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Robert E. Riggs*

I. BACKGROUND

In his celebrated dissent from the majority in Paris Adult Theatre I v. Slaton,1 Justice Brennan concluded that obscenity could never be defined with sufficient precision to establish a workable constitutional standard. He observed that experience with the Roth case2 has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments.

... ...

[N]o one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully supressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.3 He therefore urged that the first amendment guarantees of free speech be interpreted to “prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly ‘obscene’ contents,” at least “in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults.”4 Since Justice Brennan had authored the Court’s opinion in Roth, the Paris dissent was an acknowledgment of a fundamental change in his own position.


1. 413 U.S. 49 (1973). Paris upheld a court order under Georgia civil law enjoining the exhibition of two sexually explicit films in two Atlanta, Georgia, “adult” theaters. There was no issue of prior restraint.


3. 413 U.S. at 83, 85 (Brennan, J., dissenting) (footnote omitted).

4. Id. at 113.
during the intervening years.

Justice Brennan’s easy identification of Roth v. United States with “suppression of obscenity” is a nice irony in the perspective of history. Roth, to be sure, had upheld a federal conviction for transmitting obscene materials through the mails. But in the process, the Court adopted a definition of obscenity far less restrictive than the test then being applied in many jurisdictions throughout the country. Prior to the 1957 Roth decision, United States obscenity law had leaned heavily upon the 1868 English case of Regina v. Hicklin. In that case Lord Cockburn delineated the test of obscenity as being “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” The effect of this test was to tie the definition of obscenity to the assumed susceptibilities of the most vulnerable members of the potential audience. Although the material might have no “corrupting” influence on persons of great moral rectitude, or even on the average person, it could still be “obscene” if the court was convinced that it might corrupt weaker persons whose minds were “open to such immoral influences.” Furthermore, isolated passages could be used to condemn the whole work.

Notwithstanding the fact that a number of state and lower federal court decisions had made serious inroads upon the Hicklin formula by the mid 1950s, Hicklin remained the law in many jurisdictions. Only after Roth was it clear that the Hicklin test

5. L.R. 3 Q.B. 360 (1868).
6. Id. at 371.
8. Judge Learned Hand in United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913), had suggested by way of dictum that the “average conscience” would be a better measure than the conscience of the most susceptible. Twenty years later a federal district judge abandoned Hicklin and applied Hand’s dictum to find that James Joyce’s Ulysses, taken
would not meet the requirements of the first amendment. The effect of Roth, therefore, far from spearheading a new movement for the suppression of obscenity, was to open the legal floodgates to a great wave of sexually oriented expression. Roth replaced the standard of the most susceptible members of a potential audience with the standard of the "average person, applying contemporary community standards." Furthermore, isolated passages would no longer suffice: "the dominant theme of the material taken as a whole" must "appeal to the prurient interest." Roth was part of the burgeoning judicial trend to enlarge first amendment guarantees in all areas. Its impact was not to suppress but to stimulate the production and distribution of sexually oriented material.

Justice Brennan was right in at least one respect, however. Experience from Roth to Paris had raised doubts concerning the feasibility of the definitional approach to obscenity control. A bare majority of five justices had agreed on Roth's new and more liberal definition of obscenity. Within a decade, however, this limited consensus had disintegrated. By 1967 at least four different views of obscenity had emerged, none commanding a majority. Totally bereft of doctrinal unity, the Court initiated a practice of per curiam reversals of obscenity convictions when as a whole, was not obscene. United States v. One Book Entitled "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd, 72 F.2d 705 (2d Cir. 1934). Thereafter some state and federal court decisions adopted a more permissive rule while others retained the Hicklin standard. See cases cited at note 6 supra. A few months before Roth, the Supreme Court had rejected the "most susceptible persons" element of the Hicklin test by finding unconstitutional a Michigan statute prohibiting sale to adults of materials tending to corrupt minors. Butler v. Michigan, 352 U.S. 380 (1957). In Roth the Hicklin approach was rejected outright.

9. 354 U.S. at 489.
10. Id. (footnote omitted) (emphasis added).
11. Chief Justice Warren concurred in the result without endorsing the reasoning. Id. at 494 (concurring opinion). Justice Harlan believed the reviewing court must make an independent judgment upon the materials in each case rather than propounding a generalized definition to be applied by the trier of fact. He also argued that states should have much greater latitude than the federal government to regulate obscenity. Id. at 496 (separate opinion). Justice Douglas, joined by Justice Black, contended that obscenity is a form of expression fully protected by the first amendment. Id. at 506 (dissenting opinion).
any five or more justices, applying their separate definitions, could agree that the materials in question were not obscene.13 This approach was not calculated to provide much guidance to lower courts, nor even much consistency in Supreme Court decisions.

No one regarded this doctrinal anarchy as a satisfactory state of affairs, and it was ultimately terminated by Miller v. California,14 a companion case to Paris. Sustaining a conviction for knowingly distributing obscene matter in violation of California law, a bare majority of the Court once more agreed on a new definitional test of obscenity. Chief Justice Burger, author of the opinion, set forth the following "basic guidelines for the trier of fact":

(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.15

The Court repeated and emphasized the point that regulation should be limited to "works which depict or describe sexual conduct" and then only if the conduct was "specifically defined by the applicable state law, as written or authoritatively construed."16 Past experience had convinced Justice Brennan that a definitional approach to the regulation of obscenity was not workable, at least not within the constraints of the first and fourteenth amendments. For five members of the Court, however, the same experience pointed to the need for agreement on a more specific and concrete definition.

