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examination of procedural protections will not only provide a method for determining the reasonableness of proposed body intrusions, but it also will serve to highlight the right of the individual to hold his person inviolate against unwarranted state searches.

MICHAEL B. MINTON

OBSCENITY—JURY DETERMINATION OF CONTEMPORARY COMMUNITY STANDARDS CONSTITUTIONALLY REQUIRED IN MISSOURI

_Kansas City v. Darby_1

Robert Darby was convicted of exhibiting an obscene motion picture in violation of a Kansas City ordinance.2 Darby was tried without a jury in the Kansas City Municipal Court.3 On appeal to the circuit court Darby filed a motion to dismiss on the ground that he "was denied in the Municipal Court trial below the right to have community standards with regard to the question of obscenity determined by a jury . . . ."4 The motion was overruled and, after a jury trial in the circuit court

facts and circumstances of each case, see note 30, supra, nor the possibility that often the public interests in obtaining evidence may outweigh the inviolability of the person. For an excellent discussion of the factors to be considered in deciding what is reasonable in a particular fact situation, see Comment, supra note 29, at 312-18. For arguments supporting the "per se unreasonable" position, see Note, Criminal Procedure—Search and Seizure—Bodily Intrusions—Substantive Interpretation of Fourth Amendment Rights, 50 Tul. L. Rev. 411, 417-18 (1976); Note, Surgery and the Search for Evidence: United States v. Crowder, 37 U. Pitt. L. Rev. 429, 438-41 (1975). The latter note was published before the original court of appeals decision in Crowder was withdrawn.

2. _Kansas City, Mo., Code of Gen. Ordinances_ § 5.56 (1967) provides: "No person shall exhibit in the city any motion picture which he knows is immoral, obscene or detrimental to the public good, or rent, sell or give the same to any other person for the purpose of exhibition."
3. _Id._ § 22.1 prohibits jury trials in municipal court.
4. 544 S.W.2d at 530.
Darby was convicted and sentenced to 120 days in jail and a five hundred dollar fine. The Kansas City District of the Missouri Court of Appeals affirmed the conviction. The Missouri Supreme Court reversed, holding that a jury trial "in the first instance" is required for a determination of obscenity under the first and fourteenth amendments. A jury determination of obscenity at the appeal stage in the circuit court was held to be insufficient.⁵

In McNary v. Carlton,⁶ an action to enjoin the sale and distribution of an obscene book under section 563.285, RSMo 1969, the Missouri Supreme Court previously held that a jury determination of obscenity under the standards established by the United States Supreme Court in Miller v. California⁷ was constitutionally required. Darby makes it clear that an opportunity for such a jury determination must be available to a defendant in the first instance, that is, in the initial judicial proceeding.

A persuasive argument can be made that a jury trial is not constitutionally necessary in either the Darby or McNary situations. The maximum penalty that Darby could have received in municipal court for violating the city ordinance was six months imprisonment, or a five hundred dollar fine, or both.⁸ The United States Supreme Court has recognized since Callan v. Wilson⁹ that there is a class of petty offenses which may be tried without a jury. In Baldwin v. New York¹⁰ the Supreme Court ruled that for purposes of the right to a jury trial, an offense could be classified as petty if authorized imprisonment did not exceed six months. Missouri adopted the rule of Baldwin in State ex rel. Cole v. Nigro,¹¹ holding that there was no right to a jury trial in municipal court where the violation of an ordinance could incur no more than six months imprisonment.

