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AUTHORITIES CITED:

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1288

MARVIN MILLER,

Appellant,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

Motion of the American Civil Liberties Union of Southern California and the American Civil Liberties Union to File Brief *Amici Curiae*

The American Civil Liberties Union and the American Civil Liberties Union of Southern California respectfully move for leave to file a brief *amici curiae* in this case. Appellant's attorney has consented to the filing of this brief; the attorney for the appellee has not responded to our request for consent.

The American Civil Liberties Union is a nationwide nonpartisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil Liberties Union and functions within Southern California where this case arose.

During its fifty-year existence, the ACLU has particularly been concerned with safeguarding the First Amendment rights of free speech, free assembly and freedom of the press. Indeed, the ACLU was born in the years immediately following the First World War when those rights were so seriously jeopardized.

While our original concern was with efforts to restrict political expression, we have long maintained that all forms of speech and writing, including "obscenity," are entitled to blanket constitutional protection.

We believe that the issue to which our brief is addressed is extremely important not only in terms of this Court's obscenity doctrine, but in terms of all aspects of the First Amendment. For if there can be a variable standard from state to state to judge obscenity, there can be differing rules governing other First Amendment matters as well.

We believe that the entire thrust of this Court's teachings cuts against such variable standards. We believe that this *amici* brief will be of assistance to the Court by pointing out the doctrinal bases for the proposition that the First Amendment erects a uniform and national barrier against local censorship.

For these reasons, we respectfully request leave to file the within brief *amici curiae*.

Respectfully submitted,

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Attorney for Movants

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BRIEF *AMICI CURIAE*

Interest of *Amici*

The interest of *Amici* is set out in the preceding motion for leave to file this brief.

Question Presented

This brief is addressed solely to the issue of whether the use of a "state-wide" standard to establish the "customary limits of candor" element of the present obscenity test is violative of the First Amendment.

ARGUMENT

I.

The constitutional status of allegedly obscene expression requires determination on the basis of a national standard. Application of the criteria of State or local communities would undermine independent judicial review based upon First Amendment standards essential to a self-governing people.

1. All obscenity cases are at one and the same time First Amendment cases. The suppression of any particular expression "raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within constitutional standards". *Roth* v. *United States,* 354 U.S. 478, 497 (1957) (opinion of Justice Harlan). Since the fundamental freedoms of speech and press are indispensable to the continuing growth of a free society, "ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States . . . It is therefore vital that the standards of judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest". *Roth* v. *United States, supra* at 488 (opinion of Justice Brennan).

It misses the mark to state that obscenity is not "speech" and therefore subject to state regulation. "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." *Smith* v. *California,* 361 U.S. 147, 155 (1959). The power to

suppress obscenity is limited by the constitutional protection for free expression. "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrants of Property,* 367 U.S. 717, 731 (1961). This is but "a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks". *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963). "The line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . " *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). As Justice Brennan has noted,

> " . . . It has been suggested that this is a task in which our Court need not involve itself . . . But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates an issue of constitutional law . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' " *Jacobellis* v. *Ohio,* 378 U.S. 184, 187-188 (1964).

2. The foregoing demonstrates that First Amendment scrutiny is involved in every obscenity case. Each decision

in an obscenity proceeding means either that the particular communication will enter into the "thinking process of the community", or it will be suppressed. Since "obscenity" is a limitation on the right of the public to access to constitutionally protected material, it is the character of the right, and not the limitation, which determines application of a constitutional standard. In short, the focus is on First Amendment freedoms, their values and functions in a democratic society. We are dealing with freedom of expression, "the matrix, the indispensable condition, of nearly every other freedom". *Palko* v. *Connecticut,* 302 U.S. 319, 327 (1937).

The Court has frequently emphasized the individual and social importance of freedom of expression. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States, supra,* at 484. "It is the function of speech to free men from the bondage of irrational fears." *Whitney* v. *California,* 274 U.S. 357, 376 (1927). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940). "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell* v. *Connecticut,* 310 U.S. 296, 310 (1940). "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlighten-

ment was ever to triumph over slothful ignorance." *Martin* v. *Struthers,* 319 U.S. 141, 143 (1943). "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press Co.* v. *United States,* 326 U.S. 1, 20 (1945). "Free discussion of the problems of society is a cardinal principle of Americanism—a principle that all are zealous to preserve." *Pennekamp* v. *Florida,* 328 U.S. 331, 346 (1946). "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). "Its [the Constitution] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 (1959).