Miller "sought to clarify the constitutional definition of obscene material subject to regulation by the States."17 Paris explored and reaffirmed the legitimacy of the state interest in regulating obscene conduct and expression, even when the conduct involves only consenting adults. The lengthy Brennan dissent in

15. Id. at 24 (citations omitted).
16. Id.
17. Paris Adult Theatre I v. Slaton, 413 U.S. at 55.
Paris, however, provided an elaborate rationale for rejecting altogether the Roth-Miller-Paris definitional approach to the regulation of obscenity. The arguments presented in the dissent remain important today because they continue to represent the position of at least three members of the Court. Justices Brennan and Marshall participated in the dissent and have not since changed their position. Justice Stevens, who succeeded Justice Douglas, has regularly sided with the dissent when the Miller definition is at issue. He has made clear his position that criminal prosecution is not suitable as "the mechanism for regulating the distribution of erotic material." With such continuing support on the Court, the rationale for changes urged by the present minority surely retains continuing importance.

The purpose of this Article is to determine whether the Brennan argument, as set forth in the Paris dissent, remains persuasive in the light of developments since the Miller decision. To some extent the arguments for treating obscenity as protected expression have their foundation in value preferences. The Brennan position is rooted in a strong preference for first amendment values over almost everything else. The Burger (majority) position, while sensitive to first amendment concerns, shows greater deference to the judgment of state legislatures and is more willing to look for some suitable balancing of free expression against other values of importance to society.

Value preferences, however, provide only the foundation for the Paris dissent. The Brennan rationale, so carefully articulated in that opinion, also assumes that a particular, unverified, empirical state of affairs justifies the abandonment of obscenity suppression. As he states, it is the Court's "experience with the


Roth approach" that convinced him of the irreconcilability of "outright suppression of obscenity" with the "fundamental principles of the First and Fourteenth Amendments." This Article will not explore his value premises, even though they are not wholly shared; rather, it will examine the extent to which the empirical assumptions underlying the Brennan rationale are supported by actual developments.

II. The Brennan Assumptions

Justice Brennan's assumptions can be readily gleaned from the Paris dissent, and some of them are spelled out quite explicitly. He does not label them "empirical assumptions." He discusses them instead as "problems" arising from the "vagueness of the standards in the obscenity area." Nevertheless, the existence of a problem in each instance is premised on certain factual assumptions which may or may not be accurate. The distinction between "problems" and "assumptions" is not purely academic. A problem calls for a solution. Empirical assumptions, on the other hand, call for verification or disconfirmation. If the problem exists only in relationship to a particular set of factual assumptions, disproving the assumptions may suggest that there is no problem or that the problem is of different dimensions.

The problems identified by Justice Brennan in Paris relate to (1) "the lack of fair notice," (2) "the chill on protected expression," and (3) "stress imposed on the state and federal judicial machinery." Clearly implied are corresponding empirical assumptions that prospective defendants do not in fact have fair notice, that protected expression is chilled, and that judicial machinery is subject to stress.

With respect to the first problem, Justice Brennan argues that fair notice is precluded by the inherent vagueness of concepts used to define obscenity. The meaning of such terms as "prurient interest," "patent offensiveness," and "serious literary value" must necessarily vary "with experience, outlook, and even idiosyncrasies of the person defining them." Book publishers and booksellers can thus never be sure when the materials they publish or purvey are likely to be deemed criminally obscene.

20. 413 U.S. at 83 (Brennan, J., dissenting).
21. Id. at 86.
22. Id. at 93.
23. Id. at 84.
Hence the lack of fair notice.

The second problem arises from the same context. Because booksellers cannot be sure when they are crossing the line that separates the obscene from the nonobscene, they may refrain from publishing or selling material that would in fact be constitutionally protected. Hence the chill on protected expression.

The third problem concerns "the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague."24 One aspect of this "stress" is the sheer number of cases appealed to the Supreme Court and other courts of appellate jurisdiction. A second aspect of the institutional problem is the personal predicament of judges who must peruse or view the material before passing judgment on its obscenity. Still another aspect is the "continuing source of tension between state and federal courts" made inevitable by uncertain standards that require an independent determination by the Supreme Court and thus "render superfluous even the most conscientious analysis by state tribunals."25 This tension is heightened by the Court's inability to justify its decisions "with a persuasive rationale—or indeed, any rationale at all—" which "necessarily creates the impression that [the Court is] merely second-guessing state court judges."26

24. Id. at 91.
25. Id. at 93.
If Justice Brennan had limited his critique to the historical period from Roth to Miller, his position would be easier to defend. However, he predicted that things would not be, indeed could not be, better after Miller. His assumptions about what had happened since Roth were projected unchanged upon the post-Miller world.

