JUDICIAL ENFORCERS? EXPLORING LOWER FEDERAL COURT COMPLIANCE IN REGULATING THE OBSCENE

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Although federal circuit and district court judges are placed within a federal hierarchy, and receive legal and judicial training that emphasizes the importance of the judicial framework and its structure, such judges are also subjected to other pressures such as the types of litigants within the courtrooms as well as their local political environment. Furthermore, such judges are apt to form their own views about politics and legal policy and are often appointed by presidents who approve of their ideological leanings. Thus, federal courts are caught between competing goals such as their willingness to maximize their preferred legal policy, and their place within the judicial hierarchy. This dissertation applies hierarchy and impact theory to assess the importance of the judicial framework and its socialization, by analyzing both the judicial opinions and votes of federal circuit and district court judges in obscenity cases during a four-decade period (1957-1998).

The research presented here finds the influence of higher court precedent to correspond in part with the conception of a judicial hierarchy. An analysis of citations of Supreme Court precedent (*Roth v. United States* (1957) and *Miller v. California* (1973)) in lower court majority opinions suggests low levels of compliance: lower courts at the circuit and district court level do not signal to the Supreme Court their acceptance of High Court doctrine; thus, except for 'factual' cases, most circuit and district court decisions do not comply formally with higher court precedent. An analysis of judicial votes, however, suggests that a Supreme Court doctrinal shift (to

Miller v. California) influences lower court decisions only at the circuit court level. Further investigation suggests that Supreme Court precedent has a greater influence in circuit courts than in district courts: not only is the magnitude greater for circuit (versus district) court decisions, such results occur when controlling for such factors as the appointing president, regional variations, various constitutional claims and types of litigants. Thus, it appears that the influence of Supreme Court doctrine is much stronger in the circuit courts (only one step removed from the Supreme Court) than in district courts yet the hierarchy is influential nonetheless.

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CHAPTER 1

INTRODUCTION, LITERATURE REVIEW AND THEORETICAL APPROACH TO THE RESEARCH

One of the most difficult social issues in contemporary America is obscenity. The topic of obscenity, and especially the amount of protection to grant materials of an erotic (or more graphic) nature, provokes a variety of responses across a wide ideological spectrum. To what extent (if any) should governments at all levels protect or outlaw materials that depict, describe or otherwise address the topic of sex? Some deem pornography to be a matter of the exploitation of women and argue that governments should enact legislation intent on criminalizing such activities (MacKinnon and Dworkin 1998). A contrasting view considers such regulation an offense against true intent of the Framers (Henthoff 1992, Chapters Eleven, Twelve). At least one author suggests that lawmakers consider "the moral evils of obscenity, the virtues of art, and the requirements of public consensus in a regime of rational liberty" and that works "must be *predominantly* obscene" to justify condemnation (Clor 1969, 272-273). Another asserts that the liberal view of declaring no speech off limits is a false hope and that an unwavering adherence to abstract principles represents "a Cartesian fantasy" (Fish 1994, 132). One thinker argues that an "imaginative" obscenity may be permissible for ridiculing the low in Eros; the contemporary

discussion of sex, with its scientific reductionism, renders obscenity meaningless at best and a violation of Eros at worst (Bloom 1993). One author sums the problem: "[T]he thoughtful man realizes that there is necessarily a tension, in a healthy community, between the demands of the public and the charms of the private. To sacrifice either one to the other is to deprive mankind of something essential to the full flowering of the human being or to the competent dedication of citizens" (Anastaplo 1975, 118).

Caught in the middle of this maelstrom are federal lower courts. Charged with the task of ruling on a variety of legal (and political) issues within the realm of obscenity, federal lower courts are called upon to reflect upon various issues such as deciding at what point freedom of expression ends and the "exploitation of interests in titillation by pornography"[1] begins. Moreover, their role as arbiters of both public discourse and private behavior is mitigated by their place within the judicial hierarchy. While federal district courts hold the responsibility of determining crucial case facts and applying the law and circuit courts are to correct the errors made by district courts, both are held responsible to the Supreme Court, which has the authority to vacate, reverse, and/or remand lower-court decisions should they be an inconsistent application of precedent. Last, their legal and judicial education socializes judges into accepting their role within the judicial framework. However, while circuit and district court judges

1. *Ginzburg v. United States*, 383 U.S. 463 (1966), 475.

remain a part of the federal judicial hierarchy they are not simply robots, but are also human beings who, over their lifetime, form a number of views about politics and law, and are not immune from advocating their views of good legal policy from the bench. In addition, judges are appointed by presidents who (to varying degrees) have their own views about both law and politics. To the extent that a case provides an opportunity, judges are motivated to make decisions according to their view not only of the facts at hand but of legal policy as well. During their formative years on the bench judges might be more accepting of their actual place within the judiciary and the usefulness of higher-court precedent, but, after a suitable time, they discover the extent to which they can express their own preferences and disregard an emerging precedent as it conflicts with their own preferences. Judges are also part of a greater political arena with pressures from the local political community.

As one can see, federal lower court judges are caught between competing goals such as their willingness to maximize their preferred legal policy and their place within the judicial hierarchy. Given the incompatibility of such goals, it becomes important to ask: *to what extent does higher court precedent constrain (or influence) federal district and circuit court decision-making*? As stated by Congressman Otto Passman, does it appear true "that at least some federal judges take their orders directly from the Supreme Court" (Rosenberg 1991, 673)? It is the purpose of this dissertation to ascertain the extent to which

Supreme Court doctrine influences the judicial behavior of lower federal courts, while applying the hierarchy and other theories to their judicial opinions and decisions. The research presented here asks, "Does a judicial hierarchy exist within the federal court system such that Supreme Court precedent significantly influences the judicial behavior of district and appellate judges?" It finds that a judicial hierarchy does exist within the circuit (and less in district) courts, even within such a politically divisive topic as obscenity. While the political and constitutional saliency of the topic (and much public law research) suggests that judges make decisions guided primarily by their own (and others') policy priorities, the judicial experiences incurred by federal judges should prove significant influences in supporting a judicial hierarchy. By analyzing the decisions of federal district and circuit court judges in the area of obscenity, this dissertation research seeks to discover whether the judicial hierarchy exists not just *pro forma* but in practice as well.

The research presented in this dissertation finds the influence of higher court precedent to correspond in part with the conception of a judicial hierarchy. The analysis (in Chapter 3) of citations of Supreme Court precedent *Roth v. United States* (1957) and *Miller v. California* (1973)) in lower court opinions suggests low levels of compliance: lower courts at the circuit and district court level do not signal to the Supreme Court their acceptance of High Court doctrine; thus, most circuit and district court decisions do not comply formally

with higher court precedent. Chapter 4 suggests that a Supreme Court doctrinal shift (to *Miller v. California*) influences lower court decisions only at the circuit court level. Further analyses, found in Chapter 5, document further that Supreme Court precedent has a greater influence in circuit courts than in district courts: not only is the magnitude of the impact of precedent greater for circuit (versus district) court decisions, this impact occurs when controlling for such factors as appointing president, regional variations, various constitutional claims and types of litigants. Thus, it appears that the influence of Supreme Court doctrine and the judicial hierarchy is much stronger in the circuit courts (only one step removed from the Supreme Court) than in district courts.

Compliance and Impact Within The Federal Judicial Hierarchy

Beginning with early works (Murphy 1959; Patric 1957, Sorauf 1959) scholars have sought to determine the influence of the Supreme Court's decisions on its political environment (e.g. Baum 1994; Bond and Johnson 1982; Dolbeare and Hammond 1971; Shapiro 1968). A part of such literature has focused upon the dynamics between the Supreme Court and lower courts, seeking to discover whether lower courts comply with higher-court precedent. This begs the question: why might one find deference to higher courts at all? As Baum suggests, “Supreme courts are like other organizational leaders in that their formal position does not guarantee them effective control over their subordinates” (1994, 694). Even with a clear directive, lower courts retain

'substantial discretion' over judicial implementation (Baum 1976) and can even try "distinguishing their case from the disliked precedent through creative discussion of the facts, while giving lip service to the precedent" and "engage in announcing an interpretation of law contrary to the interpretation of the disfavored precedent." (Songer and Sheehan 1990, 308) While their judicial socialization and legal training impress upon judges the importance of an effective hierarchy (Howard 1981, 115-24), other scholarship (e.g. Alumbaugh and Rowland 1990; Goldman 1966, 1975) suggests the influence of policy preferences (originating from themselves, the president, and their local environment) on lower-court choices. Given the numerous influences on their choices, it might appear that Supreme Court precedent would pale in comparison to more personal and explicitly political considerations. Yet other works find that lower courts rarely engage in noncompliance. Why might this be? The prevailing literature on judicial compliance and impact outlines one approach: the judicial hierarchy and judicial signaling.

The Judicial Hierarchy and Judicial Signaling. One section of the literature centers on the hierarchical framework of the judiciary: due to the institutional structure of the federal judiciary (with the Supreme Court at the top) and the legal rules and mores within the federal judiciary, lower courts will obey the Supreme Court's decisions and integrate the prevailing doctrine into their opinions and decisions. As members of an interpreting population, judges

support Supreme Court precedent partly because a "widespread failure to apply them [higher court policies] would lead to a breakdown of the judicial system" (Johnson and Canon 1999, 36) or in order to increase the accurate interpretation and clarity of the law (Baum 1978; Howard 1981, 115-24). One recent survey of district judges found over 95 percent of both Democratic and Republican appointees agreeing or agreeing strongly with the statement that ""Even if a district court judge strongly believes that a particular Supreme Court decision is 'wrong,' the district court judge is nonetheless bound to follow such a ruling"" (Lyles 1997, 21). Along similar lines, more methodologically-sophisticated impact research conjectures that Supreme Court precedent provides signals to lower courts about important legal questions. Thus, lower courts will pay attention to higher court precedent as it settles legal questions (Lloyd 1995, 417) or because judges accept a role within the judicial hierarchy (Sanders 1995). Thus, the Court provides signals to lower courts through a "jurisprudential regime referring to a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area" (Richards and Kritzer 2002, 308), and lower-court judges are expected to respond to such changes (e.g. Johnson 1987).

A body of research on federal lower-court compliance does provide evidence for the influence of the judicial hierarchy, with federal circuit and district

courts complying with Supreme Court doctrine. Gruhl's (1980) analysis of libel cases (for an eleven-year period after *New York Times v. Sullivan* (1964)) among circuit and district judges finds federal lower courts willing to apply the "actual malice" test for public figures and even to apply the "public figure" designation to prominent individuals or those in the public spotlight even after the *Butts* and *Walker* decisions (Tables 1-3; 510, 512, 513)[2], and circuit courts were readily compliant in libel and self-incrimination cases as well (Songer and Sheehan 1990). Thus, even in cases involving a highly controversial topic there are significantly high levels of compliance. Not all research finds overwhelming support for the "upper-court myth" (Frank 1963). For example, Reid's (1988) analysis of admission to judicial proceedings cases in the wake of the Court's *Richmond* decision and its limits upon the right to access reports that, during a six-year time period (1980-1985) beginning shortly after the Burger Court's *Richmond* decision, federal and state courts as a whole tended to remain consistent only 45.7 percent of the time (Table 2, 519): lower courts were quite unlikely (4.6 percent) to resist Supreme Court policy but were quite likely (49.1 percent) to go beyond the bounds of such policy and extend the right.

The empirical research on the impact of the judicial hierarchy on federal court outcomes (that is, judicial decision-making) suggests a more complicated picture, seemingly dependent not only on the level of the court but also on the

[2] One should note, however, that not all agree that anticipatory compliance is a good indication

issue itself. Stidham and Carp's (1982) research discovers a high degree of compliance by district judges with High Court policy shifts in economic regulation, conscientious objector, and state habeas corpus cases, with a greater degree of liberalism after the Court's more liberal precedents in such issue areas (Tables 1-3; 219, 223). However, Peltason (1961) finds many Southern district judges avoided the spirit of the *Brown v. Board* decisions (1954, 1955) in later school desegregation cases, in some cases by permitting a variety of delaying tactics years later. In addition, Songer and Sheehan (1990) find that circuit courts increased their collective liberalism after the Court's expansion of the "actual malice" test found in *Rosenbloom v. Metromedia* (1970) yet did not alter their decision pattern substantially in response to significant policy changes in libel or self-incrimination cases.

The literature on judicial signals provides confirmation for the impact of Supreme Court precedent, even when accounting for such factors as the appointing president of the judge, the types of litigants in the courtroom and the types of legal claims that they make. Lloyd discovers that lower federal circuit and district court judges were less likely to strike down reapportionment plans after the Court's *Swann v. Adams* (1967) decision (1995: Table 1, 417), and district courts also responded to the 'creeping evolution' of *Brown v. Board of Education* (1954, 1955) by increasing their likelihood of striking down

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of lower-court compliance (Reid 1988).

segregation policies (1995: Table 2, 743). Most importantly for the present research, Songer and Haire discover that "the impact of changing Supreme Court precedent appears to be substantial" in obscenity cases (974), as circuit court judges were significantly more likely to vote in a conservative direction after the announcement of the *Miller* decision (Table 2, 976).

A related element of the judicial hierarchy is the influence of the formal distance between the lower court itself and the Supreme Court. One should expect that circuit judges are more likely to adopt a High Court doctrine because they are institutionally closer to the Court than are district courts, and are thus more sensitive to potential pressures (e.g. reversals) for voting against the newer doctrine, since reversals increase the workload of lower courts already facing high caseloads and increasingly limited resources (Baum 1997, 118-119; see also Reid 1988). Pacelle and Baum find that the organizational "distance" of the court under review has a significant impact on lower-court behavior, with state supreme courts and federal circuit courts more likely than others to favor the Supreme Court "winner" (1992). As one application of the potentially higher compliance among circuit than district courts, Reid's study finds circuit courts to be more responsive than district courts to Supreme Court policy, tending to remain more consistent and trial courts more expansive than their counterparts in adopting Supreme Court doctrine (1988: Table 3, 523), yet federal district courts were the most likely to rule in a manner consistent with Court policy and

least likely to rule in an expansive manner (Table 4, 524). Last, in his study of various Supreme Court precedents on lower-court decisions Johnson finds circuit courts are not "more supportive of Supreme Court decisions", as there are no significant differences between them on their reactions to precedent (1987, 334); if anything, district court judges responded more than circuit judges to legal factors and in integrating the precedent into their decisions (Table 2, 332).

Some research also suggests that owing to the potential for reversal by appeals courts, district judges will tailor their decisions and opinions to avert such judicial difficulties. Eisenstein stresses that "[S]ince they all look to the same appellate body, the judges within a circuit look to and cite the same body of decisions and rulings" (1973, 146), and Carp and Rowland also suggest that "[T]he court of appeals is in a strategically powerful position to influence the nature and scope of the decisions of its trial judges" (1983, 87). Though scant, the existing research finds guarded confirmation for this proposal, with a moderate correlation between the proportions of patents declared valid in circuit courts and those in the district courts (Baum 1980: Figure 2, 221). Thus while concluding "that the courts of appeals fall far short of determining the policies of subordinate courts in any absolute sense" (224) the circuit courts did exert some influence over the district courts in one policy area.

Alternatives to Compliance/Impact Theory

While some of the federal court literature focuses narrowly on the extent of lower court compliance with Supreme Court precedent, numerous works on judicial decision-making assert the importance of other factors in closer proximity to judges as individuals. When viewed from this perspective, judges at all levels have other motivations while making decisions. Much of the literature tends to center around basic themes: the judicial organization, the problems of communication, bureaucratic resistance, and case and litigant characteristics.

The Judicial Organization. Yet another section of the literature arises from an organizational perspective (Weber 1947). Higher-court judges might attempt to exert control over their judicial inferiors through the use of sanctions (such as reversals), but subordinates might respond by nullifying the spirit of such reversals (Baum 1976). Previous research has thus placed unrealistic expectations of the Supreme Court's ability as an "omnipotent court", expecting "complete acceptance": policy-makers hardly expect this, especially in areas where there are "competing influences" (Baum 1978, 210). Instead, research should perceive the American court system as an organization: while the organizational head does not have "absolute command," subordinates are obliged to account for policy changes in their decisions depending upon the clarity of the policy message and their awareness of such change (211). Thus, the "hierarchical relationships in the legal system are ambiguous ones,

containing substantial measures of both superior influence and subordinate independence" (Baum 1980, 224).

Baum (1976) suggests that the implementation of decisions is a two-stage process consisting in the transmission of and response to directives, and judicial authorities can increase their chance of implementation by communicating clear decisions and using persuasion within opinions. Subordinates within the judicial hierarchy might implement such policy when "they possess positive motivations to do so" (96). More specifically, in receiving the message lower court judges will more likely respond positively to the higher court's message when they: 1) have few 'psychic costs' in changing policy directions; 2) have a high level of congruence between the policy change and their own policy preferences; or 3) recognize a greater level of authority attached to the appellate decision. Since appellate judges cannot fire their judicial subordinates, and the infrequent reversal is seen as symbolic, higher court judges will most likely influence a lower court judge through persuasion in their opinions.

Two years later, in a refinement of this argument, Baum (1978) argues that four factors motivate lower-court judges to adopt or reject Supreme Court policy. First, as judges receive a similar legal training and socialization into the field of law and the legal system, with its reliance on precedent and *stare decisis*, they tend to accept the importance of their place within the judicial hierarchy and believe "they have an obligation to implement directives handed down from

above" (211). Second, lower-court judges are acutely aware of the possibility of reversal; interviews with federal district judges revealed that they "frequently keep track of their 'batting averages' on appeal" (213). If lower-court judges are to avoid the embarrassment of a higher-court remand they are likely to remain attuned to higher-court precedent. Third, a judge's policy preferences might lead to a refusal to adopt High Court policy: "strong disagreement with a policy provides a powerful incentive to resist it," as judges often begin their career on the bench with certain policy preferences and "their experience as judges gives them strong opinions on other issues" (213). Last, judges have other interests (e.g. friendship and respect of colleagues, increased workloads) that can serve to frustrate higher-court policy changes. While it is unrealistic to expect complete acceptance of Court doctrine, as either the message may not arrive or else run counter to lower-court policy preferences, Baum concludes that in many issue areas judges are likely to respond in a positive manner either because they agree with the policy or (if uninterested) out of an obligation arising from their legal training and socialization.

The organizational model receives some empirical support within the public law field. Such findings are bolstered by Pacelle and Baum's (1992) analysis of remands: stronger orders from the Supreme Court (e.g. reverse, vacate-and-remand) increased significantly the likelihood that federal courts will change their mind in favor of the Court's newer standards. In addition, proximity

to the Supreme Court equates with a greater likelihood of changing its previous decision to fit newer precedent (Table 3; 188). Reid (1988) finds that the hierarchy model does not apply to First Amendment cases: only 45 percent of the time do lower courts act in a manner consistent with Supreme Court precedent (Table 1; 519).

As one potential application of organizational theory, some literature on federal judges hints at the importance of judicial experience. Thus, because of the "burden of his inexperience" newer judges have a lesser knowledge of what is acceptable practice on the bench and will be more likely than more experienced judges to apply the Court's doctrines (Stidham and Carp 1982, 221), while judges with experience on the bench have a greater familiarity with the nuances of the judicial system and are less likely to follow the perceived whims of the Supreme Court. Later works, however, lead to a more complex picture of judicial experience interfering with the relationship between Supreme Court policy change and lower court acceptance of such change. Drawing from a broad range of High Court policy shifts and a random list of fourteen rulings from 1950 to 1975, one study of circuit and district courts finds that previous national judicial experience (measured by a four-point scale) has no discernible impact on the holding, reasoning, or consistency of lower court rulings after the announcement of a Supreme Court doctrine (Johnson 1987: Table 2, 332). However, High Court doctrinal changes were effective in producing legal change

in labor and antitrust cases among holdover judges and among Eisenhower appointees in antitrust cases after 1957 (1987, 838 fn. 4), the time-frame of appointment was somewhat though not completely influential in libel and self-incrimination cases although 'seasoned' (pre-1965) judges were somewhat yet not significantly less likely than their less experienced colleagues to support the Supreme Court after the *New York Times v. Sullivan* (1965) decision (Songer and Sheehan 1990: Table 5, 311). Last, newer district courts were more willing than "holdover" judges to rule in a way similar to the Supreme Court in conscientious objector cases but not in state habeas corpus or economic regulation cases (Stidham and Carp 1982: Tables 1-3; 219, 223, 226).

Although not normally found under the rubric of organizational theory, one section of the judicial politics literature has tested independently the importance of two potential aspects: the importance of personal and presidential preferences. Drawing from research on the Supreme Court (e.g. Rohde and Spaeth 1976; Segal and Cover 1989; Segal and Spaeth 1993), a body of literature suggests that judges have their views about a variety of legal and political issues and will pursue them when possible. However, lower-court judges face certain constraints and conditions not inherent within the Supreme Court.[3] Stidham and Carp (1982), for example, argue the appointing president,

[3.] As Segal and Spaeth point out, "Members of the Supreme Court further their policy goals because they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction. Although the absence of these factors may

region, and political party of the judge provide mitigating circumstances in the decision of a judge to comply or resist compliance. Judges comply to the extent that a new or emerging doctrine reflects their own policy views (Baum 1976, 1978). The most prominent of such characteristics within the lower-court literature is the political party of their appointing president. Ideologically-conscious presidents in the modern era choose to shape the federal bench in line with their respective outlooks on law and politics and the appointment process filters out those candidates not of the president's liking (e.g. Carp and Rowland 1983; Rowland, Carp and Stidham 1984). President Reagan at times made personal phone calls to nominees in order to obtain their consent (Goldman 1997, Chap. 8) and President Nixon vowed to appoint "law and order" judges during his tenure (Rowland, Songer and Carp 1988). Thus, the Johnson, Nixon, Carter and Reagan "judicial cohorts were chosen with a keen eye toward the ideological direction of their subsequent voting behavior" (Rowland and Carp 1996, 33; see also Carp and Rowland 1984, Chapter 3; Stidham and Carp 1987).

Certain conditions must be met, according to Rowland and Carp (1996), before a link can be made between presidential campaigns and judicial outputs. First, the issue under dispute must have some factual or legal ambiguity (see also Carp and Rowland 1980), allowing less jurisprudential considerations to

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hinder the personal policy-making capabilities of lower court judges, their presence enables the

creep into the picture. Second, the dispute category must draw the president into the spotlight when making platform promises about the judiciary: topics such as abortion and school prayer bring forth heated rhetoric and political discussion, unlike more mundane issues (e.g. patent cases). Last, the issue must not bring about competing influences outside the judiciary that might conflict with the president's position. Partisan division within district courts depends on the capacity for great fact-finding discretion, the saliency of and debate about the topic, and low levels of appellate reversal (Rowland and Carp 1996, 39-42).

Partisan and presidential preferences have tended to be influential among both circuit and district judges. As a reflection of the influence of partisanship, Democrats (but not Republicans) tended to use ideologically-similar (liberal) precedents and ignore different (non-liberal) precedents (Johnson 1987: Table 2, 332), and partisan differences exist for Democratic and Republican judges for many case types with party as the leading explanatory factor (Goldman 1966: Table 5, 380; 1972: Table 7, 501). However, Songer and Davis find modest but significant party effects for appellate courts among various issues (1990: Table 1; 323) and there is a weak link between self-reported political orientations and percentage of liberal votes for civil rights (but not criminal) cases (Howard 1977: Table 3, 929), and no significant party-related effects on the Second, Fifth and

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justices to vote as they individually see fit" (1993, 69).

D.C. circuits in the 1970s (1981). Certain presidents have tended to place their mark on the federal appellate courts. Reagan appointees, for example, were unique in their conservatism in criminal justice issues and cases involving minorities and the disadvantaged (Rowland, Songer and Carp 1988; Stidham and Carp 1987) and Republican appointees tended to show a higher degree of conservatism than Democratic appointees in economic cases (Songer 1987) and in libel and self-incrimination cases (Songer and Sheehan 1990). The more methodologically sophisticated research also finds that lower-level Republican appointees tended to vote in a more conservative direction than do their Democratic colleagues (e.g. Songer and Haire 1992; but see Brent 1999). Not all work reaches the same conclusion, with Reagan circuit judges showing similar degrees of conservatism as other Republican appointees (e.g. Gottschall 1986; Tomasi and Velona 1987).

The existing scholarship confirms a stronger link between presidential campaigns and district-level judicial choices. One discovers the influence of Reagan's promises: district judges appointed by the Reagan administration exhibit greater conservatism in criminal justice cases than even Nixon appointees (Rowland, Songer and Carp 1988) show lesser support for minorities and the disadvantaged (Stidham and Carp 1987), and often deny standing to underdogs who challenge upperdogs in court (Rowland and Todd 1991). Rowland and Carp also find partisan divisions more prevalent in highly

contested issues (e.g. freedom of expression) than in more mundane issues (e.g. union member vs. union cases) (1996: Table 2-7, 40), and Carter appointees were more likely than Reagan appointees to vote in a liberal direction in freedom of expression cases and more likely in right to privacy cases (Table 2-10, 49). More sophisticated analysis reaches similar conclusions about appointment effects in draft offender (Kritzer 1978) as well as reapportionment decisions at the district and appellate levels (Lloyd 1995: Table 1, 417). Not all research affirms such conclusions (Sanders 1995; Walker 1972), yet overall the power of appointment remains an important force within the judiciary.

As yet another potential application of organizational theory, there is the cross-pressure of regional subcultures and political socialization on the particular views of citizens and public officials. Daniel Elazar argues that participants in a traditionalistic subculture (especially Southern states) consider government as a tool for preserving the status quo and thus view politics in a conservative light (1966). Despite their lifetime tenure and place in an elite institution, federal court judges are not immune from the influence of political socialization because they remain important members of a local political community and most judges hold their judicial appointments in the same region as their birth and background (Goldman 1997). Southern district judges tended to refuse to apply *Brown v. Board of Education* with even "deliberate speed" or else delayed implementation of integration as long as possible (Peltason 1961),

and rulings by district judges depended to a significant degree upon such factors as the percent black enrollment in school (Giles and Walker 1975) and the black percentage within a district (Vines 1964) although Southern judges were not significantly more conservative in their outlooks on desegregation cases (Sanders 1995).[4] The distinctiveness of the South holds true for many case types (Rowland and Carp 1996), and for such diverse topics as civil liberties (Walker 1972) and abortion (Alumbaugh and Rowland 1990). Such regional effects are less clear at the circuit level, however. Southern judges were not significantly more conservative in First Amendment, criminal appeals and labor relations cases, and any Southern conservatism in the realm of civil rights actually decreases after 1968 (Songer and Davis 1990: Table 1, 323), yet Southern circuit court judges did tend to vote more conservatively than others when required to judge the obscenity of materials (Songer and Haire 1992: Table 2, 976) and consider reapportionment plans (Lloyd 1995).

Communications Theory and the 'Legal' Model. Lack of compliance can also result from difficulties of communication. Judicial authorities must transmit their decision with enough clarity for subordinates to understand the guidelines to implement. Yet, higher court cases can involve complex issues: facts, issues, and holdings might remain unclear (Johnson 1987). Court guidelines might also

[4] One should note, however, that Peltason's work does include an account of New Orleans district judges thwarting the plans of the state legislature and the governor, on one occasion ordering the restraint of the governor.

provide enough confusion to mitigate their own directives and even loyal judicial subordinates require some guidance in following Supreme Court policy, something that depends not only on the (lack of) ambiguity of the precedent but the support the High Court gives to it (Baum 1976). According to this 'legal' model, a higher support by the Supreme Court for its own policies will lead to greater compliance by lower courts. Johnson and Canon (1999) cast lower court judges as those who are expected to interpret the High Court's policy correctly yet at times the Supreme Court might write unclear opinions, owing to the complexity of the issue and the inability to create a solid majority or the Court's wish to gauge public reaction to the issue at hand. It should be no surprise that lower court judges should have difficulty interpreting an "ambiguous, vague, or poorly articulated" directive from the High Court. In addition to the Court's lack of clarity, lower court judges evaluate the actual support that the Court gives its own rulings: if the High Court can not amass anywhere near unanimity on its own bench, thus signaling a lack of support for its own policy, why should lower courts expend their political and legal resources to comply with such a weak policy? In brief, "poorly written opinions, ambiguous phrasing, extraneous messages, close votes, or proliferations of complicated opinions will produce a greater variety of impact behavior, some of which will be counterproductive to compliance and the implementation of the decision's broader goals" (Canon 1991, 442). Not all research finds such support for the communications model,

however, with Reid discovering low levels of compliance in First Amendment right to access cases even after accounting for a brief period for lower courts to adjust to higher court policy (1988: Table 1, 519).

As one reflection of the communications and legal models, is it true that vaguely-worded precedents are met with lesser degrees of compliance and a greater likelihood of resisting Supreme Court policy? Communication problems play little to no role in the district and appellate courts' interpretation of libel standards after *New York Times v. Sullivan*,[5] since Supreme Court dictum remained unclear (Gruhl 1980). Using a more sophisticated approach,[6] Johnson's research on the reactions of lower federal courts (1963-1967) to recent Supreme Court precedent in various cases (1961-1963) finds that measures of Supreme Court unity and support did not influence judicial behavior of either circuit or district court judges significantly (1979: Table 1, 798-9; Table 2, 810). His later work also finds the communicability of Supreme Court decisions plays little part in circuit and district level decisions (1987: Table 2, 332).

As another method of deciphering the influence of the communications and legal models on lower-court opinions and decisions, research has tested the influence of Supreme Court unity (within its own opinions) and found varying

5. *New York Times v. Sullivan*, 376 U.S. 253 (1964).
6. Johnson uses various measures to capture decisional clarity, by coding for the size of the voting and opinion majority, the number of dissents, and opinion authorship by the Chief Justice.

support. Johnson's statistical analysis of the reactions of federal courts (1963-1967) to Supreme Court precedent (1961-1963) in various cases finds that circuit court compliance tends not to change significantly in response to either majority or minority voting/opinion size, although district court compliance is partly a function of the size of the majority opinion (though a non-monotonic relationship) (Tables 1, 2; 798-799). In a more sophisticated analysis, Johnson (1987) finds that certain measures of a precedent's strength (the number of citations, the size of the majority, the percentage of positive and/or consistent follow-up cases) have a positive influence on lower court reasoning, and the presence of a dissent has a negative influence (1987: Table 2, 332). Interestingly, district court reasoning correlates positively with the size of the Court opinion majority and the percentage of consistent follow-up cases, but circuit court reasoning correlates positively with the number of citations and the percent of positive follow-up cases. In the most sophisticated treatment, Hurwitz and Reddick (1996) discover that while circuit courts resist Supreme Court rulings with one-vote margins and/or concurring opinions, unanimity of Supreme Court rulings played no significant factor in their decisions to adopt precedent. However, one recent study finds that as the Supreme Court decided to reverse its own precedent and affirm a lower-court decision, in such cases the lower courts were less likely to apply the previous precedent as the Court had provided more negative than positive "signals" (e.g. criticisms) about its previous

holding, and in cases where there was an older precedent (Reddick and Benesh 2000).[7]

Although not directly related, one other possibility is the diminishing influence of Court precedent over time, or the 'life cycle' of a precedent: "[A]lthough a precedent does not "wear out" in a physical sense, it depreciates in an economic sense because the value of its information content declines over time with changing circumstances" (Landes and Posner 1977, 263). As time passes and both law and society develop, newer legal questions will arise for which older precedents are inadequate. As the higher courts adopt newer doctrines to account for such changes, older precedents will have a lesser 'utility' and thus will decline in usage. Previous research offers mixed support for the 'half-life' proposition: the age of the precedent itself might not lead lower court judges to cite it with any greater or lesser frequency (Johnson 1987) but lead to a greater likelihood of defiance and avoidance of (and lesser obedience to) Supreme Court precedent (Reddick and Benesh 2000; but see Reid 1988).

Resistance Within the Judicial Bureaucracy. Although one section of the literature finds lower courts to be likely to implement High Court policy, another argues that lower courts are not so accepting of their place within the judiciary. Jerome Frank summed up this view most succinctly: "In legal mythology one of

[7] In their study, they do not that while the number of cases under analysis is rather small (N=26), the study overall has the virtue of studying instances where both the lower and higher court violate the traditions of precedent and *stare decisis*, as well as studying cases where there is an

the most popular and most harmful myths is the upper-court myth, the myth that upper courts are the heart of courthouse government...In considerable part, this belief arises from the fallacious notion that the legal rules, supervised by the upper courts, control decisions" (1963, 222). Despite the formal hierarchy, the judicial bureaucracy is not significantly different from that of the executive branch: "[E]ach bureaucrat has his own ideas about proper public policy" and the Supreme Court often does not issue clear guidelines when reversing lower-court decisions (Murphy 1959, 1017-1018). Federal district and circuit judges might also hand out harsh criticisms of Supreme Court policy or re-shape the Court's policy by "explaining, limiting, and distinguishing" the prevailing doctrine, and coercion is an unlikely option for the Court (1022-1024; 1030-1031). District courts also have discretion as fact-finders, giving them a broader authority "which appellate tribunals can only partially control" (1028). With "an ambivalence toward their superiors" (Baum 1976, 102) lower-court judges might refuse to apply an obvious precedent or use a less appropriate precedent for their case, which is likely when the policy involves a fundamental change in the relevant political community (Johnson and Canon 1999, Chapter Two). Lower courts often do not defy the policy wishes of the Supreme Court outright but might select more subtle forms of noncompliance (Songer 1987, 831; 1988). Judges might acknowledge the letter of the law by mentioning a precedent yet

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actual shift in Court policy while still affirming lower-court policy.

fail to integrate its spirit by ruling in a direction opposite to the Supreme Court's doctrine or separating the case from the prevailing doctrine (Baum 1978, 212).

A certain portion of the literature has sought to test the influence of bureaucratic resistance, with mixed results. On the one hand, federal and state courts were quite unlikely to resist the Supreme Court's policies on trial procedures and public access as found in *Richmond Newspapers v. Virginia* (1980) (Reid 1988, Table 1). On the other hand, while circuit court judges were responsive to the Supreme Court's "actual malice" test (*Rosenbloom v. Metromedia* (1970)) they were not accepting of the Court's more important *New York Times v. Sullivan* "actual malice" test or the criminal procedural guidelines found in *Miranda v. Arizona* (Songer and Sheehan 1990).