In finding that a jury trial is constitutionally required in obscenity cases at the municipal court level, the Missouri Supreme Court in Darby considered the following passage from Callan "extremely persuasive."¹²

Except in that class or grade of offenses called petty offenses ... the guarantee of an impartial jury to the accused in a criminal prosecution ... secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged.¹³

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5. Id. at 532.
6. 527 S.W.2d 343, 348 (Mo. En Banc 1975).
8. KANSAS CITY, MO, CODE OF GEN. ORDINANCES § 1.17 (1967).
11. 471 S.W.2d 933 (Mo. En Banc), appeal dismissed, 404 U.S. 804 (1971) (per curiam); accord, Kansas City v. Bott, 509 S.W.2d 42 (Mo. En Banc 1974).
12. 544 S.W.2d at 580.
13. 127 U.S. at 557 (emphasis added).
The Missouri court failed to recognize the petty nature of Darby's offense; an offense, under rulings of both the United States and Missouri Supreme Courts, to which no right to a jury trial would attach.

The holding of the Missouri Supreme Court in McNary, that a jury determination of obscenity is required in an action to enjoin sale or distribution of allegedly obscene materials, was also not required. The United States Supreme Court, in a per curiam opinion remanding Alexander v. Virginia for further proceedings consistent with Miller, stated that "[a] trial by jury is not constitutionally required in this state civil proceeding . . . ." In Alexander the Court cited Kingsley Books, Inc. v. Brown where a jury trial was found not to be required under a New York obscenity statute almost identical to the Missouri statute under which the defendant in McNary was convicted.

Ignoring these precedents, the Missouri Supreme Court determined that the first amendment, as applied to the states through the fourteenth amendment, requires a jury determination of obscenity under the Miller test.

In Miller the Supreme Court established guidelines for a determination of obscenity by 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.

At first glance, it appears that the Miller test does give jurors wide discretion in determining whether materials appeal to the prurient interest and are patently offensive. Certainly the Missouri court's decisions in McNary and Darby are based on the premise that a defendant must be given an opportunity to have a jury make a determination of "contemporary community standards." However, analysis of the cases decided

14. 527 S.W.2d at 348.
15. 413 U.S. 386 (1973).
16. Id.
18. 413 U.S. at 24.
20. In McNary v. Carlton, 527 S.W.2d 343, 348 (Mo. En Banc 1975), the court stated that "[t]he residents of each [county] should be accorded the privilege, by utilization of the jury system and within the Miller guidelines, of determining for themselves what material would be considered obscene by the average person in their communities."
after *Miller* shows that, as a standard for determining obscenity, the contemporary community standard is a hopelessly inadequate tool. The Missouri court relied too heavily on the ability of jurors to determine whether a certain work is obscene.

The Supreme Court in *Miller* rejected the notion that obscenity was to be determined by the use of a national standard, finding a nationwide standard too "abstract" to aid jurors in making a determination of obscenity. The Court reasoned that whether material appeals to the prurient interest and is patently offensive is essentially a question of fact, and that the "nation is simply too big and too diverse" to apply a nationwide standard of obscenity.\(^{21}\) The Court went on to hold that for the purpose of ascertaining community standards, defining the "community" as the state of California was constitutionally acceptable.\(^{22}\) *Miller* is predicated upon the assumption that there is a definable community with a readily ascertainable standard of what is "patently offensive."

However, in the two major obscenity cases following *Miller*, the Supreme Court did not require definition of the specific community referred to in "contemporary community standards." In *Jenkins v. Georgia*\(^ {23}\) the jury was instructed to apply "community standards," with no further definition of the word "community," in determining whether a film would appeal to the prurient interest. It is difficult to imagine what could be more abstract than an undefined community. Yet the Court in *Jenkins* held that a state could define an obscenity offense in terms of "contemporary community standards" without further specification.\(^ {24}\)

In *Hamling v. United States*\(^ {25}\) the jury was instructed to apply the standards of the nation as a whole in determining the obscenity of the material involved. In *Miller* the Supreme Court stated that a national standard was too "hypothetical and unascertainable"\(^ {26}\) to allow the trier of fact to determine whether a work is obscene. In *Hamling*, however, the Supreme Court held that the use of a nationwide standard did not materially prejudice the defendant.\(^ {27}\) The Court's rationale for requiring a finding of patent offensiveness and appeal to the prurient interest in terms of a contemporary community standard was to give the fact finder a concrete standard to use in determining the obscenity *vel non* of

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22. 413 U.S. at 33-34.
24. Id. at 157.
26. 413 U.S. at 31.
27. 418 U.S. at 107.
a work, and to allow obscenity regulation to reflect local morality.\textsuperscript{28} Contrary to this rationale, the \textit{Jenkins} and \textit{Hamling} decisions support the position that there is no practical distinction between the application of a community standard or of a nationwide standard.

