Obscenity Law

Fundamental Issue: Whether, and to what extent, obscenity is constitutionally protected speech.

While the Supreme Court has argued that obscenity is not constitutionally protected, it has had serious problems in defining obscenity and distinguishing clearly between protected and unprotected speech. The Court has faced problems regarding (1) fair notice, (2) chilling protected speech, (3) local versus community standards; (4) institutional stress.

A few of the major court cases include:

1. Roth v. United States (1957) in which the Court ruled that obscene material was not entitled to First Amendment protections. However, Justice William Brennan, writing for the majority, noted that material that has even a modicum of redeeming social value is protected speech:

   All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

   "However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." The standard which the Court thereupon adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court defined material appealing to prurient interest as

   ... material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines prurient, in pertinent part, as follows: "... Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." ... "a shameful or morbid interest in nudity, sex, or excretion."

2. Paris Adult Theatre I v. Slaton (1973) in which the Court ruled that exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure
to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean "free will," that curbs governmental efforts to suppress pornography.

Notably, Justice Brennan dissented, disavowing the Court’s approach to obscenity, which he had earlier defined: “I am convinced that the approach initiated 16 years ago in Roth v. United States, 354 U.S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.”

3. Miller v. California (1973) in which the Court reexamined and discarded the obscenity standard set by Justice Brennan in the Roth case and established a new definition of obscenity, which remains the current standard. Writing for the majority, Chief Justice Warren Burger laid out the new, three-part test:

The basic guidelines for the trier of fact must be: (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court in Miller reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment; its idea of the content of "hard core" pornography was revealed in its example of the types of conduct that could not be portrayed: "(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."

In a later case, however, the Court clarified that local community standards cannot be dictated by such state laws. Juries retain discretion in determining what appeals to the prurient interest and what is patently offensive; state statutes can serve as "evidence of the mores of the community" for the jury to consider.

4. Interestingly, Stanley v. Georgia (1969) complicates matters by ruling that a state cannot prohibit citizens from possessing obscene material for personal use. Stanley v. Georgia was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. Unanimously, the Court reversed, holding that the mere private
possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Despite the unqualified assertion in Roth that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials." Roth and the cases following that decision are not impaired by today's decision," the Court insisted, but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of Roth. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.

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