The foregoing indicates the contours of First Amendment freedoms. Freedom of expression is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. A rational self-fulfillment helps to shape individual judgments. Equally important is the recognition that the First Amendment was adopted to implement and facilitate the people's power to govern themselves. These two functions, self-fulfillment and societal participation, are the essential structures of the First Amendment. On the one hand, self-government means that

each individual in society must be free to think, reason, know, consider, appreciate and imagine. He must have the unfettered right to decide what he shall say and what he shall write, what he shall read, what he shall see, and what he shall hear. On the other hand, this thinking process involves more than political discussion; it includes all ideas, all information, art and literature, or any other communication which will help to educate the citizen for self-government. T. Emerson, The System of Freedom of Expression 6-9 (1969); A. Meiklejohn, The First Amendment Is an Absolute, Sup. Ct. Rev. 245, 262-263 (1961); Note, *Freedom to Hear: A Political Justification of the First Amendment,* 46 Washington L. Rev. 311 (1971); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 Geo. Wash. L. Rev. 429 (1971).

3. The exclusion of "obscene" speech from the marketplace of ideas has raised, and will continue to raise, major problems in the constitutional area of free speech and free press. See H. Kalven, Metaphysics of the Law of Obscenity, Sup. Ct. Rev. 1 (1960); *Ginzburg* v. *United States,* 383 U.S. 463, 478-481 (1966) (opinion of Justice Black); *id.* at 483 (opinion of Justice Douglas); *Memoirs* v. *Massachusetts,* 383 U.S. 413, 455-456 (1966) (opinion of Justice Harlan); *Jacobellis* v. *Ohio, supra* at 197 (opinion of Justice Stewart); *Redrup* v. *New York,* 386 U.S. 767, 770-771 (1967) (per curiam); *United States* v. *Reidel,* —— U.S. ——, 39 U.S. Law Week 4523, 4525 (1971) (opinion of Justice White).

These proceedings raise the question of whether the Court will go further and hold that each State is free to define "obscenity" as it desires. This states' rights argu-

ment is premised on the general view that Supreme Court review, under the Fourteenth Amendment, is limited only to the question of whether "the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power." *Roth* v. *United States, supra* at 501 (opinion of Justice Harlan). It is argued that the States' power to make speech criminal is confined by the Fourteenth Amendment only to the extent "as such power is inconsistent with our concepts of 'ordered liberty.'" *Ibid.* In the obscenity area, the argument continues, the interest of the federal government is "attenuated" and federal regulation must be weighed against the First Amendment. However, the States, it is urged, have "direct responsibility for the protection of the local moral fabric," and therefore should be permitted to regulate expression dealing with sex in a less restricted manner in the light of the allegedly lesser demands of the Fourteenth Amendment. *Id.* at 503-507.

The immediate answer to the foregoing would be that if the federal government has an "attenuated interest" in regulating any area of expression, then perhaps the federal government should not be regulating "obscenity" at all. Whether the federal government or the States should regulate "obscenity" is a question of allocation of governmental power unrelated to issues of the First Amendment. However, when we come to the question of what communication is entitled to the protective guarantees of the Constitution, a separate issue is presented. Here we deal with the question of the power of Government and the individual. "Surely there cannot be one idea of free speech essential to ordered liberty and binding on the states, and another idea of free speech, not so fundamental, but more stringent,

which inhibits the federal government alone. We are having enough difficulty working out one good theory of free speech without having the obligation now to develop two theories—one for the state level and one for the federal level." H. Kalven, The Negro and the First Amendment 34 (1965).

In *Roth,* Justice Brennan, writing for the majority of the Court, stated: "[W]e rejected, in this case, the argument that there is greater latitude for state action under the word 'liberty' under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment." 354 U.S. at 492, fn. 31. In *Jacobellis* v. *Ohio, supra,* in holding that the motion picture film there involved was not obscene and entitled to constitutional protection, Justice Brennan referred again to the requirement of ascertaining the "dim and uncertain line" that often separates obscenity from constitutionally protected expression,

> "It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the States as they do to the Federal Government was rejected in Roth-Alberts, supra, where the Court's single opinion applied the same standards to both a state and a federal conviction." 378 U.S. at 187, fn. 2.

Hence, the principle was reaffirmed that in "obscenity" cases, as in all others involving rights derived from the First Amendment guarantees of free expression, the Court "cannot avoid making an independent constitutional judg-

ment on the facts of the case as to whether the material involved is constitutionally protected." 378 U.S. at 190.