If allegedly obscene works are to be evaluated by jurors in terms of a community standard, appellate review will be severely limited, as the appellate judge will have difficulty in ascertaining the community standard determined by a properly charged jury.\textsuperscript{29} However, the apparent approval by the Court of \textit{de novo} determination of obscenity on appeal makes a jury determination of contemporary community standards far less important. \textit{Miller} reserved the right for appellate courts to make an independent review of constitutional claims in obscenity cases.\textsuperscript{30} In \textit{Jenkins} the Supreme Court overturned a finding of obscenity made by a properly charged jury without discussing why the jury was wrong or what standard of review was to be used under the "contemporary community standards" test.\textsuperscript{31} In \textit{Hamling} the Court found that a finding of obscenity was justified, even though the jury used the improper national standard in determining the material's obscenity.\textsuperscript{32} \textit{Jenkins} and \textit{Hamling} support the conclusion that appellate judges may review obscenity cases and make their own determination of patent offensiveness and appeal to the prurient interest.\textsuperscript{33} Perhaps the Supreme Court realized that even when a community is precisely defined in terms of a specific geographic area, there is no ascertainable community standard.\textsuperscript{34} Whenever two or more persons are asked to determine whether material appeals to the prurient interest and is patently offensive, it is unlikely that uniform criteria will be used.

\textsuperscript{28} 413 U.S. at 30. In the \textit{Hamling} decision the Court stated that the rationale for requiring a judgment to be made in terms of contemporary community standards is to insure that material is not judged by the standards of an overly sensitive or insensitive person. 418 U.S. at 107. This is the reason the court in \textit{Miller} instructed the jury to apply the standard of the \textit{average} person in the community. 413 U.S. at 33.

\textsuperscript{29} See Note, supra note 19, at 359. The Supreme Court of Wisconsin has ruled that since questions of prurient appeal and patent offensiveness are questions of fact, appellate review is limited to the last element of the \textit{Miller} test—whether the work lacks serious literary, artistic, political or scientific value. Court v. State, 63 Wis. 2d 570, 217 N.W.2d 676 (1974).

\textsuperscript{30} 413 U.S. at 25 (1973).

\textsuperscript{31} 418 U.S. at 161. See Note, supra note 19, at 359.

\textsuperscript{32} 418 U.S. at 107.

\textsuperscript{33} See \textit{Jenkins} v. Georgia, 418 U.S. 153, 164-65 (1974) (Brennan, J., dissenting). Brennan quotes from his own dissent from Paris Adult Theatre, Inc. v. Slaton, 413 U.S. 49, 92 (1973): "Thus it's clear that as long as the Miller test remains in effect 'one cannot say with certainty that material is obscene until at least five members of this court, applying inevitably obscure standards, have pronounced it so.'"

The Missouri Supreme Court's holding, that a jury determination of obscenity under the Miller guidelines is always constitutionally required, may be ill-founded. First, the inadequacy of the community standard for determining obscenity cannot help but result in unsatisfactory and inconsistent verdicts. Second, the availability of a de novo determination of obscenity on appeal has the effect of permitting judges to determine the facts themselves. Notwithstanding these arguments, if obscenity convictions are to stand after the holding in Darby, prosecutors in Missouri must insure that defendants have the opportunity "in the first instance" to have a jury determination of the obscenity vel non of the material in question.