Despite the perceived lack of attention paid by the Supreme Court to the larger judicial organization, at least one set of scholars debates the actual usefulness of remands as a powerful tool for the Supreme Court to monitor lower courts. Pacelle and Baum argue that remands have "symbolic meaning as an evaluation of a lower court's work" (ibid., 171) and despite the minimal overt surveillance by their superiors, lower courts will tailor their decisions in line with the Court's policy wishes (Table 4, 185). Other research on judicial impact, however, declares appellate court reversal to be an ineffective tool for reining in recalcitrant judges. Songer and Sheehan (1990) find that the vast majority of the eight criminal defendant cases not fully compliant with Supreme Court policy

were neither appealed nor remanded, and the 64 circuit court post-*Miranda* decisions not supporting the defendant's position were either not appealed or reviewed (314-315). A similar picture emerges for libel decisions: of the eleven conservative post-*New York Times* cases, seven were not appealed and only one was reversed by the Supreme Court (314-315). While they speculate that "the *perception* (italics mine) of the lower court judge about the probability of reversal" may play a role in lower court decisions, the absence of reliable data precludes them from reaching much further.

Case Characteristics/Fact Patterns. Some scholars have sought to test the 'jurisprudential' aspect of what Pritchett deemed 'political jurisprudence' or estimate the importance of doctrine within and among the courts (1969, 42). This work presumes that judges will respond to the facts at hand in a way that is expected according to "standards set in Constitution, statute, precedent or Court rule" (Cook 1977, 571), and decision-makers are expected to rely on certain cues "to cut down on comprehensive decision making" (Segal 1986). Although some case facts arise from the Court's view of what is important and "incorporate doctrine that the Court enunciated *after* [original italics] it decided some of the cases" for analysis, this is "endemic to legal models in general...the old doctrine anticipated the newer one, that the facts and questions varied, not the doctrine" (George and Epstein 1992, 326-7).

Research on the Supreme Court leads to support for the influence of case

facts, such as the lesser protection by the Court from searches and seizures in cases involving homes (Segal 1984: Table 1, 895) and by a majority of 'centrist' Burger Court Justices as well (Segal 1986: Table 7, 952),[8] and factors such as aggravating circumstances when deciding capital punishment cases (George and Epstein 1992: Table 5, 334). In obscenity cases, however, research finds mixed support, such as books and live or spoken materials not influencing Court decisions in any appreciable way (Hagle 1992; McGuire 1990). Research on federal lower courts suggests the importance of case characteristics in judicial decisions, with early studies finding the racial makeup of litigants important in federal desegregation cases (Vines 1964) although facts such as level of sentence correlate negatively with degree of prior arrest record in draft offender cases (Cook 1977). More sophisticated analysis yields stronger findings. The type of law under analysis accounts, to some degree, for federal district decisions in environmental law cases (Wenner and Dutter 1988), as does the level of intrusion for circuit-level search and seizure cases (Songer, Segal, and Cameron 1994). Also, legal arguments such as First Amendment violation, privacy interest, and *no scienter* claims influence circuit court votes in obscenity cases significantly (Songer and Haire 1992: Table 2, 976). Though not all research finds the same conclusion (Sanders 1995), case characteristics remain

[8] Segal's work is not without difficulties, as noted by George and Epstein: they argue that he and other scholars construct legal models in a "rather post hoc fashion" by using "significant variables (e.g. warrantless searches made prior to arrest and consent searches) because the Court said

important within federal judicial politics research.

Litigant Characteristics. As another part of the case facts approach, other scholarship stresses the influence of certain litigants as another cue for lower court judges to consider. Galanter's research lays the groundwork for studying the influence of litigant disparities, suggesting that repeat players (e.g. federal government) have repeated exposure to the courtroom situation and thus a greater knowledge and wisdom of the legal system than do "one-shotters," who have few financial resources and no previous litigation experience and thus little guidance in successful litigation strategies. Repeat players can play the odds by selecting the types of cases most likely to achieve not only immediate but long-lasting victory (e.g. changes in legal doctrine) (1974, 99-100).

Most studies applying Galanter's (1974) claim point to the federal government as the most successful "repeat player" because of its vast experience in the courtroom and its greater financial and legal resources. Although the Solicitor General has a high level of prestige among members of the Supreme Court and thus can influence their choice of docket (Caldeira and Wright 1988; McGuire and Caldeira 1993; Perry 1991) and their final vote (e.g. George and Epstein 1992; McGuire 1990), the success of the federal government as litigant in civil liberties cases depends (to a great extent) on the time-frame of the Court with the Warren Court actually leaning in favor of

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they were important and not because he had *a priori* knowledge that they should be significant in

"underdogs" in both civil and criminal cases (Sheehan 1992: Tables 2, 3; 33-34). The federal government has proven successful in lower-court cases and the circuit courts in particular, with an overall success rate as appellant of 58.2 percent in circuit courts, and high success rates against plaintiffs such as individuals and businesses (Songer and Sheehan 1992: Table 1, 241) and a greater "success" in obscenity cases with a greater probability of judges voting conservatively (Songer and Haire 1992). In addition, in obscenity cases individuals as "one-shotter" litigants appear to have a more difficult time in circuit courts, with circuit court judges ruling in a conservative direction more often (ibid.).

Litigant Claims. Yet another aspect of the legal model is the importance of litigant claims. As part of the adversary system, the responsibility falls upon litigants to advance relevant legal arguments before the judges; thus, litigants have an opportunity to persuade the bench of important constitutional issues and "regardless of the 'objective' merits of a given case, judges' decisions will depend in part on which issues and arguments are offered by the litigants and the quality and persuasiveness of those arguments" (Songer and Haire 1992, 968). McGuire's analysis of obscenity cases discovers that governmental claims of 'erosion of morals' and 'pandering' lead to more conservative Supreme Court decisions; contrary claims (by non-governmental entities) of 'due process'

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search-and-seizure analysis" (1992, 326).

violations lead to more libertarian decisions although the same is not true for First Amendment claims (1990: Table 1, 59). Interestingly, other claims such as privacy violations and a failure to prove *scienter* do not have any significant impact on the Court's decisions. At the circuit court level, the effects of litigant claims are weaker. Songer and Haire's analysis of obscenity cases discovers that claims of a First Amendment violation lead to a greater likelihood of a liberal decision yet other claims lead either to no significant changes (privacy, prior restraint) or a greater chance of a conservative vote (no *scienter*) (1992: Table 2, 976).

Public Law Research on Obscenity

Obscenity has received empirical attention within the public law field, ranging from the simpler to the more sophisticated (e.g. Dudley 1989; Kobylka 1987, 1991; McGuire and Caldeira 1993; Songer and Tabrizi 1999). Scholars interested in judicial decision-making in obscenity cases have created integrated models of federal and state courts. Hagle's analysis finds the Supreme Court's decisions depended not only on the regional origin of the case but the lower court's decision as well (1991: Table 1, 1046); McGuire finds that legal claims, the *Miller* standard, and other components influenced the margin of victory in Court voting significantly (1990: Table 1, 59). Songer and Haire (1992) reach similar conclusions in their study of circuit courts: litigant claims, region, presidential (Johnson, Carter, Reagan) appointments and the *Miller* ruling all

contributed to judicial decision-making (Table 2; 976). Last, state supreme court judges were influenced not only by their ideological and religious preferences (e.g. Roman Catholic, Evangelical) but also Supreme Court precedent (*Miller v. California*), greater party competition, and (surprisingly) when parties argued that the materials 'were not restricted to adult use' or the prosecution had not proven *scienter*; interestingly, judges were not swayed either by the type of material in the case or First Amendment claims (Songer and Tabrizi 1999: Table 2, 518-519).

Public law research on obscenity, however, leaves a number of topics unexplored. Most prominently is the decision-making behavior of federal district judges, who take care of the first step in the judicial hierarchy. Besides Dudley (1989), no significant research to date has examined the judicial decision-making of district judges and no obscenity literature has attempted to compare decision-making across levels. In addition, research to date says little about the influence of Supreme Court precedent within the district courts as well. Interestingly, while impact research focuses on various civil rights and liberties categories (e.g. Gruhl 1980; Songer and Sheehan 1990) research on obscenity tends to focus on the influence of court rulings upon the consumer population (Levine 1969) and not on the lower courts (but see Songer and Haire 1992).[9]

[9.] Indeed, Pacelle and Baum remove obscenity cases in a secondary analysis of remands: "most of which the Court asked a lower court to reconsider a finding that some material was obscene, but on the basis of the new *Miller* rules that actually militated in favor of such a finding; to code a

Last, little research attempts to account for the potential influence of circuit court behavior on district court judges (Baum 1980).

Theory, Data and Methodology

As noted above, the research question guiding this dissertation focuses on the extent to which a judicial hierarchy exists. To what extent do lower federal courts remain susceptible to upper court directions, as opposed to asserting some level of decision-making insulated from higher court wishes? In order to find an answer, research should address such a question from multiple angles. The research presented here approaches the question of judicial hierarchy broadly by answering three questions. First, do circuit and district judges cite and use precedent in their decisions in line with the Supreme Court's wishes? Second, does Supreme Court precedent influence the decisions of lower-court individual judges in a significant way? Third, do district court decisional trends change in response to circuit court trends?

Most broadly, the dissertation weighs the accuracy of the judicial hierarchy as well as other approaches to the relationship between higher and lower courts. According to the judicial hierarchy, judges should receive, accept and use the Supreme Court's legal pronouncements and integrate them not only into their judicial opinions but into their overall voting as well. Given a wealth of judicial training and socialization of norms stressing the importance of

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reaffirmance of the original decision as a loss for the Supreme Court winner might be

transmitting higher-court precedent, as well as the likelihood of a (potentially embarrassing) reversal or remand by a higher court, it should be expected that judges of all backgrounds and partisan stripes will remain attentive and accepting of Supreme Court (and other higher-court) precedent, especially if it works against their own individual interest. Although lower-court judges make proper distinctions about what cases actually fit the precedent at hand, they are likely to accept the precedent nonetheless. Should this is true, then, there should be not only a high level of acceptance of the *Roth* and *Miller* doctrines in lower-court opinions but also a change in the judges' voting patterns—a significantly greater conservatism—in cases after the Supreme Court's ruling in *Miller v. California*. At minimum, one should expect that lower-court judges will do so in cases most applicable: when the lower-court judge determines the actual obscenity of materials brought into the courtroom for inspection. In addition, it should be expected that as circuit courts are institutionally closer than district courts are to the Supreme Court, circuit judges will be more likely to adopt and use precedent in their opinions and decision-making.

Alternately, if it is true that the judiciary is similar to other organizations, one should find a more conditional acceptance of higher-court doctrine. Lower-court judges might recognize the transmission of emerging doctrine from their superiors, but might decide that such changes run counter to their own (and

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misleading." (1992, 179)

others') interests. As judges have their own views about many policies and consider the views of others (such as their appointing president and geographic location) when making decisions, they will be more likely to act upon such preferences when there is a greater opportunity to do so—that is, when judges have a greater confidence not only about their place within the judiciary but also about the actual (and not presumed) relations between themselves and their judicial superiors. Thus, there is likely to be a greater acceptance of the Court's *Roth* and *Miller* doctrines among judges who a) agree with it (Republican more than Democratic appointees, Southern more than non-Southern judges), and b) have a lesser opportunity to express their own individual views on obscenity (newer appointees more than "holdover" colleagues). If the communications/'legal' model is true, one should expect that judges are attentive to the actual importance the Supreme Court places on its own doctrines when deciding to lend it support. In addition, judges might also reflect upon the declining usefulness of a precedent over time, with the expectation that the older doctrine does not apply so readily to newer emerging circumstances. Last, lower-court judges might elect not to use a certain precedent, or use it with less frequency than others, as the Supreme Court shows greater signs of internal division (such as a bare majority opinion) than in other cases. Thus, one should expect to see a greater application of precedent in lower-court opinions and decisions when the precedent is newer within the legal community and there are

fewer signs of internal division within the Court (cases during the earlier years after a precedent, and cases decided during *Roth* (6.5-2.5) rather than during *Miller* (5-4)).

Last, one might view the lower courts as those who seek their own (and others') preferences and resist higher-court precedent. What distinguishes judicial resistance from the others is the influence of Supreme Court on like-minded individuals. One might expect that more liberal-minded judges will resist the *Miller* doctrine and its more restrictive stance toward obscenity; however, it becomes a different matter when judges who are likely to agree with a precedent decide not to support it. It might be the case that Republican (conservative) appointees are actually dissatisfied with the emerging standards because the Supreme Court did not go far enough in attempting to eradicate obscenity, and thus one should see Republican lower-court judges displaying public disagreement with High Court policy or more likely refusing to use the policy within its opinions regardless of the core issues within the case. One might thus also find Republican judges maintaining their collective and individual conservatism in their decisions yet not increasing it significantly after the announcement of the *Miller* standards. If the notion of judicial resistance rings true, there should be little (if any) acceptance of Supreme Court precedent by lower-court judges, whether in their judicial opinions or in their actual decisions.

There should thus also be no recognizable difference between newer and more-experienced judges.

In order to assess the influence of these competing explanations of judicial behavior, as well as other explanations (such as the influence of litigants), the dissertation proceeds as follows. Chapter 2 outlines the history of obscenity from the perspective of Congress and various presidents, and most prominently important legislation and reports, while providing a description of Supreme Court doctrinal history of the First Amendment and obscenity decisions. Furthermore, it answers two crucial questions. First, how much have Congress and the president shaped obscenity policy? Second, to what extent has the Supreme Court developed a clear precedent for itself as well as a signal to lower federal courts? Chapter 3 addresses one aspect of the question of both hierarchy and the judicial organization: to what extent do circuit and district courts cite and respond to Supreme Court precedent within their opinions? One piece of evidence in favor of the hierarchical model is the usage of precedent, since by using precedent in the correct manner lower courts indicate to their superior that they accept the newer precedent. This invites the following: which precedents do judges cite in their opinions, and do they cite precedent in order to sustain their legal argument? Though previous work finds little evidence of noncompliance by lower courts, it might be expected that as obscenity is a

salient issue, judges might remain independent of the superior's signal in obscenity cases.

To support these analyses I conducted a case search for obscenity precedents (*Roth v. United States*, *Miller v. California*) in district and circuit court cases. Keeping in line with previous research (Johnson 1979; Songer and Sheehan 1990), I coded obscenity cases as either compliant or non-compliant in two ways. First, does Shepard's Citation Index indicate that the Supreme Court precedent controls or is persuasive in most if not all lower court case? The search method for finding obscenity cases did not use a Shepardization strategy for obscenity cases; thus, citation of either the *Roth* or *Miller* precedent in the case itself is not guaranteed. Nonetheless, one should expect that in a high percentage of obscenity decisions circuit and district judges will use and apply *Roth v. United States* (1957) correctly from 1957 to 1973, as well as *Miller v. California* (in cases after 1973). As a second method of detecting compliance with the Supreme Court by noting how often lower-court opinion writers applied the prevailing standards in the opinion, cases were coded for whether each standard is discussed or mentioned, applied, or not used as part of the lower court's actual reasoning within the case. According to the judicial hierarchy, most judges will use the standards and particularly in "factual" cases; evidence to the contrary will suggest the absence of a significant hierarchy and the presence of judicial resistance. If the federal lower courts are yet another

organization, one should see both Republican and newer judges significantly more likely than others to use the standards. Last, if judges are a reflection of the communications/'legal' model, one should expect to see a greater usage of each doctrine and its standards in the first few years after its adoption, and should also use the *Roth* doctrine (6.5-2.5) more often than the *Miller* doctrine (5-4).

As a first step toward determining the influence of the judicial hierarchy and others on the actual decisions of lower-court judges, Chapter 4 provides a preliminary statistical analysis (of circuit and district cases, separately) of the impact of the *Miller* decision on lower-court activity in obscenity cases. This chapter provides an analysis-of-variance of pre- and post-*Miller* decision trends for all obscenity cases, and tests whether the impact of *Miller* depends on such factors as other obscenity precedent (the *Memoirs* decision), the type of judge writing the opinion (whether a Democratic or Republican presidential appointee, whether appointed prior to the *Miller* decision), and the type of case involved (whether it is a "factual" case or otherwise). If federal district and circuit courts shifted to a significantly more conservative stance after the Supreme Court shifted to the *Miller* doctrine in 1973, lower courts should begin a significant conservative shift in their decision trends. If the acceptance of Supreme Court precedent depends upon other factors (such as the party of the appointing president), this constitutes some evidence of a judicial organization as judges

seek their own (and others') preferences before that of their higher-court brethren. Last, a lack of evidence that Supreme Court precedent influenced the lower-court judges leads to the suggestion that judges were simply resistant to higher-court policy.

In a more sophisticated test of these completing explanations of lower-court behavior, Chapter 5 focuses on the impact of Supreme Court signals on district and appellate court decision-making by providing maximum likelihood estimates of the effect of *Miller* on the circuit and district judicial decisions. While previous chapters might discover some evidence of a judicial hierarchy, it remains to be seen whether such hierarchical influences exist at the micro level even when accounting for other explanations: the appointing president and geographical region of each judge, as well as litigant categories and claims and case-related facts (whether a book and/or a film is a part of the case). In line with the theme of judicial hierarchy, a dummy variable for the impact of *Miller v. California* is added.[10] One should expect that if district and circuit court judges of all partisan, geographic and presidential stripes pay attention to the judicial hierarchy, then the *Miller* precedent should lead lower court judges to a greater conservatism. Separate analyses assess whether case selection has any influence on the statistical results: does *Miller* matter only in "factual" cases, or in a greater variety of obscenity cases? In addition to a multivariate impact

analysis of Supreme Court precedent, Chapter 5 goes one step further by analyzing the extent to which federal district courts pay attention to circuit court decision trends. Responding to the conceptual challenges offered by previous research (e.g. Baum 1980; Eisenstein 1973), the analysis tests for the potential influence of circuit-level precedent on the behavior of their respective district judges by running a separate model including an indicator of circuit factual precedent in "factual" district cases.

Assessing the Significance of the Judicial Hierarchy in Obscenity Cases

The issue of obscenity offers a glimpse into the greater world of public law and judicial politics in two main ways. The first is assessing the importance of traditional norms of behavior within the federal judiciary and the influence of the judicial hierarchy upon the actions of lower-court judges. The issue of obscenity affords researchers a good opportunity to study the dynamics between the Supreme Court and lower federal courts as well as the actual (versus presumed) reactions of lower courts to higher-court precedent. On the one hand, as two historical doctrines, the *Roth* and *Miller* decisions shaped American public debate about how to define obscenity and how to regulate such materials and under what conditions, including guidelines that lower-court judges (and other branches of government, by implication) were required—not requested—to

[10.] More specifically, the *Miller* dummy variable is coded as "1" for every case decided after June 21, 1973 (the day of the reported decision).

use when reviewing various materials such as movies and books.[11] If the judicial hierarchy remains in place lower courts should integrate the standards not only into their opinions but also their votes. On the other hand, certain aspects of both cases can lead lower court judges to re-consider whether to enforce either doctrine. While in both cases the Supreme Court asserted the guidelines for what is obscene the standards offered lower-court judges some discretion in applying such standards, and thus lower-court judges (district judges in particular) have the opportunity to use the standards in a way that might run contrary to the Court's wishes such as deciding certain materials are not obscene even though the Supreme Court would have ruled otherwise. Furthermore, the more controversial and provocative of the two decisions (*Miller*) was decided by a bare majority (5-4); such a non-unanimous decision might be received with disdain or confusion by lower-court judges. If the High Court cannot garner anything close to a majority on this controversial issue, why should lower-court judges assume that the High Court is confident and clear about its own doctrine?

[11] The Supreme Court majority opinion in *Miller v. California* begins revealing the newer standard "[T]he basic guidelines for the trier of fact *must* be" (italics mine); soon afterward the Court majority notes that "[I]f a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary" (413 U.S. 15, 24 (1973)). In addition, the Court in *Roth v. United States* made it a point to review both the 18 U.S.C. § 1461 and § 311 of West's California Penal Code Ann., 1955 using the emerging obscenity standards it created (354 U.S. 476, 485-492 (1957)).

Lower court judges are expected to contend with a number of influences such as their own (and their appointing president's) preferences. Evidence of higher court precedent influencing lower-court judges provides support that lower court judges must, to some degree, constrain themselves by tailoring their preferences in line with their most relevant environment: the judicial hierarchy. More importantly, this initial foray into the question of judicial hierarchy provides a more comprehensive assessment of the applicability of judicial supremacy within the structure of the federal court system. The level of compliance found within the lower courts provides a more specific answer to the influence of higher court precedent. Is it true that the Supreme Court guides the decisions of lower court judges, as impact literature (e.g. Johnson and Canon 1999) suggests? If so, how far will lower court judges tailor their preferences to suit the desires of the Supreme Court?

The second benefit of researching obscenity cases is assessing the interplay of both law and politics within the federal judiciary in an area that is rife with law and politics. As the issue involves important questions not only of civil liberties—namely, the First Amendment—and due process—such as the boundaries of a proper search warrant—and even questions of governmental regulation, it should come as a great surprise if lower-court judges were to have no pre-conceived notions about obscenity. Obscenity, thus, is not merely a mundane or trivial issue (Songer 1987) but rather involves politically-charged

questions of free expression and governmental regulation. If lower-court judges seek to maximize their own (and their president's) views on politics, then, they are likely to filter Supreme Court doctrine through their own preferences and thus be less likely to use such precedent when it conflicts with their own inclinations. Partisan and presidential influences might well conflict with hierarchical pressures, in accounting for judicial choices at the lower federal levels. Judges might also be likely to consider seriously not only the type of person (or other litigant) entering their courtrooms but the constitutional claims made in the courtrooms. Are jurists more likely to look upon a case in a more liberal direction, as they hear that the future of the First Amendment is at stake?

In attempting to weigh the unique contributions of such factors to the behavior of judges, judicial politics research in general increasingly uses integrated models to explain judicial decision-making in salient topics such as search and seizure and death penalty cases (Segal 1984, 1986; George and Epstein 1992). In order to account for fact- and case-characteristic explanations, research must as a result choose narrow issues to provide for clear liberal and conservative distinctions in judicial choices. Factual obscenity cases provide such an issue: is the material under scrutiny obscene? Conservative judges are expected to be more likely to rule alleged materials as obscene. In other related obscenity issues (such as zoning "adult" establishments) it becomes reasonably easy to determine a clear division

between liberals (who are more likely to view this as an infringement on free speech) and conservatives (who are more likely to support the state's interest in their citizens' welfare). Furthermore, the specific nature of the case topic provides an opportunity to account for various case facts such as the nature of materials (such as films) that cannot be done in broad issue areas (e.g. economic liberalism). Even accounting for such explanations of judicial behavior, does it hold true that higher-court precedent influences lower-court decisions?

As a result, the study of federal obscenity decisions offers a unique opportunity to study not only the dynamics of the federal judiciary but also about the difficulties of law and politics at the federal level. The research presented here takes up the implicit challenge of Gibson (1983) by examining just how much lower court judges act in accordance with certain norms as well as feasibility of certain activities. By analyzing a highly controversial civil rights issue, the deck appears stacked in favor of judges acting most prominently on their own policy preferences. By analyzing an issue in which the Supreme Court makes a significant doctrinal shift, the analysis appears to favor the influence of judicial impact and hierarchy. In this way, the research here provides the opportunity to discover whether judges respond to Supreme Court precedent, whether they act in accordance with their (or the president's) ideology or other factors, or a mixture of both.

CHAPTER 2

DOCTRINAL AND POLITICAL HISTORY OF OBSCENITY IN THE UNITED STATES

This chapter provides a historical context to the issue area of obscenity, with two major purposes in mind. First, it provides a historical outline of the federal government's involvement in the area of obscenity by describing the history of federal legislation and activity ever since the early 1800s. Second, and more importantly, it provides a glimpse into the Supreme Court's legal history in the area of obscenity. How has the Supreme Court treated obscenity as a legal issue, in a doctrinal sense? Has the Supreme Court, through the *Roth v. United States* and *Miller v. California* cases, provided clear standards for lower federal courts to consider and follow? To what extent should one expect the lower courts to implement such standards, and under what conditions if any?

Federal Regulation of Obscenity

Obscenity regulation in the United States began as an attempt to punish religious blasphemy, with various states contributing to the early formation of obscenity policy in a legal and political sense. The state of Massachusetts, for example, prohibited the obscene portrayal of religious songs and preachings.[12]

[12] Enacted in 1711, the statute criminalized the "composing, writing, printing or publishing of any filthy, obscene or profane song, pamphlet, libel or mock-sermon, in imitation of preaching, or any other part of divine worship." As noted by Schauer (1976), however, no prosecutions resulted from the statute.

The first obscenity conviction in the United States occurred in *Commonwealth v. Sharpless* (1815): the state of Pennsylvania prosecuted Jesse Sharpless for presenting an allegedly obscene painting. In its ruling, the Pennsylvania Supreme Court dismissed Sharpless' contention that obscenity was not an issue of common law, and held further that public showings of such artwork symbolized the potential (among the youth) for "inflaming their passions by the exhibition of lascivious pictures."[13] Around this time state legislatures began to pass legislation criminalizing obscenity: Connecticut and Massachusetts, for example, enacted obscenity statutes in the 1830s,[14] and legislation passed by Vermont in 1821 penalized any purveyor of obscenity with a $200 fine.[15] Of the infrequent statutory prosecution, a body of common law established prohibitions on "whatever outrages decency and is injurious to public morals,"[16] with state courts convicting instances of indecent exposure as well as obscene language and publications.[17]

In 1842 the federal government began its first attempts to regulate obscene materials by enacting a customs statute designed to prohibit the importation of "all indecent and obscene prints, paintings, lithographs,

[13] 2 Serg. § R. 91, 104.
[14] Statutes of Connecticut (1830) 182-184; Massachusetts Revised Statutes, Ch. 310 Sec. 10.
[15] Laws of Vermont, 1824, ch. XXIII, no. 1, Sec. 23.
[16] *State v. Rose*, 32 Mo. 560 (1862); *State v. Gardner*, 28 Mo. 90 (1959).
[17] For a more thorough discussion of state obscenity laws leading up to the *Miller v. California* (1973), consult Schauer (1976, Chapter 10).

engravings and transparencies".[18] Twenty-three years later, the federal government expanded its regulation of the obscene by enacting legislation criminalizing the mailing of materials deemed obscene.[19] Through the efforts of Anthony Comstock obscenity soon became a matter of national concern and debate, and within a short period of time the federal government expanded its regulation of obscene materials. Beginning in 1872 Comstock initiated a campaign to remove obscene materials from public commerce in the belief that newspapers, literature, magazines, and art held the potential to corrupt the minds of individuals. Comstock led a movement throughout the New York YMCA organization to establish 'vice societies' and to strengthen obscenity statutes further. His continual lobbying efforts met with success: in 1873 Congress enacted a new law (commonly referred to as the Comstock Act) prohibiting the mailing of obscene publications.[20] This law, entitled "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use," penalized various immoral acts (including obscenity) with each offense worth one to ten years in prison and a fine ranging from $100 to $5,000. Three years later Congress strengthened the law to make any obscene material "non-mailable."[21] Appointed special agent to the Post Office Department, Comstock made concerted efforts to enforce this most recent legislation vigorously.

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[18] Currently found as 19 U.S.C. § 1305 (1970).
[19] 13 Stat. 509.
[20] The amendment to the 1865 law is found in 17 Stat. 598. The current version of the law is

Schauer (1976) credits the efforts of Comstock and the resulting Comstock Act with shaping significantly the case law arising at both the state and federal levels.

The federal government expanded its regulation of obscenity further during the twentieth century, in tandem with its expanded use of the Constitution's Commerce Clause to justify various regulations (Schauer 1976, 171). The national government thus criminalized interstate transportation of obscene materials by any courier or related business, and in 1955 expanded this law by permitting the confiscation and destruction of such materials.[22] In recent decades the federal government expanded the scope of enforceable obscenity legislation even further. The Postal Service thus received permission to refuse delivery of mail to certain customers who made such requests, and will notify the sender to cease such mailings.[23] With the advent of radio the federal government established criminal penalties for the transmission of "any obscene, indecent, or profane language" and, if convicted, includes at present time a fine of no more than $10,000 or imprisonment of no more than two years (or both).[24] The Post Office adopted a comprehensive regulatory framework to outline the

currently found at 18 U.S.C. § 1461 (1970).
[21] 19 Stat. 90 § 1 (1876).
[22] 18 U.S.C. § 1465, enacted by 69 Stat. § 3 (1955).
[23] 39 U.S.C. § 3008 (1967). Interestingly, the statute itself not only includes obscene materials but any materials that an addressee deems inappropriate.
[24] 18 U.S.C. § 1464.

process of handling obscene materials discovered in the mails.[25]

Within the past three decades the federal government expanded the scope of obscenity regulation to include provisions designed to prosecute materials exhibiting the sexual exploitation of children.[26] Currently, the mailing of obscene materials is a federal crime, punishable by a penalty of up to five years in prison or up to a $5,000 fine (or both) for the first offense only, for anyone who "knowingly uses the mails for the mailing, carriage in the mails, or delivery" of such materials[27] as well as "sexually oriented advertisements."[28] The federal government may also prosecute those who use a "common carrier" such as UPS to send allegedly obscene materials, as well as the interstate transportation of such materials and even the portrayal of obscenity on the outside of envelopes and other wrappers.[29] The importation of obscene materials also became a federal offense.[30] In 1985 the federal government also expanded the reach of the Racketeer Influenced and Corrupt Organizations (RICO) statute to include obscenity. Under the Federal Anti-Pandering Act,

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[25] 39 C.F.R. § 124.9 (1974).
[26] The Sexual Exploitation of Children Act of 1977 (18 U.S.C. §§ 2251-2254) (amended in 1984 as the Child Protection Act) criminalizes the exploitation of children for the purposes of child pornography, with photographs deemed to be evidence of child abuse and exploitation. Due to the special nature of protections required for children, materials deemed child pornography do not need to be marked "obscene" in order not to be mailed. Congress also enacted the Communications Decency Act (part of the 1996 Telecommunications Act; PL 104-104, 110 Stat 56), which covered the transmission of or knowing usage of interactive computer services to display "obscene or indecent" communications to those under the age of eighteen while adding some exceptions.
[27] 18 U.S.C. § 1461.
[28] 18 U.S.C. § 1735.
[29] 18 U.S.C. § 1462; 18 U.S.C. § 1465; 18 U.S.C. § 1463. Customs officials are authorized,

people may request that obscene advertisements not be sent to their mailing address.[31]

As an indication of the significance of obscenity within the public realm, on two occasions the federal government organized commissions to study the topic in greater detail. Congress established the first U.S. Commission on Obscenity and Pornography in October 1967 as Public Law 90-100, to conduct "a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography" (*Report* 1970, 1); President Johnson appointed members to the commission in January 1968. The 1970 Report concluded that obscenity had little appreciable impact on a person's sexual behavior or prior dispositions toward sexual morality (28-29), that people exposed to erotic materials were less concerned than others about the negative effects of such exposure (20), that exposure to such material was not found to have a negative impact on sex crimes or sex delinquency (32), and that a stark increase in sexual crimes has not occurred as believed by some (31). A national study also revealed two general dimensions of the public's views on obscenity: while adults "should be allowed to read or see any sexual materials they wish," minors should not have

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under 19 U.S.C. § 1305, to seize materials they consider obscene.
[30] 18 U.S.C. § 1462; 19 U.S.C. § 1305.
[31] 39 U.S.C. § 3008.

the same unlimited availability (49). The Report also noted the inconsistencies of the public's views on obscenity: "Between 40% and 60% believe that sexual materials provide information about sex, provide entertainment, lead to moral breakdown, improve sexual relationships of married couples, lead people to commit rape, produce boredom with sexual materials, encourage innovation in marital sexual technique and lead people to lose respect for women" (27). The 1967 Commission recommended a nationwide sex education effort as well as open discussion on the topics of obscenity and pornography (54-55) and that "federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed" (57), since governmental regulation would supplant personal choices in morality and "tend to establish an official moral orthodoxy" (62).

Almost twenty years later the federal government established yet another Commission with the intent to discover and respond to the changes in the field of obscenity. Under the guidelines of the Federal Advisory Committee Act of 1972 and "at the specific request of President Reagan" (*Report* 1986, 3), then-Attorney General William French Smith established the committee and Attorney General Edwin Meese appointed its members. This second commission expressed significantly different views on the harm (both potential and actual) resulting from exposure to obscenity. They declared a causal relationship (in clinical and experimental settings) between exposure to so-called "slasher" films

and the potential for aggression and victims of such aggression are perceived to be deserving of such treatment (39-40), and exposure to nonviolent "degrading" materials lead to similar (though weaker) findings (42).

At the same time, however, they found non-violent and non-degrading materials do not "bear a causal relationship to rape and other acts of sexual violence" (43). The 1986 Commission recommended no further expansion of current obscenity regulations to Congress, since new laws would likely be challenged on constitutional grounds (53). Instead, the Report recommended that Congress should initiate further efforts to regulate sexually violent materials while still recognizing the protections afforded certain materials by the First Amendment (65).[32] In response to the findings of the Commission, Attorney General Edwin Meese created the National Obscenity Enforcement Unit (NOEU) in March 1987. Designed to increase the prosecution of retailers, distributors and producers of obscenity, the NOEU later separated into the Federal Obscenity Task Force (one component of a coordinated effort to prosecute obscenity purveyors) and the Obscenity Law Center (a clearinghouse of legal resources). At present date the Criminal Division of the Department of Justice includes a Child Exploitation and Obscenity Section, charged with investigating

[32] Interestingly, as Michael J. McManus notes in his introduction to the printed *Report*, a series of articles in *Penthouse* magazine "point out that the Commission was deeply divided, unable even to agree on whether the nuclear family is the basic unit of society. They say the Commission had such "irreconcilable differences" that it "went into meltdown"" (xxxvi).

alleged violations of child pornography laws.[33]

Obscenity and the Federal Government: Presidential Intentions

Despite the adoption of obscenity laws since the 1870s, few presidents prior to the late 1950s discussed the topic of obscenity as a matter of public debate,[34] with only Harry Truman issuing any statement touching directly upon obscenity.[35] Since the adoption of the *Roth v. United States* (1957)[36] standards, virtually every President (with the exception of Ford) made at least one statement addressing obscenity, pornography or child pornography. Due to the constitutional division between protected expression and obscenity, however, presidents differed in the extent to which they would initiate and support (or oppose) obscenity legislation. Most presidents tended to say very little except when confronted with the issue. Democratic presidents either tended to say little or else raised objections about obscenity legislation. President Kennedy, for example, told a reporter during a news conference that "I don't think that the

[33] 18 USC § 2251 deals with the exploitation of children; 18 USC § 2252A ("Child Pornography Prevention Act") is yet another aspect of criminal law relating to child pornography.
[34] Franklin Delano Roosevelt once remarked tangentially, in a radio interview, "[G]overnment restrictions on the press amount to little more than laws to prevent the printing of obscene matter and articles calculated to incite rebellion." ("Radio Interview on Government Reporting to the People. May 9, 1939." *The Presidential Papers of Franklin D. Roosevelt, 1939*, Item 76.
[35] Upon holding a news conference on March 29, 1951. Truman stated: "It has always been and always will continue to be the policy of this administration to back up the States in their inherent police powers by every appropriate measure. We supported legislation to prohibit the interstate shipment of slot machines in violation of State laws, and to prohibit the use of interstate communications facilities to transmit gambling information. We already have laws to back up the States in their enforcement of local narcotics and alcohol laws. The postal laws forbid the use of the mails for transmitting lottery, obscene, and fraudulent material. There are many more measures which need not be cataloged here" ("The President's News Conference of March 29, 1951." *The Public Papers of the Presidents, Harry S. Truman 1951*, Pg. 201, Item 63, March 29).
[36] *Roth v. United States*, 354 U.S. 476 (1957).

