Movie Day at the Supreme Court
"I Know It When I See It"
A History of the Definition of Obscenity
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What is "obscene" under U.S. law has plagued our courts for the last fifty years.

In 1964, Justice Potter Stewart tried to explain "hard-core" pornography, (legally synonymous with obscenity), "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . "[i]

It is surprising how recently the difficulty in definition really started to crystallize. The more one considers this topic and the attempts of the esteemed Justice Brennan, who served from 1956 to 1990 and one of the great legal and moral minds of the 20th century, to define it, the more one is forced to conclude that this is a much harder task than it may appear at first blush.

Background

The book *The Brethren* by Watergate reporter Bob Woodward outlined the behind-the-scenes battles of the Supreme Court during the 1960's and 1970's and provides interesting context to the obscenity cases decided during that period, most of important of which was *Miller v. California*, which still defines obscenity today.

The book described Supreme Court "movie day" when the law clerks and the justices sat down to eat popcorn and see the films for the cases before them. Justice Hugo Black always refused Movie Day by saying that "if I want to go see that film, I should pay my money." Black, who served 1937 to 1971, and co-refusee Justice William Douglas, who served from 1939 to 1975, had been the only two justices who believed that speech should be entirely free of restrictions.

The law clerks who drafted the justices' opinions had their own influence on the cases and created short hand for what each Justice would find obscene:

> *Justice Byron White's Definition*: "no erect penises, no intercourse, no oral or anal sodomy. For White, no erections and no insertions equaled no obscenity."
>
> *Brennan's Definition, The Limp Dick Test*: "no erections. He was willing to accept penetration as long as the pictures passed what his clerks referred to as the 'limp dick' standard. Oral sex was tolerable if there was no erection."
>
> *Stewart's Definition, The Casablanca Test*: " ' . . . I know it when I see it.' [Stewart] had seen in during World War II, when he served as a Navy lieutenant. In Casablanca, as watch officer for his ship, he had seen his men bring back locally produced pornography. He knew the difference between that hardest of hard core and much of what came to the Court. He called it his 'Casablanca Test'."[ii]

And these were the liberal Justices.

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The First Definition

In 1957, Brennan first crafted the legal definition of obscenity in the case of *Roth v. United States*. Although indirectly and randomly addressed in the law to this point, *Roth*'s holding on pornography was a case of first impression for the US Supreme Court. Brennan held that the First Amendment did not protect obscene materials, like certain other forms of speech. Contrary to common perception, there are actually numerous forms of speech not entitled to First Amendment protection, including speech which creates a clear and present danger of imminent lawless action; speech which contains narrowly predefined "fighting words"; written or spoken untruths (libel, slander, fraud) which may be punished by civil suit; speech which is false or deceptive advertising; speech which threatens others; and restrictions in which the government can demonstrate a "narrowly tailored" "compelling interest".

The *Roth* definition of obscenity was:

> Speech which " . . . to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest" and which is "utterly without redeeming social importance"[iii].

By 1964, as lower courts had misapplied the *Roth* standard resulting in many cases for Court review, Justice Brennan tried to clarify this standard by adding another requirement for obscenity -- that the material "go substantially beyond customary limits of candor in description or representation." The Court also clarified the definition of "community" as that of the nation, not the local community[iv]; this distinction resulted in a more liberal definition of obscenity.

The Second and Current Definition

The tide turned on free speech and sex when two liberal elements -- Chief Justice Earl Warren, an Eisenhower appointee, resigned in 1969 and Black, a Roosevelt appointee, resigned in 1971. Nixon appointed two replacements, Chief Justice Warren Burger and Justice William Rehnquist, along with two other appointees Harry Blackmum and Lewis Powell. With the arrival of Rehnquist and Burger came the arrival of a more conservative Court and a second definition of obscenity.

In summer of 1973, the Court decided a group of pornography cases that set the standards for the law to come. It was in his dissent in one of these cases that Justice Brennan, having seen how the intent of his words had been altered, admitted:

> "Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[v]

Unfortunately, this realization came too late.

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In 1973, in *Miller v. California*, Justice Burger stated the second definition of obscenity – the majority position of the Court:

"(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."

This holding specifically excluded the former and missing elements of the prior test and also held that it was not error for the applied "community standards" to be local rather than national.

In an attempt to give notice regarding what was "hard core" the Court stated:

"(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."[vi]

Clarifications

Post-*Miller*, the Court has clarified and exemplified aspects of the *Miller* standard:

- "community standards" to be applied by a juror are that "from which he comes for making the required determination"[vii];
- "appeals to the prurient interest" means that which appeals to "shameful or morbid interests" in sex, but not that which incites normal lust[viii], and includes materials designed for and primarily disseminated to a deviant sexual group (for example, sadists) which appeals to the prurient interests of that group[ix];
- "average person" includes both sensitive and insensitive persons, but does not include children[x]
- having some value does not prevent a finding of obscenity; prevension requires serious artistic, political, or scientific value, using a national standard[xi]

Additionally the Court has stated that "indecent" materials are protected and has defined indecent to mean "nonconformance with accepted standards of morality. [xii]

The Definition of Child Pornography

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In *Ferber* in 1982, the Court held that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" because:

- "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and therefore that narrowly tailored government interests may restrict such speech as stated in the initial definitions of restricted speech above.
- "The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."
- "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal through the Nation."
- "The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis."
- "Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions"

The Court then designated changes to the *Miller* standard applicable for child pornography:

"A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[xiii]

Conclusion

What persons in the sex industry typically fail to understand is how conservative the legal standards for pornography are and how vulnerable to prosecution they truly are. One reading of the personal obscenity tests of the liberal justices of the past makes that clear.

Like with most other businesses and acts, life is full of risks. Risks in the sex industry are criminal and civil prosecutions, and corresponding forfeiture laws regarding assets resulting from or used in the business/act. Prosecution and its results are a function of risk and luck.

In order to assess your risks, first understand them by consulting an attorney. Once you understand them, then decide how much and how long is enough relative to your risks and goals.

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- Do you have lots of assets and revenue from your business which state, federal or local agencies would like to possess and sell through forfeiture laws?

- Would you be easily portrayed as a villain in a political campaign?

6) *Jurisdictions and Community Standard for Obscenity*

- Is your community and the communities where your products are shipped or your customers reside conservative? Are they big cities or rural communities?

- If you have an international business, where are your customers located or products being shipped to? Have you considered that you are also subject to the laws of these regions which may be very severe? Are these regions you physically visit or have assets in?

7) *Longevity*

- How long have you been doing something risky? How much money have you made? Is it worth the continued risk?

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[i] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)
[ii] *The Brethren*, Bob Woodward and Scott Armstrong, (Simon & Schuster, 1979), p. 193-200.
[iii] Roth v. United States, 354 U.S. 476, 477, 489 (1957)
[iv] Jacobellis v. Ohio, 378 U.S. 184, 192-193 (1964)
[v] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973)
[vi] Miller v. California, 413 U.S. 15, 24-25 (1973)
[vii] Hamling v. United States, 418 U.S. 87, 105 (1974)
[viii] Brockett v. Spokan Arcades Inc., 472 U.S. 491 (1985)
[ix] Miskin v. New York, 282 U.S. 502 (1966)
[x] Pinkus v. United States, 436 U.S. 293, 298-299 (1978)
[xi] Pope v. Illinois, 481 U.S. 497 (1987)
[xii] FCC v. Pacifica, 438 U.S. 726, 741 (1978)
[xiii] New York v. Ferber, 458 U.S. 747, 757-766 (1982)

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