Freedom to Read Foundation News

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R. Kathleen Molz, President Judith F. Krug, Executive Director

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Highlights of Annual Meeting

In a report prepared for the Council of the American Library Association, gathered in Detroit for the ALA's 1977 Annual Conference, retiring FTRF President Richard L. Darling presented an account of the business conducted by the Foundation Board of Trustees at its regularly scheduled summer meeting.

The Board of Trustees of the Freedom to Read Foundation met here in Detroit on Wednesday, June 15, to review the present status of the various cases in which we have been involved, and to discuss further action. Today's report relates to several such cases and to one new one.

New Step in California

In my last several reports I told the Council that we were waiting, in the case of *Moore* v. *Younger,* for an opinion requested from the California Attorney General by the State Librarian, affirming that he construed the Superior Court decision in a manner that exempted librarians from criminal liability under the California "harmful matter" statute. A favorable opinion would have meant that the case was finished. An unfavorable one would force us to return to the federal court, where we began in 1972.

After months of delay, Attorney General Younger finally responded. He reaffirmed his original opinion given in 1972—the court decisions to the contrary notwithstanding—that libraries, librarians, and library employees are *not* exempt from prosecution under the "harmful matter" statute.

We have exhausted our alternatives in the California State courts. Our only hope now of eventual success in *Moore* v. *Younger* is to return to the federal court which had directed us to pursue relief in the state courts. The road ahead may be as long as that we have already travelled, though we hope not. The research is done, however, and the briefs with which we were successful in the state courts will only need to be updated. A favorable action in federal court will have more widespread implications, in any case. On Wednesday, the Board of Trustees directed us to return to federal court and carry the case as far as we need to go.

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High Court:

'Community Standards' Cannot Be Defined

In a widely expected but nonetheless dismaying ruling, the U.S. Supreme Court on May 23 upheld the federal conviction of Iowan Jerry Lee Smith and declared that state obscenity law cannot define "local community standards." Smith's appeal was supported by the Freedom to Read Foundation.

Smith, who was indicted in a U.S. District Court in Iowa for mailing obscene materials in violation of 18 USC 1461 (a Comstock law), sought without success to question the jury panel on voir dire *on their knowledge of "contemporary community standards" in their federal district with regard to the depiction of sex and nudity.*

The case proceeded to trial and at the close of the federal prosecutor's case, Smith's attorney unsuccessfully moved for a directed verdict of acquittal on the grounds that the Iowa obscenity statute in effect at the time of Smith's conduct, which proscribed only the dissemination of so-called obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials had offended that standard.

Upon his conviction, Smith appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed his conviction on the grounds that the questions proposed during voir dire *were impermissible since they concerned ultimate questions of guilt or innocence rather than the jurors' qualifications, and that community standards were properly defined, not by the state law, but rather by the jurors' "inborn and often undefinable" sense of those standards.*

Justice Blackmun delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell, and Rehnquist joined. Substantive portions of the opinion are reprinted here (with footnotes and some citations omitted).

In his summary of the proceedings below, Justice Blackmun emphasized that "what [the] petitioner did clearly was not a violation of state law at the time he did

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Highlights *(from p. 1)*

By now you may know from press reports that the U.S. Supreme Court, by a five-to-four vote, upheld the conviction of Iowan Jerry Lee Smith in *Smith* v. *United States*. We entered this case at the appeals court level after Smith had been convicted in U.S. District Court in Iowa for mailing allegedly obscene materials through the U.S. postal service within Iowa. Since Iowa had repealed its obscenity law as far as it related to adults, the *Smith* case seemed to provide a vehicle for seeking clarification of the community standard rules. Carrying the appeal to the U.S. Supreme Court, we argued that the District Court which convicted Smith should have been directed to apply the community standard established by the Iowa legislature when it decriminalized obscenity.

The Supreme Court, in upholding Smith's conviction, ruled that the jurors' "own knowledge of the views of the average person in the community" are the source of applicable community standards. Since a jury is not selected until after an act has been committed, there is no way of knowing from what community they will be selected or of determining what community standards apply. The Court also held that a state legislature may not define the "applicable standard of prurient interest for all communities in the state." The Court further ruled that the work itself is the only proof that the prosecution must present, with no requirement that there be evidence on the issue of obscenity or on the community standards which should be applicable.

Our general counsel, William D. North, prepared an analysis of the majority decision and its implications for librarians. After considerable discussion, the Board of Trustees referred his analysis to the ALA Intellectual Freedom Committee for study. In due course you will, no doubt, receive recommendations from that committee.