Post Office can be expected to do anything but carry out the laws, nor can the Attorney General, and the laws, which are interpreted by the courts, are quite clear;"[37] on another occasion Kennedy stated that "grave constitutional and other considerations… compel me to withhold my approval of" an obscenity bill.[38] President Johnson signaled his disapproval of a District of Columbia crime bill out of concern for overzealous law enforcement at the expense of civil liberties; the solution to the D.C. crime problem (and related problems such as obscenity), according to Johnson, is "[B]etter trained and better paid policemen," "[B]etter police organization," and "[B]etter staffed courts."[39] While President Clinton sent an executive memorandum to Attorney General Reno in 1993, urging the Justice Department to increase its efforts through legislation to combat child pornography,[40] Clinton made no statements to the public or Congress on the issue. Strikingly, only once did Carter address the topic of obscenity in public: during a 1978 reception honoring the National Commission on the Observance of International Women's Year, 1975 he reminded the audience that "[I]n October, I signed a bill to Congress that passed concerning child abuse. I signed

[37] "The President's News Conference of August 29, 1962." *The Public Papers of the Presidents, John F. Kennedy 1962*, Pg. 650-651, Item 352, August 29.
[38] "Memorandum of Disapproval of Bill Concerning Indecent Publications in the District of Columbia. October 19, 1962." *The Public Papers of the Presidents, John F. Kennedy 1962*, Pg. 796, Item 479, October 19.
[39] "Memorandum of Disapproval of the District of Columbia Crime Bill. November 13, 1966." *The Public Papers of the Presidents, Lyndon B. Johnson 1966*, Pg. 1382-1383, Item 611, November 13.
[40] "Letter to Attorney General Janet Reno on Child Pornography. November 10, 1993." *The Public Papers of the Presidents, William J. Clinton 1993*, Pg. 1952, November 10.

a bill against child pornography in February of this year."[41]

Although it is unlikely that any president would support such materials as child pornography or obscenity *per se*, Republican presidents tended to show their disapproval of obscenity more forcefully than did Democratic presidents. In his only public statement on the topic of obscenity, George H.W. Bush assured members of the Religious Alliance Against Pornography in 1991 that the Bush administration "is committed to the fullest prosecution of obscenity and child pornography crimes…through such Federal initiatives as Project Postporn" and urged the Religious Alliance to "[P]lease keep up the good fight. Please continue to educate Americans about the threat that obscenity and child pornography pose to our Nation."[42] Two Republican presidents are prominent in terms of their support for obscenity legislation and law enforcement efforts: Richard M. Nixon and Ronald Reagan. The bulk of public statements about obscenity and pornography arise from Presidents Nixon and Reagan. In three separate messages to Congress Nixon highlighted the importance of obscenity as a national issue, recommended the increased efforts to stop organized crime, narcotics and obscenity,[43] and submitted a bill to Congress regarding

[41] "National Commission on the Observance of International Women's Year, 1975 Remarks at a Reception Honoring the Commission. March 22, 1978." *The Public Papers of the Presidents, Jimmy Carter 1978*, Pg. 554, March 22.
[42] "Remarks to the Religious Alliance Against Pornography. October 10, 1991." *The Public Papers of the Presidents, George Bush 1991*, Pg. 1280 -- Pg. 1281, October 10.
[43] "Special Message to the Congress on Forthcoming Legislative Proposals Concerning Domestic Programs, April 14, 1969." *The Public Papers of the Presidents, Richard Nixon 1969*, pg. 284, Item 150, April 14.

obscenity.[44] Nixon also implored Congress to pass his obscenity bill in order to protect minors and prohibit the pandering of such materials,[45] and expressed his frustration with Congressional gridlock and indecision[46] even upon resubmitting his obscenity bill.[47] He went so far in his 1970 State of the Union address to increase federal action.[48] Nixon also clashed with the findings of the 1967 Commission:

> "So long as I am in the White House, there will be no relaxation of the national effort to control and eliminate smut from our national life. The Commission contends that the proliferation of filthy books and plays has no lasting harmful effect on a man's character. If that were true, it must also be true that great books, great paintings, and great plays have no ennobling effect on a man's conduct. Centuries of civilization and 10 minutes of common sense tell us otherwise…The warped and brutal portrayal of sex in books, plays, magazines, and movies, if not halted and

[44] "Special Message to the Congress on the Administration's Legislative Program. September 11, 1970." *The Public Papers of the President*, Richard Nixon 1970, Pg. 289, September 11.
[45] "Special Message to the Congress on Obscene and Pornographic Materials. May 2, 1969." *The Public Papers of the Presidents*, Richard Nixon 1969, Pgs. 344-346, Item 181, May 2.
[46] For example, Nixon stated that "[T]he bill which would stop the obscenity and the pornography from going into the homes of Americans still languishes in the Senate. It is time to get that bill out of the Congress of the United States and enacted into law." ("Remarks in Ocean Grove, New Jersey. October 17, 1970." *The Public Papers of the Presidents, Richard Nixon 1970*, Pg. 860, Item 353, October 17.)
[47] "Special Message to the Congress Resubmitting Legislative Proposals. January 26, 1971." *The Public Papers of the Presidents, Richard Nixon 1971*, Pg. 65, Item 29, January 26.
[48] "But in the field of organized crime, narcotics, pornography, the Federal Government has a special responsibility it should fulfill. And we should make Washington, D.C., where we have the primary responsibility, an example to the Nation and the world of respect for law rather than lawlessness." ("Annual Message to the Congress on the State of the Union. January 22, 1970." *The Public Papers of the Presidents, Richard Nixon 1970*, Pg. 12, Item 9, January 22.)

reversed, could poison the wellsprings of American and Western culture and civilization."[49]

Another Republican, Ronald Reagan, took similar steps as president to address the problem of obscenity and pornography in the United States. Reagan told the National Religious Broadcasters, for example, of the increased efforts by the U.S. Customs Service to crack down on the importation of obscenity.[50] In signing the Child Protection Act of 1984, Reagan denounced the 1970 Commission report and announced the creation of a new one, and highlighted the increased efforts by the Justice Department to prosecute pornography cases.[51] In his 1987 State of the Union address, Reagan highlighted his further efforts to stop the spread of child pornography as well as obscenity.[52] In that same year Reagan sent the Child Protection and Obscenity Enforcement Act of 1987 to Congress, as "a direct outgrowth of a deep concern this Administration has had about the effects of obscenity and child pornography in our Nation."[53] The issue of pornography also became an element of his

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[49] "Statement About the Report of the Commission on Obscenity and Pornography. October 24, 1970." *The Public Papers of the Presidents*, Richard Nixon 1970, Pgs. 940-941, Item 381, October 24.

[50] "Over the past year, the United States Customs Service has increased by 200 percent its confiscation of obscene materials coming in across our borders." ("Remarks at the Annual Convention of the National Religious Broadcasters. January 30, 1984." *The Public Papers of the Presidents, Ronald Reagan 1984*, Pg. 120, January 30.)

[51] "Remarks on Signing the Child Protection Act of 1984. May 21, 1984." *The Public Papers of the Presidents, Ronald Reagan 1984*, Pg. 721, May 21.

[52] "Message to the Congress on "A Quest For Excellence."" *The Public Papers of the Presidents, Ronald Reagan 1987*, Pg. 74, January 27.

[53] "Message to the Congress Transmitting Proposed Legislation on Child Protection and Obscenity Enforcement. November 10, 1987." *The Public Papers of the Presidents, Ronald*

nomination of Justice Kennedy to the Supreme Court.[54] Perhaps one can sum up Reagan's views with this remark, given at a fund-raiser in 1985:

> "I don't believe that our Founding Fathers ever intended to create a nation where the rights or pornographers would take precedence over the rights of parents and the violent and malevolent would be given free rein to prey upon our children."[55]

Obscenity and Judicial Scrutiny: The Supreme Court

Despite the various legislation enacted by Congress to stave off the alleged effects of obscenity and various lower court rulings on the subject,[56] the Supreme Court did not enter the national debate fully until 1957. At certain times the Court attempted to ascertain a sufficient definition of obscene, such as in 1896 with its declaration that "the words 'obscene,' 'lewd' and 'lascivious' as used in the statute, signify that form of immorality which has relation to sexual

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Reagan 1987, Pg. 1313, November 10.

[54] "I don't need to tell anyone here the sad, often tragic story of years of judicial solicitation for every conceivable right of criminals and neglect for the victims of crime, of playing fast and loose with first amendment rights in a way that gave too many pornographers free rein, of fanciful constitutional arguments use to throw out long and hard police work, and of the price our nation has paid for all of this…I have nominated a judge to the Supreme Court who is realistic about pornography and crime in general: Anthony M. Kennedy." ("Remarks to Administration Supporters on Child Pornography and the Supreme Court Nomination of Anthony M. Kennedy. December 4, 1987." *The Public Papers of the Presidents, Ronald Reagan 1987*, Pgs. 1435-1436, December 4.

[55] "Remarks at a Fund-raising Luncheon for Virginia Gubernatorial Candidate Wyatt Durrette in Arlington, Virginia. October 9, 1985." *The Public Papers of the Presidents, Ronald Reagan 1985*, Pg. 1213, October 9.

[56] In *United States v. Wightman* (1886), for example, a collection of letters is considered "exceedingly coarse and vulgar, and one of them is grossly libelous," but not suggestive of "libidinous thoughts, or excite impure desires" (636).

impurity."[57] However, from the late 1860s to the mid-twentieth century, federal lower courts tended to rely upon an English common law precedent to make its obscenity determinations. In *Regina v. Hicklin* (1868)[58] the defendant sought a declaration that the pamphlet "The Confessional Unmasked: shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession" was designed to be a tool for religious and political education and thus, not legally obscene. The *Hicklin* test required triers of fact to consider "whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." Through this standard, lower courts were charged with protection the weakest minds of the community, often conceived of as children.[59]

For the next fifty years lower courts in the United States debated the usefulness of the *Hicklin* test, at times going so far as to criticize the test,[60] yet even its critics recognized *Hicklin* as the guiding rule of law in the field of

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[57] *Swearingen v. United States*, 161 U.S. 446 (1896), 451.
[58] *Regina v. Hicklin*, L.R. 3 Q.B. (1868), 36.
[59] In his opinion in *Butler v. State of Michigan* (1957), Frankfurter struck down a Michigan law because "[T]he incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children" (352 U.S. 380, 383).
[60] In *In re Worthington Co.* (1894), one New York court determined Payne's *Arabian Nights*, Ovid's *Art of Love*, and Boccaccio's *Decameron*, among other works, were not obscene, arguing further that "[I]t is very difficult to see upon what theory these world-renowned classics can be regarded as specimens of that pornographic literature which it is the office of the Society for the Suppression of Vice to suppress" (361). Judge Learned Hand offered a critique of the *Hicklin* test in *United States v. Kennerley* (1913): "I hope it is not improper for me to say that the rule as laid down, however, consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words,

obscenity.[61] In various cases lower courts debated the definition of obscenity as "Tending to stir the sex impulses or to lead to sexually impure and lustful thoughts".[62] When not relying upon *Hicklin*, however, lower courts received little guidance from the Supreme Court in the field of obscenity and thus attempted to create standards such as a "balancing test"[63] and a "compromise between candor and shame."[64] While the Court in *Chaplinsky v. New Hampshire* (1942)[65] hastened to note that obscenities (along with other categories of speech such as fighting words, libelous words, and profanities) have very little social value to them and thus receive no constitutional protection, the Court still did not offer a comprehensive set of standards by which to weigh the potential obscenity of materials.

The Supreme Court and the *Roth* Standards. Although the Supreme Court did not remain altogether silent on the topic of obscenity,[66] only in 1957 did the Court attempt to formulate a comprehensive set of standards for determining

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"obscene, lewd, or lascivious."" (209 F. 119, 120)

[61] While Judge Learned Hand critiqued the *Hicklin* test, he nonetheless took pains to recognize that *Hicklin* "has been accepted by the lower federal courts until it would be no longer proper for me to disregard it." (209 F. 119, 120).

[62] See, for example, *United States v. One Obscene Book Entitled "Married Love"* (1931) (declaring the book *Married Love* not obscene; upheld in *United States v. One Book Entitled Ulysses* (1934)) and *United States v. One Book Called "Ulysses"* (1933) (declaring *Ulysses* to be not obscene).

[63] *United States v. Levine,* 83 F.2d 156 (1936).

[64] *United States v. Kennerley*, 209 F. 119 (1913).

[65] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[66] In *Mutual Film Corporation v. Ohio Industrial Comm'n* (1915), for example, the Supreme Court declared motion pictures to receive no First Amendment protection but decades later afforded First Amendment protection to films such as "La Ronde" and "M" in *Superior Films, Inc. v. Department of Education* (1953). In *Grimm v. United States* (1895), the Court argued that advertisements (letters) describing the types of obscenity to be purchased and the method of

what is obscene. This decision not to address the issue of obscenity changed dramatically with the Court's ruling in *Roth v. United States* and its companion case *Alberts v. California*.[67] After sending out circulars to widen his market of potential customers, Roth was charged on twenty-six counts with mailing obscene circulars and advertisements as well as an obscene book and thus violating a federal obscenity statute; a jury trial in the Southern District of New York convicted him on four counts and the Court of Appeals for the Second Circuit affirmed his conviction.[68] Alberts was charged with "keeping for sale" various "obscene or indecent publications" as well as the creation and mailing of obscene advertisements (both state offenses); the Department of the Superior Court of the State of California in and for the County of Los Angeles affirmed his conviction in the Beverly Hills Judicial District Court.

The majority opinion, written by Justice Brennan, centered on the topic of obscenity: "[T]he dispositive question is whether obscenity is utterance within the area of protected speech and press."[69] Noting that recent Court cases, and legislation enforced by ten of fourteen states responsible for the ratification of the Constitution, placed restrictions on the freedom of speech, Brennan thus argued that the freedom of speech is not absolute. During the early years of the republic, according to Brennan, various state laws and state court precedent

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obtaining such materials are considered obscene.
[67] 354 U.S. 476 (1957).
[68] 237 F.2d 796.

provided "sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."[70] The intent of the First Amendment, according to the Court majority, was to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," and so any "ideas having even the slightest redeeming social importance" should receive First Amendment protection.[71] However, both the presence of obscenity laws in every state and the number of federal laws against obscenity justified the treatment of obscenity as outside the purview of the First Amendment. Due to the lack of constitutional protection afforded obscenity, it mattered little whether such regulation served to punish "incitation to impure sexual *thoughts,* not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts* [italics in original]".[72] In addition, due to its unprotected status obscenity is not constitutionally protected speech, and thus federal obscenity statutes do not infringe upon the Ninth and Tenth Amendment protections against alleged encroachment upon individual liberties.

Brennan provided the foundations for the *Roth* test, in distinguishing between the topics of sex and of obscenity. Brennan considered sex in and of itself "a great and mysterious motive force in human life" and "one of the vital

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[69] 354 U.S. 476 (1957), 481.
[70] 354 U.S. 476 (1957), 483.
[71] 354 U.S. 476, 484.

problems of human interest and public concern"; obscenity, in contrast, "deals with sex in a manner appealing to prurient interest."[73] Materials not speaking to the prurient interest should, in contrast, receive constitutional protection. Brennan proffered the following standards for determining what is obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[74] In doing so, Brennan supplanted the *Hicklin* standards because such standards could well authorize the censorship of works of art or literature (to name a few media) that discuss sex in a lawful manner. Although Brennan noted the imprecision involved with certain terms (especially "prurient"), he argued that "'when measured by common understanding and practices'"[75] the general public should have sufficient guidance in determining what is obscene. Through Brennan's majority opinion, the Supreme Court enunciated its first official test for distinguishing between legitimate discussions, depictions, or portrayals of sex from those materials portraying sex in a manner 'appealing to the prurient interest.'[76]

For nine years this remained the predominant case law within the field of

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[72] 354 U.S. 476, 486.
[73] 354 U.S. 476, 487.
[74] 354 U.S. 476, 489.
[75] 354 U.S. 476, 491; quoting directly from *United States v. Petrillo*, 332 U.S. 1 (1947), 7-8.
[76] In a single footnote, Brennan's majority opinion attempts to define 'prurient' as "material having a tendency to excite lustful thoughts." Prurient thus centers around the morbid, the shameful, the lustful; or as defined by the A.L.I., Model Penal Code, ' 207.10 (2): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid

obscenity. Despite the reassurances of Brennan, it became debatable whether purveyors of sex-related materials (much less lower courts at federal and state levels) could ascertain the 'prurience' of the materials at hand. Justice Harlan's concur/dissent in *Roth* argued that the Supreme Court could not discuss constitutional matters in obscenity cases without making a case-by-case consideration of the materials and furthermore can not provide sufficient guidance as to what is "utterly without redeeming social importance".[77] Douglas' dissent (joined by Black) argued that the *Roth* standards punished the thoughts (not the conduct) aroused by the materials and that "literature should not be suppressed merely because it offends the moral code of the censor".[78]

The Warren Court began to outline further aspects of the *Roth* test in later cases and make emendations to the *Roth* standards. For example, in *Manual Enterprises, Inc. v. Day* (1962)[79] Justice Harlan's majority opinion concluded that in order for materials to appeal to the 'prurient interest', it must do so in a "patently offensive way." Two years later, in *Jacobellis v. Ohio* (1964)[80] Brennan's majority opinion argued that judges must not only consider the *Roth* standards but must assess further whether a work is "utterly without socially

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interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

[77] 354 U.S. 476, 499, 507. "Many juries might find that Joyce's "Ulysses" or Boccaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." 354 U.S. 476, 499.

[78] 354 U.S. 476, 513.

[79] *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

redeeming value" according to national standards.[81] The "prurient interest" test could also apply more narrowly to 'deviant groups' if the materials under scrutiny were "designed for and primarily disseminated to a clearly defined deviant sexual group," according to *Mishkin v. New York* (1966).[82]

In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* (1966) [83] a plurality of the Court merged previous standards into another constitutional test: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value."[84] The plurality opinion (written by Brennan) asserted that each standard "is to be applied independently," so that materials that are deemed prurient and patently offensive would not be labeled obscene unless they were "utterly without redeeming social value."[85] The Supreme Court began to signal its willingness to consider actual intent in criminal cases, such as the intent to "pander" to certain groups in order to satisfy the "prurient interest" requirement of the *Roth-Memoirs* standards. In

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[80] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
[81] 378 U.S. 184, 191-195.
[82] *Mishkin v. New York*, 383 U.S. 502 (1966).
[83] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966)
[84] 383 U.S. 413 (1966), 418.
[85] 383 U.S. 413 (1966), 419.

Ginzburg et al. v. United States (1966)[86] the Court affirmed the obscenity convictions of Ginzburg and three corporations because the defendants promoted the "sexually provocative" aspects of their works in an environment designed to sell such provocative materials, and thus demonstrated a concerted effort to appeal to prurient interests. By proving that criminal defendants "pandered" to a certain prurient interest in potential readers, prosecutors could seek a different avenue through which to obtain a conviction.

Members of the Supreme Court began to show dissatisfaction with its definitions of obscenity, as no Court majority to date championed any certain test. The Court soon began to resort to "Redrupping": in accordance with its ruling in *Redrup v. New York* (1967)[87] the Court would issue a *per curiam* reversal of a lower court conviction if five members of the Court deemed the materials in question not obscene. As noted by the *per curiam* opinion, "[W]hichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. Accordingly, the judgment in each case is reversed."[88] As noted by Gunther, while applying their own standards members of the Court reversed more than thirty lower court decisions as a result of the *Redrup* test (1991, 1104).

Obscenity and the *Miller* Standards. This pattern changed when a Court majority

[86] *Ginzburg et al. v. United States*, 383 U.S. 463 (1966).
[87] *Redrup v. New York*, 386 U.S. 767 (1967).
[88] 386 U.S. 767 (1967), 771.

created yet another set of obscenity standards in 1973 with their decision in *Miller v. California* (1973).[89] Miller initiated a marketing strategy to increase his sales by sending out unsolicited advertisements in the form of brochures describing certain books and a film for sale,[90] hoping to attract potential customers. One of the advertisements arrived at a Newport Beach restaurant, whereupon the owners of the restaurant filed a complaint with the police. A jury in California convicted him of knowingly distributing obscene materials (a misdemeanor offense), something affirmed by the Superior Court of California, Orange County. Writing for the Court majority (5-4), Chief Justice Warren Burger (joined by White, Blackmun, Powell, and Rehnquist) inaugurated a conservative change in the Court's obscenity doctrine. Burger began his discussion of case law by noting, "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[91] Chief Justice Burger noted the inability of the Court (with the exception of *Roth*) to formulate any standard that could withstand constitutional scrutiny under the police power of the states; even

[89] *Miller v. California*, 413 U.S. 15 (1973).
[90] As noted in Chief Justice Burger's majority opinion, the "brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." 413 U.S. 15 (1973), 18.
[91] 413 U.S. 15, 18.

the author of the *Memoirs* test discarded it, and no one else supported it.[92]

While declaring obscenity to be outside the protection of the First Amendment, Chief Justice Burger conveyed a need to tailor the scope of permissible regulation narrowly "to works which depict or describe sexual conduct."[93] According to the *Miller* test jurists must consider "(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."[94] Furthermore, as *obiter dicta*, Burger's opinion provided some initial guidance to state governments as to what may be obscene including the greater leeway for states to regulate conduct than nonphysical actions.[95] Although the newer standards, according to Burger, would lead only to the conviction of "hard core" materials considered "patently offensive,"[96] such judicial determinations would be left to the jury system. Chief Justice Burger diverged further from previous

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[92] 413 U.S. 15, 23.
[93] 413 U.S. 15, 24.
[94] 413 U.S. 15, 24.
[95] "It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. 15, 25.
Burger also noted the greater latitude given to states for the "regulation of nonverbal, physical conduct than...depictions or descriptions of the same behavior." 413 U.S. 15, 27 n 8.

obscenity standards by adopting a reticence to define concepts such as "prurient interest" or "patently offensive" on a national level, and any attempt to force states to do so "would be an exercise in futility."[97] Since the vast regulation of obscenity did not stifle or influence "expression of serious literary, artistic, political, or scientific ideas,"[98] contemporary efforts would lead, presumably, to few significant deleterious effects either. In addition, that juries "may reach different conclusions as to the same material does not mean that constitutional rights are abridged" because it "is one of the consequences we accept under our jury system."[99]

The *Miller v. California* decision marked a turning point in the constitutional history of the Supreme Court. As noted by O'Brien, the aftermath of the *Roth* and subsequent decisions meant "only hard-core pornography fell outside of the scope of protected speech" (1995, 420). Nonetheless, the *Miller* decision supplanted *Roth* and *Memoirs* in fundamental ways. The three-part test outlined by *Roth* required jurists to consider the views of the 'average person' applying 'contemporary community standards' (meaning national standards). While the *Miller* decision integrated the above standard as part of its doctrine, it transformed the meaning of community standards from the national to the local

[96] 413 U.S. 15, 27.
[97] 413 U.S. 15, 30.
[98] 413 U.S. 15, 35.
[99] 413 U.S. 15, 26.

level.[100] The Court having shifted the locus of responsibility from that of the nation (considered 'unworkable' by the *Miller* court) to the states or cities and other lower-level governmental entities, certain portions of the country found greater license to prosecute individuals as well as certain establishments (e.g. bookstores, "adult" theatres) trafficking in questionable materials if such materials were considered offensive to the local community. As asserted by Burger in the *Miller* decision, "[P]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[101] Not everyone agreed with this line of reasoning, however. Douglas' dissent argued that there is no exception for obscenity, that only by constitutional amendment could there be any prohibitions, and that criminal punishments should be void because there was no adequate warning to purveyors beforehand about what is obscene.[102] In addition, Brennan's dissent (joined by Stewart and Marshall) argued that the state statute is overbroad and thus unconstitutional.[103]

The Burger Court signaled yet another conservative change within the field of obscenity by altering the standards required by triers of fact to consider.

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[100] Indeed, the Court majority added the following in the opinion: "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…[I]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." 413 U.S. 15, 31-32.
[101] 413 U.S. 15, 33.
[102] 413 U.S. 15, 37-47.

The Warren Court required triers of fact to consider whether the material, taken as a whole, appealed to the prurient interest (i.e. a shameful, morbid, lustful interest in sex) and whether such material is *utterly* without redeeming social importance (*Roth*) or social value (*Memoirs*). Defendants in obscenity cases prior to 1973, faced with significant punishment by law, could attempt to make some case that the materials offered some indefinite 'social value' to the materials and could presumably succeed in court. Defendants faced with prosecution after June 1973 received much less latitude under the serious literary, artistic, political, or scientific value standard. By requiring defendants to explicate in greater detail whether the materials contribute to "the free and robust exchange of ideas and political debate,"[104] the scope of constitutional protection (through the First Amendment's freedom of speech) narrowed and thus the prosecution for obscenity became more likely.

Since the *Miller* decision, at various times the Court attempted to clarify some of the unclear aspects of the newer standards. For example, in *Pinkus v. United States* (1978)[105] the Court ruled that when trying defendants, juries may not consider "children" as part of the community at large but could consider "sensitive persons" when determining the "average person." The Court in *Pope*

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[103] 413 U.S. 15, 47-48.
[104] 413 U.S. 15, 34.
[105] *Pinkus v. United States*, 436 U.S. 293 (1978).

v. Illinois (1987)[106] also declared that the serious literary, artistic, political or scientific value of should not be determined by an "ordinary" person; instead, juries should ask "whether a reasonable person would find such value in the material, taken as a whole" appeals to a prurient interest and patent offensiveness.[107]

Miller v. California (1973) and its companion cases signaled the beginning of a conservative shift in the Supreme Court's doctrine by creating a newer set of standards for obscenity. While the *Miller* court integrated the first three standards into its definition of obscenity ("average person," "contemporary community standards," "dominant theme…prurient interest") it made two fundamental changes. First, it moved the locus of community standards from the nation to local communities (such as states and cities). In this way, the Supreme Court conferred upon prosecutors in more conservative districts a greater freedom to initiate legal action against alleged pornographers because of the local community's opposition to such materials. Second, the *Miller* test forced alleged pornographers to provide further justification for the materials held for sale or distribution. Instead of simply describing some "redeeming social value" for the national community, such purveyors needed to provide more particular proof of literary, scientific, political, or artistic value. By these standards materials needed to survive a higher degree of scrutiny in order to avoid the

[106] *Pope v. Illinois*, 481 U.S. 497 (1987).

label “obscene.”

In this way the *Miller* case inaugurated (in part) an emerging “legal regime” (Richards and Kritzer 1998), even as its only direct suggestion about classifying materials is that conduct-oriented materials should be subject to greater scrutiny than others.[108] Since the *Miller* decision the Supreme Court itself tended to decide cases in a significantly proscriptionist (or conservative) manner (Kobylka 1987). The Court has not hastened to supplant the *Miller* standards with another distinct test; rather, the Court has instead chosen to center its pornography discussion on *Miller* and its progeny. The actual standards, especially those arising from the *Roth* and *Miller* decisions, provide a narrow set of guidelines that the lower courts must apply when making their decisions. While the definitions of various terms (such as “prurient”) do not achieve a “god-like precision”[109] and thus lead to a certain measure of interpretation, the supplementary examples in the opinion (such as examples of “prurient”) provide an extra measure of guidance in determining how materials relate to the standards provided by the Court. As a result, both the *Roth* and *Miller* cases provide lower courts with standards that, while not perfect, nonetheless give guidance and clarity to lower courts as to how to approach the question. (This becomes a subject of empirical analysis in Chapters 4 and 5.)

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[107] 481 U.S. 497 (1987), 501.
[108] 413 U.S. 15, 27 fn. 8.
[109] *Miller v. California*, 413 U.S. 15 (1973), 28.

Thus, one expects lower courts to apply the *Roth* standards until 1973, and the *Miller* standards after 1973. While the standards are not as clear-cut as those found in other issue areas (such as the Miranda rights required by the Court), through both *Roth* and *Miller* the Supreme Court required lower courts (and both federal and state legislators, indirectly) to use the emerging constitutional obscenity standards when making their decisions and also to view materials with a more proscriptionist eye after the *Miller* decision.

Obscenity and Questions of Due Process. As noted throughout the Court's history, the realm of obscenity politics did not simply end with the official determination of obscenity. While those trafficking in the obscene are obliged to consider the substantive aspects of obscenity (are the materials obscene?), prosecutors must consider the procedural aspects of obscenity litigation. The Fifth and Fourteenth Amendments require that all levels of government provide sufficient levels of due process. The most important procedural aspect of obscenity cases is the use of adversary hearings. In many instances, the federal government seeks to obtain and destroy certain pornographic or obscene materials. Prosecutors must afford some type of adversary hearing (either prior to or after seizure), providing defendants the opportunity to present their defense of the materials. As noted by Schauer, "[T]he most precise test imaginable is of little use if there is no assurance that the test will be fairly applied, and that the test will be applied in every instance where suppression of constitutionally

protected material is possible" (1976, 206). During its constitutional history the Supreme Court has required adversary hearings in cases where the prosecution intended to seize and destroy the materials. Thus, prosecutors may not seize materials prior to an adversary hearing simply by obtaining an injunction,[110] or by obtaining some type of *ex parte* determination of the obscenity of the materials.[111] Prosecutors must offer an adversary hearing even after a judge views the materials either prior to or after issuing a warrant[112] or after issuing a warrant based on a police officer's personal conclusions about the materials.[113] One general guideline is the ten-day rule: it is sufficient to have an adversary hearing no more than ten days after seizure.[114] Under certain restrictions, then, prosecutors may seize materials as evidence.

Prosecutors must also deliberate the procedures by which they obtain a warrant for the seizure of materials. In *Marcus v. Search Warrant* (1961) the Supreme Court outlined certain rules for the legal search and seizure of materials. Law enforcement officials in *Marcus* obtained a warrant after an *ex parte* hearing (in lieu of an adversary hearing) based on the conclusions of a single law enforcement official and also granted virtually unlimited authority to determine which magazines were considered obscene, without any judicial

[110] *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).
[111] *Marcus v. Search Warrant*, 367 U.S. 717 (1961).
[112] *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973).
[113] *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).
[114] *U.S. v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

determination. The Supreme Court held that law enforcement officials must make certain not to seize or suppress non-obscene materials, and that law enforcement officials must provide some type of 'searching' inquiry into the actual obscenity of the materials. Prosecutors and law enforcement officials also may not use evidence based on a faulty warrant in order to obtain an obscenity conviction, as found in *Mapp v. Ohio* (1961).[115] The Supreme Court also made the warrant an official requirement of obscenity prosecution. In *Roaden v. Kentucky* (1973)[116] the county sheriff viewed a sexually explicit film at a local theatre, and thus concluded it to be obscene and seized (without warrant) a copy of the film for use as evidence. The Supreme Court held that the prior restraint of such materials forced law enforcement officials to a higher standard; at the very least, a properly obtained search warrant prior to seizure is necessary.

One crucial element within the American legal system is the importance of intent--that the party planned to commit (to) some action. With this in mind, prosecutors in obscenity cases must respond to charges of *no scienter*; that is, the defendant in the case did not know (that is, could not identify) the actual contents of the materials. In *Smith v. California* (1959)[117] the proprietor of a bookstore was charged with the criminal possession of a book later deemed obscene by a judge. The proprietor had claimed that he had no knowledge of

[115] *Mapp v. Ohio*, 367 U.S. 643 (1961).
[116] *Roaden v. Kentucky*, 413 U.S. 496 (1973).
[117] *Smith v. California*, 361 U.S. 147 (1959).

the actual contents of the book, and as such could not be held responsible for the materials (as defined by law). Justice Brennan's majority opinion argued that because the ordinance in question did not include an element of *scienter* ("knowledge by appellant of the contents of the book"[118]) but retained its strict-liability standard, booksellers would restrict the types of books to those given a proper examination; this in turn would become "the public's burden, for by restricting him the public's access to reading matter would be restricted."[119] The public at large would thus have access to fewer books, and the resulting tendency of booksellers to restrict the types of materials held to the public (partly out of fear of criminal prosecution) represented a chilling effect on the freedom of speech. In order to effect the prosecution of obscenity, ordinances must (at the least) provide some scienter component. Three years later the Court reversed a Post Office determination of obscenity, ruling not only that the materials were not obscene but also that the Judicial Officer of the Post Office had not proven sufficiently that the defendant knew at least some advertisers found in the magazines wanted to sell obscene materials.[120]

In later cases the Supreme Court began to outline the definition of scienter in greater detail. In *Mishkin v. New York*[121] the Court agreed that the prosecution had proven scienter, in light of the facts that the appellant had given

[118] 361 U.S. 147, 149.
[119] 361 U.S. 147, 153.
[120] *Manual Enterprises v. Day*, 370 U.S. 478 (1962).

specific instructions to his writers, attempted to hide his efforts in the publication of such materials, and published a number of similar materials in large quantities. In *Hamling v. United States* (1974)[122] the Court defined scienter as "constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."[123] As a result of the *Hamling* decision it became a matter for prosecutors to prove "knowledge of the contents of the materials." As noted by Schauer, "some courts have held that the scienter requirement is satisfied if it is proved that the defendant knew or should have known of the contents of the materials" (1976, 225).