The belief that the States should be permitted to "experiment" on the basis of their own "community standards" is extremely alarming. It has not been accepted in other First Amendment areas such as libel law, where certain expression has been categorized as deserving of lesser constitutional protection. See *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). If accepted with regard to obscenity, the result would be the elimination of independent judicial review based on federal constitutional standards. Decision-making in the constitutional area would be controlled by concepts of state law. If States were permitted to infringe on constitutional freedoms by their own subjective standards, the fundamental political goal of self-government for which the Constitution was ordained and established would be defeated. Moreover, such a "watered-down version of constitutional rights," *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1966), would reverse the process of absorption of the specific freedoms of the first ten Amendments into the "liberty" guaranteed against state infringement by the Fourteenth Amendment. See, *e.g., Gitlow* v. *New York,* 268 U.S. 652, 666 (1925); *Pennekamp* v. *Florida, supra* at 335; *Gideon* v. *Wainwright,* 372 U.S. 335, 340-342 (1963); *Benton* v. *Maryland,* 395 U.S. 784, 793-796 (1969); *Malloy* v. *Hogan,* 378 U.S. 1, 4-11 (1964).

America is, of course, composed of different individuals and groups of individuals—social, political, economic, religious, ethnic and cultural. We are all, however, citizens of the United States living under a national Constitution. We have changed from a nation of farmers, shopkeepers and artisans into a vast, complex, industrial society. There

is a "common market" of concern which transcends state borders with respect to the meaning of freedom of speech and freedom of the press. The nation as a whole is concerned that education for self-government and self-realization shall be unimpaired, because it is now plain that the citizens of every State in the Union must be fully informed and mature if the country is to endure. "It is not true that a citizen of Massachusetts need not care if the citizens of Alabama are barred from reading certain books or seeing certain films; for there is a national—federal—interest in the level of education and culture achieved or possible in any part of the country." M. Konvitz, Expanding Liberties 220-221 (1966). Clearly, the status of individual expression under the Constitution cannot be determined by local tolerance. The standard of judgment of acceptability of expression must be a national one because it is "the fundamental and paramount law of the nation" which is being expounded. *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958).

It is plain that if the "rational" standard is accepted, such test will unquestionably result in widespread suppression of allegedly "obscene" materials at state and municipal levels. The unevenness of censorship permitted by a local standard would inevitably deter the dissemination of protected expression. The First Amendment guarantee fundamentally protects interstate and intrastate expression from the vagaries of local censorship and political opportunism. "There are village tyrants as well as village Hampdens." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943). Unless First Amendment standards are permitted to govern all attempted "obscenity" censorship in the United States, "a witch hunt might well come to pass which would make the Salem

tragedy fade into obscurity." *United States* v. *Klaw,* 350 F.2d 155, 170 (2 Cir. 1965). Publishers and producers of books, magazines, films, and other media of communication, cannot be expected to print or create separate editions of books or prints of film to satisfy police officers, prosecuting officials, censorship boards and private censorial groups in Youngstown, Ohio, Detroit, Michigan, Mobile, Alabama, Sioux City, Iowa, Grand Rapids, Michigan, and other parts of the country. Each "community" under such circumstances would censor literature and the arts for the entire country. See, Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 302-320 (1954); Newsletters on Intellectual Freedom, Intellecutal Freedom Committee of the American Library Association.

The statement in *Jacobellis,* therefore, with respect to the requirement of a national standard, reaffirms a principle essential to the maintenance and operation of our constitutional system:

> . . . Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed

> by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' Pennekamp v. Florida, supra, 328 U.S., at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding. 378 U.S. at 194-195.

See, Brennan, *The Bill of Rights and the States,* in The Great Rights 67-86 (Cahn Ed. 1963).

If the aim of self-government based upon the broadest freedoms of speech and press is to be achieved, the diversity among communities should be reconciled with the demands of the First Amendment in a manner quite different than that proposed by states' rights advocates. The rule should be, first, that if expression does not substantially exceed national standards, then such expression is plainly entitled to constitutional protection. However, local communities may permit a broader area of freedom of expression than even that which the First Amendment assumedly protects. Thus, before a communication can be suppressed, the proof should show beyond doubt, initially, that the particular expression exceeds the standards of the nation as a whole. If it does not, then clearly the material is entitled to constitutional protection. Addi-

tionally, however, if national standards are exceeded, it should still be open to the accused to show a broader toleration by the local community. In brief, a local community may tolerate what the nation, generally, does not, but a local community should not be permitted to suppress what the nation tolerates.[1]

These principles have been recognized by lower federal courts which have also warned against the danger that First Amendment values can be put to a vote or in other respects subject to local control. Thus, for example, in *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla. 1970) (three-judge court), the question was whether Florida could refer to local community standards in regulating obscenity. The court's reply is appropriate:

> The constitutional necessity for a national, as opposed to a local, standard is apparent not only because "[i]t is, after all, a national Constitution we are expounding," *Jacobellis* v. *Ohio* . . ., but also because of the unevenness of censorship permitted by a local standard, making criminal to show in one part of the State, or of the nation, that which is legal in

[1] There is precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon such conduct." *In re Mayalls Naturalization,* 154 F. Supp. 556, 560 (E.D. Pa. 1957) (opinion by Chief Judge Ganey); see also, *In re Naturalization of Spak,* 164 F. Supp. 257, 259-260 (E.D. Pa. 1958).