Censorship on Long Island

The third case discussed by the Foundation Board was *Pico* v. *Board of Education,* better known as the Island Trees School District case, filed by the New York Civil Liberties Union on behalf of students.

At Midwinter the Board of Trustees authorized the Foundation to enter this case in whatever way would be most effective. We sought to file a suit on behalf of librarians as a class but were unable to find a librarian with standing in whose name the case could be filed. Repeated attempts to find other ways to become involved were similarly frustrated. Despite criticism in the library press that the Foundation was failing to act in this case of flagrant censorship affecting libraries, every effort was made to enter the case.

We held a meeting last month in New York City with representatives of the Civil Liberties Union, the New York Library Association Intellectual Freedom Committee, and the Foundation, and have agreed to file an *amicus* brief on behalf of the students at the appropriate time. Executive Director Krug has asked the president of the ALA Young Adults Services Division, who was present at the meeting, to request that the appropriate group in that division assist us by identifying the issues concerning young people's rights that should be addressed.

In the meantime, the case has not progressed. The NYCLU filed the case in the New York State courts. The Island Trees Board of Education succeeded in having it moved to federal court, but to date the lawyers for Pico have taken no further action, either to accept the federal court jurisdiction or to have the case returned to the state court. Until they do, nothing can happen on the issues, and we can only wait.

Violence in the Media

The new case discussed by the Foundation was *Niemi* v. *NBC*. The case derived from the NBC television program entitled "Born Innocent," which some of you may have seen. The program concerned a girl in trouble who at one point in the broadcast was confined in an institution for delinquent girls. In one scene, the girl was the victim of an artificial rape. The program subsequently dealt with her escape from the reformatory and her later prob!ems. One of the messages of the program was clearly the lack of safety provided by such institutions.

A few days later Olivia Niemi, a minor, was the victim of a similar artificial rape at a beach. One of the perpetrators of this act said she had seen or had heard about the broadcast of "Born Innocent," and on that ground Niemi's mother sued NBC.

NBC won in the lower court, but when Niemi appealed, the network asked us to file an *amicus* brief relating to the First Amendment issues involved. The Executive Committee of the Foundation, acting on behalf of the Board of Trustees, decided we should do so.

The implication of this case for librarians is clear. If the plaintiff's arguments are accepted, then the victim of any crime—kidnaping, robbery, rape, murder—could claim damages if the wrong-doers can merely be persuaded to blame their crime on something they read, heard or saw. When you consider the acts of violence with which our literature is filled, it becomes obvious that accepting the view that "monkey see, monkey do" applies to all humankind could only lead to endless and direct censorship. Even admitting that there are sick and deranged people among us, to accept a theory that material which might lead them to act in anti-social ways should be controlled would reduce us all to seeing and reading only that which has been screened for the deficient among us. By implication, we would need psychological profiles on all the patrons of our libraries. Our

concern with this case is very real.

The new Board of Trustees for 1977-78 also met on Wednesday and elected its officers. Dr. R. Kathleen Molz was elected president and will be reporting to you at the Council's next meeting at Midwinter.

Respectfully submitted,
RICHARD L. DARLING, President
For the Trustees
Freedom to Read Foundation

New Trustees Elected

Voters in the Foundation's 1977 election selected Kenneth L. Donelson, William M. Lucas Jr., Florence McMullin, and R. Kathleen Molz to serve on the Board of Trustees for the term 1977-79.

Donelson, professor of English at Arizona State University, is the author of more than forty articles on censorship. Active in the National Council of Teachers of English, he is the editor of the most recent version of the NCTE pamphlet, "The Students' Right to Read," and the NCTE booklist for senior high students, *Books For You.*

Lucas, a New Orleans attorney, represents national publishers and distributors of magazines and paperback books. He has defended more than fifty First Amendment cases in city, state, and federal courts, including the U.S. Supreme Court. He is a member of the First Amendment Lawyers Association and has served on the Foundation Board since 1975.

McMullin, a trustee of the King County Library System, has worked to further First Amendment rights through participation in the Academic Freedom Committee of the American Civil Liberties Union, Washington Division, and the Intellectual Freedom Committee of the American Library Trustee Association, and as chairperson of the Intellectual Freedom Committee of the American Library Association. First as a representative of the American Library Trustee Association and then the ALA Intellectual Freedom Committee, she has served on the Foundation Board since 1972.

Molz, professor of library science at Columbia University, previously served on the Board both as an elected trustee and as the representative of the ALA Intellectual Freedom Committee, which she chaired. Long active in the American Library Association, she is a member of the ALA Council and Executive Board.

