated in *Miller*.[75] This test contained both good and bad news for dealers in sexually explicit materials. The bad news consisted of the fact that the "serious literary, artistic, political, or scientific value" part of the test encompassed a broader range of materials than the *Memoirs* test of "utterly without redeeming social value."[76] The good news consisted of the Court's assurances that obscenity statutes were going to have to be specific[77] and the possibility that a body of law would develop which would permit identification of local community standards and make dealers in sexually explicit materials aware of whether or not they will incur criminal liability.

The Court's decisions in *Smith* and *Ward*, however, have withdrawn the good news offered by *Miller*. The decision in *Smith* is such that a defendant in an obscenity case is not guaranteed a method of determining the jurors' understanding of local community standards. Furthermore, a defendant has no guarantee that uncontested evidence about relevant community standards will have any impact on the jury's decision. The prosecution in an obscenity case, on the other hand, is not required to introduce any evidence of what the relevant local community standards are or whether the defendant's actions have violated those standards. The prosecutor merely has to present the materials in question and allow the jurors, using only their personal views, to reach their conclusions.

The Court, in affirming the petitioner's conviction in *Smith*, has granted jurors in obscenity cases a great deal of freedom to apply their subjective standards to the materials in question. *Smith* allows jurors to bring personal prejudices into the jury box, gives the defendant no way to detect these prejudices, allows these prejudices to serve as the basis for the jurors' rejection of evidence presented by the defendant and permits jurors to base a criminal conviction on their decision to allow prejudices to outweigh uncontested evidence presented

[73] 413 U.S. 49, 113 (Brennan, Stewart, and Marshall, JJ., dissenting).

[74] 413 U.S. 15, 27 (1973).

[75] See text accompanying note 11 *supra*.

[76] 430 U.S. at 191.

[77] 413 U.S. at 24.

by the defendant. Under *Smith*, therefore, there is no hope that predictable and regular sets of community standards will develop. Instead, obscenity decisions will be based on the varying subjective opinions, however formulated, of the jurors.

Ward also cut back on the promise held out by *Miller* by damaging any hopes for specificity in obscenity statutes. *Ward* held that statutes need not exhaustively list the acts or conduct which may not be depicted. Instead, the Court held that the Illinois obscenity statute was not overbroad if "the Illinois court recognizes the limitations on the *kinds* of sexual conduct which may not be represented or depicted under the obscenity laws."[78]

The Court, furthermore, reasoned that previous Illinois obscenity cases adequately warned the petitioner that he was dealing in proscribed materials. Under such reasoning, once an initial set of dealers in sexually explicit materials is prosecuted, all dealers in such materials are deemed to be adequately warned. As pointed out in Justice Stevens' dissent, however, such reasoning does away with the need for states to adhere to the specificity requirement of *Miller*. Also, state legislators are no longer required to draw up detailed obscenity statutes because, under *Ward*, obscenity statutes are not required to exhaustively list the proscribed materials. As noted by Justice Stevens, *Ward* allows individuals to be prosecuted although the materials in question are not specifically described in the relevant obscenity statute.[79]

There are, in addition to the Court's cutting back on the promises held out by *Miller*, other problems with last term's obscenity decisions. One such problem is that *Smith* increases the possibility that small communities will impose their values and standards upon the nation's media centers and that the right of free speech will vary from community to community. The increased possibility of local control over the national media and of varying first amendment standards stems from the Court's willingness to allow obscenity convictions to be based on the findings of a jury using standards drawn from a narrow segment of the population and the Court's willingness to allow jurors to reach their conclusions on the basis of their personal experiences.

[78] 97 S. Ct. at 2091.

[79] *Id.* at 2094 (Stevens, J., dissenting).

The narrowing of the geographical base from which standards are drawn was justified by the Court in *Miller*.[80] *Miller* rejected the contention that questionably obscene materials should be measured against a national standard. The Court stated that a standard which insured that the material in question be "judged by its impact on an average person, rather than a particularly susceptible or sensitive person"[81] was constitutionally adequate. This narrowing of the geographical base was further discussed in *Jenkins v. Georgia*,[82] which held that although *Miller* approved the use of statewide community standards, it did not mandate their use. Instead, according to *Jenkins*, states have great freedom in defining the community from which contemporary community standards are drawn. The combination of basing federal convictions on the narrow perspective of a small segment of the population and granting jurors great freedom to apply their personal standards raises serious free speech and free press questions.

The ability of a narrow and unrepresentative group to exercise control over the right to free speech is, however, not an absolute one. The limits to this ability consist of the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary"[83] and the fact that only "hard core" pornography may be constitutionally proscribed.[84] However, the lack of a clear definition of hard core pornography[85] and the diffi-

[80] *Miller* held, *inter alia*, that the trier of fact in an obscenity case may measure the issues of prurient appeal and patent offensiveness by the standard that prevails in the local community and need not employ a national standard.

[81] 413 U.S. at 33.

[82] 418 U.S. 153 (1974).

[83] Miller v. California, 413 U.S. at 25.

[84] *Id.* at 27.

[85] The difficulty of defining "hard core" pornography is illustrated by the problems which Justice Stewart met in attempting to define those materials which should be categorized as "hard core" pornography. Justice Stewart's attempt ended in conclusion that:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring). Justice Stewart's "I know it when I see it" test has been the subject of much commentary.

culties involved in awaiting appellate reversal of jury decisions are such that even these restraints upon the discretion of a local jury is of limited benefit to dealers in sexually explicit materials.