[I]t is beyond dispute that the [Miller] approach can have no ameliorative impact on the cluster of problems that grow out of the vagueness of our current standards. Indeed, even the Court makes no argument that the reformulation will provide fairer notice to booksellers, theater owners, and the reading and viewing public. Nor does the Court contend that the approach will provide clearer guidance to law enforcement officials or reduce the chill on protected expression. Nor, finally, does the Court suggest that the approach will mitigate to the slightest degree the institutional problems that have plagued this Court and the state and federal judiciary as a direct result of the uncertainty inherent in any definition of obscenity. 27

Nor was the applicability of Justice Brennan’s assumptions limited to the particular definitional formulation of Miller. They applied, apparently, to all possible judicial definitions of obscenity:

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 totally 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. 28

As factual propositions, Justice Brennan’s assumptions

27. 413 U.S. at 98 (Brennan, J., dissenting).
28. Id. at 103 (footnote omitted).
about lack of fair notice, the chill on protected expression, and institutional stress present serious difficulties of analysis. In any empirical study, concepts must be "operationally" defined, that is, "defined in terms of, or with reference to, specific kinds of data that are available and can be measured." The first assumption, that the Miller definition does not provide potential defendants fair notice of what materials may be deemed criminally obscene, is especially difficult to define operationally in any useful way. The empirical fact is a subjective one, i.e., how the bookseller perceives the legal rule in relation to his own business activities. With such a troublesome focus, the difficulty of obtaining reliable data is virtually insurmountable. Data could, of course, be generated by surveying a sample of defendants in obscenity prosecutions, but the cost-benefit ratio of such a project would be less than favorable. Even if an appropriate sample could be identified and an adequate response obtained, few defendants could be objective about their own attitudes toward a legal rule under which they had been prosecuted and, in many cases, convicted. In the absence of reliable data, the validity of Justice Brennan's assumption about fair notice must be challenged in the same manner as he defends it—through use of logic and analogy rather than systematic empirical data.

Proving or disproving the "chill" on protected expression is beset with many of the same difficulties. A satisfactory test would first require an examination of material the potential purveyor would have published had he not felt the chill and then a determination of whether, if the material had been published, it would have been constitutionally protected. Merely stating the test is enough to demonstrate its unfeasibility. Absent such data, this assumption will be evaluated by reference to national trends in the volume and explicitness of erotic materials since the Miller decision.

The third assumption, relating to stress imposed on the judicial machinery, can be adequately defined in some of its aspects by reference to the decided cases. Exploration of this assumption will represent the principal empirical contribution of this Article.

III. Analysis of Brennan's Assumptions

A. Vagueness and Fair Notice

Is the rule of Miller too vague to provide fair notice? The answer depends on what is meant by fair notice. In the Paris dissent Justice Brennan quoted with obvious approval the majority opinion authored by Chief Justice Warren in United States v. Harriss:

[T]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The United States v. Harriss formulation is specifically addressed to statutory vagueness, and in that respect the Miller decision clearly opts for a stricter standard of notice by insisting that the proscribed conduct "be specifically defined by the applicable state law." Justice Brennan applies this same standard to constitutional interpretation as well, however, and we will follow his lead.

If the notice requirement means that a bookseller must know with certainty that contemplated conduct is (or is not) forbidden, then Mr. Brennan is right in stating that there would not be fair notice in many obscenity cases. But the Court has not characteristically demanded the "sure knowledge" kind of notice. In Nash v. United States, a 1913 decision upholding criminal sanctions under the Sherman Act, Justice Holmes observed:

[The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

Neither the decision nor the rationale of Nash has since been

32. 413 U.S. at 24.
33. 229 U.S. 373 (1913).
34. Id. at 377.
repudiated, and the case is still cited in opinions where the issue of vagueness is raised.\textsuperscript{35}

Moreover, the Court has gone far beyond holding that facial vagueness in a statute may be constitutionally tolerable. Even where the statute on its face is too vague to provide adequate notice, the Court has consistently held that the indefiniteness may be cured by authoritative state court interpretation. A typical statement of this rule is found in \textit{Wainwright v. Stone:}\textsuperscript{36} “For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation, ‘we must take the statute as though it read precisely as the highest court of the State has interpreted it.’”\textsuperscript{37} Until the mid 1960s the curative interpretation could even come after the fact through an appellate court gloss on a statute under which the appellant had already been convicted in a trial court.\textsuperscript{38} This anomaly has now been removed from the law,\textsuperscript{39} but at no time has the Court abandoned its position that state court interpretation may cure unconstitutional vagueness in a statute for the purpose of subsequent prosecution.

In cases decided by the Supreme Court there is no dissent from the proposition that some degree of uncertainty is constitutionally tolerable. \textit{United States v. Harriss} set forth the standard of fair notice upon which Justice Brennan relied in his \textit{Paris} dissent. But even in that opinion, Chief Justice Warren


\textsuperscript{36} 414 U.S. 21 (1973).


\textsuperscript{38} In 1960 a commentator noted that “the Supreme Court, in passing on these penal statutes, has invariably allowed them the benefit of whatever clarifying gloss state courts may have added in the course of litigation of the very case at bar.” \textit{Note, The Void-for-Vagueness Doctrine in the Supreme Court}, 109 U. Pa. L. Rev. 67, 73 (1960) (footnote omitted). This anomaly had been earlier noted by the Court itself. Speaking by way of dictum, Justice Reed observed, “We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation.” Winters v. New York, 333 U.S. 507, 514-15 (1948).