Other members of the 1977-78 Board are Neil H. Adelman, Chicago attorney; Dale B. Canelas, assistant director for public services, Stanford University Libraries; Zoia Horn, chairperson of the ALA Intellectual Freedom Committee; Eric Moon, president of Scarecrow Press and ALA president; Eli M. Oboler, university librarian, Idaho State University; Russell Shank, university librarian, University of California at Los Angeles, and ALA president-elect; Sophie Silberberg, library consultant, New York City; Helen W. Tuttle, assistant university librarian for technical services, Princeton University; and Robert Wedgeworth, ALA executive director.

Newly elected FTRF President R. Kathleen Molz

Officers Chosen

Following the regularly scheduled meeting of the 1976-77 Board of Trustees, in Detroit, the 1977-78 Board convened to elect officers. Chosen were R. Kathleen Molz, president; Dale B. Canelas, vice president; and Helen W. Tuttle, treasurer. Elected to serve with the officers on the Executive Committee were William Lucas and Robert Wedgeworth. Judith F. Krug, executive director, serves as the Board's secretary.

Former Trustees Die

The recent passing of Evelyn Levy, retired from the Enoch Pratt Free Library, is a loss to her friends in the library world and her colleagues in the fight for intellectual freedom. First with the Boston Public Library and later at Enoch Pratt, she championed the right of every person for free access to library materials. She was active in several library organizations, having served on the ALA Council and Executive Board, the ALA Intellectual Freedom Committee, and the Board of Trustees of the Freedom to Read Foundation, and was a member of other adult education and civil rights organizations.

To honor Evelyn's memory in the intellectual freedom area, we, a group of her colleagues, ask that contributions in her name be made to the Freedom to Read Foundation.

PAGE ACKERMAN, ARTHUR S. MEYERS, MARGARET E. MONROE, NETTIE B. TAYLOR, FANNETTE THOMAS

Evelyn Levy served on the Intellectual Freedom Committee from 1962 to 1968 and was a member of the

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High Court *(from p. 1)*

it. It is to be observed, also, that there is no suggestion that petitioner's mailings went to any unconsenting adult or that they were interstate."

. . . . . .

We granted certiorari in order to review the relationship between state legislation regulating or refusing to regulate the distribution of obscene material, and the determination of contemporary community standards in a federal prosecution.

IV

The "basic guidelines" for the trier of fact in a state obscenity prosecution were set out in *Miller* v. *California* [1973] in the form of a three-part test:

> "(a) whether 'the average person, applying contemporary 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; (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

. . . . . .

The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S., at 26, 30. See *Hamling* v. *United States,* 418 U.S., at 104-105. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins* v. *Georgia,* 418 U.S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as "patently offensive" in a Sec. 1461 prosecution are the "hard core" types of conduct suggested by the examples given in *Miller*. See *Hamling* v. *United States,* 418 U.S., at 114; cf. *Jenkins* v. *Georgia,* 418 U.S., at 160-161. Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards.

The issue we must resolve is whether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as c. 725 of the Iowa Code. Put another way, we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be, and, if such a declaration has been made, whether it is binding in a federal prosecution under Sec. 1461.

Obviously, a state legislature would not be able to define contemporary community standards in a vacuum. Rather, community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. In *Hamling* v. *United States,* the Court recognized the close analogy between the function of "contemporary community standards" in obscenity cases and "reasonableness" in other cases:

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."

It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.

This is not to say that state legislatures are completely foreclosed from enacting laws setting substantive limitations for obscenity cases. On the contrary, we have indicated on several occasions that legislation of this kind is permissible. See *Hamling* v. *United States,* 418 U.S., at 114; *Miller* v. *California,* 413 U.S., at 25. State legislation must still define the kinds of conduct that will be regulated by the State. For example, the Iowa law in effect at the time this prosecution was instituted was to the effect that no conduct aimed at adults was regulated. At the other extreme, a State might seek to regulate all the hard core pornography that it constitutionally could. The new Iowa law, which will regulate only material "depicting a sex act involving sado-masochistic abuse, excretory functions, a child, or bestiality," provides an example of an intermediate approach.

If a State wished to adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case, or by legislating with respect to the instructions that must be given to the jurors in such cases. In addition, the State might add a geographic dimension to its regulation of obscenity through the device of zoning laws. Cf. *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976). It is evident that ample room is left for state legislation even though the ques-

tion of the community standard to apply, when appeal to prurient interest and patent offensiveness are considered, is not one that can be defined legislatively.