> another (an equal protection rationale), and because of the inevitable consequence of chilling the dissemination of protected expression (a First Amendment basis). Moreover, the national standard is not a national "average" of permissibility that would result in half of the nation being brought under the more repressive standards of the other half, thereby depriving that public of access to expression permitted in their own locale. Although the contours of the national standard may be imprecise, the First Amendment guarantee is a fundamental one that protects interstate (and intrastate) expression from the vagaries of local censorship and political opportunism. 319 F. Supp. at 466.

Similarly, in *United States* v. *35 MM Motion Picture Film Entitled "Language of Love"*, 432 F. 2d 705 (2d Cir. 1970), the Second Circuit, rejecting the contention that great deference should be paid to the verdict of the jury because it is the vehicle of public sentiment, rhetorically questioned whether,

> [i]n final analysis, is freedom of speech and expression, including exhibition of motion picture films, to be based on the opinions of 51 percent or even 80 percent of our populace? If so, it might well be that on a national plebiscite the "Language of Love", "I Am Curious (Yellow)", "Les Amants", "Memoirs", and others will all be condemned by a majority vote. Minorities would then read and see what their fellow men would decide to permit them to read and see. The shadow of "1984" would indeed be commencing to darken our horizon. 432 F. 2d at 715 (footnote omitted).

Professors Lockhart and McClure agree, rejecting "the validity of the assumption that the phrase 'contemporary community standards' refers to the standards of state or local communities". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 110 (1960). The authors state that "the standards of society as a whole" are the only applicable constitutional standards, *id.* at 110, and view the concept of "local community standards" as a "dangerous expansive concept". *Id.* at 114. Another outstanding legal scholar has also argued against a double standard in the area of liberty of speech and press. Paul Freund argues that the standard of representative self-government should be the basic standard for judges in applying constitutional guarantees. He repeats the words of Dr. Meiklejohn that it is the "mutilation of the thinking process of the community" from which the First Amendment was designed to save us:

> "There is here, I believe, a useful analogue in the market place for goods, but the analogue is not the local market. Rather it is the concept of a national market, which no state can freely foreclose because the market involves outside interests that are not represented within the state. It is the federal system in the commercial realm which provides a parallel to the control of expression by the state, and the key is the concept of representation . . . No compact majority could act for all potential hearers, any more than one state can set a rule for others in the regulation of interstate commerce . . . For our purposes, it seems to me, the most useful reference point for limitations on fundamental freedoms is to be found by recurring to the analogy of the free national market safeguarded against local self-interest . . . If the court does require

a local government to turn square corners when it deals with interstate commerce or trade in ideas, it is vindicating its responsibility as the guardian of structure and process." Freund, The Supreme Court of the United States, 81-87 (paperback ed. 1961).[2]

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[2] In *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655 (1968), the California Supreme Court held, for the purposes of determining the obscenity of a theatrical "topless" dance, that "the relevant community" was the State of California. The court distinguished the particular "fact situation" in that case from books or films intended for nationwide dissemination. The court agreed that under such circumstances a "non-national community standard might well unduly deter expression in the first instance and thus run afoul of First Amendment guarantees." The topless dancing was described as subject matter "obviously not intended for nationwide dissemination." 72 Cal. Rptr. at 666.

It was suggested in *Giannini* that expert witnesses might be difficult to find to testify with respect to a nationwide standard. There does not appear to be much merit to this contention. It is, of course, true that the standard is imprecise; nevertheless, knowledge of what the nation tolerates can be as reasonably demonstrated by informed persons as the demonstration of state toleration. *Giannini* pointed to the statement by Judge Hand in *United States* v. *Kennerley*, 209 Fed. 119 (D.C.N.Y. 1913) which, protesting the old *Hicklin* rule, urged that the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which "the community have arrived here and now" (*ibid.*, 21). An examination of the entire passage indicates clearly that Judge Hand was not referring to the standards of state or local communities, but rather to the standards of society as a whole. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 110 (1960). It is submitted that the importance of invoking a national standard transcends the question of whether or not the particular expression is presented locally or disseminated throughout the country. A national standard is required in all cases in order to make certain that the restrictive standards of particular local communities in obscenity censorship will not reduce freedom of speech and press to the standards of those who "little understand them or appreciate their values." *Id.* at 114.

CONCLUSION

If there is to be freedom of speech and press anywhere, there must be freedom of speech and press everywhere. Any restriction on the right of citizens to freely express themselves, and the right of the public to hear and to be informed, must have a national justification; it cannot depend for its validity upon the capriciousness or whim of a "local community".

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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