As a result of the above rulings, lower courts are required to consider certain allegations of procedural misconduct. Certain procedural rules such as proving *scienter* and requiring adversary hearings provide a bulwark against an overzealous prosecution, and federal courts have the opportunity to consider whether governmental attorneys have committed due process violations. Prosecutors may not simply remove offensive materials from the premises, but rather must afford some type of adversary hearing to the purveyors of such materials. In addition, prosecutors must prove that the defendants knew the contents of the materials; in the absence of such proof (a failure to prove

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[121] *Mishkin v. New York*, 383 U.S. 502 (1966), 511-512.
[122] *Hamling v. United States*, 418 U.S. 87 (1974).
[123] 418 U.S. 87, 123.

scienter), the prosecution has little case. Federal lower courts attuned to Supreme Court precedent are thus called upon to consider matters of due process (where applicable) in their considerations of obscenity cases; otherwise, non-governmental litigants might claim (and in some situations, not without reason) that the government has engaged in such behavior as overzealous prosecution in failing to conform to Fourth and Fifth Amendment guidelines.

Evidentiary Standards and the Right to Privacy. While considering the application of various obscenity standards, at times the Court has accounted for other important factors. The Court entered the debate over the division of public and private lives of individuals in its obscenity decisions. In *Stanley v. Georgia* (1969)[124] the Court asserted that the mere possession of certain obscene materials is not in itself a crime. Relying in part upon previous decisions, most prominently in *Griswold v. Connecticut* (1958),[125] the Court argued that "[I]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[126] Governments thus have greater control over the regulation of obscenity as it remains a matter of public dissemination, especially within the commercial marketplace; such regulation thus ends as it intrudes upon the residence of its citizens. Later decisions, however, served to limit the "zone of

[124] *Stanley v. Georgia*, 394 U.S. 557 (1969).
[125] *Griswold v. Connecticut*, 357 U.S. 449 (1958).
[126] 394 U.S. 449, 557; 565.

privacy" available to individuals. The Court, for example, held that the right of individuals to possess obscenity within their homes did not necessarily translate into a First Amendment right to purchase such materials,[127] and the Court also permitted searches of luggage by Customs officials.[128] Last, the right to privacy (upheld for individuals in *Stanley*) also did not extend as far as the commercial sphere.[129] According to the above rulings, non-governmental litigants may claim that the government intrudes into their private affairs, something that lower federal court judges shall consider in determining the fate of obscenity litigants.

Governmental Regulation and Statutory Construction. As noted over its constitutional history, the Supreme Court required the use of strict scrutiny when reviewing governmental regulation of free expression (considered a "fundamental right" ever since *Palko v. Connecticut* (1937)).[130] Because of the importance of the First Amendment's freedom of speech, governments must provide sufficient justification (indeed, strict scrutiny) for any efforts to tailor such expression and have often encountered difficulties in crafting legislation that can survive constitutional scrutiny. Similarly, litigants have challenged the overbreadth of certain regulations "which occurs when the statute punishes not only that which can properly be made criminal or otherwise restricted, but also that which cannot, without violating the Constitution, be made criminal" (Schauer

[127] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973).
[128] *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).
[129] *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402

1976, 154). At times various litigants have also argued that certain federal, state and local regulations are vague: the statute does not provide a sufficiently precise definition of the materials it intends to regulate. In a legal sense, does the statute give citizens a clear conception of what is obscene versus non-obscene? In the absence of a clear-cut definition of what is obscene, such regulation has not survived strict scrutiny and is thus ruled unconstitutional. As noted by Schauer, not only do vague statutes violate due process because individuals are punished for conduct that is uncertain as a crime, but people are likely to censor themselves out of fear of punishment and thus free expression is stifled (1976, 159).

The Supreme Court dealt with the problem of overbroad legislation in a number of rulings. In *Joseph Burstyn, Inc. v. Wilson* (1952),[131] for example, the Supreme Court struck down the "sacrilegious" element of a New York statute regarding the licensure of motion pictures because the statute provided little guidance of what may constitute "sacrilegious" films. As argued by the Court, censors using this standard would (at best) have difficulties in not promoting one religion over another; as noted by the Court majority, "[T]his is far from the kind of narrow exception to freedom of expression which a state may carve out to

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U.S. 363 (1971).
[130] *Palko v. Connecticut*, 302 U.S. 319 (1937).
[131] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

satisfy the adverse demands of other interests of society."[132] Through this ruling the Court sent a message to governments: in constructing a statute regulating free expression, governments must curtail their regulatory authority by providing a precise, narrow definition of what is to be prohibited. More importantly, the term "sacrilegious" involved a broad concept; thus, the government's ability to regulate on the basis of religion highlighted its overbreadth. Five years later the Supreme Court reversed a conviction of the regulation of books "tending to the corruption of the morals of youth," contending that by prohibiting to adults the sale of materials unfit for minors the state of Michigan "reduce(s) the adult population of Michigan to reading only what is fit for children."[133] Soon thereafter the Court also struck down, on overbreadth grounds, the denial of licenses to show motion pictures "which are immoral in that they portray 'acts of sexual immorality...as desirable, acceptable or proper patterns of behavior.'"[134] In the *Roth* ruling, however, the Court maintained that the term obscenity (as defined in its ruling) provided adequate guidance to authorities and citizens; as a result, 18 U.S.C. § 1461 was not unconstitutionally vague.

Ten years later the Supreme Court issued a more precise statement about adequate standards of vagueness. In *Interstate Circuit, Inc. v. City of*

[132] 343 U.S. 495, 504.
[133] *Butler v. Michigan*, 352 U.S. 380 (1957), 384.
[134] *Kingsley International Pictures Corporation v. Regents*, 360 U.S. 684 (1959).

Dallas (1968)[135] the Court struck down a municipal board ratings system (and its classification of movies as either "suitable" or "not suitable for young persons") because it conferred too much authority upon the board without defining its terms clearly. More particularly, the regulation of motion pictures (one method of expression) through licensing schema (with the potential of granting extensive decision-making authority to censors) demanded a precise set of standards;[136] terms such as "sexual promiscuity" must be defined carefully and precisely.[137] While differing standards for minors and adults are considered permissible,[138] up to this point the Court asserted simply that regulatory bodies must take great care to limit their discretion and provide clear standards for citizens.

In two companion cases to *Miller*, however, the Supreme Court narrowed the scope of permissible regulation further. In *Paris Adult Theatre I v. Slaton* (1973)[139] the Supreme Court altered its judicial considerations of vagueness. Unlike previous cases, in *Paris* the Court required that regulations not only must be limited to depictions and descriptions of conduct of a sexual nature but must also provide descriptions of such impermissible conduct.[140] The Court in *Paris* pointed to the *Miller* decision to provide guidelines for unacceptable conduct.

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[135] *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).
[136] 390 U.S. 676, 682-683.
[137] 390 U.S. 676, 687-688.
[138] *Ginsberg v. New York*, 390 U.S. 629 (1968).
[139] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).
[140] *Miller v. California*, 413 U.S. 15 (1973), 25.

The Court in *United States v. 12 200-Ft. Reels of Film* (1973)[141] reversed a district court's finding of 19 U.S.C. § 1305 unconstitutional, and pointed further to the *Miller* decision in asserting its willingness to define certain terms such as "obscene," "lascivious," and "indecent."[142] One year later the Court upheld 18 U.S.C. § 1461, holding that the *Miller* cases show "there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases".[143] As a result of the *Miller* and companion cases, "what now seems to be required is some description, in the statute or by judicial construction, of the actual types of sexual acts or depictions or conduct that may not be exhibited or distributed" (Schauer 1976, 168). At the same time, however, the Court in *Reno v. ACLU* (1997) struck down the Communications Decency Act because of its lack of defining important terms such as "indecent," without which such laws can be struck down as vague.[144]

Due to the various Supreme Court rulings lower courts must consider the strength of the laws that support obscenity prosecutions. Due to the risk of violating a fundamental right—freedom of speech—governmental entities must craft legislation that survives strict scrutiny. Non-governmental litigants can assert that the laws are vague or overbroad, and lower courts are called upon to

[141] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973).
[142] 413 U.S. 123, 130 (footnote 7 in opinion).
[143] *Hamling v. United States*, 418 U.S. 87, 114 (1974).

consider whether such laws violate the First Amendment. Although the Supreme Court has (over time) come to provide greater support for governmental laws and regulations against charges of vagueness and overbreadth, such challenges can nonetheless remain an important part of obscenity litigation in the lower courts. As a result, it is not unlikely for litigants to assert that certain regulations or statutes do not withstand strict scrutiny and are thus unconstitutional.

The Regulation of "Adult" Businesses and Establishments. Perhaps in response to a growth in "adult" businesses, the Court has grappled with the question of regulating certain types of conduct such as "topless" and related dancing. As one method of reducing the presence of certain types of businesses, cities and other lower-level governments have chosen to create certain zones (commercial or otherwise) without actually making a factual statement on the activity's (non)obscenity or its status within the First Amendment. The Court has tended to look more favorably upon zoning as it relates to the "secondary effects" of such activities (and not the conduct itself) and less as it prohibits certain conduct outright. In two cases the Court has approved of zoning measures designed to place certain "adult" businesses a minimum distance away from such things as schools and churches. The Court majority in *Young v. American Mini-Theatres* (1976) asserted that Detroit's policy of requiring "adult" theaters to be at least 1,000 feet from any two other "regulated uses" was not vague because of the

[144] *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, 521

little likelihood of deterring businesses and a "less vital interest" in borderline pornographic material.[145] The City of Detroit had also, according to the Court, not violated prior restraint in its classification system because of its "interest in planning and regulating the use of property for commercial purposes."[146] In *Renton v. Playtime Theaters, Inc.* (1986)[147] the Court permitted city zoning ordinances forbidding the establishment of adult theatres within 1,000 of a residential zone when such ordinances seek to regulate the secondary effects of such adult business (such as the "quality of urban life"), and since there was sufficient land available for such businesses to locate (although they would need to compete in the real estate market). However, cities may not exclude "topless" dancing outright from areas assigned as commercial property, as the Court asserted in *Schad v. Mt. Ephraim* (1981).[148] The Court argued that as the city had not proven the "unique problems" associated with topless dancing, narrowly tailored its regulation or chosen a "least restrictive means" to solve the problem, and had excluded only "commercial live entertainment" but not other commercial uses, the regulation could not stand.

The Court has also placed limits on governmental authority to regulate the presentation of the dances themselves. In the case of *Doran v. Salem Inn,*

U.S. 844 (1997).
[145] 327 U.S. 50, 58-61 (1976).
[146] 327 U.S. 50, 62.
[147] *Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986).
[148] *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).

Inc. (1975),[149] local officials in Nassau County, New York passed an ordinance making it "unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so thinly draped as to appear uncovered." Three corporations, each of them providing topless dancing, challenged the ordinance in federal district court; prior to the issuance of a preliminary injunction striking down the ordinance, one corporation (M & L) resumed such dancing very briefly (the other two had not), and was met with criminal summonses. In addition to ruling that M & L had a different status as litigant because it had broken the law, the Supreme Court struck down the ordinance because it regulated activities that have some constitutional protection in "any public place", and the government had not offered any "legitimate state interest" to balance the limited constitutional protection given such dancing. However, as the Court ruled in *Barnes v. Glen Theatre, Inc.* (1991)[150] an Indiana law prohibiting totally nude dancing furthered a "substantial governmental interest" by the state to uphold order and morality and thus minimizing the "secondary effects" of such material on the local community. Thus, as the ordinance sought to stop public nudity and not erotic dancing, and was an "incidental restriction" on such activities, the requirement that dancers wear such items as G-strings and pasties was not a fundamental violation of the First Amendment.

[149] *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

The Court has also permitted the regulation of certain sexually explicit entertainment through the use of the Twenty-First Amendment. In *California v. LaRue* (1972) the State of California passed regulations "prohibiting certain sexually explicit live entertainment or films in licensed bars and nightclubs" and thus leading to the revocation of licenses for this offense. The ordinance passed constitutional muster, according to the Court, because it is "not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink."[151] Moreover, it was not unreasonable either to conclude that serving liquor and providing topless dancing led to various harmful effects or that the government may choose a preventive measure instead of relying on the self-regulation of such businesses (e.g. bartenders).[152] Indeed, in such situations the government need not limit itself to the Court's decisions in obscenity or cases regarding "communicative conduct."[153]

As a result of the Court's rulings, state and local governments have some room to regulate "adult business" under certain circumstances such as asserting the detrimental "secondary effects" of such materials. Nonetheless, there must be a searching inquiry into the "compelling governmental interest"–are the reasons for such regulation of greater worth than the status of certain regulated

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[150] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).
[151] *California v. LaRue*, 409 U.S. 109, 113 (1972).
[152] 409 U.S. 109, 113-119.

materials (e.g. topless dancing) within the First Amendment?

The Problem of Child Pornography. One special category of concern is the debate over child pornography within the courtrooms. Prior to the judicial debate over obscenity as begun in *Roth v. United States* (1957), the federal courts tended to remain silent on the issue of obscenity as related to minors.[154] By the 1950s the Court began to wrestle with the degree to which minors should be considered in regulating the obscene. The Court in *Butler v. Michigan* (1957)[155] overturned Butler's conviction, arguing that statutes criminalizing materials "manifestly tending to the corruption of the morals of youth" was "not reasonably restricted to the evil with which it is said to deal."[156] In one of Frankfurter's most famous statements from the bench he declared, "the incidence of this standard is to reduce the adult population of [the country] to reading only what is fit for children."[157] The Court began to alter its opinion about pornography and children by the 1960s. In *Ginsberg v. New York* (1968)[158] the Court provided governments a greater degree of authority in seeking to protect minors from obscene materials; thus, the Court sustained Ginsberg's conviction for selling "girlie" magazines to a minor (in particular, to a sixteen-year old boy). Since the

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[153] 409 U.S. 109, 116.
[154] In *United States v. Bennett* (1879), the Southern District of New York ruled that *Cupid's Yokes, or the Binding Forces of Conjugal Life* could be deemed obscene if it led to certain depraved thoughts "in the young and inexperienced" (24 F. Cas. 1093, 1104-5).
[155] *Butler v. Michigan*, 353 U.S. 380 (1957).
[156] 353 U.S. 380, 383.
[157] Ibid.
[158] *Ginsberg v. New York*, 390 U.S. 629 (1968).

state "has an independent interest in protecting the welfare of children and safeguarding them from abuses,"[159] state legislatures may alter the criminal standards for determining obscenity as applied to children.

Not until the 1980s did the Court struggle with the issue of child pornography in greater detail. In *New York v. Ferber* (1982)[160] the Court upheld a state law designed to prohibit the distribution of child pornography. The appellant in *Ferber* was convicted under New York Penal Law § 263.15, which states "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." Noting this as the "first examination of a statute directed at and limited to depictions of sexual activity involving children,"[161] the Court upheld the statute as an application of the state's protection of its minor citizens and defended the statute against claims of overbreadth. The *Ferber* Court argued that the "physiological, emotional, and mental health of the child" and the economic incentives for creating and selling child pornography as an industry outweighed any significant First Amendment concerns and gave legislatures greater latitude for enacting such laws.[162] More significantly, the Court asserted that the *Miller* standards did not reflect the "compelling" interest in protecting children from

[159] 390 U.S. 629, 640.
[160] *New York v. Ferber*, 458 U.S. 747 (1982).
[161] 458 U.S. 747, 753.

"sexual exploitation" and thus the *Miller* standards were inadequate.[163] Put another way, child pornography represents a class of materials with much less constitutional protection than obscenity (or pornography). As found in the case itself, the Supreme Court asserted that child pornography is a separate class of materials than either obscenity or pornography.[164] Eight years later, in *Osborne v. Ohio* (1990),[165] the Court upheld an Ohio statute criminalizing the possession of child pornography, and as such the mere possession of child pornography was considered a criminal act. The Court, however, remanded the case due to the insufficiency of jury instructions regarding lewdness.

Thus, the Court has treated child pornography in a fundamentally different

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[162] 458 U.S. 747, 756-764.

[163] 458 U.S. 747, 761. The Court notes, for example, that "whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography." (Ibid.)

[164] As part of the Court majority's reasoning in the case, White asserted that "We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children" (458 U.S. 747, 753).

Furthermore, "The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem" (458 U.S. 747, 761).

[165] *Osborne v. Ohio*, 495 U.S. 103 (1990).

way than cases dealing with obscenity as well as “adult” businesses and related regulations. Because of the special considerations regarding children (in particular, the protection of their safety, health and welfare) governments should not consider *Miller* or related obscenity doctrine as part of their prosecution. While related to obscenity, child pornography is not the same and the judiciary is not to treat them as the same either.

Chapter Summary

This chapter outlines the activities of the federal government, the President, and the Supreme Court as they relate to obscenity. It also lays the groundwork for the discussion of the influence of Supreme Court precedent on lower federal court behavior. First, it provides a glimpse into the history of federal legislation in the field as well as the activities of Congress and presidents through the enactment of laws and Commissions. Second, it highlights the important Supreme Court rulings that have occurred prior to, during, and after both the *Roth v. United States* and *Miller v. California* decisions. Since the *Roth v. United States* decision the Supreme Court continued to issue rulings in obscenity cases, thus remaining an important actor in obscenity. Over the course of the next two decades the Court also defined the types of factors for lower courts to consider in obscenity cases, as well as the types of decisions expected by such lower courts. To the extent that lower court judges account for Supreme Court decisions, such judges will not only need to consider certain

factors (such as the presence of *scienter*) but will rule in accordance with Supreme Court doctrine. In addition, the Court has issued guidelines not only about the types of acceptable regulations for "adult" businesses but also about the fundamentally different nature of child pornography as a First Amendment question. While lower-court judges might consider *Roth* or *Miller* as part of their guidelines (such as the suggestion of greater scrutiny for "conduct" versus other types of materials), they are quite likely to follow the Court's assertion that *Miller* has no place within a proper discussion of child pornography and such regulations.

More importantly for this research, the Supreme Court altered its obscenity doctrine through its decisions in *Memoirs v. Massachusetts* (1966) and *Miller v. California* (1973). If lower federal courts remain attentive to Supreme Court precedent, such doctrinal changes should alter both the opinions (and justifications) and decisions handed down in lower federal courtrooms. More specifically, one should expect that lower courts will utilize *Roth* and *Miller* in their actual decisions through the citation of legal precedent in their opinions as well as changes in their voting behavior. The following chapters will also explore an important alternative explanation to federal district and circuit court behavior, that judges will rule according to the intentions of the appointing President: judges appointed by Democratic presidents will be more likely to support a libertarian (or liberal) stance in obscenity cases. While Republican

presidential appointees are more likely than their Democratic brethren to support the conservative position (such as giving a greater latitude to local governments to regulate “adult” businesses), Nixon and Reagan appointees should be more likely than other appointees to behave in this manner.

CHAPTER 3

FEDERAL CIRCUIT AND DISTRICT COURT COMPLIANCE WITH SUPREME COURT OBSCENITY PRECEDENT, 1957-1998

> "However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, concurring)

This chapter analyzes the ability of the Supreme Court to elicit manifest compliance with its obscenity precedents in federal circuit and district court obscenity cases. It answers the following research questions. First, to what extent do lower court opinion writers cite Supreme Court precedents in their opinions? Second, to what ends do federal lower court opinion writers use such precedent in their opinions? Third, to what degree do lower-court opinion writers comply with Supreme Court precedent; that is, to what degree does the prevailing Supreme Court precedent control their decisions? The chapter outlines the data collection procedures used for this project, and provides a description of the data and the variables used. It concludes with an analysis of the prevalence and uses of the *Roth v. United States* and *Miller v. California* decisions, applying not only hierarchical theory but also other competing explanations (such as organizational resistance and judicial resistance).

Case Collection and Methodology

To discover the reactions of federal lower courts to Supreme Court obscenity doctrine, it was first necessary to compile a list of district and circuit court obscenity cases. I approached this task first by using LEXIS and Westlaw to find federal cases that included some form of the roots "obscen" or "pornog" in their text.[166] This search strategy had the added advantage of including unpublished cases, something that judicial politics scholars have found to be of importance (e.g. Songer 1988b, Olson 1992). An alternative strategy, using the Westlaw Key Number system for the topic of obscenity, led to the identification of a much smaller universe of obscenity cases in federal courts. Finally, a citation list (provided graciously by the National Obscenity Law Center) proved a useful and reliable outside source for discovering potential cases. The initial universe of cases included any case discovered using any of these lists.

The next step required the removal of cases that did not involve obscenity in any significant way. Initially, cases were considered for analysis if they related to the issue of obscenity in either a factual way (that is, when a judge makes a factual determination of some material's obscenity) or a procedural or statutory way (when a judge is asked to nullify an obscenity search warrant, review jury instructions, or challenge a statute at large, for example). A sizeable number of potential cases did not discuss any issues pertaining to obscenity

[166] The exact search command seeks "obscene*" or "pornog*". This asterisk instructs the search

within the opinion, even when they cited Supreme Court obscenity precedents. As just one example, while *Cipriano v. City of Houma* (1968) quoted aspects of the Supreme Court's decision in *Ginsberg v. New York* (1968) the main issue in the case was eligibility for voting on utility revenue bonds. Other cases, such as *Esteban v. Central Missouri State College* (1968), involved such issues as disorderly conduct during a mass demonstration. As neither case involved the regulation of obscenity as an issue of the case, both cases were excluded from the dataset, as were cases merely stipulating the fact that someone used obscene language when they did not pose a fact under dispute.

After removing the patently unsuitable cases, I identified four categories of case types for analysis. The first class of cases is "factual" obscenity cases, in which the judge makes some assessment of the materials at hand. Factual cases:

a. made a factual determination about the obscenity of the materials involved
b. determined whether a magistrate had sufficient cause to declare materials obscene
c. determined whether the lower court evidence is sufficient to sustain obscenity conviction
d. decided whether a jury properly found materials obscene.

The second class of obscenity cases involved procedural challenges typically involving challenges to governmental authority and regulation. As one

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algorithm to find all words beginning with the root and ending with any combination of letters.

example, in *City News Center, Inc. v. Carson* (1969)[167] the judge determined that law enforcement officials had not procured a search warrant or waited for an adversary hearing prior to a seizure; thus, the seizure of materials was unconstitutional. Other cases challenged the procedures necessary for an adequate trial, for example the decision reached by the judge in *U.S. v. Treatman* (1975)[168] found that the grand jury received proper instructions prior to its determination about the materials.

A third class of cases involved challenges to obscenity statutes, ordinances, and regulations. Individuals faced with obscenity prosecution might attempt to challenge the constitutionality of a statute itself, claiming, for example, that it has vague or overbroad language. In *U.S. vs. Articles of "Obscene" Merchandise* (1970), the plaintiff challenged the obscenity statute by claiming that it posed an 'unreasonable burden' against his private usage of materials as well as his defense of such materials. In *Paper Back Mart v. City of Anniston, Alabama* (1976), the judge ruled that the municipal ordinance adopted the *Miller* standards so closely that it was neither vague nor overbroad.

The fourth class of cases involved challenges to the regulation of "adult entertainment businesses." In these cases, federal district and circuit courts have to consider such issues as the constitutionality of city zoning ordinances requiring that an adult business or sexually oriented business (and topless or

[167] *City News Center, Inc. v. Carson*, 298 F. Supp. 706 (1969).

nude dancing businesses in particular) must be at least 500 to 1,000 feet away from schools, churches and other public areas or the mandating removal of doors from movie booths within adult bookstores. These types of cases pose a certain difficulty within the field of obscenity research, for they do not fall so neatly into the category of obscenity. Although city and other local governmental officials would intend to regulate various sexually-oriented businesses, the ordinances they used would say very little about the actual content of the materials. Indeed, in certain cases both parties conceded that the materials themselves are not obscene.[169] Chapter 2 illustrates the various methods the Supreme Court has enacted to regulate sex-related businesses, combining the Twenty-first Amendment's power to regulate liquor distribution and the state's interest in its citizens' safety and welfare due to the effects of topless (and bottomless dancing) on neighborhoods (*California v. LaRue* (1972)), the state's traditional police power to protect the health and morality of its citizens from First-Amendment protected nude dancing (*Barnes v. Glen Theatre* (1991)), or the city's interest in commerce (*Young v. American Mini Theatres* (1976)). In this way, local governments would seek to avoid is the core issue of both *Roth v. United States* and *Miller v. California*: whether the judge or jury may define the

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[168] *United States v. Treatman*, 524 F.2d. 320 (1975).

[169] Although there is a minority of cases in which the judge (or judges) issues some statement regarding the extent of First Amendment protection the "topless" or other dance receives, the vast majority of related cases (over 90 percent of both district and circuit cases) the judge (or judges) either makes no comment about the constitutionality of the dance itself or else notes in passing that both parties concede the materials are not obscene.

materials as obscene according to the most recent guidelines. Rather, the issue in the vast majority of these cases was whether state and local governments may either regulate the materials themselves without prohibiting them outright (requiring pasties on dancers, or removing doors from movie booths in adult bookstores), or else regulate the location of such materials (concentrating them within a certain part of the city limits).

Scholars tend to place such cases (and similar cases, by implication) in closely-related categories. The case of *Renton v. Playtime Theatres* proves instructive. Some legal textbook authors label this as a case involving the "near obscene" (Lockhart et al. 1980; Shiffrin and Choper 1996), the "lewd, profane, and indecent" (as opposed to the obscene: Stone et al. 1999), "offensiveness and indecency" (Gunther 1991), the "sexually explicit" (Smolla 1999) "but not obscene" (Sullivan and Gunther 1999), or the non-obscene "adult" or "pornographic" (Nowak and Rotunda 2000 and Kmiec and Presser 1998b, respectively). Others place *Renton* within the field of obscenity (Epstein and Walker 2000; Farber, Eskridge, and Frickey 1998);[170] Tribe argues that obscenity jurisprudence will likely not be settled until obscenity is recognized as speech yet "subject--as is all speech--to regulation in the interests of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods" (1988, 909-910). One finds similar results when reviewing the treatment of

[170] Farber, Eskridge, and Frickey do note, however, that the case did not involve any claim

Barnes v. Glen Theatre, with some scholars placing it in a discussion of obscenity (Farber, Eskridge, and Frickey 1998; Van Alstyne 1995) and others characterizing it as encompassing the "near obscene" (Lockhart, Kamisar and Choper 1980; Shiffrin and Choper 1996), the "sexually explicit" (Smolla 1999), the "lewd, profane, indecent" (Stone et al. 1999) or symbolic speech (as separate from obscenity) (Stephens and Scheb 1999).[171] All of this suggests not only the complexities of regulating sexually-oriented materials but of defining what constitutes obscenity litigation.

While cases involving the regulation of adult or sexually-oriented establishments are unlikely to involve a determination that topless dancing is obscene (under the *Roth* or *Miller* guidelines),[172] they do involve the regulation of questionable if not outright prohibited materials and activities. In such cases lower-level governments seek to regulate sexually-oriented materials while avoiding the need to discern the actual obscenity of the materials. Lower courts might aim to avoid the potential complications of a direct obscenity analysis while still attempting to regulate such materials indirectly. Nevertheless, it is useful to include such cases in the overall analysis, to assess the elasticity of obscenity precedent, and discover how far such precedent does extend. The

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regarding the obscenity of the materials (1998).

[171] The same legal scholars tended to characterize *Schad v. Mt. Ephraim*, *Young v. American Mini-Theatres*, *Erzoznik v. City of Jacksonville* and *Sable Communications v. FCC* as close but not quite obscene.

[172] A search of the dataset reveals less than a dozen circuit and district court cases making an explicit statement about the First Amendment protection of such materials.

question of how far obscenity precedent does stretch also arises in Chapters 4 and 5.

As noted in Chapter 2, another difficult issue involves the status of child pornography cases. As such cases deal with a form of pornography, at first glance it would seem appropriate to include them in the analysis. However, since its ruling in *New York v. Ferber* (1982) the Supreme Court has treated child pornography as a separate First Amendment-related issue. The Supreme Court has placed a lesser burden upon governmental officials to prove something is child pornography "even if it does not meet the *Miller* test for obscenity" (Kmiec and Presser 1998a, 438). Chapter 2 outlines the variety of reasons for treating child pornography differently but one section of Justice White's majority opinion makes the argument most succinctly: "The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children"; therefore, questions that arise normally under the *Miller* standards (e.g. literary/artistic/political/scientific value) would have no place in the discussion of child pornography and "[W]e therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem" (*New York v. Ferber*, 458 U.S. 747, at 760-761). To include questions of child pornography and related regulatory statutes, ordinances and the like, would therefore mean including cases that were

fundamentally distinct from obscenity cases because they involve a separate jurisprudence, as well as one important mitigating factor (the heightened concern for children).

I read each case to determine whether it involved such issues as the determination of obscenity, procedural safeguards involved with seizing materials and prosecuting defendants for allegedly obscene materials, alleged controversies surrounding the grand jury or jury trial phase of the case, challenges to statutes involving allegedly obscene materials, and the nature of licensing boards and licenses as well as ordinances regulating adult entertainment. Cases not involving such issues, such as challenges by defendants to seizure of bookkeeping records as part of RICO prosecution, were excluded from analysis. This yielded a total of 469 district court cases and 402 circuit court cases.

I coded the 871 circuit and district cases for a number of variables, using copies of the coding sheet found in Appendix A. Appendix B provides a description of each variable as well as its coding rule. As a foundation for the data set, I used the 1957-1990 circuit court obscenity data graciously provided by Professors Donald Songer of the University of South Carolina and Susan Haire of the University of Georgia and used in their work on this topic. I expanded the Songer-Haire data set by adding eight years (1991-1998) and including a wider variety of case types for analysis (most prominently, regulation

of “adult” businesses), as well as by coding the district court cases.

To account for the potential influence of presidential intentions and judge-related characteristics, my research approached the concept of ideology and presidential influence as does much of the literature (e.g. Goldman 1997; Rowland and Carp 1996; Sanders 1995) by dividing judges into Republican appointees or Democratic appointees. The actual appointment dates were coded from various volumes of the *Federal Supplement*; information on the appointing president was available in *The American Bench* (1979, 1987-1989) and *Who’s Who in American Law* (1977-1978, 1983, 1987-1988), as well as in the Federal Judicial Center’s Federal Judges Biographical Database (http://air.fjc.gov/history/judges_frm.html). With appointment dates in hand, judges were coded into two cohorts: those appointed prior to the *Miller v. California* decision (“holdover” judges) and those appointed afterward (new judges). Based on their content, cases were also classified into “factual” obscenity cases and other obscenity cases, according to the description given above.

Figure 3-1 illustrates that scholars use a litany of definitions and categories of compliance. Tarr, for example, considers compliance “as involving proper application of standards enunciated by the Supreme Court in deciding all cases raising similar or related questions. Noncompliance involves a failure to apply--or properly apply--those standards” (1977, 35). Much of the existing

literature sketches out some type of continuum: does the lower court accept the Supreme Court's doctrine, ignore it, interpret it incorrectly, or distinguish it from the case at hand? Perhaps the simplest is that of Johnson (1987), who divides cases into two categories: "(1) the holding (reasoning) was followed and applied, or (2) the holding (reasoning) was neither followed nor applied" (326). As a further exploration, Johnson codes cases for the citation (or absence) of prevailing Supreme Court precedent. Last, at least one author explores the concept of defiance, which "signifies an overt refusal to follow a Supreme Court precedent" (Songer 1988a, 425-6). To account for the nature of defiance, Songer coded the cases to determine whether the lower court opinion "explicitly stated that the court was not bound by the Supreme Court decisions" or the case "was twice reversed or vacated by the Supreme Court", and coded for occasions when the lower-court judge should have used the *Miranda* ruling in criminal cases but did not (431).

One aspect of the prevailing literature centers on Supreme Court cases with certain procedural guidelines for lower courts to follow. Lower courts were thus compliant with *Miranda* if they required all four warnings to be administered and a valid waiver completed, and noncompliant if the court permitted a harmful, incriminating statement into the court without the defendant's understanding and acknowledgment of the *Miranda* warnings (Songer 1988a; Songer and Sheehan 1990). Lower courts were also compliant in libel cases when they interpreted

and applied the actual malice test to their decision correctly, and non-compliant in cases where the lower court does not apply the test when it was considered appropriate (Gruhl 1980; Songer and Sheehan 1990). One can conceive of both *Roth* and *Miller* in the strictest sense as cases of constitutional procedure: in both cases the Supreme Court created certain standards for lower court judges to use when deciding whether certain materials fell under the category of obscenity. One should expect that if lower court judges conform to the letter of the law they will use the standards given them in *Roth* and *Miller*. More broadly, drawing from the concept of "jurisprudential regimes" developed by Richards and Kritzer (2002), as both *Roth* and *Miller* are considered the prevailing doctrines within obscenity, one should expect each to guide lower-court judges in their judgments in a variety of obscenity cases. Although the standards themselves involve an element of discretion and judgment for lower-court judges, compliant judges should be expected to use such standards in their cases.

The first indicator of lower-court compliance with High Court precedent was whether the lower-court opinion writer integrated the prevailing precedent in his decision and, in this sense, complied with the precedent. The indicator is intended to capture whether *Roth* or *Miller* became the controlling or persuasive element of the case itself. A standard measure of the usage of precedent in court opinions is the Shepard's citation, which analyzes each Supreme Court decision for its influence in subsequent Supreme Court and lower court

decisions. Figure 3-2 lists the categories that Shephard's uses to classify the responses judges can make to a given precedent. These range from adopting the precedent as the controlling doctrine in the case to criticizing it outright or questioning its validity. Because the present study analyzes the usage of the *Roth* and *Miller* doctrines in lower court obscenity cases, judges in such cases are compliant if they used *Roth* as the prevailing doctrine in cases prior to the adoption of *Miller* (June 21, 1973) and used *Miller* in cases after its adoption.

Another useful measure was the actual usage of the *Roth* and *Miller* standards in the opinion, intended to indicate the intensity of lower court attachment and adherence to Supreme Court precedent. Figure 3-3 outlines both the *Roth* and *Miller* standards and the coding strategy for each. The coding of the *Roth* and *Miller* standards involved noting the presence of the standard in the case and its actual usage: no citation, citation of the standard, mentioning/discussing the standard, or explicitly applying the standard in the case itself or becoming the reasoning for the case. Judges were thus considered compliant in the extent to which the *Roth* or *Miller* standards were applied (and not simply cited, mentioned or discussed) in the reasoning of the case itself.

As noted in Figure 3-3, for the *Roth* test each case was coded separately for the presence (or absence) and usage of each of the following doctrinal standards:

1. the average person using contemporary community standards
2. the dominant theme, appeals to the prurient interest

For the *Miller* test, the same procedures were used for each of the following:

1. the average person using contemporary community standards
2. the dominant theme, appeals to the prurient interest
3. depicts/describes sexual conduct in a patently offensive way
4. lacks serious literary, artistic, political, scientific value

Analysis and Results

The guiding question of the research presented here is whether lower courts attend to the Supreme Court's obscenity doctrine; that is, whether federal appellate and district court opinion writers include the *Roth* or *Miller* decision (or both) in their opinions and if so, in what form. Tables 3-1 to 3-21 report the usage of the *Roth* and *Miller* doctrines by both circuit and district court judges.