An even stronger reason for holding that a state law regulating distribution of obscene material cannot define contemporary community standards in the case before us is the simple fact that this is a *federal* prosecution under Sec. 1461. The Court already has held, in *Hamling,* that the substantive conduct encompassed by Sec. 1461 is confined to "the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California.*' " 418 U.S., at 114. The community standards aspects of Sec. 1461 likewise present issues of federal law, upon which a state statute such as Iowa's cannot have conclusive effect. The kinds of instruction that should be given to the jury are likewise a federal question. For example, the Court has held that Sec. 1461 embodies a requirement that local rather than national standards should be applied. *Hamling* v. *United States, supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. Both of these substantive limitations are passed on to the jury in the form of instructions.

The fact that the mailings in this case were wholly intrastate is immaterial for a prosecution under Sec. 1461. That statute was enacted under Congress' postal power, granted in Art I of the Constitution, and the postal power clause does not distinguish between interstate and intrastate matters. This Court consistently has upheld Congress' exercise of that power to exclude from the mails materials that are judged to be obscene.

Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority. See *Miller* v. *California,* 413 U. S., at 30. The type of conduct depicted must fall within the substantive limitations suggested in *Miller* and adopted in *Hamling* with respect to Sec. 1461. Cf. *Jenkins* v. *Georgia, supra.* The work also must lack serious literary, artistic, political, or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review. Finally, it is always appropriate for the appellate court to review the sufficiency of the evidence.

Petitioner argues that a decision to ignore the Iowa law will have the practical effect of nullifying that law. We do not agree. In the first place, the significance of Iowa's decision in 1974 not to regulate the distribution of obscene materials to adults is open to question. Iowa may have decided that the resources of its prosecutors' offices should be devoted to matters deemed to have greater priority than the enforcement of obscenity statutes. Such a decision would not mean that Iowa affirmatively desired free distribution of those materials; on the contrary, it would be consistent with a hope or expectation on the State's part that the Federal Government's prosecutions under statutes such as Sec. 1461 would be sufficient for the State's purposes. The State might also view distribution over the counter as different from distribution through the mails. It might conclude that it is easier to keep obscene materials out of the hands of minors and unconsenting adults in retail establishments than it is when a letter or package arrives at a private residence. Furthermore, the history of the Iowa law suggests that the State may have left distribution to consenting adults unregulated simply because it was not then able to arrive at a compromise statute for the regulation of obscenity.

Arguments similar to petitioner's "nullification" thesis were made in cases that followed *Stanley* v. *Georgia,* 394 U.S. 557 (1969). In *United States* v. *12 200-ft. Reels of Film,* the question was whether the United States constitutionally might prohibit the importation of obscene material that was intended solely for private, personal use and possession. See 19 USC 1305 (a). *Stanley* had upheld the individual's right to possess obscene material in the home, and the argument was made that this right would be virtually meaningless if the Government could prevent importation of, and hence access to, the obscene material. The Court held that *Stanley* had been based on the privacy of the home, and that it represented a considered line of demarcation in the obscenity area. Consequently, despite the incidental effect that the importation prohibition had on the privacy right to possess obscene material in the home, the Court upheld the statute. A similar result was reached in the face of similar argument, in *United States* v. *Orito.* There, 18 USC 1462, the statute prohibiting knowing transportation of obscene material in interstate commerce, was at issue. The Court held that *Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home.

In this case, petitioner argues that the Court has recognized the right of States to adopt a laissez-faire attitude toward regulation of pornography, and that a holding that Sec. 1461 permits a federal prosecution will render the State's right meaningless. Just as the individual's right to possess obscene material in the privacy of his home, however, did not create a correlative right to receive, transport, or distribute the material, the State's right to abolish all regulation of ob-

scene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State.

Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves. We hold only that the Iowa statute is not conclusive as to the issue of contemporary community standards for appeal to the prurient interest and patent offensiveness. Those are questions for the jury to decide, in its traditional role as factfinder.

V

A. We also reject petitioner's arguments that the prospective jurors should have been asked about their understanding of Iowa's community standards and Iowa law, and that Sec. 1461 was unconstitutionally vague as applied to him. The particular inquiries requested by petitioner would not have elicited useful information about the jurors' qualifications to apply contemporary community standards in an objective way. A request for the jurors' description of their understanding of community standards would have been no more appropriate than a request for a description of the meaning of "reasonableness." Neither term lends itself to precise definition. . . .

B. Neither do we find Sec. 1461 unconstitutionally vague as applied here. Our construction of the statute flows directly from the decisions in *Hamling, Miller, Reidel,* and *Roth*. As construed in *Hamling,* the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls. Similarly, the possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional. We find no vagueness defect in the statute attributable to the fact that federal policy with regard to distribution of obscene material through the mail was different from Iowa policy with regard to the intrastate sale of like material.

