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An Obscenity Law for Indiana

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I.

Miller v. California[1] did much to dispel the utter confusion which has enveloped obscenity cases for many years. It held as follows.

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find 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. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts, supra, 383 U.S., at 419. . . .[2]

The Court likewise held:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual members.[3]

And it added the following footnote.

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, supra, 354 U.S. at 492, n. 30, . . . "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. . . ."[4]

Finally, the Court held:

> The adversary system, with lay jurors as the usual ultimate fact-finders, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

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> . . . The jury . . . was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency" it was to apply "contemporary community standards of the State of California."[5]
>
> . . .
>
> We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards were constitutional errors.[6]
>
> . . .
>
> . . . [T]he primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive one . . . . We hold the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.[7]

That statement is noteworthy--"constitutionally adequate." The Court had previously held that

> To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.[8]

It now holds that to require the jury to evaluate the materials with reference to a state-wide standard is "constitutionally adequate." It does not hold that state-wide standards must be used, only that they may be used and that a mythical national standard may not.

But there are many communities within a State. "The adversary system with lay jurors as the usual ultimate fact-finders, has historically permitted the triers of fact to draw on the standards of <u>their</u> community, guided always by limiting instructions on the law." (Emphasis supplied)[9] <u>Their</u> community, as in the case of other criminal proceedings, is the <u>county</u> in which trial is held--the forum county. "In short, the only viable standard is the standard of the community of the <u>time</u> and <u>place</u>; that is to say, the standard of the jury, for, in our jurisprudential system, the jury <u>is</u> the community."[10]

It follows that the same book or motion picture may be

held obscene in one county, not obscene in another. Why not? As suggested above, the morals and mores of its inhabitants may and do vary within a State, especially between a rural and a metropolitan area. The very same difference of attitude and outlook which may result in holding materials obscene in this county and not in that, influences the result in murder and other criminal cases and always has. Yet nobody seems to think that violates the Constitution. On what grounds, then, could it be held that there is a constitutional violation in the single instance of obscenity cases?[11]

The very same case in the very same county may result in diametrically opposed verdicts on alternate days. That is not very likely to happen, but it is an ever-present possibility. And so, by way of a corrective, judges are allowed to overrule plainly wrong verdicts against criminal defendants. The chance that a wrong verdict will free a defendant who ought not be freed is a price we have always been willing to pay for the jury system.[12]

The short of it is that there is no ground for making a special case of obscenity and granting a preferred status to those charged with that offense. They are entitled to the same due process as defendants charged with other kinds of criminal misconduct--the same and no more. And they receive that when their guilt is passed on by a jury under proper instructions, subject only to the general supervisory control over verdicts which judges have traditionally exercised.[13] What are proper instructions? Miller v. California[14] has answered that. To be sure, it upheld a state-wide test but, at the same time, indicated that a county test would be approved--

> The adversary system . . . has historically permitted triers of fact to draw on the standards of <u>their</u> community . . . . (emphasis supplied)[15]

And their community is the <u>forum county</u>, the county in which trial is held.

II.

Indiana has two overlapping statutes relating to obscene matter, namely, I.C. 35-30-10-1, I.C. 35-30-10-3, and I.C. 35-30-10-2; and I.C. 35-30-10.5. Neither is consistent with Miller v. California[16]. Both, therefore, are unconstitutional. It is submitted that the Indiana statutes here enumerated should be repealed, and the California statute, as construed and modified by Miller, enacted to replace them. If this proposal is adopted, the Indiana statute would read as follows.

Public Law No.

An Act to amend I.C. 1971, 35-30 by adding a new chapter defining and forbidding obscene matter and certain acts pertaining thereto, and imposing penalties.

Be it be enacted by the General Assembly of the State of Indiana:

Section 1. I.C. 1971, 35-30 is amended by adding a new chapter to be numbered 10.6 and to read as follows:

Sec. 1. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards of the forum county, i.e., the county in which a person is prosecuted for an offense under this chapter, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor and describes such matter in a patently offensive way; and is matter which, taken as a whole, lacks serious literary, artistic, political or scientific value.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups,

in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that 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.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

Sec. 2. Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly sends or causes to be sent, 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.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

Sec. 3. Employment of minor to perform prohibited acts

Every person who, with knowledge that a person is a minor, or who, while in possession of such facts that he should reasonably know that such person is a minor, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 2, is guilty of a misdemeanor.

Sec. 4. Advertising or promoting sale or distribution; solicitation

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

Sec. 5. Singing or speaking obscene song, ballad, etc., in public place

Every person who knowingly sings or speaks any obscene song, ballad, or other words, in any public place is guilty of a misdemeanor.

Sec. 6. Requiring receipt of obscene matter as condition to sale or delivery of papers, magazines, books, etc.; denying or threatening to deny franchise

Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.

Sec. 7. Defense

It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

Sec. 8. Punishment

(a) Every person who violates Section 2 or 4 is punishable by

fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, a violation of Section 2 or 4 is punishable as a felony.

(b) Every person who violates Section 3 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of Section 3, he is punishable by imprisonment in the state prison not exceeding five years.

(c) Every person who violates Section 6 is punishable by fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been twice convicted of a violation of this chapter, a violation of Section 6 is punishable as a felony.

Sec. 9. Destruction of obscene material upon conviction

Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the prosecuting attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

FOOTNOTES

1. 413 U.S. 15 (1973).

2. Id. at 24.

3. Id. at 26.

4. Id.

5. Id. at 30-31.

6. Id. at 31.

7. Id. at 33-34.

8. Id. at 30.

9. Id.

10. O'Meara and Shaffer, Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Lawyer 1, 9 (1964).

11. Id. at 11.

12. Id.

13. Id.

14. Note 1, supra.

15. Note 8, supra.

16. Note 1, supra.