\textsuperscript{39} See \textit{Shuttlesworth v. City of Birmingham}, 382 U.S. 87, 91-92 (1965); \textit{Ashton v. Kentucky}, 384 U.S. 186, 198 (1966). These cases indicate that a criminal conviction will no longer be sustained on the basis of a limiting interpretation of the statute occurring subsequent to the trial.
acknowledged that all uncertainty need not be eliminated. It was enough that “the general class of offenses to which the statute is directed is plainly within its terms.” If that condition is met, “the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.” Indeed, terms such as “breach of peace,” “disturbing the peace,” and “disorderly conduct” are inherently incapable of defining with absolute certainty the specific kinds of conduct deemed criminal. Yet statutes utilizing such terms are not uniformly held to be unconstitutionally vague, and attempts to provide the requisite clarity through judicial construction are often much easier to understand as case-by-case rationalizations after the fact than as fair notice to future defendants.

Like obscenity statutes, breach of peace statutes often raise issues of first amendment rights—admittedly an area where “stricter standards of permissible statutory vagueness may be applied” because of the “potentially inhibiting effect on speech.” But obscenity prosecutions also suggest interesting parallels with antitrust cases where the more relaxed Nash rationale has been applied. In both areas the potential defendant is likely to be a businessman attempting to promote a primarily business interest. Both need legal counsel in advance of pro-

40. 347 U.S. at 618 (citations omitted).

Sunderland makes the same point in slightly different terms: [Justice Brennan’s] argument simply establishes that judicial judgment is necessary to the application of obscenity statutes if their purpose is to be effected. Such judgment is characteristic of a body of law containing such terms as “breach of the peace,” “negligence,” and “due process of law.” Although these terms are no more susceptible to precise and inclusive definition than is obscenity, the fact that they do not admit of a litmus paper test does not eliminate them from the cognizance of the law.

L. Sunderland, Obscenity: The Court, the Congress and the President’s Commission 23 (1974).


43. The following excerpt from a story reported in a national Sunday supplement section may not be atypical: “I’m basically a businessman,” observed a theater owner in response to queries about his X-rated movie house. “If I could show Walt Disney movies in Concord and make money at it, I’d do it. But it’s been shown in the past that the theater can’t be supported by that type of film . . . . If people didn’t want these types of films, they wouldn’t pay to see them.” Frank, The Problem of Pornography in Cities
jected action to avoid pitfalls on an uncertain legal terrain. The object is profit, and both may be willing to run the risk of prosecution, or even conviction, if the risk is slight or the rewards great enough. The publisher of sexually oriented materials has no more uncertainty about his options than the potential antitrust violator. Few will argue that even the most experienced antitrust lawyer can advise his client with certainty (1) that prosecution will or will not follow from a given action and (2) that such a prosecution will or will not be successful. Risks can be estimated, but the issue of illegality in borderline cases remains for the judicial process to resolve.

The point of this argument is simple: the constitutional requirement of fair notice has been held to be satisfied in areas of criminal law no less vague than the field of obscenity. Speaking for the Court in Miller, Chief Justice Burger expressed his con-

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Large and Small, Family Weekly, Jan. 28, 1979, at 6.

Compare this with the comment of a businessman indicted for price fixing in 1975, as reported in BUSINESS WEEK, June 2, 1975, at 48: “When you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn’t mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars.” See also Breit & Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 HARV. L. REV. 693 (1973); Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. CHI. L. REV. 423 (1963).

44. “[T]he generality of the language of the Sherman Act often makes it very difficult for an honest businessman to determine whether particular business conduct violates the law. Recognizing this problem of vagueness, criminal enforcement actions are usually brought only against ‘hardcore’ activities such as ‘price fixing’ or ‘predatory practices.’” M. HANDLE, H. BLAKE, R. PITOFFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 155 (1975) (footnote omitted). In this context, the reference to “hardcore” activities seems especially apt.

45. The concept of the commercial sex-exploiter as businessperson, consciously pressing toward the outer edge of the legally permissible, is illustrated in a feature article about a successful Atlanta criminal lawyer, appearing in the National Law Journal, Aug. 6, 1979, at 13. The story is best told in the words of the writer:

Mr. Zell's colorful career in defense of pornography took off in 1974 in a now-celebrated “Masturbation-for-hire” operation.

A local entrepreneur approached Mr. Zell and he wanted to open an establishment that could legally offer some sort of sexual service. He wanted to know what was legal.

“I researched the law and told him he couldn’t offer oral sex, intercourse or anything with animals, but there was nothing in the law about masturbation.”

So the city’s first “Bath House,” a name Mr. Zell chose because it sounded innocuous, opened to offer masturbation massages by a female “attendant.”

Even though the service cost $25, there were soon long lines of customers. Criminal charges brought under existing laws were dismissed, and, according to the report, “the bath house continued to enrich its owners until the city hurriedly passed a specific ordinance to outlaw that type of practice.”
viction that the decision would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."\(^{46}\) He did not say that such notice would mean full predictability, but the law does not require that. He was affirming that business people dealing in such wares would not be without notice of the risks they are taking. Given the nature of the business, this does not seem an unreasonable assumption. Unless the test demands absolute certainty of prediction, they have "fair notice."

**B. The Chill on Protected Speech**

If the rewards of risk taking are great enough, publishers may press hard against the bounds of the permissible, and even beyond. Of this the wares in many an adult book store bear graphic witness. Still, some publishers and sellers may interpret restraints on the conservative side and refrain from purveying erotic materials that would in fact pass constitutional muster if put to the test. As previously noted, however, the assumption that constitutionally permissible material goes unpublished for this reason is hard to prove or disprove empirically. Material that is not published will never be subjected to a judicial test of its prurience, offensiveness, and social value. But even if the *Miller* rule encouraged some publishers to guess conservatively, it is hard to see that society is the worse for having access to a little less pornography of a type that falls just short of constitutionally defined hard core.