VI

Since the Iowa law on obscenity was introduced into evidence, and the jurors were told that they could consider it as evidence of the community standard, petitioner received everything to which he was entitled. To go further, and to make the state law conclusive on the issues of appeal to prurient interest and patent offensiveness, in a federal prosecution under Sec. 1461, would be inconsistent with our prior cases. We hold that those issues are fact questions for the jury, to be judged in light of the jurors' understanding of contemporary community standards. We also hold that Sec. 1461 is not unconstitutionally vague as so applied, and that petitioner's proposed *voir dire* questions were not improperly refused.

The judgment of the Court of Appeals is affirmed.

The Dissents

Justices Brennan, Stewart, and Marshall filed their now-traditional dissent in obscenity cases, citing their previous claims that the Comstock laws—under which Jerry Lee Smith was convicted—are "clearly overbroad and unconstitutional." Justice Stevens, the newest member of the Court, filed a lengthy and vigorous dissent. With the exception of the brief introduction and several long footnotes, Stevens' opinion is reprinted in full here.

I

A federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country. This proposition is so obvious that it was not even questioned during the first 90 years of enforcement of the Comstock Act under which petitioner was prosecuted. When the reach of the statute is limited by a constitutional provision, it is even more certain that national uniformity is appropriate. Nevertheless, in 1963, when Chief Justice Warren concluded that a national standard for judging obscenity was not provable, he suggested the substitution of community standards as an acceptable alternative. He thereby planted the seed which eventually blossomed into holdings such as *Miller, Hamling,* and today's pronouncement that the relevant standard "is not one that can be defined legislatively."

The conclusion that a uniformly administered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases. Quite the contrary, it is a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material.

The most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards. Even the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source. The diversity within the nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prose-

cuted. Indeed, in *Miller* itself, the jury was asked to apply the contemporary community standard of California. A more culturally diverse state of the union hardly can exist, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard.

Indeed, in some ways the community standard concept is even more objectionable than a national standard. As we have seen in prior cases, the geographic boundaries of the relevant community are not easly defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor. Moreover, although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to comprise the jury in a given case.

The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

This conclusion is especially troubling because the same image—whether created by words, sounds, or pictures—may produce such a wide variety of reactions. As Mr. Justice Harlan noted, it is ". . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California,* 403 U. S. 15, 25. In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.

II

Although the variable nature of a standard dependent on local community attitudes is critically defective when used to define a federal crime, that very flexibility is a desirable feature of a civil rule designed to protect the individual's right to select the kind of environment in which he wants to live.

In his dissent in *Jacobellis* v. *Ohio,* 378 U. S. 184, Chief Justice Warren reminded us that obscene material "may be proscribed in a number of ways," 378 U. S., at 201, and that a lesser standard of review is required in civil cases than in criminal. Moreover, he identified a third dimension in the obscenity determination that is ignored in the Court's current formulation of the standard:

> "In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." 378 U. S., at 201 (footnote omitted).

The standard now applied by the Court focuses its attention on the content of the materials and their impact on the average person in the community. But that impact is not a constant; it may vary widely with the use to which the materials are put. As Mr. Justice Sutherland wrote in a different context, a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Whether a pig or a picture is offensive is a question that cannot be answered in the abstract.

In *Roth* v. *United States,* 354 U. S. 476, 485, the Court held "that obscenity is not within the area of constitutionally protected speech or press." That holding rests, in part, on the assumed premise that all communications within the protected area are equally immune from governmental restraint, whereas those outside that area are utterly without social value and, hence, deserving of no protection. Last Term the Court expressly rejected that premise. *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 66–71; *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 771–773. The fact that speech is protected by the First Amendment does not mean that it is wholly immune from State regulation. Although offensive or misleading statements in a political oration cannot be censored, offensive language in a courtroom or misleading representations in a securities prospectus may surely be regulated. Nuisances such as soundtrucks and erotic displays

in a residential area may be abated under appropriately flexible civil standards even though the First Amendment provides a shield against criminal prosecution.

As long as the Government does not totally suppress protected speech and is faithful to its paramount obligation of complete neutrality with respect to the point of view expressed in a protected communication, I see no reason why regulation of certain types of communication may not take into account obvious differences in subject matter. See *Lehman* v. *City of Shaker Heights,* 418 U.S. 298. It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.

I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.