Most broadly, the hierarchical theory of judicial decisions leads to the expectation that lower-court judges will adopt higher-court precedent. If it is true that *Roth* and *Miller* are the prevailing obscenity doctrines for their time, and lower-court judges accept their roles as judicial executors of High Court jurisprudence and their place within the judicial hierarchy, one should expect that at minimum a majority of judges will use *Roth* and *Miller* as the prevailing precedent through the use of Shepard's and by applying the standards in their actual opinions. Judges might have serious disagreements with the policy at hand, but will adopt it if they must because it is their duty and because of the perception of a potential reversal. Because the analysis deals with a variety of

obscenity cases, one should expect that at minimum in a majority of cases (prior to *Miller*) both circuit and district court judges will use *Roth* and its standards as a controlling or persuasive element in their reasoning, and the same will occur with the *Miller* decision and standards after its adoption on June 21, 1973. Alternately, if it is true that lower-court judges are actually resistant to High Court policy, one should expect that in only a minority of cases will lower-court judges decide to use the prevailing precedent in their opinions or use the standards to determine the ruling in the case. While heeding the admonitions of Baum (1978) not to expect complete obedience to or compliance with the *Roth* and *Miller* decisions, one might nonetheless expect a reasonable amount of activity by the lower courts in response to such changes in Court doctrine.

Table 3-1 provides an initial answer, analyzing all obscenity majority opinions over a forty-year time span (1957-1998). The initial results provide little support for lower-court compliance with either *Roth* or *Miller*, be it at the circuit or district court level. For example, in 47 percent of circuit cases and 40 percent of district cases decided prior to the adoption of *Miller v. California* (1973) the lead judge did not cite *Roth v. United States* (1957) in any way. Along similar lines, of those cases decided after *Miller v. California*, in 43.0 percent of circuit cases and 53.3 percent of district cases there is no mention of *Miller* either. In addition, only a small minority of circuit and district court opinions prior to *Miller* identifies *Roth* as controlling authority in the cases themselves (1 of 132 circuit cases and

2 of 180 cases, respectively). The same holds true for the *Miller* decision, with only 15 of 270 circuit cases (5.6 percent) and 7 of 289 district cases (2.4 percent) having the decision as either controlling or persuasive. The same applies to the lower courts' attempts to explain either of the Court's doctrines within the cases. Considering that the analysis focuses on a rather narrow type of cases–that is, dealing with the legal issues regarding obscenity and the regulation of various adult establishments–it is surprising to find such low levels of compliance among lower courts. Even removing cases dealing with "adult entertainment" zoning would lead (at best) to a less than 10 percent usage of the doctrines at each level.

All the same, lower-court judges as a group are not completely unaware of the *Roth* or *Miller* rulings, suggesting the presence of some higher-court influence on lower-court opinion writing. The percentage of opinions citing *Roth v. United States* drops off noticeably upon the Supreme Court's ruling in *Miller v. California* (1973); such non-citation grows from 47 percent to 75.6 percent of circuit opinions, and from 40 percent to 76.5 percent of district opinions. One can conclude from this that lower courts recognized that the *Miller* ruling supplanted *Roth* as the effective legal doctrine in obscenity cases at the federal level. One can also note that approximately 50 percent of pre-*Miller* cases at the circuit and district levels cited *Roth* at least once in the opinion, and of all the post-*Miller* cases 50.0 percent of circuit opinions and 43.6 percent of district

opinions included *Miller* at least once within the opinion. This alone certainly does not constitute solid evidence in favor of a compliant lower-court judiciary; nonetheless, it provides one piece of evidence that the Supreme Court has transmitted both doctrines successfully to its lower-court brethren, who are aware (at some level) of such changes within the field of obscenity.

A similar picture emerges from Tables 3-2 and 3-3, which report the percentages of cases that not only cite *Roth* and *Miller* rules of law but also use them or their rules of law in some significant way. At the beginning of every Supreme Court opinion there is a description of the case history as well as a summary of the important guidelines/rules within the case, which Shepard's divides into rules of law. For example, as noted in Figure 3-4, the second portion of the *Miller* decision (here, rule two) declares the official obscenity standards (prurient interest of the average person using contemporary community standards, patently offensiveness, lacking serious literary, artistic, political, scientific value). Lower court judge might well decide to adopt the prevailing obscenity standards without needing to touch upon the constitutionality of a relevant statute (covered by *Roth*'s rules six through eight).

Both Tables 3-2 and 3-3 suggest a general awareness of both *Roth* and *Miller* by majority-opinion writers yet little willingness to integrate such doctrines into their overall reasoning. For the purposes of determining lower-court reactions to *Roth* it is most useful to focus specifically on rule four, which

declares the prevailing obscenity standards of the day (whether the work appeals to the prurient interest according to the average person using contemporary community standards). Table 3-2 reveals some awareness of *Roth*'s actual standards prior to the adoption of *Miller v. California*: although 47 percent of circuit and 40 percent of district opinions do not cite *Roth* in any way and another 21 percent of circuit and district court cases cites *Roth* within the opinion itself, 23.5 and 30.0 percent of circuit and district court opinions (respectively) cite the actual rule within the opinion itself and yet another 8.3 and 6.7 percent follow the rule (that is, the rule is the controlling authority for the lower-court rationale). It is important to note that of those cases decided prior to *Miller*, approximately 47 percent of circuit opinions and 39.4 percent of district opinions do not include *Roth* in any form; thus, there is a significant portion of majority-opinion writers not considering *Roth* important enough to reflect upon its holdings or reasoning within its opinions. One possible explanation of such levels of non-citation is that a significant portion of cases includes a variety of constitutional issues (e.g. the consideration of unreasonable search and seizure, the regulation of adult establishments) that neither *Roth* nor *Miller* decides. If one does not include mere citation as compliance, however, it becomes clear that lower courts do not manifestly agree with High Court obscenity policy.

One finds a similar pattern with the use of *Miller*'s rules one and two. As pointed out in Figure 3-4, rule one declares that states may regulate those

materials that fit the definition of obscenity (included--within the rule--as prurient interest, patently offensive, no "serious literary, artistic, political or scientific value"); rule two makes it a point to proclaim the new obscenity standards (which, unlike rule one, includes the "average person, using contemporary community standards"). Table 3-3, reporting the usage of *Miller*'s rules one and two by lower courts upon its issuance by the High Court, demonstrates slight usage of both rules by the lower courts. A significant percentage of majority opinions does not include *Miller* regardless (44 percent and 53 percent for circuit and district court opinions, respectively), which suggests either that lower-court opinion writers are unaware of the *Miller* decision (which seems unlikely, given the attention to the issue by legislators, presidents and the Supreme Court) or that *Miller* is simply not influential enough for them to consider when ruling on the case at hand. An analysis of rule two, however, reveals a certain portion of cases in which *Miller* is the High Court doctrine to follow (15.6 and 17.6 percent of circuit and district court opinions, respectively). In addition, another 14.8 and 9.3 percent of circuit and district court majority-opinion writers decided that while *Miller* rule two does not control the actual outcome of the case, it was worthy enough for at least one significant mention within the case. Once again, it is worthwhile to note that a significant portion of cases involved more than one legal issue, which can lead to competing doctrines and precedents; thus, perhaps lower-court opinion writers might need to pick and choose other related

precedents as needed (such as the use of *Young v. American Mini-Theatres* (1976) regarding zoning restrictions, or *Kingsley Books, Inc. v. Brown* (1957) regarding the need for an adversary hearing).[173] Accounting for the fact that a certain portion of cases is not so clear-cut as to point solely to *Roth* or *Miller* as the controlling doctrine in the case,[174] one can conclude reasonably that while lower-court judges as a group did not respond as significantly to Supreme Court doctrine as expected by the hierarchical model (e.g. Baum 1978) they nonetheless signified their awareness of such obscenity policy and in some cases chose to use such precedent as the controlling element in their case reasoning. The findings up to this point are still surprising, however, given the high levels of compliance by lower courts in other controversial areas such as libel and self-incrimination (Gruhl 1980; Songer 1988; Songer and Sheehan 1990).

While the use of Shepard's citations can provide insight into lower-court compliance, it supplies only a partial representation of such reactions to High Court policy. As one example, lower-court judges might need to decide not only whether certain materials are obscene but also whether a search warrant violated Fourth Amendment protections. In addition, judges might choose to put only one or a few of the prevailing standards to use when making their judgment,

[173] *Young v. American Mini-Theatres*, 327 U.S. 50 (1976); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)).
[174] For example, as noted in Chapter Two the Supreme Court has ruled on due process-related

something that the Shepard's citation method might not determine in its readings of court cases. In other words, it may be possible that the Shepard's citations underestimate the extent to which judges use only specific aspects of the actual *Roth* or *Miller* standards and thus Shepard's discounts the judges' awareness of such doctrines. Table 3-4 displays the usage of prevailing obscenity standards in majority opinions at the federal appellate and district levels.

What is rather striking at first glance is the likelihood that circuit and district court opinion-writers decide to use neither the *Roth* nor *Miller* standards. Judges at both the district and appellate levels did not include *Roth*'s "average person using contemporary community standards" approximately 64 percent of the time; similar results occur with the "prurient interest" standard, with 62.1 and 56.7 percent of appellate and district court opinions (respectively) making no mention of it at all. Comparable results occur with the *Miller* standards as well: the likelihood of a circuit or district court opinion not mentioning the patently offensive standard, for example, is 65.2 and 63.6 percent respectively, and such results represent the *Miller* doctrine overall. One must read such results with an element of caution, so as not to conclude that approximately 60 percent of all cases include no standards at all. In addition, with the presence of competing legal issues residing within a variety of cases it is quite possible that judges simply do not find such standards instructive in their deliberations. Nonetheless,

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issues such as the necessity of adversary hearings prior to the seizure of allegedly obscene

such results suggest that both *Roth* and *Miller* do not have as long a reach within the realm of obscenity policy in the federal courtrooms as one might expect.

The results so far show little mindfulness by federal court judges about the *Roth* or *Miller* standards (or both) although with some willingness to use them when crafting their majority opinions. In approximately 15 percent of circuit court majority opinions written prior to *Miller*, the author either mentions or else discusses (or explains) the "average person, using contemporary community standards" standard found in *Roth v. United States* as part of the case; the same occurs in almost 13 percent of district court opinions. In other words, in such cases the author gives at least some notice of the prevailing standard. Such results are typical not only for the *Roth* "prurient interest" standard but for each of the *Miller* standards (in cases written after the adoption of *Miller*). More importantly, in a certain minority of cases the majority opinion writer chooses to apply at least one of the prevailing standards directly within the case itself. For example, in 20.7 percent of circuit court cases and 23.2 percent of district court cases the author of the opinion makes significant use of the "patently offensive" standard found in *Miller v. California* by analyzing the case (in part) through such standard. One finds much the same results with the rest of the *Roth* and *Miller* standards, with some instances of circuit or district court opinion authors being

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materials (e.g. *Marcus v. Search Warrant* (1961); *Roaden v. Kentucky* (1973)).

somewhat more likely to use the prevailing standards.[175] Although judges are more likely to use the actual standards in their opinions than to have the case guide their overall analysis (as recorded by Shepard's), such low numbers suggest that High Court doctrine reaches only so far, and does not affect a significant number of cases.

Once again, it is worthwhile to consider the extent to which federal lower-court judges adapt to shifts in Supreme Court doctrine. If the hierarchical model holds true, then it is quite likely that upon a shift in legal doctrine lower-court judges will adapt by (at most) only mentioning the previous standard while applying the newer precedent to the case at hand. Tables 3-1, 3-2 and 3-4 offer some insight by investigating the usage of *Roth v. United States* after the Supreme Court's adoption of *Miller v. California* with its newer standards. The results provide a more indirect affirmation of how lower-court judges pay attention to Court policy: an increasing likelihood of judges not using *Roth* in the face of the *Miller* standards. Circuit and district judges were 47.0 and 40.0 percent likely not to mention *Roth* in cases prior to June 21, 1973; such non-mention of *Roth* rose to 75.6 and 76.5 percent upon the adoption of *Miller* (Table 3-1). The same holds true for the use of *Roth*'s rules of law, as the citation of rule four dropped from 23.5 to 7.4 percent in circuit cases and from 30 to 7.6

[175] The *Roth* "prurient interest" became useful in 25.8 and 31.1 percent of circuit and district court opinions, respectively; in approximately 25 percent of both circuit and district cases the author chose to apply *Miller*'s "contemporary community standards" within the case itself.

percent in district cases (Table 3-2). As further evidence, whereas circuit and district court opinion authors were 8.3 and 6.7 percent likely to follow rule four in justifying their legal decisions, such usage dropped to 2.6 and 0.3 percent respectively. The results thus suggest that while attempting to justify their decisions, lower-court judges at both levels are responsive to alterations in Supreme Court doctrine and adjust their post-*Miller* opinions accordingly albeit in a negative way (by removing *Roth* from consideration or mention in the case). One thus cannot say that lower courts are completely resistant to Supreme Court policy.

Another test of the judicial hierarchy approach to the federal court system has to do with the distinct reactions of circuit and district court judges. Although the empirical research is mixed (Johnson 1987; Reid 1988), it is reasonable to suspect that within the area of free speech circuit courts are more attentive to Supreme Court doctrine because of their judicial training and socialization as well as the potential for higher-court criticism and sanctions. Stated in another way, one might expect that as circuit court judges are one step removed from the Supreme Court (with the potential for remands and other non-direct sanctions within High Court opinions, a source of embarrassment) and trained to adhere to Court precedent as appellate courts, they might be more likely to adhere more closely to Supreme Court doctrine and its alterations as they arise. Are circuit court judges more responsive, as expected by the hierarchy model? If so, one

should see a greater percentage of circuit (as opposed to district) court judges using *Roth* and *Miller* as persuasive or else controlling the reasoning in the case, and apply the *Roth* standards prior to the declaration of *Miller*, and the *Miller* standards afterward.

The results in Tables 3-1 to 3-4 offer mixed support for this notion. For example, circuit judges are slightly more likely than their district court counterparts to cite *Miller* at least once in their opinion (47.0 versus 41.2 percent) but not much more likely to use *Miller* as the controlling factor in their opinion (5.6 versus 2.4 percent) (Table 3-1). In addition, circuit court opinion-writers are not significantly more likely to use the rules of law found in either *Roth* or *Miller*; in fact, district court authors are slightly more likely to follow both *Miller* rules.[176] In two instances circuit court authors avail themselves more significantly than do district courts to the Court's standards, and that occurred with the use of *Roth* after the adoption of *Miller v. California*.[177] However, district court judges are slightly more likely than circuit judges (in pre-*Miller* decisions) to apply both *Roth* standards in their opinions, and to apply the "serious literary, artistic, political or scientific value" standard (in post-*Miller* decisions) (Table 3-4). This parallels (though not completely) the findings of Johnson, whose work

[176] Circuit court judges used *Miller* rules one and two in 4.0 and 15.3 percent of all post-*Miller* cases, respectively; district court judges acted likewise in 6.8 and 17.5 percent of all cases (Table 3-3).
[177] In 5.1 percent of post-*Miller* cases at the circuit level the author did apply *Roth*'s "contemporary community standards," and district court judges used the same standard in no cases at all; similar results occur with the "prurient interest" standard (Table 3-4).

asserts that "[F]ederal courts of appeal are even less likely than district courts to follow the high court's reasoning" (1987, 338). At this point it appears that the hierarchical model is not as applicable to obscenity as to other issues (e.g. Gruhl 1980; but see Reid 1988) and such low levels of compliance are rather surprising given the previous research (Gruhl 1980; Songer 1988).

It is worthwhile to note that both the *Roth* and *Miller* standards provide standards for determining the obscenity of various materials (as well as guidelines for governmental regulations); the *Miller* standards, for example, offer standards for the "trier of fact".[178] However, in a number of cases judges need to rule upon a number of obscenity-related issues (such as allegations of an improper seizure or a faulty regulation) without needing to consider the actual obscenity of any materials. As a result, judges might decide to note *Roth* and *Miller* but not integrate them into their overall decision as they decide that the case at hand requires other more directly-related precedents. As one example, it might be that in a case dealing with the search and seizure of obscene materials *Marcus v. Search Warrant* (1961) or *Roaden v. Kentucky* (1973)[179] might be more appropriate as the guiding precedent in the case than would either *Roth* or *Miller*. Judges might thus view both *Roth* and *Miller* more narrowly, by recognizing the core of the rulings (outlining the obscenity standards) and choosing not to apply them when the case does not require the

[178] *Miller v. California*, 413 U.S. 15 (1973), 15.

analysis of any materials. If this is true, judges will continue to notice the core doctrine of *Roth* and *Miller* and apply them when deciding the legal fate of books, magazines, and other items within the courtrooms. If compliance means the "proper application of standards enunciated by the Supreme Court in deciding all cases raising similar or related questions…(and) [N]oncompliance involves a failure to apply--or properly apply--those standards" (Tarr 1977, 35), perhaps judges determined that the emerging obscenity standards apply only in cases involving the obscenity of materials at hand. Within their legal training judges are required to consider the applicability of higher-court precedent to the cases at hand; to that extent it is possible that judges elected to avoid the application of *Roth* and *Miller* except when each was useful for the case at hand (determining the obscenity of materials). Thus, judges are supporting the judicial hierarchy by interpreting the law accurately.

One way to test for this is a comparison of "factual" cases (as defined above) with other cases. In such factual cases, judges might also rule on at least one other issue that is part of the case such as the legality of a certain local ordinance or the propriety of a massive seizure of materials. Factual obscenity cases represented 22.1 percent of circuit cases and 22.6 percent of all district cases (89 of 402 cases and 106 of 469 cases, respectively). In perhaps the most important test of the hierarchy theory, if judges are attentive to

[179] *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Roaden v. Kentucky*, 413 U.S. 496 (1973).

Supreme Court obscenity doctrine when it is most closely related—that is, in cases where the judge must decide the obscenity of some materials (such as magazines or films)—then one should expect that in most factual cases the judges will use the prevailing obscenity standards in their opinions. One should also expect a significantly higher application of *Roth* and *Miller* (and their standards) in factual cases than in other cases. Alternately, if the notion of resistance is true, one should expect that in less than a majority of cases will judges use the prevailing standards in their opinions. Tables 3-5 to 3-9 provide some hints at the usefulness of Supreme Court doctrine in determining what is obscene.

The results in Tables 3-5 through 3-9 provide mixed support for the influence of *Roth v. United States* (1957) and *Miller v. California* (1973) inside the federal courtrooms. On the one hand, lower court judges in factual cases are not significantly more likely to use *Roth* or *Miller* as controlling precedent overall and as rule of law, showing quite low levels of compliance (Table 3-5 to 3-7). The only aberration involves *Miller* rule two, with roughly 30 to 35 percent of factual obscenity cases guided by this doctrine (as opposed to roughly 13 percent of non-factual cases; Table 3-7). On the other hand, Table 3-8 provides good evidence that both federal circuit and district court judges in factual obscenity cases are more likely to use the actual precedents, than were judges in other cases. In cases prior to the *Miller* decision, circuit and district court

opinion writers apply *Roth*'s "contemporary community standards" in 35.2 and 55.4 percent of factual cases, a much higher rate than in non-factual cases (10.3 and 8.9 percent, respectively). One discerns an even greater divide in applying the *Roth* "prurient interest" standard, lending further credence to the notion that lower courts are more likely to use the prevailing standards in factual cases and thus signal to the higher courts their willingness to apply the prevailing precedent, although lower court judges are not unanimous in using such standards in even factual cases.

An investigation of the usage of the *Miller* standards leads to stronger support, with a significantly higher degree of compliance (that is, application of the standards in the opinion) in factual cases at both levels. As noted in Table 3-9, circuit and district court opinion writers use the "community standards" guideline much more often in factual cases (80.0 and 64.0 percent) as opposed to other cases (17.9 and 17.2 percent); similar differences arise for the other standards and at both levels. Thus, lower court judges are willing to use the prevailing standards in cases that are most similar to that of the Court (e.g. Songer 1988; Songer and Sheehan 1990). Indeed, in factual obscenity cases circuit judges demonstrate an even greater willingness than their trial-court counterparts to apply the *Miller* standards (in some contrast with Reid 1988)! Whereas district courts are more likely to use the *Roth* standards, the reverse occurs with *Miller*: district court opinion-writers are less likely than their appellate

brethren to apply the prevailing standards in their opinions (Table 3-9). Perhaps, then, judges elected to view *Roth* and *Miller* with a narrower eye toward jurisprudence by applying the standards to factual cases rather than to a greater variety of obscenity cases altogether. While a sufficient explanation for this is beyond the scope of the research presented here, it does provide an interesting question for the future: to what extent do circuit courts display a greater adherence to precedents which are better suited for trial-level courts?

One potential reason for the relatively low levels of usage of *Roth* and *Miller* is the type of judge seated on the bench. If it is true that the judiciary is like other organizations, comprised of people with their own policy preferences, one might argue that judges are more likely to adopt High Court precedent when they are more likely to agree with it (cf. Songer and Sheehan 1990). As a result, and applying organizational theory, one can make a reasonable argument that older ("holdover") judges are more likely to have their own particular views about obscenity and are thus less likely to conform to Supreme Court precedent than will more recent appointees to the lower federal courts (those appointed after *Miller*), who are "more in tune" with Court precedent and thus have fewer 'psychic costs' in changing their views (Baum 1976). More specifically, one should expect a significantly higher application of the *Miller* doctrine and its actual standards by newer court appointees than by more experienced judges.

Tables 3-10 through 3-13 assess the usage and application of *Miller* rule

two as well as the *Miller* standards. If anything, the research yields contrary findings; holdover judges were actually more likely to support the Supreme Court's obscenity decisions.[180] Although neither group demonstrates overwhelming support for the *Miller* rule two doctrine in all cases and neither group applies the actual standards to any great extent, holdover judges are actually more likely than new judges to use *Miller* as the controlling doctrine in obscenity cases; this occurs at both the circuit and district court levels (21.5 versus 10.3 percent and 24.1 versus 13.9 percent, respectively; Table 3-11). This split among the judges does not quite hold true for the application of the standards in the opinions, at least for district judges. At the circuit level, holdover judges are more likely than their newer counterparts to use all of the *Miller* standards, such as a greater percentage of such cases applying the "community standards" and "patently offensive" guidelines (44.6 versus 10.3 percent and 35.5 versus 8.1 percent, respectively). District court judges tend not to behave in the same way: both new and holdover judges tend to apply the "prurient interest" and "literary, artistic, political, scientific value" standards in roughly equal measure (25.0 versus 21.7 percent and 25.9 versus 21.1 percent, respectively). This suggests that if there is indeed any such division, it appears

[180] The analyses for partisan effects exclude all per curiam cases because such cases did not supply a specific author and thus one could not determine for certain whether the actual opinion writer (if indeed only one judge wrote the opinion) was a Democratic-presidential appointee or the reverse. The analyses for 'holdover' effects include only those per curiam cases where all three judges were either appointees prior to the *Miller* decision (June 21, 1973) or afterwards. For this research, it is assumed that the effects for previous experience on the bench (or lack

to exist only at the circuit court level; these findings do contrast in part with the null findings of Songer and Sheehan on the impact of Court precedent (1990: Table 5, 311).[181] One should also note, however, that holdover judges at both levels do indeed drop their collective usage of the *Roth v. United States* doctrine and its standards after the *Miller v. California* decision (Tables 3-10 to 3-12); one can infer from this that holdover judges do notice the change in obscenity standards and acted accordingly. Is it thus true that one's judicial training is reinforced as the years of experience accrue over time?

Yet another test of organizational theory is the influence of partisanship within the judges themselves. If it is true that lower-court judges weigh both the congruence of a precedent with their views on legal issues, as well as the 'costs' involved with adopting such a precedent, one should expect that judges who agree ideologically with the prevailing precedent will be more likely to support it than those who do not. This might suggest a potential partisan split among lower-court judges. As the *Miller* decision decreased the scope of materials protected as non-obscene and thus led to a more conservative shift in the field of obscenity, one should expect a significantly greater likelihood of conservative opinion writers (that is, Republican presidential appointees) to adopt the *Roth* and *Miller* doctrines and their standards more willingly than others (Democratic

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thereof) are uniform across opinion writers.

[181] There is an element of caution here, as Songer and Sheehan tested the 'holdover'/new judge distinction only on the impact of (and not compliance with) Supreme Court precedent.

appointees), and thus a higher degree of applying the *Miller* decision and its standards. To test for this, opinion writers were divided according to the political party of their appointing president.[182]

The analyses performed in Tables 3-14 to 3-17 lead to marginal support for this proposition, such as the usage and application of *Roth* rule four and the *Roth* standards. During the years prior to the *Miller* decision few appointees (whether of Republican or Democratic presidents) tend to have the *Roth* decision control their ruling in the case at hand, with no group at either the circuit or district court level reaching above 15 percent (Table 3-14). Some minor differences do occur with respect to both using rules of law and the standards themselves, yet they are not significant enough to lend any support to the notion of ideological divisions among lower courts (Table 3-15).[183] Minimal differences occur at the circuit level, with both Democratic and Republican groups applying the "community standards" and "prurient interest" guidelines with roughly the same frequency (27.7 versus 26.4 percent and 31.9 versus 35.8 percent, respectively; Table 3-16). One does find a partisan difference at the district level, as Republican opinion writers tended to apply the "community standards" and "prurient interest" guidelines at a greater level than did their

[182] The analyses exclude per curiam cases because such opinions did not signify a specific author and thus one could not ascertain the political party of the appointing president.
[183] One finds lesser support for this proposition with the usage of *Miller* rule two: the minimal lack of controlling authority by *Miller* remains virtually indistinguishable among Democratic and Republican appointees (17.6 and 17.4 percent, respectively), and Republican appointees at the circuit level were even less likely than their Democratic counterparts to use rule two as the

Democratic brethren (37.2 versus 19.7 percent and 48.8 versus 25.0 percent, respectively). This hints that judges might be more selective at the district court level with their support or non-support for Supreme Court policy. However, there is no clear pattern among either circuit or district court judges with respect to the application of the *Miller* standards: both Republicans and Democrats tend to avoid using the standards at roughly the same levels (both groups use each standard in approximately 16 to 28 percent of opinions). This suggests a lack of clear partisan cleavages regarding the usage and application of Supreme Court obscenity precedent.

As one test of the 'legal' and communications model, one might expect that precedent has only so much support as time passes, and its overall usefulness fades with the years. On its face, this has some validity: members of the Supreme Court consider the 'ripeness' of newer cases an important factor in deciding whether to review and potentially replace prevailing doctrines (Perry 1991). Although previous research offers mixed support for the 'half-life' proposition (Johnson 1987; Reddick and Benesh 2000; Reid 1988), while drawing from the work of Landes and Posner (1977) one can make a reasonable case that lower-court judges will be likely to weigh the vitality of Supreme Court as they review cases arising in their courtrooms, and thus discard older precedent as newer precedents emerge. More specifically, one might expect

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persuasive authority (12.4 versus 20.6 percent).

that both circuit and district judges will elect not to apply the *Roth* and *Miller* doctrines and their standards after a certain time has passed. In order to test the influence of the 'half-life' proposition, cases were divided into two groups: cases that had arisen soon after the declaration of the prevailing precedent (that is, within five years of the prevailing doctrine) and cases decided afterward.[184]

One does find support for the declining influence of Supreme Court precedent, although the effect is more pronounced for the *Miller* decision than for *Roth*. A series of analyses finds circuit and district court judges marginally more likely (as a collective group) to use *Roth* rule four as controlling or persuasive during the first five years of its adoption than in subsequent years (12.9 versus 6.9 percent and 11.5 versus 5.8 percent, respectively; Table 3-18). There is a somewhat more pronounced effect when examining the application of *Roth* standards in the opinions. Circuit court judges tend to be more compliant with the Court's "community standards" and "prurient interest" guidelines during the first few years than in later ones (29.0 versus 17.8 percent and 32.3 versus 23.8 percent, respectively); district courts tend to do likewise with the prurient interest (42.3 versus 29.2 percent) but not the contemporary community standard (23.1 versus 23.4 percent) (Table 3-20). *Miller*'s effectiveness does have its own 'half

[184] Although Landes and Posner do not offer any specific timelines for the actual adoption of the precedent, they find, for example, that "[I]n the 1974-1975 court of appeals sample, half of the citations to Supreme Court and other-court decisions were less than 9.8 and 4.3 years old, respectively" (255). While this might suggest extending the period of analysis to a grouping of cases arising within ten years (rather than five), what matters in the present analysis is the actual usage and application of precedent rather than simply the citation. Thus, five years seemed a

life,' with both circuit and district courts more likely to adopt the policy as law in the first few years than in later years (21.2 versus 11.8 percent and 34.7 versus 11.5 percent, respectively; Table 3-19). One also finds an average decline of 20 to 25 percentage points in the use of the *Miller* standards, after the first five years of its adoption; such a decline is more pronounced for circuit courts than their district court counterparts, which suggests circuit courts may be more attentive to High Court policy up to a certain time point (Table 3-21). Supreme Court policy appears to be met with some support but then with a significant decline in effectiveness after a while (Reddick and Benesh 2000).

Last, as a test of the communications model on judicial behavior, is it the case that the greater strength of the Supreme Court precedent (here, a higher degree of Court unanimity in the opinion) leads to a greater likelihood that judges will adopt that precedent? Although the empirical research does not speak with one voice on this topic (Johnson 1979, 1987), one can argue lower-court judges might notice the differential support that the Supreme Court has given to its rulings in *Roth v. United States* (6.5-2.5) and *Miller v. California* (5-4). As a result, if this element of the legal model is true, then one should expect a greater degree of support by both circuit and district judges for the *Roth* doctrine over the *Miller* doctrine, and thus a greater application of each doctrine and their respective standards in cases within five years of the latest Supreme Court

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reasonable amount of time.

doctrine than in cases at least five years after the doctrine.

Tables 3-1 to 3-9 highlight the responses of federal circuit and district judges to both doctrines, in all cases as well as cases involving some determination of the material's obscenity or non-obscenity. Overall, reviewing the results in Tables 3-1 to 3-4, one finds little significant difference between the *Roth* and *Miller* doctrines in all cases. Both circuit and district judges tend not to find *Roth* or *Miller* persuasive (Table 3-1), and there is little difference when comparing the application of the *Roth* and *Miller* standards either (Table 3-4). While circuit judges are a bit less likely than district judges to cite *Roth*, district judges are less likely than their circuit brethren to cite *Miller* (Tables 3-2, 3-3), although there is a slightly greater likelihood of *Miller* being persuasive rather than *Roth* (ibid.). Nonetheless, there does not appear to be any significant pattern emerging from the lower courts when analyzing all obscenity cases.

When reviewing only the factual obscenity cases one discovers little significant pattern at the district level. District judges do tend to find *Miller* more persuasive than *Roth* overall (34 percent for *Miller* rule two, 14 percent for *Roth* rule one) (Tables 3-6 and 3-5, respectively). However, their overall application of the *Miller* standards is not significantly greater than that of *Roth*: judges use the *Miller* standards approximately 62 percent of the time, yet they apply the *Roth* "prurient interest" standard 75 percent of the time (Tables 3-9 and 3-8, respectively). Although the greater use of the *Roth* standard is expected, one

does not find a clear pattern of district judges using *Roth* at a higher level than *Miller*. One does find the beginnings of an unexpected pattern among the circuit courts. Circuit judges are less likely to find *Roth* persuasive than *Miller* (0 versus 20 percent; Table 3-5), and a little more likely to use *Miller* rule two than *Roth* rule four (both of which declare the prevailing obscenity standards) (31.4 versus 14.8 percent; Tables 3-7 and 3-6, respectively). One also finds a significantly higher degree of circuit judges using the *Miller* standards than the *Roth* standards: on average, the *Miller* standards are used 75 percent of the time, but circuit judges use the *Roth* standards 35-50 percent of the time (Tables 3-9 and 3-8, respectively). If anything, it appears that circuit court judges as a group tended to give the *Miller* decision greater attention when making their decisions. More to the point, it suggests that the faithfulness of lower-court judges to apply the Court's obscenity precedents does not depend on the institutional strength of the actual precedent.

Chapter Summary

The research presented here tested the effects of a variety of models on the usage of prevailing Supreme Court precedents. An assessment of the usage of High Court doctrine (coding both from Shepard's volumes and reading through each opinion for the actual usage of standards) leads to the following discoveries. First, lower federal courts overall tend not to conform strongly to the notion of the judicial hierarchy, as they tended not to use either the *Roth* or

the *Miller* doctrines or their rules of law; only in a certain minority of cases do such opinion writers deem it important enough to apply either a rule of law or various obscenity standards. However, as some (albeit weak) evidence of the hierarchy model, lower courts do tend to drop the *Roth* doctrine upon the creation of the *Miller* standards by the Supreme Court; although this is not strong evidence, it does suggest lower courts have some awareness of the Court's emerging obscenity jurisprudence. Second, one finds a greater usage of the prevailing obscenity doctrine and standards in cases involving some inquiry into the alleged obscenity of the materials under investigation rather than in other cases. This offers some evidence that lower courts tend to view the *Roth* and *Miller* standards with an eye toward its relevancy: as the case resembled the prevailing standards more directly, lower court judges thus sought to apply obscenity doctrine to the case at hand.

Third, as a test of organizational theory, the effects of experience on the bench ('holdover' versus new judges) are somewhat muted, with holdover circuit court judges showing some greater willingness than their lesser-experienced brethren to use the *Miller* standards in their opinions. As further contrary evidence, there appears to be no substantial difference between holdover and new judges at the district court level. Fourth, as another test of organizational theory the evidence presented here suggests little partisan difference (that is, the effects of presidential appointment) among circuit and district court judges

within the realm of obscenity: only among district court judges determining the usefulness of the *Roth* standards does there appear any substantial partisan split. This suggests that lower court judges tend not to view Supreme Court obscenity doctrine with any significant partisanship; in other words, lower court judges tend not to be politically prejudiced in their selection to use (or not to use) such precedent in their opinions. (This becomes a subject of scrutiny in Chapters 4 and 5.) Fifth, as a test of the legal model of Supreme Court impact, there is mixed support for the declining influence of the *Roth* and *Miller* doctrines: while circuit and district court judges tended not to drop their overall support for *Roth* and its standards after five years, they do tend to do so with *Miller* and its standards. Last, there is mixed support for the notion of a judicial hierarchy at this point: while circuit court opinion writers are more likely than district court opinion-writers to use *Miller* standards in their opinions on factual cases, the reverse is true for the *Roth* standards. In addition, district court judges are slightly more likely than circuit court judges to use the *Roth* doctrine overall and to use the *Miller* standards in their opinions. Thus, at this point it appears that the hierarchy model is not as prevalent as one might expect.