The salient fact, of course, is that the quantity and explicitness of sexually oriented materials has continued to increase since the *Miller* decision. While no reliable statistics are available, the evidences of volume and explicitness are all around us. In 1976, *Time* magazine averred that "porn has mushroomed in the past decade, from a marginal underground cottage industry to an open, aggressive, $2 billion-a-year crime-ridden enterprise."\(^{47}\) Without giving specific figures, a recent analysis of obscenity in the United States concluded that the "volume of pornography consumed by Americans increased tremendously during the 1960s and on past the mid-1970s despite government and other efforts to control it."\(^{48}\) Sampson, in a technical report

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46. 413 U.S. at 27.
prepared in August 1970 for the President’s Commission on Ob-scenity and Pornography, saw the 1960s witnessing

a shift of such major proportions that the degree of explicitness at the frontier in 1960 is now found in mass media widely dis tributed to the general buying public. During this period, the most explicit materials available on the market became more and more graphic. By August 1970, the most explicit materials available “above the counter” were approximately equivalent to the most explicit materials ever produced for covert sale.49

This observation was pre-Miller, but there is no evidence that the trend has changed much since then. The point is well made in the conclusion of the 1977 report of the New York University Law School’s Obscenity Law Project, eloquent in the simplicity of its understatement: “The quantity and explicitness of materials apparently available nationwide . . . tend to belie assertions that obscenity regulation chills constitutionally protected speech.”50

The N.Y.U. Obscenity Law Project requires further examination here because its purpose was “to evaluate Miller’s impact on the prosecution, control, production, distribution, and sale of sexually explicit material.”61 Its findings are clearly relevant to determining the “chilling” impact of Miller.

The empirical portions of the N.Y.U. study are based on 542 questionnaire responses from city, county, and United States prosecutors throughout the country and some 97 interviews with “persons knowledgeable about obscenity law enforcement, conducted in 12 major cities.”62 Summarized, the study found that (1) fewer responding jurisdictions were prosecuting obscenity cases after Miller (1974-75) than before (1971-72),63 and (2) considering all prosecutions in all responding jurisdictions, the total number of prosecutions had declined since Miller.64 With re-


51. Id. at 859.

52. Id. at 860. The latter group included prosecutors, defense attorneys, police officials, persons in the entertainment industry, state legislators, and purveyors of sexually explicit materials.

53. Id. at 866-67.

54. Id. at 870. Although questionnaire data for 1976 prosecutions was not as com-
spect to the quantity of obscenity apparently available, 57.1% of
the responding prosecutors reported an increase in their juris-
dictions during 1976 over 1971; only 22% detected a decrease.65
The study concluded that “pornographic materials have grown
more explicit in the years following Miller,”66 and that Miller
had exercised “little if any inhibiting effect on the content of
sexually explicit materials.”67

One must admit that none of the published sources provides
highly reliable indices of quantity and explicitness in sexually
oriented materials since Miller. Even the impressive N.Y.U. Ob-
scenity Law Project data consists only of people’s opinions on
the subject. But, such as it is, the evidence (supported by simple
observation and awareness) all points in one direction: a nation-
wide increase in both quantity and explicitness of sexually ori-
ented material. If some individuals have felt the chill, the social
impact of the chill has surely been de minimis.68

C. The Stress on Judicial Machinery

If the case for fair notice is at least arguable, and if the so-
cial impact of the chill seems negligible, what about the “institu-
tional stress” on state and federal judicial machinery? Here the
primary concerns raised by Justice Brennan are the sheer num-
ber of cases coming to the appellate level, the predicament of

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55. Id. at 887.
56. Id. at 889 (footnote omitted).
57. Id. at 890. These conclusions were based in part upon published sources but also
on the Project’s own extensive interviews. The post-Miller published comments in-
cluded: (1) Arnold, We’re Losing the Porno War, National Observer, Dec. 18, 1976, at 1,
Col. 1; Slade, Recent Trends in Pornographic Films, Society, Sept.-Oct. 1975, at 77;
Smith, The Social Content of Pornography, 26 J. COM. 16, 19 (Winter 1976); N.Y.
Times, June 23, 1973, at 1, col. 2; Time, April 5, 1976, at 58-63; U.S. News & World
Rep., Jan. 13, 1975, at 31-33. For recent comments on volume and explicitness, all neces-
sarily impressionistic rather than precise, see Frank, The Problem of Pornography in
Cities Large and Small, Family Weekly, Jan. 28, 1979, at 5; N.Y. Times, Sept. 17, 1979,
§ B, at 10, col. 1; Time, Aug. 27, 1979, at 64.
58. One “west coast defense attorney,” interviewed for the N.Y.U. project, alleged
that some of “the more established producers of pornography left the business after
Miller because of a perceived increase in the risk” and were “replaced by ‘gypsy’ produc-
ers who operated on lower budgets and made films of lower quality.” Another inter-
viewee said that major motion picture producers “were about to begin production of
hard core films featuring recognized actors and actresses” but cancelled those plans after
Miller. Obscenity Law Project, supra note 50, at 889 n.376. If true, this could mean that
Miller has resulted in less “high quality” hard core, which might be regarded by some as
a negative social impact.
judges who must peruse the material, and the tension between state and federal courts resulting from uncertainty of standards. The "personal predicament" will not be addressed as a separate issue because, to a large extent, it is a function of the number of cases. The problem of judicial satiety at the appellate level is reduced in proportion to any decrease in the number of cases on appeal. This Article will, however, introduce empirical data bearing on the other two issues: the impact of Miller on the number of cases appealed and on the tension between state and federal courts.