In this case the petitioner's communications were intended to offend no one. He could hardly anticipate that they would offend the person who requested them. And delivery in sealed envelopes prevented any offense to unwilling third parties. Since his acts did not even constitute a nuisance, it necessarily follows, in my opinion, that they cannot provide the basis for a criminal prosecution.

I respectfully dissent.

Smith v. U.S.

The Implications for Libraries

To advise the Board of Trustees and the Intellectual Freedom Committee of the American Library Association, FTRF General Counsel William North prepared the following analysis of the Smith *decision. The final paragraphs enumerate the potential problems of libraries and provide recommendations for library boards and librarians.*

The *Smith* case was supported by the Freedom to Read Foundation and the American Library Association in the Court of Appeals for the Eighth Circuit and in the Supreme Court because it offered an opportunity for the Supreme Court to further consider and clarify certain issues presented or created by the Court's decision in *Miller* v. *California,* 413 U.S. 15 (1973), establishing that "obscenity" was a "question of fact" to be measured by the "contemporary community standards of the community." Among the specific issues posed by the *Smith* case deemed relevant to libraries and librarianship, as well as the broader interests of intellectual freedom and the right to read, were the following:

1. What is the community from which the applicable community standards must be derived?

2. May a state, by legislation, define the applicable standards for all communities in the state?

3. What showing must be made to prove the community standards by which a literary or pictorial work is to be judged?

4. Do state law and the standards established thereby preempt the application of federal law?

5. What is the nature of the "knowledge" which will satisfy the requirement of scienter *for criminal prosecution?*

As a consequence of the decisions in the *Smith* case, all of these issues have been clarified, albeit *not* in the way the Foundation and the Association desired. The implications of the *Smith* case in respect of each of the foregoing issues may be summarized as follows:

1. The Court confirmed the definition of the "community" utilized in *Hamling* v. *U.S.,* 418 U.S. 87 (1974), as the "community or vicinage from which [the juror] comes. . . ." This means that the "community" for purposes of the determination of whether sexually explicit materials are constitutionally protected is defined solely by the composition of the jury hearing the case. Depending on the geographical area from which such jury is drawn, the jury may represent many towns, villages and cities, or it may represent merely one municipality or even one neighborhood. Moreover, since the community standards are derived by the juror's ". . . own knowledge of the views of the average person in the community or vicinage from which he comes," it must follow that those standards are not ascertainable until after the jurors are selected. This being so, there can be no ascertainable community from which "community standards" may be derived until *after* the act which is alleged to offend those standards has occurred and prompted criminal prosecution.

Thus, the *Smith* case clearly holds that a distributor

of sexually explicit material may be criminally prosecuted and convicted of violating community standards which he could not have identified prior to his prosecution.

2. The Court held that the state legislature was not entitled to define the applicable standard of appeal to prurient interest for all communities in the state. The Court recognized the authority of the state to define the kinds of conduct to be regulated but refused it the right to define the criteria by which such conduct is to be deemed "reasonable" or as involving "prurient appeal." To the extent a state legislature desires to influence the determination of community standards, it must do so, not by defining the standards themselves, but rather by defining the area from which the jury could be selected or by legislating with respect to jury instructions, provided such instructions do not define the community standard to be applied.

Thus, the *Smith* case clearly holds that state legislation may not be relied upon to define the community standards by which the criminality of the dissemination of sexually explicit material will be measured.

3. The Court held that the only showing which the prosecution is required to make to convict is the work itself. In the *Smith* case the prosecution introduced into evidence the materials covered by the indictment—materials which depicted nude males and females engaged in intercourse, masturbation, fellatio, and cunnilingus. It offered no other evidence on the issue of obscenity or on the "community standards" which should be applied.

Thus, the *Smith* case clearly holds that once the offending material has been introduced into evidence, the prosecution has satisfied completely its burden of proof on the issue of obscenity and has absolutely no obligation to prove that such material is contrary to community standards.

4. The Court held that a state policy permitting consenting adults access to obscene matter did not foreclose criminal prosecution under federal law even when the entire distribution occurred intrastate.

Thus, the *Smith* case clearly holds that state statutory exemptions from liability under obscenity and harmful matter statutes do not foreclose prosecution under federal statutes which do not have comparable exemptions. Moreover, notwithstanding the suggestion of the Supreme Court in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 64 (1973), that "the states are free to adopt a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer," such freedom is really meaningless in view of the fact that it merely changes the forum of prosecution from the state courts to the federal courts, at least to the extent the mails and/or interstate commerce is involved.