Therefore, the threat of narrow-minded opinions controlling the national media and, consequently, of a first amendment standard which varies from community to community is a real one. Although this possibility appears constitutionally untenable, the Court is willing to accept it. The Court, however, does not view its decisions in this light. Instead, the Court defended its decision in *Miller* with the contention that:

> Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or what is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation. . . .[86]

Justice Stevens' dissent in *Smith* points out the difficulties he has with the Court's current framework for dealing with obscenity laws. Justice Stevens maintains that local community standards toward obscenity are as difficult to administer as were the national standards which the *Miller* Court declared to be unworkable. He notes that local or state standards are as unascertainable and diverse as are national standards and, furthermore, are more vulnerable to subjective opinions, manipulation and variation than a national standard would be. He feels that the problem is compounded by the subjective nature of the decisions which a jury in an obscenity case must reach.

Justice Stevens concludes that the problems inherent in the criminal proscription of sexually explicit material are such that the control of such materials should be handled through civil regulations. He notes that the decisions in cases such as *Young v. American Mini Theatres, Inc.*[87] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[88] reject the premise that constitutionally protected speech is an all or nothing proposition. He goes on to state that the concept of civil regulation, which has been used to regulate the free expression of those using sound trucks[89] and issuing securities prospectuses,[90] should be used to regulate the offensive aspects of the distribution of obscene materials. However, Justice Stevens feels that the government cannot totally suppress such materials.

The Court's decision in *Splawn* will not serve to create new confusion because *Splawn* was based on the interpretation of a single California case[91] and has no further implications. *Splawn*, however, will do nothing to *clarify* questions about the effect that the circumstances surrounding the sale and distribution have upon a criminal prosecution for violation of obscenity laws. The Court, in relying on *Ginzburg v. United States*[92] and *Hamling v. United States*,[93] failed to expound on the *extent* to which such circumstances may affect a finding of obscenity *vel non*. *Splawn*, on the whole, is no more than "a logical extension of recent developments in this area of the law"[94] and is, therefore, unenlightening.

See, e.g., Robert L. Anderson, *Free Speech and Obscenity: A Search For Constitutional Procedures and Standards*, 12 U.C.L.A. L. REV. 532, 545-46 (1965); Robert Krueger, *Fair Comment: What's All This . . . About Pornography?*, 40 L.A.B. BULL. 505, 511-13 (1965); Manuel L. Port, *Standards of Judging Obscenity—Who? What? Where?*, 46 CHI. B. REC. 405 (1965); Notes and Comments, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1375-76 (1966).

[86] 413 U.S. at 30.

[87] 427 U.S. 50 (1976). The Court, in *Virginia Pharmacy Board* held, *inter alia*, that Virginia's statutory bans on advertising prescription drug prices violated the first and fourteenth amendments. The Court held that "commercial speech" was not wholly outside the protection of the first and fourteenth amendments and that the Virginia statutes in question exceeded the state's power to control pharmacists' advertisements.

[88] 425 U.S. 748 (1976). In *Young* the Court upheld the validity of a Detroit zoning ordinance which regulated the location of "adult entertainment" establishments. The Court held that the regulations in question did not violate the first amendment or the equal protection clause of the fourteenth amendment.

[89] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

[90] *See, e.g.*, S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180 (1963).

[91] People v. Noroff, 67 Cal. 2d 791, 63 Cal. Rptr. 575, 433 P.2d 479 (1967).

[92] 383 U.S. 463 (1966).

[93] 418 U.S. 87 (1974).

[94] 97 S. Ct. 1756, 1769 (1977) (Stevens, J., dissenting). Although Justice Stevens' comment was made in reference to the Court's decision in *Smith*, it is equally applicable to the Court's decision in *Splawn*.

Marks can also be viewed as having no far-reaching effects. The holding in *Marks* represents no new or controversial position. To the extent that one accepts the holdings of the Court in *Miller* and *Hamling*,[95] one can accept the holding in *Marks*. However, to those who feel that the current obscenity laws violate the first or fourteenth amendments, *Marks* is a case which maintains the unconstitutional doctrines of *Miller* and *Hamling*. This assertion is supported by reading the separate opinions of Justices Brennan, Stewart, Marshall and Stevens in *Marks*. These Justices agreed with the specific holding of the Court despite their disagreement with the majority on the constitutionality of the current obscenity laws.

Justice Stevens' dissent in *Ward* stated that the Court's decision in that case undermined *Miller* itself and, "undoubtedly, hastens its ultimate downfall."[96] This contention was based on the belief that *Ward* marked an abandonment of the promise, held out by *Miller*, of a principled effort to respond to the argument that the inherent vagueness of the concept of obscenity makes criminal prosecutions for violation of obscenity statutes constitutionally defective.[97]

It is difficult to disagree with Justice Stevens' conclusions. Although the holding of *Roth v. United States*,[98] that pornography is not constitutionally protected,[99] retains the support of a majority of the Court and although the Court has restricted obscenity prosecutions to "hard core" pornography, serious due process and free speech questions remain unanswered, with no solutions in sight. Many of these problems stem from the "inherent vagueness of the concept of obscenity."[100] Although *Miller* assured specificity in obscenity statutes and held out the hope of predictability in obscenity prosecutions, last term's obscenity decisions indicate that predictability and specificity are as far away, if not further away, than they were when *Miller* was decided.

It is difficult, therefore, not to conclude that these obscenity decisions demonstrate the inability of the Court, as currently constituted, to establish a principled framework for the proscription of sexually explicit materials. Furthermore, it appears questionable whether the Court will ever be able to set standards for the criminal punishment of those dealing in sexually explicit materials which will satisfy more than a slim majority of the members of the Court.

[95] See notes 38–39 *supra*.
[96] 97 S. Ct. 2094 (Stevens, J., dissenting).
[97] See text accompanying notes 74–79 *supra*.
[98] 354 U.S. 476 (1957).
[99] *Id.* at 485.
[100] 97 S. Ct. 2085, 2094 (1977) (Stevens, J., dissenting).