1. Miller's Impact on the Number of Cases Appealed

Data relating to the number of cases appealed is presented in figures 1 and 2 and tables 1 and 2. The data base consists of state and federal appellate cases digested in the *West Decennial Digests* and the *General Digest* covering the years from 1947 to 1978. The validity of the tables and corresponding graphs depends on the accuracy and completeness of the West digesting system, but risking a small margin of error on West's part is obviously preferable to undertaking an original analysis of all reported cases for the period. Table 1 and figure 1 deal only with cases digested under obscenity key number 5, entitled "Obscene Publications, Pictures, and Articles." Key number 5 was selected for primary analysis because, on inspection, it appeared to include the issues most likely to be affected by the Miller decision. For that data the number of entries is identical with the number of actual cases appealed, except that a case appealed more than once is digested separately for each appellate level. Table 2 and figure 2 record the number of digested entries under all other obscenity key numbers. Because a given case may deal with more than one aspect of obscenity and hence be digested under two or more key numbers, the number of entries exceeds the number of cases by some undetermined amount. A laborious comparison of entries for every key number could have eliminated this discrepancy, but such a screening process was not felt necessary. It is reasonable to assume that the average number of digested entries per case will not vary significantly from year to year. Since trends rather than absolute numbers are the most important information to be drawn from the data, the trend line should look approximately the same whether digest entries or whole cases are used. This assumption is strengthened by observation of the similarity in graph lines depicted in figures 1 and 2.
TABLE 1
STATE AND FEDERAL APPELLATE CASES, 1974-1978, DIGESTED UNDER WEST OBSCENITY KEY NUMBER 5, "OBSCENE PUBLICATIONS, PICTURES, AND ARTICLES"

<table>
<thead>
<tr>
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<th>Year</th>
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<td>1957</td>
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</tbody>
</table>

FIGURE 1
GRAPH OF STATE AND FEDERAL APPELLATE CASES, 1947-1978, DIGESTED UNDER WEST OBSCENITY KEY NUMBER 5, "OBSCENE PUBLICATIONS, PICTURES, AND ARTICLES"
TABLE 2

STATE AND FEDERAL APPELLATE CASES, 1962-1978, DIGESTED UNDER ALL WEST OBSCENITY KEY NUMBERS, EXCEPT NUMBER 5

<table>
<thead>
<tr>
<th>Year</th>
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<th>Year</th>
<th>Number of Cases</th>
<th>Year</th>
<th>Number of Cases</th>
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<td>1973</td>
<td>137</td>
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<td></td>
</tr>
</tbody>
</table>

FIGURE 2

GRAPH OF STATE AND FEDERAL APPELLATE CASES, 1962-1978, DIGESTED UNDER ALL WEST OBSCENITY KEY NUMBERS, EXCEPT NUMBER 5

Number of Cases

Year
The table and corresponding figure present the same data. Of the two, the graph is the more interesting because it highlights the trend and gives a better sense of relative proportions for different points on the curve. The tables simply provide detail for those who wish to examine the trend more closely. Looking at figure 1, the salient features of the curve are a uniformly small number of cases until the middle 1950s, a gradual if uneven upswing in appealed cases for the next decade, a sharp up-trend beginning in 1969, and an almost equally sharp downturn since 1975. The moments of significant change in the trend line correspond in time with three landmark U.S. Supreme Court decisions on obscenity: Roth (1957), Memoirs v. Massachusetts (1966), and Miller (1973). Roth and Memoirs precede periods of increased output of appellate decisions; Miller comes at the beginning of a significant decrease. Although year to year fluctuations in the curve cannot be explained by these decisions, the general shape of the curve suggests some causal relationship. The inference is strengthened when lag time is taken into consideration. In each case the trend heralded by the decision does not appear until the second or third year following. Given the time-consuming nature of the appellate process, a lapse of two or three years before the effects of the decision become apparent is not unreasonable.

This study was undertaken for the express purpose of testing the hypothesis that the volume of appealed cases would increase after Roth and Memoirs and decline after Miller. The liberalizing impact of Roth and the law of obscenity has been discussed above. Memoirs further expanded the scope of first amendment restrictions on the suppression of obscenity by insisting that no work, however offensive or prurient its appeal, could be found obscene if it possessed even a fragment of social value. In so holding, the Court overturned a determination by the Massachusetts Supreme Judicial Court that John Cleland's 18th-century novel, Memoirs of a Woman of Pleasure or Fanny Hill, was obscene. Given this enlarged authority of appellate judges to overturn lower court convictions, an increased number of appeals was to be anticipated.

60. See text accompanying notes 5-10 supra.
Miller cut in the opposite direction. By moving from a national community standard to a local community standard, and by requiring materials to pass a "serious value" test, the discretion of appellate courts was limited and the range of unprotected materials was broadened. Logically, the result of such a doctrinal shift should have been fewer appeals and fewer reversals on appeal. The figures in tables 1 and 2 demonstrate that the absolute number of appellate cases has declined since Miller. Findings of the previously cited N.Y.U. survey indicate that the proportion of reversals on appeal also decreased, at least in the years immediately following Miller. Respondents reported 18% of pre-Miller (1971-72) convictions reversed on appeal but only 8% reversal for the post-Miller period (1974-75). The lowered likelihood of reversal in all probability contributed to fewer cases being appealed.

