

## **Censorship: A Case Studied Through Past, Present, and Future**

*The following is a section from a twenty page paper by Laura Tull:*

### **INTRODUCTION**

Censorship and the First Amendment are hot topics today. In the past few years there have been more and more cases of restricting the right to speak. Artists have not been excluded from these restrictions. In fact, to a large extent they have been in the center of it all. This paper is going to explore one incident of an attempt to censor controversial art. This particular incident began over two years ago on April 7, 1990, when police entered the premises of the Contemporary Arts Center in Cincinnati, Ohio, and forced the Center to temporarily close, as members of a grand jury examined an exhibition there. Later that day, in Hamilton County Municipal Court, the grand jury members convened and returned indictments. For the first time in the history of the United States of America, an art gallery was charged with the criminal misdemeanors of pandering obscenity and the illegal use of minors. The cause of these charges were seven photos in a one hundred and seventy- five photo exhibition of the work of the late Robert Mapplethorpe, entitled "The Perfect Moment". These seven photos were placed in a separate room of the exhibit because of the nature of their subjects. This case has already been decided, and the defendants have been acquitted. But it is important that an exploration of this case be made. As Millicent A. Guadieri, executive director of the Association of Art Museum states:

The selection of works to be placed on exhibition is a matter of professional judgement. Also, works of art can be controversial. The board must therefore be prepared to handle with integrity and intelligence such problems that may arise.<sup>1</sup>

Because this is an issue that all Art Managers will probably face, this paper will examine what for now is the only case where the issues entered the court room. The case of Cincinnati v. Contemporary Arts Center (CAC) and Dennis Barrie will be examined from the perspective of its legal background, its actual occurrence, and its after effects, both on the center and to the art world in general.

### **LEGAL BACKGROUND**

An understanding of the legal background of obscenity law is essential to understanding how Dennis Barrie and CAC finally won. For, as juror Anthony Eckstein stated: "The first thing we did was to make sure that each of us understood the obscenity law."<sup>2</sup> To really understand the events of the Dennis Barrie case, it is important to look back in time to a Supreme Court case that occurred in 1973, Miller v. California. It is this case that is referred to when the courts look to see if the case in review fits what could be called the Miller standard of obscenity, the legal definition. In this case the appellant, Marvin Miller, was charged under California Penal Code

with knowingly distributing obscene material through the mail. He had distributed several brochures by mail as a form of advertising certain "adult" books. In these brochures were sexually explicit illustrations. It was the intention of the Supreme Court at that time to "define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."<sup>3</sup> The Fourteenth Amendment deals with the relation of the superiority of the states to the Federal level of government. Basically it involves the superiority of the Constitution over State laws. Thus the Miller case was setting a precedent over how all states should view obscenity in the context of the First Amendment of the United States. Due to the importance of the First Amendment it is stated here as from the Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>4</sup>

Despite the right of free speech under this amendment, it was not interpreted by the court as protecting all forms of speech. The court at the time acknowledged "the inherent dangers of undertaking to regulate any form of expression. [And that] state statutes designed to regulate obscene materials must be carefully limited."<sup>5</sup> It would allow certain types of regulated unprotected speech, but not overtly remove the rights of individuals to free expression. The court thus determined that applicable state law must specifically define any sexual conduct restricted. This definition in State laws must reflect a three point definitional test of obscenity, as written in the opinion of the Miller case:

- (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interests.
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>6</sup>

The court further explained that the first two points were to be based on a community standard, for "it would be unrealistic to require that the answer be based on some abstract formulation," and that a "national community standard" for all fifty states "would be an exercise in futility."<sup>7</sup> "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."<sup>8</sup> Thus, obscenity is to be determined by each individual state based on the above three points, so that what is obscene in California, may not be considered obscene in Ohio. Now the third point is never connected in the court opinion with the "community standard." It is stated, however, that the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent."<sup>9</sup> It is important to keep the three points of obscenity in mind as the Dennis Barrie case is discussed, especially the third point and this discrepancy with the "community standard.."

Now, the Miller case was far from the last obscenity case that the Supreme Court would hear, and has not stood entirely unchanged with time. There was a case in 1987 that would alter slightly how the definition of obscenity would be used, at least the third point. Since the Dennis Barrie case involved works of art, it is important to look at this new case's effect on the third point of the obscenity definition that encouraged the protection of works of artistic value. This case is referred to as Pope v. Illinois. In this case, the omission of the "community standard" as a bases for determining whether a work is covered under the third point is assessed in detail. This case involved the selling of "obscene" magazines. The court opinion reaffirmed the application of "community standards" to determine an "appeal to prurient interest" and "patent offensiveness."<sup>10</sup> Now when the court turned to the third prong of the test, it finally set a standard by which this point was to be determined. In the words of the opinion:

The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.<sup>11</sup>

This seems to be considered by some an improvement from the old concept of viewing the value of works from the eyes of an average person in a community. Michael Bamberger, counsel for the Media Coalition, sees this ruling as allowing "standards applied in each state to be more continuous,"<sup>12</sup> that is, less variance from state to state. "The risk.. is that under a 'community standards' instruction a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion."<sup>13</sup> Also, states Irwin Karp, participant in the Volunteer Lawyers for the Arts, "there would be tremendous diversity of opinion and, more importantly, an average person is not qualified to make those judgements. The ruling requires the courts to consider evidence from experts."<sup>14</sup> What is curious about this case, beyond how it changes the obscenity question, is that, in every article about the CAC's case used in this paper, not once is the "reasonable man decision" brought forward. Most just put all three points under the "community standard." This is especially interesting since it is considered that the expert opinions brought forward by the defense won them the acquittal.

## ENDNOTES

1. Tully, Judd. "Where Does the Buck Stop?." Arts News v. 90 (October '91) p.156.
2. Cembalest, Robin. "The Obscenity Trial." Arts News. v.89 (December '90) p. 137.
3. The Supreme Court Obscenity Decisions. Greenleaf Classics, Inc.: San Diego, 1973., p.5.
4. United States Constitution.
5. The Supreme Court Obscenity Decision, p.9.
6. Ibid., p.9-10.
7. Ibid., p.16
8. Ibid., p.9
9. Ibid., p.20.
10. 107 S.Ct. 1918, p. 1920.
11. Ibid., p.1921.
12. "Supreme Court Fine Tunes Third Part of 'Miller' Test." Publisher's Weekly. v.231 (May 22, 1987) p. 20.
13. 107 S.Ct. 1918, p. 1921, including footnote.
14. "Miller Test.", p. 20.