While this chapter assesses the usage of Supreme Court obscenity doctrine in their opinions, it remains to be seen whether such doctrines are an important aspect of lower-court decision making. One might argue that opinions simply justify the votes that judges intended to make, or alternately that judges

themselves simply might not find the doctrine important enough either to explain or apply in sufficient detail and yet become persuaded by High Court precedent and be more likely to rule in a conservative direction after the *Miller v. California* (1973) ruling. Most broadly, while the *Roth* and *Miller* doctrines appear not to influence the written word (that is, lower court opinions), does Supreme Court obscenity doctrine influence the final decisions of lower court judges (that is, their votes after the adoption of *Miller v. California*)? This becomes the subject of Chapters 4 and 5.

FIGURE 3-1: PREVIOUS CODING SCHEMA FROM COMPLIANCE RESEARCH

Response	Author	Definition
1. Compliance	Johnson (1979)	Lower court judge shows he follows Supreme Court decision or attempts to justify his decision along lines of Court's decision
	Gruhl (1980)	"lower court used the actual malice test when it should have used it and if the court interpreted the test correctly when it did use it."
	Songer and Sheehan (1990)	"required all four Miranda warnings to be given in cases involving custodial interrogation which were decided after the date of the Supreme Court's *Miranda* decision and if an intelligent waiver was executed for all admissions which were admitted into evidence."
a. Following	Johnson (1979)	"cited as controlling" (borrowed from Shepard's)
b. Harmonized	Johnson (1979)	"apparent inconsistency explained and shown not to exist"
c. Parallel	Johnson (1979)	"cited case substantially alike or an all fours with cited case in its law or facts"
d. Narrow compliance	Gruhl (1980)	"court used the test when it should have but did not interpret it correctly, or if the court used the test in a narrower manner than it should have."
	Songer and Sheehan (1990)	"if the concept of custodial interrogation was defined very narrowly or if the burden of proof for showing that a waiver was made voluntarily and intelligently was not placed squarely on the prosecution."
e. Consistent	Reid (1988)	Does lower court rule in accordance with the Supreme Court's ruling
f. Anticipatory	Gruhl (1980)	Lower court anticipated a subsequent Supreme compliance Court and acted to comply with it."
g. Expansive	Reid (1988)	Does the lower court expand the right to access to judicial proceedings
2. Non-compliance	Gruhl (1980)	"court did not use the test at all when it should have used it."
3. Evasive	Johnson (1979)	Lower court judge distinguishes Court decision from the present case, or gives it a limited interpretation of the decision
a. Distinguished	Johnson (1979)	"case at bar different either in law or fact from case cited for reasons given"
b. Limited	Johnson (1979)	"refusal to extend decision of cited case beyond precise issues involved"
c. Resistant	Reid (1988)	Is the lower court reluctant to apply the Supreme Court's use of access right
4. Discord/	Johnson (1979)	Cannot agree on how to interpret a Court decision, disagreement including (for multi -judge court) criticism of a case or of lower court majority's treatment of decision
5. Defiance	Songer (1988)	"overt refusal to follow a Supreme Court precedent"

FIGURE 3-2: CODING RULES FOR COMPLIANCE WITH SUPREME COURT PRECEDENT

TREATMENT OF PRECEDENT (as quoted in Shepard's citations)

Treatment Type	Description
Criticized (c)	"The citing opinion disagrees with the reasoning/result of the case you are Shepardizing, although the citing court may not have the authority to materially affect its precedential value."
Distinguished (d)	"The citing case differs from the case you are Shepardizing, either involving dissimilar facts or requiring a different application of the law."
Explained (e)	"The citing opinion interprets or clarifies the case you are Shepardizing in a significant way."
Followed (f)	"The citing opinion relies on the case you are Shepardizing as controlling or persuasive authority."
Harmonized (h)	"The citing case differs from the case you are Shepardizing, but the citing court reconciles the difference or inconsistency in reaching its decision."
Dissenting opinion (j)	"A dissenting opinion cites the case you are Shepardizing."
Questioned (q)	"The citing opinion questions the continuing validity or precedential value of the case you are Shepardizing because of intervening circumstances, including judicial or legislative overruling."

FIGURE 3-3: CODING SCHEMA USED FOR USAGE OF SUPREME COURT OBSCENITY PRECEDENT

Use of Standards Does the lower court use the precedent's standards in the analysis (opinion)?

Score	Definition
0	Standard not included in lower court opinion
1	Court opinion mentions standard (e.g. quotes it) but does not outline or explain standard in meaningful way
2	Court opinion discusses (explains) standard, but does not apply standard in the court's analysis
3	Court opinion applies standard, as part of its analysis

Coding of Specific Supreme Court Standards in *Roth* and *Miller*:

***Roth* Standards** *Roth v. United States* standards in lower-court opinions:
(a) Average person, using contemporary community standards
(b) Dominant theme of the material, taken as a whole, leads to prurient interest

***Miller* Standards** *Miller v. California* standards coded in lower court opinions:
(a) Average person, using contemporary community standards
(b) Dominant theme of the material, taken as a whole, leads to prurient interest
(c) The work depicts or describes sexual conduct in a patently offensive way
(d) Material lacks serious literary, artistic, political, scientific value

FIGURE 3-4: *ROTH* AND *MILLER* RULES OF LAW

Roth v. United States, 354 U.S. 476 (1957)
Rule Three:

Obscenity not protected under First Amendment, or Fourteenth Amendment's Due Process Clause

(a) First Amendment does not "protect every utterance"

(b) Speech protections intended for exchange of ideas to effect political, social changes that the people wish

(c) Ideas with at least "slightest redeeming social importance" get full protection (unless within small area of more important interests), but First Amendment history rejects obscenity because it is "utterly without redeeming social importance"

Rule Four:

Since obscenity not protected, no constitutional violation out of failure to apply "clear and present danger" or because "probably would induce its recipients to such conduct."

(a) Sex and obscenity not synonymous; obscenity relates to prurient interest

(b) Must protect freedom of speech, when materials do not lead to prurient interest

(c) Standard for judging obscenity: "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

(d) Both trial courts followed proper standards, definition

Miller v. California, 413 U.S. 15 (1973)
Rule One:

States can regulate works that:

(a) taken as whole, appeals to prurient interest in sex

(b) portrays sexual conduct in patently offensive way (defined by state law)

(c) taken as whole, has no "serious literary, artistic, political or scientific value"

Rule Two:

Standard for judging obscenity: whether

(a) "the average person, applying contemporary community standards" finds the work, taken as whole, "appeals to the prurient interest"

(b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"

(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

State laws limited to this are protected under appellate review

TABLE 3-1: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* (1957) AND *MILLER V. CALIFORNIA* (1973) IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1957-1998[A]

Circuit Court Case Usage	***Roth v. US* (1957)**				***Miller v. CA* (1973)**	
	Pre-*Miller*		**Post-*Miller***			
	N	**%**	**N**	**%**	**N**	**%**
Not cited	62	47.0	204	75.6	116	43.0
Roth (*Miller*) Cited Once or Twice	68	51.5	63	23.3	127	47.0
Roth (*Miller*) Cited > Twice	1	0.8	0	0.0	8	3.0
Criticizes *Roth*'s (*Miller*'s) Reasoning	0	0.0	0	0.0	0	0.0
Distinguishes Case from *Roth* (*Miller*)	0	0.0	0	0.0	0	0.0
Interprets or Clarifies *Roth* (*Miller*)	0	0.0	1	0.4	4	1.5
Roth (*Miller*) as Controlling, Persuasive	1	0.8	2	0.7	15	5.6
Trying to harmonize Present Case with *Roth* (*Miller)*	0	0.0	0	0.0	0	0.0
Questions value of *Roth* (*Miller*)	0	0.0	0	0.0	0	0.0
Total	132	100.1	270	100.0	270	100.1
District Court Case Usage	**N**	**%**	**N**	**%**	**N**	**%**
Not cited	72	40.0	221	76.5	164	53.3
Roth (*Miller*) Cited Once or Twice	92	51.1	64	22.1	119	41.2
Roth (*Miller*) Cited > Twice	10	5.6	0	0.0	7	2.4
Criticizes *Roth*'s (*Miller*'s) Reasoning	0	0.0	1	0.3	0	0.0
Distinguishes Case from *Roth* (*Miller*)	0	0.0	0	0.0	0	0.0
Interprets or Clarifies *Roth* (*Miller*)	1	0.6	1	0.3	2	0.7
Roth (*Miller*) as Controlling, Persuasive	2	1.1	0	0.0	7	2.4
Trying to harmonize Present Case with *Roth* (*Miller)*	0	0.0	0	0.0	0	0.0
Questions value of *Roth* (*Miller*)	3	1.7	2	0.7	0	0.0
Total	180	100.1	289	99.9	289	100.0

[a] Includes cases with indeterminate judicial decision. Only post-*Miller* cases are included for analysis of *Miller v. California* (1973).

TABLE 3-2: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* RULES OF LAW IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAM), 1957-1998[A]

Circuit Court Case Usage	Rule Three				Rule Four			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Roth not cited	63	47.7	203	75.2	62	47.0	203	75.2
Case cited at least once	50	37.9	50	18.5	28	21.2	37	13.7
Rule of law cite in opinion	16	12.1	16	5.9	31	23.5	20	7.4
Criticizes reasoning of rule	0	0.0	0	0.0	0	0.0	0	0.0
Distinguishes rule from case	1	0.8	0	0.0	0	0.0	0	0.0
Interprets or clarifies rule	0	0.0	0	0.0	0	0.0	2	0.7
Roth rule controlling, persuasive	2	1.5	1	0.4	11	8.3	7	2.6
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0	0	0.0	1	0.4
Total	132	100.0	270	100.0	132	100.0	270	100.0
District Court Case Usage	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
Roth not cited	72	40.0	221	76.5	71	39.4	221	76.5
Case cited at least once	64	35.6	49	17.0	38	21.1	41	14.2
Rule of law cited in opinion	40	22.2	18	6.2	54	30.0	22	7.6
Criticizes reasoning of rule	2	1.1	0	0.0	0	0.0	0	0.0
Distinguishes rule from case	0	0.0	0	0.0	1	0.6	0	0.0
Interprets or clarifies rule	1	0.6	0	0.0	4	2.2	3	1.0
Roth rule controlling, persuasive	1	0.6	0	0.0	12	6.7	1	0.3
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule of law	0	0.0	1	0.3	0	0.0	1	0.3
Total	180	100.0	289	100.0	180	100.0	289	99.9

[a]Only post-*Miller* cases used for analysis of *Miller v. California* (1973).

TABLE 3-3: SHEPARD'S CITATION AND USAGE OF *MILLER V. CALIFORNIA* RULES OF LAW IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1973-1998[A]

Circuit Court Case Usage	Rule One		Rule Two	
	N	%	N	%
Miller not cited	117	43.3	117	43.3
Miller cited at least once	113	41.9	61	22.6
Actual rule of law cited in opinion	26	9.6	40	14.8
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	1	0.4
Interprets or clarifies rule	2	0.7	9	3.3
Miller rule as controlling, persuasive	11	4.1	42	15.6
Trying to harmonize present case with *Miller* rule of law	1	0.4	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	270	100.0	270	100.0

District Court Case Usage	N	%	N	%
Miller not cited	153	52.9	152	52.6
Miller cited at least once	90	31.1	55	19.0
Actual rule of law cited in opinion	21	7.3	27	9.3
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	1	0.3	0	0.0
Interprets or clarifies rule	4	1.4	4	1.4
Miller rule as controlling, persuasive	20	6.9	51	17.6
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	289	99.9	289	99.9

[a] Presented as frequencies, and as percentages. Only post-*Miller* cases used for analysis of *Miller v. California* (1973).

TABLE 3-4: USAGE OF *ROTH V. UNITED STATES* AND *MILLER V. CALIFORNIA* STANDARDS (INCLUDING PER CURIAMS), 1957-1998[A]

Usage of *Roth v. United States*	Average person, Cont. Comm. Stds				Dominant Theme, Prurient Interest			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	85	64.4	245	90.7	82	62.1	242	89.6
Mentions standard	16	12.1	10	3.7	12	9.1	11	4.1
Discusses (explains) standard	4	3.0	1	0.4	4	3.0	2	0.7
Applies standard in analysis	27	20.5	14	5.2	34	25.8	15	5.6
Total	132	100.0	270	100.0	132	100.0	270	100.0
District Court Decisions								
Not included in opinion	115	63.9	278	96.2	102	56.7	279	96.5
Mentions standard	16	8.9	11	3.8	19	10.6	10	3.5
Discusses (explains) standard	7	3.9	0	0.0	3	1.7	0	0.0
Applies standard in analysis	42	23.3	0	0.0	56	31.1	0	0.0
Total	180	100.0	289	100.0	180	100.1	289	100.0

Usage of *Miller v. CA* (Cases after *Miller*)	Avg person, Comm. Stds		Prurient Interest		Patently Offensive		LAPS Value	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	158	58.5	172	63.7	176	65.2	185	68.5
Mentions standard	35	13.0	40	14.8	32	11.9	28	10.4
Discusses (explains) std.	7	2.6	0	0.0	6	2.2	3	1.1
Applies std. in analysis	70	25.9	58	21.5	56	20.7	54	20.0
Total	270	100.0	270	100.0	270	100.0	270	100.0
District Court Decisions								
Not included in opinion	183	63.3	190	65.7	182	63.0	188	65.1
Mentions standard	27	9.3	31	10.7	38	13.1	35	12.1
Discusses (explains) std.	6	2.1	2	0.7	2	0.7	0	0.0
Applies std. in analysis	73	25.3	66	22.8	67	23.2	66	22.8
Total	289	100.0	289	99.9	289	100.0	289	100.0

[a] Note: cases coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. Also includes cases with indeterminate vote.

TABLE 3-5: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* AND *MILLER V. CALIFORNIA* IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), FACTUAL AND OTHER OBSCENITY CASES, 1957-1998[A]

Circuit Court Case Usage	***Roth v. US* (1957)**				***Miller v. CA* (1973)**			
	Factual		**Other**		**Factual**		**Other**	
	Pre-*Mllr*	**Post-*Mllr***	**Pre-*Mllr***	**Post-*Mllr***				
	N/%	**N/%**	**N/%**	**N/%**	**N**	**%**	**N**	**%**
Not Cited	13/24.1	23/65.7	49/62.8	181/77.0	6	17.1	110	46.8
Cited Once, Twice	41/75.9	12/34.3	27/34.6	51/21.7	18	51.4	109	46.4
Cite More Than Twice	0/0.0	0/0.0	1/1.3	0/0.0	3	8.6	5	2.1
Criticize Reasoning	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Distinguish	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Interpret/ Clarify	0/0.0	0/0.0	0/0.0	1/0.4	1	2.9	3	1.3
Controlling/ Persuasive	0/0.0	0/0.0	1/1.3	2/0.9	7	20.0	8	3.4
Harmonizing	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Question Value	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Total	54/100	35/100	78/100	235/100	35	100.0	235	100.0
District Cases	**N/%**	**N/%**	**N/%**	**N/%**	**N**	**%**	**N**	**%**
Not Cited	13/24.1	23/65.7	49/62.8	181/77.0	6	17.1	110	46.8
Not Cited	9/16.1	33/66.0	63/50.8	188/78.7	13	26.0	141	59.0
Cited Once, Twice	39/69.6	16/32.0	53/42.7	48/20.1	34	68.0	85	35.6
Cite More Than Twice	5/8.9	0/0.0	5/4.0	0/0.0	2	4.0	5	2.1
Criticize Reasoning	0/0.0	0/0.0	0/0.0	1/0.4	0	0.0	0	0.0
Distinguish	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Interpret/ Clarify	0/0.0	0/0.0	1/0.8	1/0.4	0	0.0	2	0.8
Controlling/ Persuasive	2/3.6	0/0.0	0/0.0	0/0.0	1	2.0	6	2.5
Harmonizing	0/0.0	0/0.0	0/0.0	0/0.0	0	0.0	0	0.0
Question Value	1/1.8	1/2.0	2/1.6	1/0.4	0	0.0	0	0.0
Total	56/100	50/100	124/100	239/100	50	100.0	239	100.0

[a] Presented as frequencies, and as percentages. These analyses included cases with indeterminate judicial decision. Only post-*Miller* cases are included for analysis of *Miller v. California* (1973). Factual obscenity cases are those in which either the judge declares materials to be non/obscene, or else supports the like decision by a lower judge, magistrate or jury.

TABLE 3-6: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* RULE OF LAW NUMBER FOUR IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), FACTUAL AND OTHER OBSCENITY CASES, 1957-1998[A]

Circuit Court Case Usage	Factual				Other			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Not cited	13	24.1	23	65.7	49	62.8	180	76.6
Case cited at least once	10	18.5	4	11.4	18	23.1	33	14.0
Rule of law cited in opinion	23	42.6	3	8.6	8	10.3	17	7.2
Criticize rule's reasoning	0	0.0	0	0.0	0	0.0	0	0.0
Distinguish rule from present case	0	0.0	0	0.0	0	0.0	0	0.0
Interprets or clarifies rule	0	0.0	1	2.9	0	0.0	1	0.4
Rule controls/persuasive	8	14.8	4	11.4	3	3.8	3	1.3
Try to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule	0	0.0	0	0.0	0	0.0	1	0.4
Total	54	100.0	35	100.0	78	100.0	235	100.0

District Court Case Usage	N	%	N	%	N	%	N	%
Not cited	8	14.3	33	66.0	63	50.8	188	78.7
Case cited at least once	11	19.6	7	14.0	27	21.8	34	14.2
Rule of law cited in opinion	27	48.2	8	16.0	27	21.8	14	5.9
Criticizes rule's reasoning	0	0.0	0	0.0	0	0.0	0	0.0
Distinguish rule from present case	1	1.8	0	0.0	0	0.0	0	0.0
Interprets or clarifies rule	1	1.8	2	4.0	3	2.4	1	0.4
Rule controls, persuasive	8	14.3	0	0.0	4	3.2	1	0.4
Try to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.4
Questions value of rule	0	0.0	0	0.0	0	0.0	1	0.4
Total	56	100.0	50	100.0	124	100.0	239	100.0

[a] Presented as frequencies, and as percentages. This analysis includes opinions with an indeterminate judicial vote.

TABLE 3-7: SHEPARD'S CITATION AND USAGE OF *MILLER V. CALIFORNIA* RULES OF LAW IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), FACTUAL AND OTHER OBSCENITY CASES, 1973-1998[A]

Circuit Court Case Usage	Rule One				Rule Two			
	Factual		Other		Factual		Other	
	N	%	N	%	N	%	N	%
Miller not cited	6	17.1	111	47.2	6	17.1	111	47.2
Miller cited at least once	23	65.7	90	38.3	11	31.4	50	21.3
Rule of law cited in opinion	2	5.7	24	10.2	5	14.3	35	14.9
Criticizes reasoning of rule	0	0.0	0	0.0	0	0.0	0	0.0
Distinguishes rule from case	0	0.0	0	0.0	0	0.0	1	0.4
Interprets or clarifies rule	0	0.0	2	0.9	2	14.3	7	3.0
Miller rule controls, persuasive	4	11.4	7	3.0	11	31.4	31	13.2
Try to harmonize present case with *Miller* rule of law	0	0.0	1	0.4	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Total	35	100.0	235	100.0	35	99.9	235	100.0
District Court Case Usage	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
Miller not cited	13	26.0	140	58.6	13	26.0	139	58.2
Miller cited at least once	28	56.0	62	25.9	16	32.0	39	16.3
Rule of law cited in opinion	2	4.0	19	7.9	4	8.0	23	9.6
Criticizes reasoning of rule	0	0.0	0	0.0	0	0.0	0	0.0
Distinguishes rule from case	0	0.0	1	0.4	0	0.0	0	0.0
Interprets or clarifies rule	0	0.0	4	1.7	0	0.0	4	1.7
Miller rule controls, persuasive	7	14.0	13	5.4	17	34.0	34	14.2
Try to harmonize present case with *Miller* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Total	50	100.0	239	99.9	50	100.0	239	100.0

[a] Presented as frequencies, and as percentages. Only post-*Miller* cases used for analysis of *Miller v. California* (1973).

TABLE 3-8: USAGE OF *ROTH V. UNITED STATES* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), FACTUAL AND OTHER OBSCENITY CASES, 1957-1998[A]

Usage of *Roth v. United States*	Average Person, Contemporary Community Stds.							
	Factual				Other			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	21	38.9	22	62.9	64	82.1	223	94.9
Mentions standard	10	18.5	3	8.6	6	7.7	7	3.0
Discusses (explains) standard	4	7.4	0	0.0	0	0.0	1	0.4
Applies standard in analysis	19	35.2	10	28.6	8	10.3	4	1.7
Total	54	100.0	35	100.0	78	99.9	235	100.0
District Court Decisions								
Not included in opinion	17	30.4	47	94.0	98	79.0	231	96.7
Mentions standard	6	10.7	3	6.0	10	8.1	8	8.3
Discusses (explains) standard	2	3.6	0	0.0	5	4.0	0	0.0
Applies standard in analysis	31	55.4	0	0.0	11	8.9	0	0.0
Total	56	100.0	50	100.0	124	100.0	239	100.0

Usage of *Roth v. United States*	Dominant Theme, Prurient Interest							
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	19	35.2	22	62.9	63	80.8	220	93.6
Mentions standard	6	11.1	2	5.7	6	7.7	9	3.8
Discusses (explains) standard	2	3.7	1	2.9	2	2.6	1	0.4
Applies standard in analysis	27	50.0	10	28.6	7	9.0	5	2.1
Total	54	100.0	35	100.0	78	100.1	235	100.0
District Court Decisions								
Not included in opinion	10	17.9	46	92.0	92	74.2	233	97.5
Mentions standard	2	3.6	4	8.0	17	13.7	6	2.5
Discusses (explains) standard	2	3.6	0	0.0	1	0.8	0	0.0
Applies standard in analysis	42	75.0	0	0.0	14	11.3	0	0.0
Total	56	100.0	50	100.0	124	100.0	239	100.0

[a]Note: cases were coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which judge noted variants of phrase "applying the *Roth* (or *Miller*) standards

TABLE 3-9: USAGE OF *MILLER V. CALIFORNIA* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), FACTUAL AND OTHER OBSCENITY CASES, 1973-1998[A]

Usage of *Miller v. CA* (Cases after *Miller*)	Avg person, Comm. Stds				Dominant Theme, Prurient Interest			
	Factual		Other		Factual		Other	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	6	17.1	152	64.7	7	20.0	165	70.0
Mentions standard	1	2.9	35	14.9	1	2.9	39	16.5
Discusses (explains) standard	0	0.0	6	2.6	0	0.0	0	0.0
Applies standard in analysis	28	80.0	42	17.9	27	77.1	31	13.6
Total	35	100.0	235	100.1	35	100.0	235	100.0
District Court Decisions								
Not included in opinion	11	22.0	172	72.0	15	30.0	175	73.2
Mentions standard	6	12.0	21	8.8	2	4.0	29	12.1
Discusses (explains) standard	1	2.0	5	2.1	1	2.0	1	0.4
Applies standard in analysis	32	64.0	41	17.2	32	64.0	34	14.2
Total	50	100.0	239	100.1	50	100.0	239	99.9

Usage of *Miller v. CA* (Cases after *Miller*)	Patently Offensive				LAPS Value			
	Factual		Other		Factual		Other	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	6	17.1	170	72.3	7	20.0	178	75.7
Mentions standard	1	2.9	31	13.2	2	5.7	26	11.1
Discusses (explains) std.	1	2.9	5	2.1	0	0.0	3	1.3
Applies std. in analysis	27	77.1	29	12.3	26	74.3	28	11.9
Total	35	99.9	235	99.9	35	100.0	243	100.0
District Court Decisions								
Not included in opinion	14	28.0	168	70.3	14	28.0	174	72.8
Mentions standard	5	10.0	32	13.4	5	10.0	30	12.6
Discusses (explains) std.	0	0.0	2	0.8	0	0.0	0	0.0
Applies std. in analysis	30	60.0	37	15.5	31	62.0	35	14.6
Total	50	100.0	239	100.0	50	100.0	239	100.0

[a]Note: cases were coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which the judge noted variants of phrase "applying the *Roth* (or *Miller*) standards

TABLE 3-10: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* RULE OF LAW NUMBER FOUR IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1957-1998[A]

Circuit Court Case Usage	**Holdover**				**New Judges**	
	Pre-*Miller*		**Post-*Miller***		**Post-*Miller***	
	N	**%**	**N**	**%**	**N**	**%**
Roth not cited	63	47.4	81	66.9	110	80.9
Case cited at least once	28	21.1	19	15.7	17	12.5
Actual rule of law cited in opinion	31	23.3	12	9.9	8	5.9
Criticizes reasoning of rule	0	0.0	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	0	0.0	0	0.0
Interprets or clarifies rule	0	0.0	2	1.7	0	0.0
Roth rule as controlling, persuasive	11	8.3	6	5.0	1	0.7
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0
Questions value of rule of law	0	0.0	1	0.8	0	0.0
Total	133	100.1	121	100.0	136	100.0
District Court Case Usage	**N**	**%**	**N**	**%**	**N**	**%**
Roth not cited	70	39.1	81	75.0	139	77.2
Case cited at least once	38	21.2	16	14.8	25	13.9
Actual rule of law cited in opinion	54	30.2	7	6.5	15	8.3
Criticizes reasoning of rule	0	0.0	0	0.0	0	0.0
Distinguishes rule from present case	1	0.6	0	0.0	0	0.0
Interprets or clarifies rule	4	2.2	3	2.8	0	0.0
Roth rule as controlling, persuasive	12	6.7	1	0.9	0	0.0
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0	1	0.6
Total	179	100.0	108	100.0	180	100.0

[a] Presented as frequencies and percentages, using only post-*Miller* cases for analysis of *Miller*. Includes opinions with an indeterminate judicial vote, as well as per curiam decisions where all three judges are within the same category (appointed prior to *Miller*, or else after *Miller*).

TABLE 3-11: SHEPARD'S CITATION AND USAGE OF *MILLER V. CALIFORNIA* RULE OF LAW NUMBER TWO IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1973-1998[A]

Circuit Court Case Usage	Holdover		New Judges	
	N	%	N	%
Miller not cited	32	26.5	77	56.6
Case cited at least once	34	28.1	26	19.1
Actual rule of law cited in opinion	22	18.2	16	11.8
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	1	0.8	0	0.0
Interprets or clarifies rule	6	5.0	3	2.2
Miller rule as controlling, persuasive	26	21.5	14	10.3
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	121	100.1	136	100.0

District Court Case Usage	N	%	N	%
Miller not cited	47	43.5	104	57.8
Case cited at least once	20	18.5	35	19.4
Actual rule of law cited in opinion	13	12.0	14	7.8
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	0	0.0
Interprets or clarifies rule	2	1.9	2	1.1
Miller rule as controlling, persuasive	26	24.1	25	13.9
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	108	100.0	180	100.0

[a] Presented as frequencies and percentages, using only post-*Miller* cases for analysis of *Miller*. Includes opinions with an indeterminate judicial vote, as well as per curiam decisions where all three judges are within the same category (appointed prior to *Miller*, or else after *Miller*).

TABLE 3-12: USAGE OF *ROTH V. UNITED STATES* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1957-1998[A]

Usage of *Roth v. United States*	Average Person, Contemporary Community Stds.					
	Holdover: Pre-*Miller*		Post-*Miller*		New judges	
	N	%	N	%	N	%
Circuit Court Decisions						
Not included in opinion	86	64.7	100	82.6	132	97.1
Mentions standard	16	12.0	8	6.6	2	1.5
Discusses (explains) standard	4	3.0	1	0.8	0	0.0
Applies standard in analysis	27	20.3	12	9.9	2	1.5
Total	133	100.0	121	99.9	136	100.1
District Court Decisions						
Not included in opinion	114	63.7	103	95.4	174	96.7
Mentions standard	16	8.9	5	4.6	6	3.3
Discusses (explains) standard	7	3.9	0	0.0	0	0.0
Applies standard in analysis	42	23.5	0	0.0	0	0.0
Total	179	100.0	108	100.0	180	100.0

Usage of *Roth v. United States*	Dominant Theme, Prurient Interest					
	N	%	N	%	N	%
Circuit Court Decisions						
Not included in opinion	83	62.4	99	81.8	130	95.6
Mentions standard	12	9.0	8	6.6	3	2.2
Discusses (explains) standard	4	3.0	1	0.8	1	0.7
Applies standard in analysis	34	25.6	13	10.7	2	1.5
Total	133	100.0	121	99.9	136	100.0
District Court Decisions						
Not included in opinion	102	57.0	103	95.4	175	97.2
Mentions standard	19	10.6	5	4.6	5	2.8
Discusses (explains) standard	3	1.7	0	0.0	0	0.0
Applies standard in analysis	55	30.7	0	0.0	0	0.0
Total	179	100.0	108	100.0	180	100.0

[a] Presented as frequencies and percentages, using only post-*Miller* cases for analysis of *Miller*. Includes opinions with an indeterminate judicial vote, as well as per curiam decisions where all three judges are within the same category (appointed prior to *Miller*, or else after *Miller*). Note: cases coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. Also includes cases with indeterminate vote, but excludes per curiam decisions.

TABLE 3-13: USAGE OF *MILLER V. CALIFORNIA* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), 1973-1998[A]

Usage of *Miller v. California*	Average person, Cont. Comm. Stds				Dominant Theme, Prurient Interest			
	Holdover		New judges		Holdover		New judges	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	48	39.7	100	73.5	61	50.4	100	73.5
Mentions standard	16	13.2	19	14.0	17	14.1	22	16.2
Discusses (explains) std.	3	2.5	3	2.2	0	0.0	0	0.0
Applies std. in analysis	54	44.6	14	10.3	43	35.5	14	10.3
Total	121	100.0	136	100.0	121	100.0	136	100.0
District Court Decisions								
Not included in opinion	67	62.0	115	63.9	70	64.8	119	66.1
Mentions standard	6	5.6	21	11.7	10	9.3	21	11.7
Discusses (explains) std.	4	3.7	2	1.1	1	0.9	1	0.6
Applies std. in analysis	31	28.7	42	23.3	27	25.0	39	21.7
Total	108	100.0	180	100.0	108	100.0	180	100.1

Usage of *Miller v. California*	Patently Offensive				LAPS Value			
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	61	50.4	105	77.2	68	56.2	106	77.9
Mentions standard	14	11.6	17	12.5	11	9.1	16	11.8
Discusses (explains) std.	3	2.5	3	2.2	2	1.7	1	0.7
Applies std. in analysis	43	35.5	11	8.1	40	33.1	13	9.6
Total	121	100.0	136	100.0	121	100.1	136	100.0
District Court Decisions								
Not included in opinion	70	64.8	111	61.7	69	63.9	118	65.6
Mentions standard	10	9.3	28	15.6	11	10.2	24	13.3
Discusses (explains) std.	0	0.0	2	1.1	0	0.0	0	0.0
Applies std. in analysis	28	25.9	39	21.7	28	25.9	38	21.1
Total	108	100.1	180	100.1	108	100.0	180	100.0

[a] Note: cases coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. Also includes cases with indeterminate vote, but excludes per curiam decisions.

TABLE 3-14: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* RULE NUMBER FOUR IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (EXCLUDING PER CURIAMS), DEMOCRATIC AND REPUBLICAN APPOINTEES, 1957-1998[A]

Circuit Court Case Usage	Democrats				Republicans			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Roth not cited	19	40.4	80	74.8	17	32.1	87	71.9
Case cited at least once	8	17.0	15	14.0	17	32.1	17	14.0
Actual rule of law cited	14	29.8	8	7.5	16	30.2	11	9.1
Criticizes reasoning	0	0.0	0	0.0	0	0.0	0	0.0
Distinguishes	0	0.0	0	0.0	0	0.0	0	0.0
Interprets/clarifies	0	0.0	0	0.0	0	0.0	2	1.7
Roth rule as controlling, Persuasive	6	12.8	3	2.8	3	5.7	4	3.3
Trying to harmonize case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule	0	0.0	1	0.9	0	0.0	0	0.0
Total	47	100.0	107	100.0	53	100.1	121	100.0
District Court Case Usage	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
Roth not cited	54	40.9	100	73.5	14	32.6	117	78.5
Case cited at least once	29	22.0	19	14.0	8	18.6	22	14.8
Actual rule of law cited	40	30.3	16	11.8	14	32.6	6	4.0
Criticizes reasoning	0	0.0	0	0.0	0	0.0	0	0.0
Distinguishes	1	0.8	0	0.0	0	0.0	0	0.0
Interprets/clarifies	1	0.8	0	0.0	3	7.0	3	2.0
Roth rule as controlling, Persuasive	7	5.3	0	0.0	4	9.3	1	0.7
Trying to harmonize case with *Roth* rule of law	0	0.0	0	0.0	0	0.0	0	0.0
Questions value of rule	0	0.0	1	0.7	0	0.0	0	0.0
Total	132	100.1	136	100.0	43	100.1	149	100.0

[a] Presented as frequencies, and as percentages. Includes opinions with an indeterminate judicial vote, but excludes per curiam decisions.

TABLE 3-15: SHEPARD'S CITATION AND USAGE OF *MILLER V. CALIFORNIA* (1973) RULE OF LAW NUMBER TWO IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (EXCLUDING PER CURIAMS), DEMOCRATIC AND REPUBLICAN APPOINTEES, 1973-1998[A]

Circuit Court Case Usage	Democrats		Republicans	
	N	%	N	%
Miller not cited	44	41.1	52	43.0
Case cited at least once	19	17.8	29	24.0
Actual rule of law cited in opinion	18	16.8	19	15.7
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	1	0.9	0	0.0
Interprets or clarifies rule	3	2.8	6	5.0
Miller rule as controlling, persuasive	22	20.6	15	12.4
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	107	100.0	121	100.0

District Court Case Usage	N	%	N	%
Miller not cited	75	55.1	76	51.0
Case cited at least once	22	16.2	32	21.5
Actual rule of law cited in opinion	14	10.3	12	8.1
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	0	0.0
Interprets or clarifies rule	1	0.7	3	2.0
Miller rule as controlling, persuasive	24	17.6	26	17.4
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	136	99.9	149	100.0

[a] Presented as frequencies, and as percentages. Only post-*Miller* cases used for analysis of *Miller v. California* (1973). This analysis excludes per curiam decisions.