The "landmark case" hypothesis, of course, does not explain all of the fluctuations in the curve. A slight upward trend may be perceived even before Roth; the peak year is 1974 rather than 1973 when Miller was decided. The peaks and valleys shown

63. 413 U.S. at 30-34 (1973). "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." Id. at 31-32. The following year the Court held that the community standards need not be "statewide" either. Jenkins v. Georgia, 418 U.S. 153 (1974). In a companion case to Jenkins, the Court extended the local standards holding to a federal prosecution for mailing obscene material. Hamling v. United States, 418 U.S. 87 (1974).

64. The Miller formulation is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24. The Memoirs rule afforded protection unless the material was "utterly without redeeming social value." 383 U.S. at 418.


66. In 1975 the author of a comment wrote:

Miller's impact, although limited, is nonetheless important. The Miller rules effectively restructure the process through which, in particular cases, official answers are generated to the questions of what obscenity is and whether it ought to be suppressed. Appellate courts and legislatures no longer play paramount roles. Instead, much of the locus of responsibility shifts to triers of fact.


68. On the other hand, the Obscenity Law Project reported that the conviction rate in obscenity trials were identical for pre- and post-Miller prosecutions, i.e., 78% for both periods. Id. at 909. If the prospects for reversal decreased to some extent, the likelihood of conviction in the first place remained the same. And, as noted above, the number of prosecutions initiated by the sample group declined slightly after Miller.
during the 1960s must surely be related to other circumstances. This is not surprising. The number of appeals undoubtedly bears a relationship to the number of prosecutions, and the decision to prosecute is affected by many influences other than the current Supreme Court definition of obscenity. As catalogued by the N.Y.U. Obscenity Law Project, such “influences” include community attitudes toward obscenity, “the vocalness of those offended by sexually explicit materials,” prosecutor priorities, prosecutor resources, legislative activity, judge and jury attitudes, and political pressures.69 Many of these variables are interrelated, but most would operate independently of the existing legal definition of obscenity. Influences such as these undoubtedly account for many of the fluctuations in the trend line for appellate decisions. Indeed, given the number and variety of such forces, it is remarkable that the curve comports so well with the hypothesis.

The landmark case hypothesis is consistent with observed facts and, on all the circumstances, remains highly plausible. But no causal relationship need be shown to challenge the validity of Justice Brennan’s empirical assumption about Miller. We may totally reject the hypothesis and assume instead that fewer appeals are the result of fewer prosecutions. Fewer prosecutions, in turn, may be a product of limited prosecutorial resources and growing public tolerance of sexually explicit materials. Whatever the causal factors, the volume of appealed cases did not increase after Miller; it declined. If institutional stress is associated with a high volume of appeals, the stress is less since Miller.

Table 2 and figure 2 require little additional comment. The data are presented to show that the overall shape of the curve is approximately the same for all entries as for key number 5 entries. Comment on possible causal relationships would be largely redundant of the preceding discussion.70

2. Miller’s Impact on Tension Between State and Federal Courts

The volume of decided appellate cases can be measured by a relatively straightforward count of index entries. The second aspect of institutional stress—tension between state and federal

69. Id. at 891.
70. A Lexis search on the word “obscenity” for the years 1947-79 produced more cases than those listed in Table 2 but a curve of similar shape to that shown in Figure 2.
courts—has qualitative aspects that are obviously more difficult to define in operational terms. The method chosen was to equate tension with judicial opinions expressing dissatisfaction with the state of obscenity law as promulgated by the U.S. Supreme Court. If such a definition has validity, tension can be measured by counting the number of cases from a given sample in which such expressions of dissatisfaction appear. Defining "tension" in this fashion does not eliminate subjective judgment since someone must still decide which cases express dissatisfaction and which do not. Some such judgment must be made in virtually every kind of content analysis, however, and any reader is free to read the cases cited and make his own determination.71

West's Digest was again the starting point for data collection, with obscenity key number 5 providing access to judicial decisions most relevant to the search. The date of the Memoirs decision (1966) seemed a useful starting place, and 1978 was selected as a convenient cutoff point. The initial pool of cases thus included entries under obscenity key number 5 in the 8th Decennial Digest (1966-76) and cases decided between 1976 and 1978 appearing in the General Digest. From this population a random sample of 10% was drawn by selecting every tenth case, excluding decisions of the U.S. Supreme Court. The sample ultimately included thirty-two reported cases from the pre-Miller period72 and twenty-eight post-Miller decisions.73