5. The Court makes it clear that the only knowledge required to permit criminal prosecution is knowledge that a literary or pictorial work contains representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and/or representations or descriptions of masturbation, excretory functions, and exhibition of the genitals. Moreover, the disseminator of a work may be presumed to have such knowledge, albeit not conclusively.

It is *not* necessary for a person to have knowledge or belief that the representations or descriptions are patently offensive or lewd, or inconsistent with community standards. A good-faith belief that the work had serious literary, artistic, political or scientific value will not avoid conviction if the jury believes the work does not have such value.

Risks and Liabilities

The significance of the *Smith* case to librarians is enormous in that it appears to clarify, at least until there is a change in the Supreme Court composition, the nature and scope of the risks and liabilities of disseminating works which may be deemed sexually explicit. The *Smith* case makes clear:

First, that any librarian disseminating any work describing or depicting normal or abnormal intercourse, excretion, masturbation, or the genitals, is vulnerable to criminal prosecution, notwithstanding express exemption from such prosecution under state law.

Second, that the "community standards" by which the obscenity of the work, and therefore the criminality of its dissemination, will be determined cannot be ascertained until after the prosecution has been initiated and the jury has been impaneled.

Third, that the determination of a jury that a work is obscene is a question of fact which is substantially unreviewable on appeal.

Fourth, that the general existence and ready availability of other works substantially comparable in nature, content, descriptions, and representations to the work which prompts the prosecution do not establish that the work in question satisfies community standards.

Fifth, that the jury may determine whether a work lacks serious literary, artistic, political or scientific value, but that this determination may be the subject of appellate review.

Sixth, "guilty knowledge," that is, knowledge of the obscenity of the work, is not required for conviction so long as the disseminator is aware that the work includes the descriptions or depictions which the jury ultimately determines to be obscene.

Recommendations

In practical terms, the decision in the *Smith* case appears to warrant the adoption of some or all of the following policies and procedures to minimize risk that librarians and library administrators and trustees will

be criminally prosecuted and convicted under federal and/or state obscenity laws.

First, all library employment agreements and personnel policies should include an agreement that the library will defend and pay all legal costs incurred as a result of the criminal prosecution of a library or library employees as a result of performance of their duties.

Second, within the limits of law the library should agree to indemnify and hold harmless library employees for any or all fines and penalties assessed against them as a result of convictions under the obscenity laws for acts done in performance of their duties.

Third, the library should agree in writing that in the event library employees are imprisoned as a result of convictions under the obscenity laws for acts done in performance of their duties, they shall be retained as employees during the periods of their imprisonment on full salary, with the continuation of all fringe benefits, and their service shall not be deemed interrupted for purposes of pension benefits or contributions or for promotion or salary increases.

Fourth, all works purchased or contemplated for purchase by the library which describe or depict normal or abnormal intercourse, excretion, masturbation, or the genitals, should be identified and submitted to the federal and/or state officials responsible for the enforcement of obscenity and harmful matter statutes for an opinion as to whether the dissemination of such works or any of them would be a prosecutable offense.

Fifth, as to any work, the dissemination of which is deemed prosecutable, the library should seek a declaratory judgment from a court of competent jurisdiction to determine whether the work is unprotected by the First Amendment.

Sixth, in the event the responsible official fails or refuses to provide the opinion requested, the library should file an appropriate proceeding to compel the issuance of such opinion.

The implementation of the foregoing policies and procedures would obviate most, if not all, of the risks posed by the decision in the *Smith* case to library employees and would, at the same time, compel the law enforcement officials and the courts, including the Supreme Court, to recognize the full implications of the rationale of the *Smith* decision.

William D. North
General Counsel

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Court Offers More Protection for 'Commercial' Speech

In three unrelated decisions handed down in the closing weeks of its 1976-77 term, the U.S. Supreme Court broadened the protection afforded so-called commercial speech last year when it struck down a Virginia law banning advertisements of prices of prescription drugs. According to the Court's latest holdings, homeowners may post "for sale" signs, lawyers may advertise prices for certain services, and pharmacists may display and advertise contraceptives.

'Home for Sale'

In deciding that "home for sale" signs represent protected speech, the Court voided the ordinance of a New Jersey township which wanted to prohibit the posting of such information. The township had acted to stem what it perceived as the flight of white homeowners from a racially integrated community.

Justice Marshall, delivering the opinion of the Court, stated:

"The [township] Council has sought to restrict the free flow of this [sic] data because it fears that otherwise, homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave the town. The Council's concern, then, was not with any commercial aspect of 'For Sale' signs . . . but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.' " (*Linmark Associates, Inc.* v. *Township of Willingboro,* decided May 2)

Ads for Legal Services

Invalidating an Arizona Supreme Court disciplinary rule prohibiting attorneys from advertising in newspapers and other media, the Court held that commercial speech involving legal services deserves at least some First Amendment protection.