In order to provide the constitutionally necessary jury determination as defined by the Missouri Supreme Court, Kansas City could amend its ordinances to allow jury trials for obscenity prosecutions in municipal court. Considering the relatively small number of obscenity prosecutions in municipal court and the cost of establishing a jury selection system, such a provision would be impractical. The alternative is a suit in circuit court brought by the city attorney to enjoin the publication, sale, or distribution of obscene materials. However, such a suit would not involve criminal penalties as did the municipal ordinance in Darby. County prosecutors can bring criminal actions in magistrate court or circuit court under several Missouri statutes.

The major criminal obscenity statute in Missouri is section 563.280, RSMo 1969, which makes it a crime to publish, sell, circulate, etc., obscene works. To insure that the defendant's constitutional rights are not violated, the jury must be instructed on the determination of the work's obscenity under the Miller guidelines. Following is a jury instruction suggested for use under this statute, which with minor adaptations may be used for the other obscenity statutes:

**OBSCENE MATERIAL:** Publication, Sale, Circulation, etc.

(As to Count ________, if) (If) you find and believe from the evidence beyond a reasonable doubt:

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35. § 563.285, RSMo 1969. Bringing suit under this section poses special problems for the prosecutor. In McNary the Missouri Supreme Court ruled that even though the action under this statute is an equitable action for an injunction, an advisory jury must rule on the issue of the work's obscenity. The Missouri Rules of Civil and Criminal Procedure, however, have no provision for special verdicts. The court in McNary did not deal with this problem. See Note, *The Binding Advisory Jury in Missouri Obscenity Cases*, 45 U.M.K.C.L. Rev. 159 (1976).

36. See §§ 563.270, 280, .290, .310, RSMo 1969. Section 542.281, RSMo (Supp. 1975), provides for the search and seizure of obscene material, but given the procedural safeguards incorporated into the statute making it difficult to seize more than a few copies of allegedly obscene material, this statute is seldom used.

First, that (on) (on or about) ——— in the (City) (County of) ———, State of Missouri, the defendant (manufactured) 38 a [describe the material] which is obscene, and

Second, that defendant knew of the character of the [describe the material] and knowingly (manufactured) 39 it, then you will find the defendant guilty (under Count ———) of the (manufacturing) 40 of an obscene [describe the material].

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

Material is “obscene” within the meaning of this instruction if:

1. The average person, applying the existing standards of the community of ——— County would find that the material, taken as a whole, appeals to the prurient interest, which is a shameful or morbid interest in sex, and excites lewd or lustful desires, 41 and

2. The material depicts or describes in a clearly and obviously offensive way [representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals], 42 and

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38. Insert other acts prohibited by the statute: (printed) (published) (bought) (sold) (offered for sale) (had in his possession with intent to circulate) (gave away) (distributed).

39. See note 38 supra.

40. See note 38 supra.

41. The guidelines established by the Supreme Court in Miller v. California require the trier of fact to determine "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ." 413 U.S. at 24. In McNary v. Carlton, the Missouri Supreme Court seemed to say that the applicable community standard is the standard of the county from which the jurors come:

We doubt that residents in St. Louis County would view a question of obscenity in the same light as residents of Dade County. We consider it important, in determining the issues of obscenity, that neither be bound by the other. The residents of each should be accorded the privilege, by utilization of the jury system and within the Miller guidelines, of determining for themselves what material would be considered obscene by the average person in their communities.

527 S.W.2d at 347-48.

42. The Miller guidelines require that the trier of fact find that the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." 413 U.S. at 24.

The Missouri Supreme Court held in McNary that § 563.280, RSMo (1969), would not be unconstitutionally vague only if the word obscene is construed to regulate the descriptions listed in the instruction. 527 S.W.2d at 346. Thus, it would seem that these descriptions have become an element of the offense. Therefore, a jury determination that the material is a patently offensive description of an ultimate sexual act, etc., is required, rather than merely a determination that the work is patently offensive.