TABLE 3-16: USAGE OF *ROTH V. UNITED STATES* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (EXCLUDING PER CURIAMS), DEMOCRATIC AND REPUBLICAN APPOINTEES, 1957-1998[A]

Usage of *Roth v. United States*	Average Person, Contemporary Community Stds.							
	Democrats				Republicans			
	Pre-*Miller*		Post-*Miller*		Pre-*Miller*		Post-*Miller*	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	24	51.1	97	90.7	31	58.5	107	88.4
Mentions standard	8	17.0	4	3.7	6	11.3	6	5.0
Discusses (explains) standard	2	4.3	1	0.9	2	3.8	0	0.0
Applies standard in analysis	13	27.7	5	4.7	14	26.4	8	6.6
Total	47	100.1	107	100.0	53	100.0	121	100.0
District Court Decisions								
Not included in opinion	90	68.2	129	94.9	20	46.5	145	97.3
Mentions standard	11	8.3	7	5.1	5	11.6	4	2.7
Discusses (explains) standard	5	3.8	0	0.0	2	4.7	0	0.0
Applies standard in analysis	26	19.7	0	0.0	16	37.2	0	0.0
Total	132	100.0	136	100.0	43	100.0	149	100.0

Usage of *Roth v. United States*	Dominant Theme, Prurient Interest							
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	23	48.9	94	87.9	27	50.9	107	88.4
Mentions standard	6	12.8	5	4.7	6	11.3	6	5.0
Discusses (explains) standard	3	6.4	2	1.9	1	1.9	0	0.0
Applies standard in analysis	15	31.9	6	5.6	19	35.8	8	6.6
Total	47	100.0	107	100.1	53	100.0	121	100.0
District Court Decisions								
Not included in opinion	82	62.1	129	94.9	17	39.5	146	98.0
Mentions standard	15	11.4	7	5.1	4	9.3	3	2.0
Discusses (explains) standard	2	1.5	0	0.0	1	2.3	0	0.0
Applies standard in analysis	33	25.0	0	0.0	21	48.8	0	0.0
Total	132	100.0	136	100.0	43	99.9	149	100.0

[a] This analysis excludes per curiam decisions.

TABLE 3-17: USAGE OF *MILLER V. CALIFORNIA* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (EXCLUDING PER CURIAMS), DEMOCRATIC AND REPUBLICAN APPOINTEES, 1973-1998[A]

Usage of *Miller v. California*	Average person, Cont. Comm. Stds				Dominant Theme, Prurient Interest			
	Democrats		Republicans		Democrats		Republicans	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	64	59.8	70	57.9	64	59.8	79	65.3
Mentions standard	17	15.9	15	12.4	18	16.8	20	16.5
Discusses (explains) std.	3	2.8	3	2.5	0	0.0	0	0.0
Applies std. in analysis	23	21.5	33	27.3	25	23.4	22	18.2
Total	107	100.0	121	100.0	107	100.0	121	100.0
District Court Decisions								
Not included in opinion	89	65.4	93	62.4	93	68.4	96	64.4
Mentions standard	13	9.6	14	9.4	12	8.8	18	12.1
Discusses (explains) std.	4	2.9	2	1.3	1	0.7	1	0.7
Applies std. in analysis	30	22.1	40	26.8	30	22.1	34	22.8
Total	136	100.0	149	99.9	136	100.0	149	100.0

Usage of *Miller v. California*	Patently Offensive				LAPS Value			
	Democrats		Republicans		Democrats		Republicans	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	69	64.5	80	66.1	71	66.4	85	70.2
Mentions standard	14	13.1	16	13.2	12	11.2	14	11.6
Discusses (explains) std.	1	0.9	5	4.1	1	0.9	2	1.7
Applies std. in analysis	23	21.5	20	16.5	23	21.5	20	16.5
Total	107	100.0	121	100.0	107	100.0	122	100.0
District Court Decisions								
Not included in opinion	90	66.2	91	61.1	90	66.2	97	65.1
Mentions standard	16	11.8	22	14.8	16	11.8	18	12.1
Discusses (explains) std.	0	0.0	2	1.3	0	0.0	0	0.0
Applies std. in analysis	30	22.1	34	22.8	30	22.1	34	22.8
Total	136	100.0	149	100.0	136	100.1	149	100.0

[a] Note: cases coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. Also includes cases with indeterminate vote, but excludes per curiam decisions.

TABLE 3-18: SHEPARD'S CITATION AND USAGE OF *ROTH V. UNITED STATES* RULE OF LAW NUMBER FOUR IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), EARLIER AND LATER CASES, 1957-1973[A]

Circuit Court Case Usage	First five post-*Roth* years		Other pre-*Miller* cases	
	N	%	N	%
Roth not cited	11	35.5	51	50.5
Case cited at least once	9	29.0	19	18.8
Actual rule of law cited in opinion	7	22.6	24	23.8
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	0	0.0
Interprets or clarifies rule	0	0.0	0	0.0
Roth rule as controlling, persuasive	4	12.9	7	6.9
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	31	100.0	101	100.0

District Court Case Usage	N	%	N	%
Roth not cited	10	38.5	61	39.6
Case cited at least once	8	30.8	30	19.5
Actual rule of law cited in opinion	3	11.5	51	33.1
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	1	0.6
Interprets or clarifies rule	2	7.7	2	1.3
Roth rule as controlling, persuasive	3	11.5	9	5.8
Trying to harmonize present case with *Roth* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	26	100.0	154	99.9

[a] Presented as frequencies, and as percentages. This analysis includes opinions with an indeterminate judicial vote.

TABLE 3-19: SHEPARD'S CITATION AND USAGE OF *MILLER V. CALIFORNIA* RULE OF LAW NUMBER TWO IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), EARLIER AND LATER CASES, 1973-1998[A]

Circuit Court Case Usage	First five post-*Miller* years		Other cases	
	N	%	N	%
Miller not cited	24	23.3	93	55.7
Case cited at least once	33	32.0	28	16.8
Actual rule of law cited in opinion	20	19.4	20	12.0
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	1	0.6
Interprets or clarifies rule	4	3.9	5	3.0
Miller rule as controlling, persuasive	22	21.4	20	12.0
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	103	100.0	167	100.1

District Court Case Usage	N	%	N	%
Miller not cited	20	27.4	132	61.1
Case cited at least once	12	16.4	43	19.9
Actual rule of law cited in opinion	13	17.8	14	6.5
Criticizes reasoning of rule	0	0.0	0	0.0
Distinguishes rule from present case	0	0.0	0	0.0
Interprets or clarifies rule	2	2.7	2	0.9
Miller rule as controlling, persuasive	26	35.6	25	11.6
Trying to harmonize present case with *Miller* rule of law	0	0.0	0	0.0
Questions value of rule of law	0	0.0	0	0.0
Total	73	99.9	216	100.0

[a] Presented as frequencies, and as percentages. This analysis includes opinions with an indeterminate judicial vote.

TABLE 3-20: USAGE OF *ROTH V. UNITED STATES* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), EARLIER AND LATER CASES, 1957-1998[A]

Usage of *Roth v. United States*	Average Person, Contemporary Community Stds.			
	First five post-*Roth* years		Other pre-*Miller* cases	
	N	%	N	%
Circuit Court Decisions				
Not included in opinion	16	51.6	69	68.3
Mentions standard	4	12.9	12	11.9
Discusses (explains) standard	2	6.5	2	2.0
Applies standard in analysis	9	29.0	18	17.8
Total	31	100.0	101	100.0
District Court Decisions				
Not included in opinion	15	57.7	100	64.9
Mentions standard	4	15.4	12	7.8
Discusses (explains) standard	1	3.8	6	3.9
Applies standard in analysis	6	23.1	36	23.4
Total	26	100.0	154	100.0

Usage of *Roth v. United States*	Dominant Theme, Prurient Interest			
	First five post-*Roth* years		Other pre-*Miller* cases	
	N	%	N	%
Circuit Court Decisions				
Not included in opinion	14	45.2	68	67.3
Mentions standard	3	9.7	9	8.9
Discusses (explains) standard	4	12.9	0	0.0
Applies standard in analysis	10	32.3	24	23.8
Total	31	100.1	101	100.0
District Court Decisions				
Not included in opinion	13	50.0	89	57.8
Mentions standard	2	7.7	17	11.0
Discusses (explains) standard	0	0.0	3	1.9
Applies standard in analysis	11	42.3	45	29.2
Total	26	100.0	154	99.9

[a] Note: cases were coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which a judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. This analysis also includes cases with an indeterminate vote.

TABLE 3-21: USAGE OF *MILLER V. CALIFORNIA* STANDARDS IN CIRCUIT AND DISTRICT COURT MAJORITY OPINIONS (INCLUDING PER CURIAMS), EARLIER AND LATER CASES, 1973-1998[A]

Usage of *Miller v. California*	Average person, Cont. Comm. Stds				Dominant Theme, Prurient Interest			
	First five yrs after *Miller*		Other Cases		First five yrs after *Miller*		Other cases	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	40	38.8	118	70.7	54	52.4	118	70.7
Mentions standard	13	12.6	22	13.2	10	9.7	30	18.0
Discusses (explains) std.	3	2.9	4	2.4	0	0.0	0	0.0
Applies std. in analysis	47	45.6	23	13.8	39	37.9	19	11.4
Total	103	99.9	167	100.0	103	100.0	167	100.1
District Court Decisions								
Not included in opinion	38	52.1	145	67.1	41	56.2	149	69.0
Mentions standard	5	6.8	22	10.2	8	11.0	23	10.7
Discusses (explains) std.	4	5.5	2	0.9	2	2.7	0	0.0
Applies std. in analysis	26	35.6	47	21.8	22	30.1	44	20.4
Total	73	100.0	216	100.0	73	100.0	216	100.1

Usage of *Miller v. California*	Patently Offensive				LAPS Value			
	First five yrs after *Miller*		Other Cases		First five yrs after *Miller*		Other cases	
	N	%	N	%	N	%	N	%
Circuit Court Decisions								
Not included in opinion	52	50.5	124	74.3	58	56.3	12	76.0
Mentions standard	9	8.7	23	13.8	6	5.8	22	13.2
Discusses (explains) std.	3	2.9	3	1.8	2	1.9	1	0.6
Applies std. in analysis	39	37.9	17	10.2	37	35.9	17	10.2
Total	103	100.0	167	100.1	103	99.9	167	100.0
District Court Decisions								
Not included in opinion	40	54.8	142	65.7	39	53.4	149	69.0
Mentions standard	9	12.3	29	13.4	10	13.7	25	11.6
Discusses (explains) std.	1	1.4	1	0.5	0	0.0	0	0.0
Applies std. in analysis	23	31.5	44	20.4	24	32.9	42	19.4
Total	73	100.0	216	100.0	73	100.0	216	100.0

[a] Note: cases were coded separately from Shepard's determination of *Roth*/*Miller* usage; cases in which a judge noted variants of phrase "applying the *Roth* (or *Miller*) standards" were coded as applying all aspects of *Roth* or *Miller*. This analysis also includes cases with an indeterminate vote.

CHAPTER 4

THE COLLECTIVE IMPACT OF SUPREME COURT OBSCENITY PRECEDENT IN FEDERAL CIRCUIT AND DISTRICT COURTS, 1957-1998

> "The *Miller* three-part test is a limitation beyond which neither legislatures nor juries may go."
> Justice Traxler; *Vernon Beigay, Inc. v. Traxler* (790 F.2d 1088, 1094 (1986))

> "Put overly simply, compliance is carrying out the letter of the decision and implementation is fostering its spirit." (Canon 1991, 439)

This chapter analyzes the influence of Supreme Court precedents in federal circuit and district court obscenity cases, by answering the following research questions. First, to what extent do doctrinal shifts by the High Court influence lower court decision trends? Second, do such impacts depend on legal or political factors? This chapter analyzes the macro-level voting patterns of circuit and district court judges, using an analysis-of-variance test to assess the influence of such factors as *Miller v. California* (1973) and *Memoirs v. Massachusetts* (1966). Further analysis evaluates such potentially intervening factors as the types of judges involved (Republican or Democratic presidential appointee), the judicial cohort on the court (whether appointed prior to the *Miller* decision or otherwise) and the type of case involved (such as a "factual" or non-factual obscenity case).

Methodology

The overwhelming majority of judicial impact research tends to focus its analysis on significant decisions of the Supreme Court and the responses of lower courts to such changes, by sifting through court opinions at all levels. While such secondary data may be the only data available for the task at hand, they provide certain advantages such as the opportunity for replicating previous studies and the improvement of measurement indicators (Nachmias and Nachmias 1992, 292-293). One method of assessing the impact of an event is a simple time-series design, "in which pretest and posttest measures are available on a number of occasions before and after the activation of an independent variable" (Ibid., 134). Most studies assessing the actual impact of Supreme Court policy changes use this method of analysis, positing that there will be a collective change in behavior after the introduction of a new doctrine. Whether analyzed at the level of federal circuit (Songer 1987; Songer and Sheehan 1990) or district courts (Johnson 1987), the prevailing method of analysis remains the same in most works: investigate the ideological rulings by lower courts before and after the Supreme Court announces a change in its prevailing doctrine. The Supreme Court at times has changed its doctrine in various areas (Johnson 1987), in issues such as conscientious objector status, economic regulation and habeas corpus (Stidham and Carp 1982), labor and antitrust (Songer 1987), and libel and self-incrimination (Songer and Sheehan 1990).

In order to provide an initial glimpse of the alleged effects of the Supreme

Court in the area of obscenity, this chapter used a pre-test, post-test method with the judicial vote (not case) as the unit of analysis. This had the added advantage of comparing individual-level explanations such as previous judicial experience and presidential appointment more directly. Similar to previous studies of judicial impact (e.g. Songer 1987; Songer and Sheehan 1992), the research presented in this chapter uses an analysis-of-variance test. The analysis omits cases with mixed results; that is, cases in which the judge rules in a liberal fashion on one issue (e.g. statute is overbroad) but conservative on another issue (e.g. adversary hearing is not necessary, as the sheriff had discretion). It also analyses only circuit and district judges, and thus removes from analysis any other judges (e.g. commerce judges sitting in on the courts). A coding of the cases led to 1216 votes in circuit-level cases (1125 circuit judge votes, 91 district judge votes) and 567 district-level votes (510 district votes, 57 circuit votes). A separation of cases into "factual" and other cases led to a total of 259 circuit-level factual decisions (242 circuit , 17 district) and 106 district-level decisions (102 district , 4 circuit). The cases were analyzed using STATA version 7 and the calculation of ANOVA.

Analysis and Results

Table 4-1 reports the initial test of both the hierarchy and resistance theories, including separate analyses for both appellate and district court judges

involved in district- or appellate-level cases, respectively.[185] The *Miller* decision represented a significant change in the Court's obscenity doctrine: not only did it expand the legal boundaries of what is obscene but it also gave more credence to national- and state-level prosecutions by focusing on local community standards. As noted by Kobylka, the Supreme Court itself tended to rule more often in a conservative direction after the *Miller* decision (1987). If the judicial hierarchy holds true (e.g. Songer 1987), one should expect that both circuit and district court judges will respond to the spirit of *Miller* by turning more conservative after the High Court decision, and thus there should be a significant collective drop in judicial liberalism in both the circuit and district court levels. Alternately, if the theory of resistance holds true, one should find no significant change among the circuit or district court judges and thus no significant collective decrease in liberalism or increase in conservatism.

Such results provide some marginal support for judicial hierarchy, with some influence of Supreme Court policy in the lower courts. At the circuit-court level, the percentage of conservative/proscriptionist votes by circuit-court judges changes after the adoption of the *Miller v. California* (1973) doctrine; whereas appellate judges are roughly 45 percent likely to rule in a liberal direction prior to the *Miller* decision, they are only 36 percent likely to do the same after the

[185] On first glance it would seem appropriate not to separate circuit and district judges in the analyses (conducting separate tests for circuit and district judges in circuit-level cases, for example), yet it became useful to separate them as a test of the influence of hierarchy on the

Supreme Court issued its newest doctrine. The actual change in means appears modest at first glance, as circuit court judges exhibit a greater conservatism than was present prior to the adoption of *Miller*; nonetheless, there is a less than 0.5 percent likelihood of this being statistically due to chance. This finding is consistent with the judicial impact literature on the federal circuit courts, whether based on a simple bivariate analysis (Songer 1987; but see Songer and Sheehan 1990) or more sophisticated maximum-likelihood analyses (Brent 1999; Songer and Haire 1992; Songer, Segal and Cameron 1994). It suggests further that even with the addition of a variety of obscenity case types (e.g. adult establishment zoning requirements, search-and-seizure issues) and an increase in the number of years since the precedent (1991-1998) the *Miller* decision still holds sway over federal appellate court judges. Thus, it appears the influence of the Supreme Court's doctrine in obscenity cases extends further than 1990 within the circuit courts (Songer and Haire 1992: Table 2, 977). The majority of district judges also ruled more conservatively after *Miller* (40.74 liberal before and 32.81 percent after, respectively). However, because of the much smaller number of such votes, the difference in their votes before and after the *Miller* decision was not statistically significant.

The 9.3% statistically significant increase in conservatism for circuit judges and the (not statistically significant) increase of 7.93% in conservatism for

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courts. If it is true that circuit court judges are institutionally closer than district judges to the

district court judges voting in circuit court decisions suggests the influence of *Miller*. High Court doctrine appears influential and circuit judge voting tends to conform to the judicial hierarchy as expected.

The results for the district-court cases reveal that both district court and circuit courts judges were considerably more likely to cast liberal votes in obscenity and pornography cases than were their counterpart in circuit court cases. However, the results offer less support for the influence of Supreme Court doctrine as an indication of the judicial hierarchy. The overall liberalism of district-court judges in district court cases lessens after the introduction of *Miller* (from 59.09 percent to 53.79 percent), one can not say with 90 percent confidence that such a change is statistically significant, despite the large N involved, in contrast to previous studies of other issues (e.g. Lloyd 1995; Sanders 1995; Stidham and Carp 1982). The likelihood of a liberal vote from an appellate-court judge voting in a district court case also decreases after the adoption of *Miller* (from 70.27 percent to 65.00 percent), but this decrease also does not reach any conventional levels of statistical significance. One possible explanation is that the results are due to the types of cases under analysis (something suggested in Chapter 3): many cases under analysis do not make an official determination of obscenity but rather deal with other legal issues (such

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Supreme Court, one should expect circuit judges to respond more strongly to Court precedent.
[186] As a further method to determine the potential significance of this relationship, a χ^2 test yielded a value of 1.426; with one degree of freedom, there is a 23 percent chance that the

as zoning regulations or the necessity of adversary hearings), and the Supreme Court's decision in *Miller* has as its focus the "trier of fact" who determines the actual obscenity of certain materials. (This is the subject of analysis in Table 4-5.) It appears that when analyzing obscenity cases at the lower federal levels, circuit court judges voting in circuit cases (the largest group of judges I am analyzing) court–but not other judges--appear to accept the spirit of the *Miller* decision and rule accordingly in their judicial behavior. The results suggest that for circuit-level judges in appellate cases "the hierarchical model should not be discarded yet" (Gruhl 1980), but the findings of High Court influence on district court judges in district-level cases are not as consistent with those of Stidham and Carp (1982) and other studies (e.g. Sanders 1995).

To what extent did lower courts pay attention to other High Court precedent, *Memoirs v. Massachusetts* (1966) in particular? As noted in Chapter 2, *Memoirs* altered the Court's definition of obscenity by including the "socially redeeming value" standard; thus, one could attempt to persuade jurists and juries of the social value of the allegedly obscene item(s) and perhaps guide the judges in favor of a more liberal or libertarian decision. Does this change in Court doctrine actually influence lower-court decisions? Table 4-2 reports the percentage of liberal decisions in circuit and district courts accounting for this alteration in Supreme Court precedent. The results suggest that judges in circuit

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relationship does not exist in fact.

court cases do tend to respond to the *Memoirs* standards with a greater degree of liberal/libertarian votes than in cases prior to *Memoirs*. Within the circuit courts, both circuit- and (the relative small number of) district-level judges respond with an increased liberalism (from 34.13 to 51.20 percent and from 12.50 to 52.63 percent, respectively). At the district court level, however, the effect is more muted. District-level judges do respond to the *Memoirs* decision with increased liberalism (from 48.84 to 61.58 percent) but the same does not hold true for (also relatively small number of) circuit judges, with an actual decrease in liberalism (from 80.0 to 68.75 percent).[187] District-level judges tend to be more liberal, but the before and after *Memoirs* difference is statistically significant at only the .10 level.

Given the potential intervention of *Memoirs*, does the Supreme Court's decision in *Miller v. California* still influence lower court decision-making behavior? Table 4-2 offers some resolution to this question but finds mixed support for the influence of *Miller* at the circuit- and district-court levels. After having heard legal arguments presented within the circuit courtrooms, both circuit and district judges tend to vote more conservatively in post-*Miller* cases than in cases after *Memoirs* but prior to *Miller*. The level of liberalism among appellate judges drops from 51.20 percent to 36.18 percent, and remains statistically significant (4.1535, $p < .0001$). A similar decrease in liberalism

[187] This might be in part a function of the relatively low number of circuit-judge votes (37).

occurs among district judges sitting in on circuit-level cases (from 52.63 to 32.81 percent), something corresponding to expectations, and the likelihood of this being due to chance ($p = .062$) suggests that such visiting judges considered *Miller* important in their votes. Thus both circuit and district court judges, presiding over cases in their respective chambers, find *Miller* compelling enough to rule in a more conservative direction.

A similar picture emerges within the district courts cases: both circuit- and district-court judges exhibit a lesser degree of liberalism in decisions subsequent to the *Miller* decision than in cases soon before the adoption of *Miller* but after *Memoirs* . The -7.70 difference exhibited by district court judges is statistically significant ($p < .05$). The same cannot be said for the smaller difference in voting displayed by those circuit judges invited to assist with district-level cases.

Overall, then, one finds circuit- and district-court judges generally to be attentive to the Supreme Court's shift in "legal regimes" (Richards and Kritzer 1998) and its lesser alterations (with the introduction of the *Memoirs* decision. Thus, without considering a potential time period for lower-courts to adjust to the Supreme Court's newer doctrine (e.g. Songer and Sheehan 1990), one finds lower court judges responding positively to Supreme Court precedent.

As one test of the influence of organizational theory on the decisions of judges, one can examine the influence of ideology and presidential intentions within the federal courtrooms. Is it true that lower-court judges will seek to justify

their previously-held views on policy, by being more likely to adopt the prevailing precedent as it suits them (Baum 1976, 1980)? Nominally, one should expect that if the judicial hierarchy remains in place, both Republican and Democratic appointees would conform to the spirit of the law by becoming more conservative after mid-1973. As obscenity involves a variety of issues pertaining not only to such questions as freedom of expression but also the rights of the criminally accused and due process, however, one might expect Republican appointees to be more willing than their Democratic brethren to accept the Supreme Court's more conservative precedent; thus, one should see a significantly greater degree of conservatism among Republican appointees (rather than Democratic appointees) in cases after the *Miller* decision. If this notion of partisanship holds true (e.g. Carp and Rowland 1983; Goldman 1975, 1997; Rowland and Carp 1996), this leads to the hypothesis that the gap between Republican and Democratic appointees will be significant, even in cases prior to the adoption of *Miller*. Taken a step further, this notion of partisan differences should lead to the hypothesis of an amplifying effect: Republican appointees will take their conservatism even further, while Democratic appointees might resist this new policy by not voting in a significantly more conservative direction and thus one will see a greater gap between such appointees after the *Miller* decision. More specifically, this led to the proposition that there will be a greater disparity in liberalism between Republican and Democratic appointees after the *Miller*

decision, than prior to the *Miller* decision. Table 4-3 explores the possible intervening influence of presidential intentions in lower court obscenity decisions.

What is striking at first glance is the marginal support for the influence of *Miller* among appointees of both Democratic and Republican presidents. In most groups Republican appointees tend to vote more often in a conservative fashion than did their Democratic counterparts (except for district-level judges sitting in on circuit cases after the *Miller* decision); this suggests that the influence of presidential partisanship remains important within the field of obscenity. With two exceptions (district judges appointed by Republicans sitting in circuit court cases and circuit court judges appointed by Democrats in district court cases), both Republican and Democrat-appointed judges do become more conservative after *Miller.*[188] However, in only one instance (circuit court judges appointed by Republicans) do the post-*Miller* changes reach any standard level of significance. The results show evidence of the expected amplifying effect: Democratic appointees increase their post-*Miller* conservatism less than Republicans in every case but one (district judges voting in circuit court cases). Surprisingly, while Democratic appointees are more liberal in most instances (the exception is circuit judges sitting in district court cases), the differences

[188] This varies in part from the study of obscenity cases conducted by Songer and Haire, which finds a greater degree of conservatism among Reagan appointees and greater liberalism among Johnson and Carter appointees regardless of intervening factors such as case facts and the

between Republican and Democratic appointees attains statistical significance only for the large number of circuit court judges sitting in circuit court cases. This suggests that presidential intentions may divide the federal circuit and district courts ideologically in obscenity cases as much as the prevailing literature on federal lower courts would suggest (e.g. Goldman 1966, 1975; Rowland and Carp 1996; Songer 1987).

Yet another test of the influence of the judicial organization is the time of appointment for each judge. As Gibson notes in his discussion of judicial behavior and theory, "[I]n a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (1983, 9). If this holds true, then one should expect that lower-court judges will attune themselves to High Court doctrine and, if necessary, alter their decision-making patterns in line with such changes because of such constraints whether external (e.g. remands) or internal (perception that the Supreme Court will reverse their ruling). While much of the literature to date tends not to support the idea (Johnson 1987; Songer 1987; Songer and Sheehan 1990), one might still make the argument that, as newer judges (those appointed after *Miller*) find themselves uncertain not only about what they "ought" to do but what they might believe is feasible. As a result, they should be more likely to be guided by High Court precedent and doctrine than

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Miller ruling (1992: Table 2, 976).

their more seasoned ("holdover") colleagues who have a firmer grasp of what is likely to be refused and remanded by their higher-court superiors, and also have a better understanding of how much authority the emerging precedent has (Baum 1976). Hypothesizing that newer judges are more receptive to Supreme Court obscenity doctrine, this leads to the expectation of a significantly lower percentage of liberal obscenity decisions after the *Miller* ruling emerging from newer court appointees than from their more experienced brethren. In a more extreme form, this leads to the supposition that more experienced judges would have their own deeply-rooted views about obscenity and are unlikely to change dramatically in the face of Supreme Court precedent, and as a result one should find no significant decrease in liberalism among these judges after the adoption of the *Miller v. California* decision.

Table 4-4 highlights the change in behavior of pre- and post-*Miller* appointees in both district and circuit cases. Within the circuit courtrooms one finds some responsiveness of both new and "holdover" circuit judges to the Court's *Miller* decision. Circuit court holdover judges tend decrease their liberalism in circuit court cases by a statistically significant -10.5%, but actually become slightly more liberal (4.74%) in the relatively infrequent instances in which they cast votes in district court cases. District court holdover judges change much less, by -4.15% in the relatively rare instances when they are voting in circuit court cases and -2.07% when voting in district court cases. The

largest category of judge-votes--cast by appellate holdover justices deciding appellate cases--did, therefore, show the influence of *Miller*, though other judge-vote categories did not.

How did the holdover justices compare to the new judges appointed after *Miller*? The post-*Miller* appointees were in three of four instances more conservative than the holdover judges in post-*Miller* case voting, but only the result for the very small N category of circuit judges voting in district court cases attained statistical significance. Furthermore, the one instance in which the new justices were actually more liberal than the holdover judges was for the most populous category, circuit court judges voting in circuit court cases. The results thus show no consistent patterns of differences between judges appointed before and after *Miller* that would support the expectation that holdover justices would be less subject to the influence of precedent that new judges.

The earlier discussion of the judicial hierarchy suggests that the impact of the *Miller* decision might depend upon the type of case involved? Applying this broadly, one should expect that judges are more willing to adopt a certain precedent as the case at hand is more closely aligned to that precedent. As *Miller* outlined the standards that lower courts are to use when scrutinizing various materials. Therefore, it would be reasonable to expect that judges would take an increased interest in *Miller* and its rulings when deciding the fate of such items as films, magazines and even live stage productions. As a result, this led

to the hypothesis that while one might expect an increased conservatism among judges in both factual and other cases, the extent of such increased conservatism should be greater in the former--the cases in which the judge must rule either on the actual obscenity of the materials or on the propriety of the lower court's (or else the jury's or magistrate's) ruling that the materials were obscene. Previous compliance literature has tested the influence of Court policy on a variety of cases (e.g. Gruhl 1980), but research to date has not tested the divergent impact of Supreme Court policy on different case types within a single issue area. Previous research on obscenity finds Supreme Court policy to influence not only its later decisions (Kobylka 1987; Richards and Kritzer 1998), but circuit court decision-making as well (Songer and Haire 1992). In order to test this proposition, I classified cases as either factual or non-factual in their content. Did the influence of Supreme Court obscenity doctrine hold true not only for factual decisions but also in cases where there is no official determination about the actual obscenity of certain materials?

The results reported in Table 4-5 provide some but not overwhelming support for this proposition. In the most populous category (circuit court judges voting in circuit court cases), judicial voting was indeed more conservative after *Miller.* As one would have predicted, the increase in conservatism was much greater for the factual cases than for other cases; indeed the difference for the much more numerous other cases does not attain statistical significance. The

differences between factual and other cases are statistically significant for post-, but not for pre-*Miller* cases in this category. The difference for the latter is in the wrong direction and statistically significant, on a two-tailed assumption. The same expected pattern is exhibited by the results for district court judges voting in circuit court cases even in the pre-*Miller* comparison between factual and other cases. However, perhaps because of the much smaller N's involved, none of these differences attains statistical significance.

Ignoring the results for the extremely small number of circuit court judge votes in district court cases (N = 4!), one also finds the expected patterns of differences for district court judges voting in district court cases. The expected differences between factual and other cases are large and statistically significant in both pre- and post-*Miller* cases. The expected increases in conservatism after *Miller* occurs in both factual and other cases, but these differences do not achieve statistically significant levels. These results document that the federal courts generally do treat factual cases differently from other obscenity cases.

One last test of the judicial hierarchy is the distinct responses of circuit and district judges to High Court precedent. Although the literature to date tends not to find circuit courts to be more compliant than district courts in adopting Supreme Court rulings (Johnson 1987; Reid 1988), there is a paucity of research comparing both levels of the court in obeying the spirit of the law—that

[189] A χ^2 test yielded a value of 0.86; with one degree of freedom, there is an approximately 77

is, comparing their overall voting patterns within the same issue area. Owing to the closer proximity of circuit judges (than district judges) to the Supreme Court, and thus a greater likelihood of the Court monitoring their decisions, this led to the expectation that circuit judges would be more responsive to the emerging *Miller* doctrine. Stated another way, as circuit courts are only one step below the Supreme Court one should expect that High Court policy will have a greater impact upon them than upon the district courts. This leads to the hypothesis that the disparity between pre- and post-*Miller* rulings will be greater for circuit judges than for district judges, and thus there should be a greater percentage change (in increased conservatism) at the circuit level than the district level.

Revisiting Table 4-1, one can see that circuit court judges voting in circuit court cases decreased their liberalism after *Miller* by s highly statistically significant -9.30%. District court judges voting in district court cases also decreased their liberalism after *Miller*, but by a smaller and not statistically significant -5.40%. At this general level, then, one finds a greater responsiveness by circuit court judges (in appellate cases) than district judges (in district cases) to Supreme Court precedent.

Chapter Summary

This chapter assessed the likelihood that the Supreme Court's doctrine influenced lower court behavior in obscenity cases. While circuit court cases

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percent chance that the relationship does not exist in fact.

tend to become more conservative after the 1973 ruling (and district cases less so), such initial results tend to mask more specific factors such as type of presidential appointee, type of case ("factual" vs. other) and even the type of judge making the decision (circuit vs. district, pre- versus post-*Miller* appointees). Overall, circuit court judges tend to respond more significantly than district judges to the *Miller* doctrine, exerting a greater conservatism after the High Court's ruling. Thus, there is some support for the hierarchical model at the circuit level, and less at the district court level (though not enough to accept the notion of judicial resistance). An overall comparison of circuit and district judges' voting patterns suggests that the distance between the Supreme Court and each lower court has an impact on their judicial choices, as appellate judges significantly altered their decisions (in circuit cases) in light of the *Miller* decision and district court judges (in district cases) did not.

There is some but certainly not overwhelming support for the influence of presidential intentions. The effects of partisanship cohorts are mixed: there appears a partisan split for circuit judges dealing with circuit-level cases (with Republicans more conservative overall and responding more significantly to the *Miller* doctrine with a greater degree of conservatism), but the partisan effect is muted at the district level.

The findings with regard to one aspect of organizational theory--the influence of judicial cohorts--is similarly mixed. While the *Miller* doctrine does

influence circuit judges voting in circuit-level cases (with more conservative rulings by "holdover" judges in post-*Miller* cases), the same does not occur with sufficient frequency for district judges dealing with district-level cases. In addition, the only significant new/holdover split occurs with circuit judges who deal with district-level cases; thus, to the extent that judges respond to the Supreme Court's doctrines with greater conservatism, it is not a matter of appointment.

Last, the influence of policy ("factual" versus other obscenity decisions) is also muted in part. At the circuit level, circuit judges do indeed respond to the Court's *Miller* doctrine by voting in a much more conservative direction afterwards, and there are significant splits in "factual" versus other cases (although in an unexpected direction prior to the *Miller* decision). At the same time, district judges ruling in district-level cases tend to lessen their liberalism but yet only significantly in non-factual cases; in factual cases they remain at the same rate of conservatism.

Perhaps Pacelle and Baum are correct, that "The finding that the distance between the Supreme Court and a lower court affects responses to remands had a strong theoretical basis, and it seems quite reasonable. Direct review by the Court seems to bind lower courts more directly to the Court and its rulings." (1992, 185) They find in their analysis of lower-court responses to Supreme Court remands that, holding a variety of other factors constant (e.g. type of

Supreme Court order such as remand, length of time between remand and lower-court decision), the likelihood that a winner in the Supreme Court did the same in the lower-court remand was negatively related to the number of steps from the Supreme Court (Tables 3 and 4, 183-184). Put another way, Supreme Court "winners" were more likely to win in circuit-court remands than in those landing in district courts.