Specifically, the Court ruled that the traditional arguments against legal advertising are inadequate to support the suppression of all "commercial speech" by attorneys. The case before it, the Court said, did not involve any questions concerning solicitation or advertising as to the quality of legal services, but only the question whether lawyers may advertise prices at which certain routine services will be performed. The belief that lawyers are somehow above "trade" is, the Court observed, an anachronism, a matter of legal "etiquette," not legal ethics.

The Court also concluded that the advertisement of legal services is not inherently misleading: ". . . advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." (*Bates* v. *State Bar of Arizona,* decided June 27)

'Offensive' Ads

In a ruling which overturned a New York State education law making it a crime for anyone, including licensed pharmacists, to advertise or display contraceptives, the Court held that the potential "offensiveness" of information regarding contraceptives does not justify its suppression. In an opinion joined by Justices Stewart, White, Marshall, Blackmun, and Stevens, Justice Brennan wrote:

"Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. See, *e.g., Cohen* v. *California,* 403 U.S. 13 (1971). As for the possible 'legitimation' of illicit sexual behavior, whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' *Brandenburg* v. *Ohio,* 395, U.S. 44, 447 (1969). They merely state the availability of products and services that are not only entirely legal . . . but constitutionally protected. These arguments therefore do not justify the total suppression of advertising concerning contraceptives." (*Carey* v. *Population Services International,* decided June 9)

Members Respond To Special Appeal

More than 200 members quickly replied to the special appeal to defray this year's extraordinary legal costs. In addition, the Playboy Foundation responded with a generous gift of $3,500.

Among the many who contributed early were:

Keith Doms, Robert B. Downs, Wendell B. Coon, Gertrude Ann Matthews, Rosemary Y. Singh, Lewis C. Naylor, Julia Crawford, Eleanor Davidson, Judith Serebnick, Kenneth Weaver, Virginia Witucke, Synova Anderson, Margaret Billingsley, Haxby News Co., L. Terry Worth, Ted Smeal, Phyllis Kuehn, Vicki Dillon, John E. George, Mary B. Kelly, Doris Herbst, Rhoda S. Appel.

Peggy Glover, Annette Boesvert, Seymour Detsky, Walter C. Allen, John Donovan, Carolyn Crawford, Arthur Goetz, Lois N. Hansen, Duane H. Meyers, Helen Meyer, Elizabeth Berry, Mrs. Vahan D. Sewny, Susan Dingle-Cliff, Rosamund Abel, Margaret L. Jacobs, Virginia Henderson, Donald H. Trottier, Laurel Fischer.

Neil Adelman, Valerie Downes, Charles Thurston, Alice Appell, Levittown (N.Y.) Public Library Staff Association, Thomad M. Coppe, Stephen K. Metzger, Forrest Alter, Dorothy Uebele, Donna Dziedzig, Gerald

Blucher, Helen W. Tuttle, M. Jean Knapp, Alexander D. Wainwright, David G. Nevin, Jean F. Gadd, Jane S. McClure, Mr. and Mrs. F. E. Noel, Dorothy P. Ladd.

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Hermina Montag, Barbara L. McNeil, Betty H. Gilbert, Carol Greenholz, Mary Anna Tien, Louis A. Rachow, Richard E. Hayes, Charles W. Conaway, R. Kathleen Molz, Mary Merritt, Nell A. Congdon, Myrtice Wickham, Jean-Barry Molz, Rosemarie Riechel, Mary H. Wiebe, Alaska News Agency, Audrey Wolfinger, Lorraine Mathies, Lester Asheim, Albert N. Meyerstein.

Lorraine F. Katz, Oklahoma Library Association, Carolyn Fruchtenicht, Grace Slocum, Marilyn Olson, John B. Tucker, Mary Ann Whitten, Elizabeth Krakauer, Adelphi University Library, Judith E. A. Odiorne, Charlotte G. Lyon.

Trustees Die *(from p. 3)*

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Claude Settlemire, director of the Salem (Oregon) Public Library since 1972 and a member of the FTRF Board in 1975-76, died suddenly last May. He was the victim of a heart attack.

Prior to assuming his position in Salem, Mr. Settlemire was assistant librarian at the St. Louis Public Library, city librarian at Boulder, Colorado, and a consultant in the California State Library system.

A memorial fund has been established in his name for the music section of the Salem Public Library.

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