Each of the sixty cases was carefully examined for expressions of criticism or dissatisfaction with the law of obscenity as promulgated by the U.S. Supreme Court. The results were startling. In ten of the thirty-two pre-Miller cases, the published opinions expressed clear dissatisfaction, and often biting criticism, of the performance of the Supreme Court in this troubled area of the law. In only one post-Miller case—a dissenting...
Selected excerpts from some of the critical pre-Miller opinions may illustrate how correct Justice Brennan was in describing institutional stress, defined in terms of judicial dissatisfaction with the state of the law in the area of obscenity. Responding to the 1966 trial of decisions in Memoirs, Ginzburg v. United States,76 and Mishkin v. New York,77 Judge Moore of the Second Circuit gently observed: “Despite the fourteen opinions in these three cases, the ‘fog in which guides and landmarks appear only dimly and obscurely from time to time’ . . . has not lifted appreciably.”78 Of the same decisions the United States District Court for the Central District of California commented: “The fact that the Court handed down fourteen different opinions in three cases on the same day . . . concerning obscenity, would indicate that clarity of understanding of the Court’s definition of obscenity is not exclusively perplexing to me.”79 Judge Orth of the Maryland Court of Special Appeals was a little more blunt: “The opinions of those [and other] cases . . . have left the law of obscenity in a deplorable state.”80 Perhaps Judge Tyler of the New York City Criminal Court said it best: “There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material. ‘Confusion now hath made its masterpiece.’ (Macbeth, Act II).”81

75. McNary v. Carlton, 527 S.W.2d, 343, 349 (Mo. 1975) (Seiler, C.J., dissenting and concurring in result). In this opinion, the dissenting judge referred to an earlier (1974) Missouri decision, S.S.&W., Inc. v. Kansas City, 515 S.W.2d 487 (Mo. 1974), in which the court had spoken of the “uncertainty” created by Supreme Court cases in this area.

76. 383 U.S. 463 (1966). The Court affirmed Ginzburg’s conviction for sending obscene materials through the mails, i.e., the magazine Eros, a newsletter Liaison, and a book entitled The Housewife’s Handbook on Selective Promiscuity. The conviction was sustained, in part, because the materials were advertised in a way that pandered to prurient interests.

77. 383 U.S. 502 (1966). The Mishkin case involved materials describing sexually deviant activities. The Court held that a finding of prurient appeal to the “probable recipient” was sufficient, even though the materials might be revolting rather than attractive to the average person. Id. at 508, 509.

78. United States v. One Carton Positive Motion Picture Film Entitled “491”, 367 F.2d 889, 892 (2d Cir. 1966) (citation omitted).


Judging by our sample the number of such commentaries was almost nine times greater in the pre-Miller period than in the years following that decision. By contrast, two of the twenty-eight post-Miller decisions praised Miller for bringing a little order out of the chaos. Justice Roberts of the Supreme Court of Pennsylvania hailed Miller as ending “a long period of uncertainty regarding the constitutional limits of governmental power to regulate obscene materials.” And the Texas Court of Civil Appeals, in an opinion issued shortly after Miller was handed down, almost gratefully commented that “our path through the judicial thicket of pornographic litigation has been aided greatly by this fortuitous event. For the first time in many years, we have a rather clear-cut definition of obscenity which commands a majority of the United States Supreme Court. . . .” Miller obviously made a difference in judicial perception of the state of the law.

IV. Conclusion

Justice Brennan’s Paris dissent was based on certain empirical assumptions about the anticipated impact of the Miller decision. This Article has attempted to raise doubt about the validity of those assumptions. Arguably, at least, producers and purveyors of obscene materials have fair notice. Given the commercial context in which such material is purveyed, and within which prosecutions take place, it is reasonable to assume that prospective defendants are cognizant of the risk they are taking. It is highly probable that many, perhaps most, take a calculated risk in getting as close to the line as they can without actually inviting prosecution. Admittedly, no one can know with certainty the exact point at which the line is crossed, but using the Miller definition, a reasonable person can at least know when he is getting close. The uncertainty experienced by businessmen in this area is surely no greater than that experienced by businessmen who wish to engage in aggressive practices without crossing the point of inviting antitrust prosecution. Certainly Miller provides more specificity than previous definitions, and it requires that state regulatory statutes also be specific. In this respect the Miller definition is demonstrably fairer than its predecessor.

What does fair notice require? Justice Brennan concluded

in his *Paris* dissent that fair notice was not possible with any definitional test of obscenity. Chief Justice Burger, speaking for the Court, was convinced that the *Miller* definition would satisfy the fair notice requirement. Neither point of view can be readily proved or disproved by empirical means. In the author's opinion the weight of analogy, logic, and experience since *Miller* supports the Burger position that *Miller* meets the constitutional notice standard.

Evidence bearing on the remaining two assumptions is less arguable. Even if some individuals have felt the chill, the increasing volume and explicitness of sexually oriented materials is powerful evidence that the alleged chilling impact upon society as a whole has been negligible. As for institutional stress, the volume of appealed cases and expressed judicial dissatisfaction with the law have measurably and markedly decreased since *Miller*. Unless one quarrels with the validity of the indicators, or denies the reliability of the sampling process, the empirical evidence of reduced stress in the system is near to being conclusive.

Casting doubt upon Justice Brennan’s empirical assumptions does not, of course, prove that *Miller* represents the best possible, or even a very good, approach to the regulation of obscenity. Proponents of a “wide open” approach may contend that any amount of chill is too much, or that any prosecution for sale to a consenting adult is one too many. Conversely, people who see pornography as a threat to society can argue convincingly that *Miller* has not helped much in view of the obvious growth of the industry since 1973. Whatever is done, however, it ought not be done under a misapprehension of *Miller*’s impact on society. Certainly those who would abandon all restrictions on distribution of obscene materials to willing adults should seriously reconsider whether the lack of fair notice, the chill on protected expression, and institutional stress are empirically sound reasons for doing so.