The next research question asks: to what extent is the influence of the *Miller* decision more complex than portrayed in a simple analysis? Might such High Court doctrine need to contend with such competing factors as the influence of federal prosecution or the geographical region of the case, or even the types of constitutional (or other) claims made by the litigants themselves? To what extent does the *Miller* decision actually alter judicial behavior? More importantly for the analysis of district-level decisions, is the effect of *Miller* contingent upon other non-doctrinal factors? This becomes the focus of the multivariate analysis offered in Chapter 5.

TABLE 4-1: PROPORTION OF LIBERAL VOTES BEFORE AND AFTER *MILLER V. CALIFORNIA* IN THE UNITED STATES COURTS OF APPEALS AND DISTRICT COURTS, 1957-1998[A]

Time Period	Percent Liberal	Difference	N	Z
Circuit Court Cases				
Circuit judge votes (N)				
June 24, 1957 to June 21, 1973	45.48		376	
		-9.30		2.99**
June 22, 1973 to Dec. 31, 1998	36.18		749	
District judge votes (N)				
June 24, 1957 to June 21, 1973	40.74		27	
		-7.93		0.71
June 22, 1973 to Dec. 31, 1998	32.81		64	
District Court Cases				
Circuit judge votes (N)				
June 24, 1957 to June 21, 1973	70.27		37	
		-5.27		0.40
June 22, 1973 to Dec. 31, 1998	65.00		20	
District judge votes (N)				
June 24, 1957 to June 21, 1973	59.09		220	
		-5.30		1.20
June 22, 1973 to Dec. 31, 1998	53.79		290	

[a] Calculations based on analysis of variance for proportions using a one-tailed test.
** $p < .01$ * $p < .05$ + $p < .10$

TABLE 4-2: PROPORTION OF LIBERAL VOTES AFTER *MEMOIRS V. MASSACHUSETTS* AND *MILLER V. CALIFORNIA* IN THE UNITED STATES COURTS OF APPEALS AND DISTRICT COURTS, 1957-1998[A]

Time Period	Percent Liberal	Difference	N	Z
Circuit Court Cases				
Circuit judge votes (N)				
June 24, 1957 to March 21, 1966	34.13		126	
		17.07		-3.24**
March 22, 1966 to June 21, 1973	51.20		250	
		-15.02		4.15**
June 22, 1973 to Dec. 31, 1998	36.18		749	
District judge votes (N)				
June 24, 1957 to March 21, 1966	12.50		8	
		40.13		-2.45
March 22, 1966 to June 21, 1973	52.63		19	
		-19.82		1.54+
June 22, 1973 to Dec. 31, 1998	32.81		64	
District Court Cases				
Circuit judge votes (N)				
June 24, 1957 to March 21, 1966	80.00		5	
		-11.25		-0.57
March 22, 1966 to June 21, 1973	68.75		32	
		-3.75		-0.28
June 22, 1973 to Dec. 31, 1998	65.00		20	
District judge votes (N)				
June 24, 1957 to March 21, 1966	48.84		43	
		12.74		-1.51+
March 22, 1966 to June 21, 1973	61.58		177	
		-7.79		1.66*
June 22, 1973 to Dec. 31, 1998	53.79		290	

[a] Calculations based on analysis of variance for proportions using a one-tailed test.
** p < .01 * p < .05 + p < .10

TABLE 4-3: PROPORTION OF LIBERAL VOTES BY REPUBLICAN AND DEMOCRATIC JUDGES BEFORE AND AFTER *MILLER V. CALIFORNIA* IN THE UNITED STATES COURTS OF APPEALS AND DISTRICT COURTS, 1957-1998[A]

Time Period	Percent Liberal	Difference	N	Z
Circuit Court Cases				
Circuit judge votes: Republicans (N)				
June 24, 1957 to June 21, 1973	43.30		194	
June 22, 1973 to Dec. 31, 1998	31.83	-11.47	421	2.72**
Circuit judge votes: Democrats (N)				
June 24, 1957 to June 21, 1973	47.80		182	
June 22, 1973 to Dec. 31, 1998	41.77	-6.03	328	1.31
Circuit Republicans vs. Democrats				
June 24, 1957 to June 21, 1973	43.30% Republican, 47.80% Democrat			-0.8764
June 22, 1973 to Dec. 31, 1998	31.83% Republican, 41.77% Democrat			-2.8037**
District judge votes: Republicans (N)				
June 24, 1957 to June 21, 1973	30.77		13	
June 22, 1973 to Dec. 31, 1998	35.48	4.71	31	-0.31
District judge votes: Democrats (N)				
June 24, 1957 to June 21, 1973	50.00		14	
June 22, 1973 to Dec. 31, 1998	30.30	-19.70	33	1.26
District Republicans vs. Democrats				
June 24, 1957 to June 21, 1973	30.77% Republican, 50.00% Democrat			-1.0392
June 22, 1973 to Dec. 31, 1998	35.48% Republican, 30.30% Democrat			0.4412
District Court Cases				
Circuit judge votes: Republicans (N)				
June 24, 1957 to June 21, 1973	70.00		10	
June 22, 1973 to Dec. 31, 1998	42.86	-27.14	7	1.15
Circuit judge votes: Democrats (N)				
June 24, 1957 to June 21, 1973	70.37		27	
June 22, 1973 to Dec. 31, 1998	76.92	6.55	13	-0.45
Circuit Republicans vs. Democrats				
June 24, 1957 to June 21, 1973	70.00% Republican, 70.37% Democrat			-0.0218
June 22, 1973 to Dec. 31, 1998	42.86% Republican, 76.92% Democrat			-1.5543+

TABLE 4-3 (CONTINUED)

Time Period	Percent Liberal	Difference	N	Z
District judge votes: Republicans (N)				
June 24, 1957 to June 21, 1973	55.56		54	
June 22, 1973 to Dec. 31, 1998	50.32	-5.24	155	0.67
District judge votes: Democrats (N)				
June 24, 1957 to June 21, 1973	60.24		166	
June 22, 1973 to Dec. 31, 1998	57.78	-2.46	135	0.43
District Republicans vs. Democrats				
June 24, 1957 to June 21, 1973	55.56% Republican, 60.24% Democrat			-0.6034
June 22, 1973 to Dec. 31, 1998	50.32% Republican, 57.78% Democrat			-1.2757

[a] Calculations based on analysis of variance for proportions using a one-tailed test.
** $p < .01$ * $p < .05$ + $p < .10$

TABLE 4-4: PROPORTION OF LIBERAL VOTES BY JUDICIAL COHORT BEFORE AND AFTER *MILLER V. CALIFORNIA* IN THE UNITED STATES COURTS OF APPEALS AND DISTRICT COURTS, 1957-1998[A]

Time Period	Percent Liberal	Difference	N	Z
Circuit Court Cases				
a. Circuit judge votes (N)				
Pre-*Miller* appointees				
June 24, 1957 to June 21, 1973	45.48		376	
June 22, 1973 to Dec. 31, 1998	34.95	-10.53	372	2.95**
Post-*Miller* Decisions (N)				
Pre-*Miller* appointees	34.95		372	
Post-*Miller* appointees	37.40	2.45	377	-0.70
b. District judge votes (N)				
Pre-*Miller* appointees				
June 24, 1957 to June 21, 1973	40.74		27	
June 22, 1973 to Dec. 31, 1998	36.59	-4.15	41	0.34
Post-*Miller* Decisions				
Pre-*Miller* appointees	36.59		41	
Post-*Miller* appointees	26.09	-10.50	23	0.89
District Court Cases				
a. Circuit judge votes (N)				
Pre-*Miller* appointees				
June 24, 1957 to June 21, 1973	70.27		37	
June 22, 1973 to Dec. 31, 1998	75.00	4.73	16	-0.36
Post-*Miller* Decisions (N)				
Pre-*Miller* appointees	75.00		16	
Post-*Miller* appointees	25.00	-50.00	4	2.07
b. District judge votes (N)				
Pre-*Miller* appointees				
June 24, 1957 to June 21, 1973	59.09		220	
June 22, 1973 to Dec. 31, 1998	57.02	-2.07	121	0.37
Post-*Miller* Decisions				
Pre-*Miller* appointees	57.02		121	
Post-*Miller* appointees	51.48	-5.54	169	-0.94

[a] Calculations based on analysis of variance for proportions using one-tailed test.
** $p < .01$ * $p < .05$ $^{+}$ $p < .10$

TABLE 4-5: PROPORTION OF LIBERAL VOTES BY CASE TYPE (FACTUAL OBSCENITY CASES VERSUS OTHER) BEFORE AND AFTER *MILLER V. CALIFORNIA* IN THE UNITED STATES COURTS OF APPEALS AND DISTRICT COURTS, 1957-1998[A]

Time Period	Percent Liberal	Difference	N	Z
Circuit Court Cases				
a. Circuit judge votes (N)				
Factual Obscenity Cases				
June 24, 1957 to June 21, 1973	50.65		154	
June 22, 1973 to Dec. 31, 1998	17.05	-33.60	88	5.91**
Other Cases				
June 24, 1957 to June 21, 1973	41.89		222	
June 22, 1973 to Dec. 31, 1998	38.73	-3.16	661	0.83
Factual versus other cases				
Pre-*Miller* cases	50.65% factual, 41.89% other			1.6798***
Post-*Miller* cases	17.05% factual, 38.73% other			-4.8893**
b. District judge votes (N)				
Factual Obscenity Cases				
June 24, 1957 to June 21, 1973	36.36		11	
June 22, 1973 to Dec. 31, 1998	16.67	-19.69	6	0.94
Other Cases				
June 24, 1957 to June 21, 1973	43.75		16	
June 22, 1973 to Dec. 31, 1998	34.48	-9.27	58	0.67
Factual versus other cases				
Pre-*Miller* cases	36.36% factual, 43.75% other			-0.3873
Post-*Miller* cases	16.67% factual, 34.48% other			-1.0829
District Court Cases				
a. Circuit judge votes (N)				
Factual Obscenity Cases				
June 24, 1957 to June 21, 1973	33.33		3	
June 22, 1973 to Dec. 31, 1998	100	66.67	1	-2.45***
Other Cases				
June 24, 1957 to June 21, 1973	73.53		34	
June 22, 1973 to Dec. 31, 1998	63.16	-10.37	19	0.77

TABLE 4-5 (CONTINUED)

Time Period	Percent Liberal	Difference	N	Z
Factual versus other cases				
Pre-*Miller* cases	33.33% factual, 73.53% other			-1.4321[+]
Post-*Miller* cases	100% factual, 63.16% other			3.3290***
b. District judge votes (N)				
Factual Obscenity Cases				
June 24, 1957 to June 21, 1973	31.58		57	
June 22, 1973 to Dec. 31, 1998	28.89	-2.69	45	0.29
Other Cases				
June 24, 1957 to June 21, 1973	68.71		163	
June 22, 1973 to Dec. 31, 1998	58.37	-10.34	245	2.15*
Factual versus other cases				
Pre-*Miller* cases	31.58% factual, 68.71% other			-5.1943**
Post-*Miller* cases	28.89% factual, 58.37% other			-3.9546**

[a] Calculations based on analysis of variance for proportions using a one-tailed test.
** $p < .01$ * $p < .05$ [+] $p < .10$
***Contrary to hypothesis, but two-tailed significant.

CHAPTER 5

THE INDIVIDUAL-LEVEL IMPACT OF SUPREME COURT PRECEDENT IN FEDERAL CIRCUIT AND DISTRICT COURT OBSCENITY DECISIONS

This chapter focuses on the influence of the Supreme Court on the decision-making of federal circuit court judges in their actual decisions. Previous chapters assess the letter of the law by outlining the prevalence and application of Supreme Court precedent, analyzing citation of higher court precedent and whether such precedent becomes an important aspect of lower court decisions. Along with Chapter 4, this chapter seeks to analyze lower court application of the spirit of the law, asking to what extent lower courts apply the *Miller* standard by changing their individual judicial choices in a conservative direction. It undertakes a more sophisticated analysis of the liberalism of federal circuit and district court-level decisions in obscenity cases by identifying separate models, using a maximum-likelihood estimator. Each model estimates the effects of various influences on lower-court judges' behavior across four decades. By analyzing Supreme Court impact simultaneously with other competing explanations, this chapter provides a tougher test of the influence of High Court doctrine and its importance.

Methodology

The research in this chapter extends that of Songer-Haire by adding eight

more years and new variables to their dataset.[190] Chapter 4 provides a description of the coding procedures for presidential influence. Previous public law literature on Southern politics has tended to cast the South as a more tradition-oriented and thus more conservative region in its research. The operationalization of the South as a region was coded in the same way as Black and Black (1992), Key (1993[1949]), and Rosenberg (1991): the eleven states of the Confederate States of American (the Confederacy), Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia, were coded one for Southern state; all other states were coded zero. While this variable was coded according to geographic placement and not personal history (place of birth, higher education), the correlation of place of birth and judicial placement justifies this coding procedure. Each judicial opinion included a listing of the court's location by district (e.g. eastern, southern, central) as well as by state. Some federal circuits include both non-Southern states within their boundaries. In order to avoid as much as possible confusion about the influence of regional background upon the decisions of circuit judges, only the Fourth, Fifth and Eleventh circuits

[190] The dataset provided by Songer and Haire provided a useful beginning for assessing circuit court obscenity decision making. The present analysis added a few variables to the Songer and Haire data. First, drawing from their coding of the circuit where the case was decided, I constructed a variable for cases arising in Southern circuits (as described further in the Analysis section). Second, while reading through the cases themselves, I coded separately for the presence of adult bookstores/theatres and for other adult businesses such as adult magazine publishers or adult entertainment establishments. From there, I merged both categories into a broader category of "adult" businesses. Third, while reading through the cases, I coded for the

counted as being distinctly Southern.[191]

In order to test the influence of case facts on obscenity decisions, I coded separate dummy variables for the presence of films and texts in the case. The data came from a reading of the case opinions themselves. Data on whether individuals were litigants in the case came from the cases as well; one indicated the presence and zero the absence of an individual litigant. The "individual litigant" variable was coded one only when the case made it clear a litigating individual was acting in his or her own capacity and not as an employee of some business. Cases were coded as involving adult businesses when the judge makes it clear that one of the litigants was indeed an adult business. The presence of the federal government as prosecution in the case was also indicated by a presence/absence dummy variable.

I measured the application of precedent by lower courts in the following way. To account for the impact of Supreme Court precedents, I constructed dummy variables with a value of one for cases decided after the announcement of the *Miller* decision. To account for the potential influence of circuit court decisions, I relied on the Songer and Haire (1992) data for information identifying circuit court rulings in obscenity cases from 1957-1990 and I

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presence of a litigant claiming a violation of the Fourth Amendment. Fourth, I also coded for the presence of a film as part of the actual case.

[191] Songer and Haire were more specific in their coding of the South as a variable, by including appeals from Arkansas and Tennessee district courts (1992, 970). Classifying the Fourth Circuit as Southern includes Maryland, a state that was not one of the eleven states of the Confederacy. Not classifying the Sixth and Eighth Circuits as Southern omits Tennessee and Arkansas, states

extended their measurement up to 1998. For the district court dataset, I coded a dummy variable indicating whether a case focused on "factual" matters.[192] To code the presence of circuit court precedent in district-level factual decisions, I coded each decision received one of three scores: -1 when the latest circuit court factual decision was conservative/proscriptionist, +1 when it was liberal/libertarian, or zero (0) when there had been no circuit decision to date after *Roth v. United States*. If the latest decision was unclear/mixed, then the score of the previous decision was assigned. Each district court decision was matched by circuit and case's decision date, and coded according to the latest circuit court decision.

By reading through the text of each case, I also coded it for the presence or absence of certain claims asserted by non-governmental litigants. In research on the Supreme Court it is possible to code for litigant arguments as expressed in the legal briefs submitted to the Court. Unfortunately, such information is not readily available for lower courts. Given this difficulty, I took the same approach as Songer and Haire and assumed here that, when crafting their legal opinions, judges would include only those legal claims they deemed

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that were parts of the Confederacy.

[192] As noted in Chapter Three, "factual" obscenity decisions at both the circuit and district court levels were defined as those decisions which included at least one of the following as a deciding issue in the opinion:

The judge makes a factual decision on the actual obscenity of the materials

The judge rules that the magistrate or lower court does or does not have sufficient cause to declare the materials to be obscene

The judge rules upon whether lower court evidence is or is not sufficient to sustain the

important to the case and the ruling itself. Most legal claims will occur only in a small proportion of district court cases. To account for the potential influence of legal claims that occur with sufficient frequency to achieve reliable estimates (Brent 1999), I grouped legal claims into two general categories: free speech and alleged prosecutorial misconduct. The first category, First Amendment claims, was coded one when the judicial opinion notes a claim of a First Amendment violation and zero otherwise.

The second category, alleged procedural misconduct, related to the procedures the Supreme Court outlines as mandatory for governmental officials in order to determine the obscenity of materials (Schauer 1976, Chapter 11). In a search and seizure of obscene materials, for example, prosecutors must hold a prompt adversary hearing to permit defendants an opportunity to defend themselves.[193] Furthermore, prosecuting officials seeking the destruction of such materials must have a warrant not obtained from *ex parte* proceedings or *ex parte* determinations by a judge.[194] The affidavits forming the justification of warrants must be also sufficiently particular in their descriptions.[195] Prosecutors also must prove *scienter*: that the alleged pornographer knew the contents of the

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obscenity conviction
The judge decides whether the jury properly found materials obscene

[193] *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

[194] *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

[195] *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

materials or at times should have known.[196] While this does not require that the party actually recognizes the materials are obscene, it does require some general knowledge of the materials in order to avoid the prosecution of an unwitting (or unwilling) recipient of obscenity.

Given these outlines, non-governmental litigants might assert that overzealous prosecutors have violated either the Fifth Amendment (due process) or the Fourth Amendment (proper warrants/search and seizure). Each of these involves allegations that governmental officials have disregarded proper constitutional procedure, whether in their actions as prosecutors or in their laws (by enacting sweeping, unclear legislation or similar regulations). Alternatively or in addition, one might claim ignorance by arguing that the prosecution failed to prove *scienter*. To account for these potential claims of procedural misconduct, I coded a dummy variable for each case for the following separate claims: whether the prosecution allegedly fails to prove *scienter*; whether the prosecution's actions violate due process; and whether governmental officials allegedly violated the Fourth Amendment in the course of their prosecution of alleged pornographers. Alleged procedural misconduct was measured as an additive index of these claims.

The bivariate analyses found in Chapter 4 offer a first glance into the relationship between the *Miller* decision and the conservatism of lower-court

[196] *Smith v. California*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974).

judges, but they do not provide a sufficient opportunity to assess the complexity of lower-court decision-making. A multivariate model is necessary to specify properly the proper relationship between Supreme Court precedent and the likelihood of a liberal vote. Under certain circumstances, ordinary least squares (OLS) regression provides an adequate estimator for testing the influence of variables in a multivariate model. However, as noted at the beginning of the chapter, OLS regression places no inherent restrictions on the dependent variable itself, and does not yield the most efficient estimates when used to analyze dichotomous variables (e.g. Aldrich and Nelson 1984). By its very nature, the dichotomous nature of the dependent variable here (the judicial vote) places both upper and lower bounds on its value: judges may choose to rule in a liberal direction (1) or else in a conservative direction (0). Estimates obtained using OLS regression may yield estimates that are, for all practical purposes, meaningless or exaggerated (e.g. values of 1.25, or a 125 percent chance of an event occurring). Furthermore, estimators such as OLS assume the effects of exogenous variables remain constant across the range of estimates, deemed "harsh and quite possibly arbitrary constraints on the values that the regression coefficients b_k may assume" and "necessarily implies heteroscedastic disturbances" (Aldrich and Nelson 1984: 24, 29).

Maximum likelihood estimators provided a method of accounting for the dichotomous nature (0 or 1) of the dependent variable more closely. As a tool

for statistical analysis, it "is asymptotically unbiased, it is consistent, it is asymptotically efficient, and it is distributed asymptotically normally" (Kennedy 1994, 21). Maximum likelihood estimators force the coefficients to conform to a bounded set of estimates ranging from 0.0 (zero percent chance of event) to 1.0 (one hundred percent chance). To yield more efficient estimates, and account for the sigmoid (S-curve) shape of the distribution of the endogenous variable, maximum likelihood estimators "try to find parameter estimates…that make the predicted values of Y, based on the parameter estimates and the assumed relationship between Y and X, as close as possible to the actually observed values of Y" (Kennedy 1994, 50). For these reasons, maximum likelihood analysis provided a sufficient statistical method for analyzing obscenity decisions at the circuit level. The data were analyzed using the LOGIT and LOGISTIC procedures available in the STATA version 7 computing package.

Analysis and Results

The initial results are presented in Tables 5-1 and Table 5-2 (for circuit and district judges. The first two impact models (Models One and Four, Tables 5-1 and 5-2) assess the influence of Supreme Court doctrine (the *Miller* dummy variable) and numerous other variables upon all obscenity cases. The models as a whole perform reasonably well: the χ^2 for the circuit court models (105.65 and 119.08) and district court models (52.03 and 57.54, respectively) suggest a good fit of each model and that the results are not simply a product of chance.

Moreover, the prediction rates of these first two circuit models (66.22 and 67.02 percent, respectively) and district court models (65.1 percent) reduce the errors of prediction by approximately 15 percent each.

One theme that occurs throughout the results is the differing behaviors of circuit and district judges. This is first evident in the influence of presidential aspirations. Much of the prevailing literature suggests not only that presidents intend to influence the judicial branch by appointing like-minded individuals, but that they have tended to succeed in circuit and district courts (e.g. Goldman 1997; Rowland and Carp 1996; Rowland, Songer and Carp 1988; Songer and Haire 1992; Stidham and Carp 1987). I expected that as a reflection of the influence of presidential intentions on judicial decisions Republican appointees would be more likely to vote in a conservative direction, because they sought to advance their own policy preferences despite their lesser place within the judicial hierarchy (e.g. Baum 1978, 1980). Applying this to obscenity cases, I hypothesized that there would be a negative relationship between Republican appointees and the chance of a liberal vote. As one can see by comparing the results in Model One and Model Four, presidential intentions exert an influence on the judicial decisions of federal circuit but not district judges. As a general group, Republican circuit appointees tend to rule in a much more conservative manner than their Democratic counterparts. The coefficient for Republican appointees in Model One, for example, is negative (-0.3456) and statistically

significant. *Ceteris paribus*, non-Republican appointees are 42.6 percent likely to rule in a liberal manner whereas Republicans are only 34.4 percent as likely to do the same. However, while Republican district appointees (in Model Four) tend to rule in a more conservative manner than their Democratic counterparts, the coefficient in the model (-0.2167) is not statistically different from zero. In other words, there appears to be no significant ideological (that is, president-driven) division within the district courts, something surprising given the previous literature on presidential appointments and district decisions (most prominently, Carp and Rowland 1983, Rowland and Carp 1996). Thus, presidential intentions tend to influence the circuit courts but not the district courts.

To assess further the potential that ideologically-conscious presidents exert an unusually significant influence on judicial voting at the circuit level, Model Two adds president-specific variables for the Johnson, Carter, Nixon and Reagan presidencies, in the expectation that Johnson and Carter judges will vote in a more liberal and Nixon and Reagan judges in a more conservative direction than other members of the circuit and district courtrooms. The picture becomes more complex, however, when assessing the influence of individual presidential appointments rather than Republican presidential appointees as a group. Johnson and Carter appointees tend to be more liberal than other judges (Nixon, Roosevelt, Bush, Truman appointees). But one can not distinguish either Reagan or Nixon appointees for any significant degrees of conservatism.

Indeed, the coefficient for Nixon appointees is positive (though not statistically significant), which implies that Nixon appointees are more strongly inclined toward casting liberal votes than were other appointees. If one considers the previous research on presidential platforms and campaign promises, this finding is quite unexpected. However, this finding parallels previous obscenity research at the circuit court level, which finds Johnson and Carter appointees to be more liberal than their Republican brethren, and Nixon judges not significantly more conservative than others (Songer and Haire 1992: Table 2, 976).[197] Such findings also suggest that certain presidents (though not Reagan) seek out judges in line with their policy preferences (e.g. Goldman 1997). This provides some evidence that when accounting for contending explanations of judicial behavior, presidential administrations have some influence in federal circuit.

Substituting dummy variables to represent the four ideologically-conscious presidents, there still tends to be a lack of influence of presidential appointees at the district court level (see Model Five). The coefficients for Nixon and Reagan appointees are both negative, but only the Reagan coefficient achieves statistical significance ($p < 0.05$), in contrast to the circuit court finding. The coefficients for Johnson and Carter appointees are *not* significant. These findings conflict in part with previous work on federal courts, which asserts a high level of importance for presidential platforms and ideologically-centered

[197] It does contrast with one finding of Songer and Haire: that Reagan judges (in their analysis)

judicial appointments (e.g. Carp and Rowland 1983; Rowland and Carp 1996; Rowland, Carp and Stidham 1984). They suggests a more moderate impact (if any) of presidential appointments--that individual presidents matter to a lesser degree in these obscenity cases than previous scholarship on district courts and judges would suggest.

Yet another contrast between circuit and district judges is the differing influence that region plays in obscenity cases, with such geographic distinctions holding true at the circuit, but not the district level. The statistical analysis in Model One reveals that circuit judges residing in Southern circuits behave in a more conservative manner than do circuit judges in other parts of the United States: the coefficient for Southern circuits is negative (-0.2516; more conservative) and statistically significant ($p<.05$). When accounting for such factors as the party or identity of the appointing president, litigant claims and characteristics, Southern circuit judges were more likely to view obscenity cases with a more conservative or proscriptionist view than did their non-Southern brethren (33.97 versus 39.82 percent, respectively). Although the magnitude of this impact is not as large as in previous circuit-level obscenity research,[198] it nonetheless points to the importance of regional differences.

At the district level, the South coefficient in Model Four is not statistically

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tend to vote in a significantly more conservative direction than other judges.

[198] Songer and Haire find in their analysis (1957-1990) that the Southern variable attains a coefficient of 0.772 (coding Southern as zero, non-Southern as one) (1992: Table 2, 976). This

significant in any model. When controlling for other factors in district cases, judges in Southern courtrooms were no more likely to rule in a conservative direction than are judges in the rest of the country. As noted before, previous judicial politics scholarship suggests the unique jurisprudence of Southern judicial politics in such district court decision-making areas as race relations. As Models One and Four imply, such regional distinctions are apparent in obscenity cases at the circuit level, but not at the district level. Thus it appears that while Southern differences might still remain in district judicial voting on other matters, this is not the case within the realm of obscenity.

Unexpected findings arise with respect to the influence of litigant claims in the federal courtrooms, at both the circuit and district levels. Previous judicial politics obscenity scholarship suggests that Supreme Court and circuit court judges are, to some extent, receptive to constitution-related litigant claims such as potential First Amendment violations (Songer and Haire 1992; cf. McGuire 1990). If this is true within obscenity cases, one should expect a positive relationship between such claims and the likelihood of a liberal vote. When accounting for other facets of obscenity cases, and expanding the time frame of the analysis, it appears that circuit judges do not respond to alleged violations of constitutional protections in the expected manner. One finds, first, that free speech claims tend to persuade circuit judges, but not their district counterparts.

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is larger than the coefficient in Model one (-0.5323).

First Amendment claims receive significant attention in circuit court obscenity cases: with no such claims the likelihood of a liberal vote is 31 percent, but when one speech claim is made the likelihood increases to 45 percent. This expected positive relationship between free speech claim and liberal voting proves similar to the results found in Songer and Haire (1992: Table 2, 976). In contrast, a First Amendment claim has no discernible impact upon district judicial behavior, as the coefficient in Model Four (0.1101) does not come close to achieving statistical significance.

Both circuit and district judges share one thing: allegations of procedural failures caused by the federal government (as party to the case) are met with unexpected consequences. Holding all other factors constant in Model One, circuit judges in these cases are increasingly likely to rule in a conservative direction as the number of procedural claims increases! *Ceteris paribus*, cases involving no procedural claims are 43.6 percent likely to be met with a liberal obscenity vote; the likelihood actually drops down to 30.0 percent with the presence of one claim (such as the use of a defective warrant) and to 19.1 percent with two claims. The results in Model Four indicate that procedural claims are also not an effective means to persuade district judges toward their cause. Litigants making no claims were 60.5 percent likely to have a liberal vote by a district judge, this drops down to 50.6 percent when a litigant claims (for example) that the government violated due process, and even further to 40.7

percent with two such claims. To the extent that litigants deem certain procedural issues important to their case, such litigants may be forced to limit the number of claims raised so as to avoid the perception of raising unnecessary issues in the courtrooms. This proves similar to previous circuit-level obscenity research, which finds that a *no scienter* challenge increases the chance of a conservative/proscriptionist vote (1992: Table 2, 976).

One potential explanation noted above, raised by Songer and Haire (1992), is that information relating to constitutional claims came from the opinions; judges are free to highlight some claims in their opinions and virtually ignore others by not addressing such claims in their opinions. In an ideal research setting, analysts may scan the briefs submitted to lower court judges as a more accurate reflection of the claims made in the courtroom. In this way, researchers may capture more accurately not only the extent to which litigants make certain claims but also the types of legal arguments judges at this level choose to ignore in their writings. Considering the fact that district cases reside at the bottom of the judicial ladder, as well as the volume of cases each year, it would have been much too time-consuming to track down case briefs (should they prove available) for this project. Owing to the lack of resources, and the inability to find such information readily available, I coded legal arguments from the opinions themselves and thus can make no accurate report regarding either the number of actual claims presented or the quality of such arguments. Until

such times as the resources are provided and relevant information is readily available, both speculations remain as such.

The findings relating to litigant characteristics are also mixed, as Models One and Four highlight the contrasting treatment of both adult businesses and individuals across court levels. Drawing from previous judicial politics scholarship (most prominently, McGuire 1990; Songer and Haire 1992), it was expected that owing to their lesser legal and financial resources, and (in the case of adult businesses) a reputation as purveyors of questionable materials, these "underdogs" would be met with a greater degree of conservatism in the courtrooms (leading to a negative coefficient). In cases at the circuit court level, judges tend not to consider adult businesses important enough to alter their judicial behavior: the coefficient for adult businesses is negative (as expected) but not statistically significantly different from zero in either Model One or Model Two.

The results do provide some evidence that certain types of litigants influence the federal judiciary at the trial court level, however, with adult businesses having a tougher time persuading district judges to rule in a liberal direction. Holding other variables constant, the likelihood of a judge casting a liberal/libertarian vote drops from approximately 60 percent down to roughly 50 percent (Models Four and Five). It appears that after increasing the time frame and scope of cases, adult businesses do have a more difficult time arguing their

case as found in previous work on adult bookstores (Dudley 1989). While "adult' businesses may be considered in a negative light by district judges, they are not so perceived in appellate decisions. Although one should keep an element of caution in comparing previous research,[199] it does suggest that such litigant traits are not an influential aspect of judicial decision-making.

Individual litigants face a more difficult time in the circuit courts, but not in the district courts. Model One does highlight the difficulty of individuals achieving legal victory in the appellate courtrooms: cases involving other litigant types such as interest groups and adult clubs are moderately likely (42.8 percent) to be met with a liberal decision, but the results suggest that individuals are only 30.2 percent likely to be treated in a liberal/libertarian manner! Stated most broadly, it appears that the lesser financial and legal resources prevalent among "underdogs" (Wheeler et al. 1987)–that is, individuals--can lead to differential treatment in appellate courtrooms but not among their district brethren.

It becomes clear throughout the research that governmental resources can have a significant impact upon judicial behavior in both circuit- and district-level obscenity cases. Is it true that the federal government had sufficiently superior legal and financial resources as "upperdog" to be successful in federal

[199] More specifically, Songer and Haire construct a category of "adult" bookstores, in which the judge notes the litigant is a bookstore known for its "adult" themes. The research here uses a broader category—namely, "adult" businesses—which includes other litigants such as "adult"

obscenity litigation, as occurs in previous work on the Supreme Court and circuit courts (McGuire 1990; Songer and Haire 1992)? If so, one should expect that when the federal government is a party to the case at hand, there is a greater likelihood it will succeed (and thus a negative relationship between the federal government as litigant and the chance of a liberal vote). The (expected) negative coefficients in Tables 5.1 and 5.2 suggest that federal prosecutors do achieve a higher degree of success in federal circuit courts, with both circuit and district judges ruling more often in a conservative direction when the federal government was party to the case. Model One provides but one example: *ceteris paribus*, all federal judges tend to rule in a liberal direction 43.3 percent of the time when the federal government is not party to the prosecution. The presence of such resources in the federal courtrooms, however, decreases the likelihood of a liberal vote down to 29.2 percent. Defendants challenged by the federal government in court are thus faced with a difficult dilemma, for their chances of acquittal or other legal victory are quite slim. Considering the amount of resources available to federal prosecutors, and especially the nature of the case topic (obscenity), it should come as little surprise that the federal government achieves a higher success rate than other litigants.

The federal government achieves a great degree of success in the district courtrooms as well. Holding all other variables constant at their means, in cases

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entertainment establishments.

without federal prosecutors there is a 64.1 percent likelihood of a liberal vote; when the United States marshals its legal and financial resources, that likelihood drops markedly to 31.4 percent and 32.1 percent (Models Four and Five, respectively)! Defendants charged with some obscenity-related offense (e.g. conspiracy to ship, interstate transportation of materials) thus encounter a much greater degree of difficulty in situations like this, and their chances of success are rather modest. Given the existing research on obscenity reporting the influence of governmental resources in appellate cases (McGuire 1990; Songer and Haire 1992), as well as the nature of obscenity itself, it should come as little surprise that the federal government succeeds at the district court level. These findings suggest that while federal resources do not alter district-level judicial behavior in desegregation cases (Sanders 1995), such resources do change such behavior when judges must consider obscenity-related questions. This leads to one interesting research question: do trial court judges pay greater attention to litigant types than do circuit court judges? Little research to date has attempted to explain the differential influence of levels of government in circuit courts; given the results presented here, one should expect that the federal government will achieve the highest success rate possible. Perhaps the lower degree of legal and financial resources available to local governments leaves them at a comparative disadvantage when compared with the federal government (e.g. Songer and Sheehan 1992).

Most important for the purposes of this analysis is the question of the judicial hierarchy. If lower-court judges are responsive to and accepting of their place within the judicial hierarchy they will integrate the spirit of the Court's obscenity doctrine by voting more often in a conservative direction after the *Miller* decision; thus, one should find a negative relationship between the *Miller* doctrine and the chances of a liberal vote by a judge. The negative and statistically significant coefficient of the post-*Miller* dummy variable in Model One suggests that circuit judges of all presidential and regional backgrounds, regardless of types of material and various litigant claims, did respond significantly to the Supreme Court's doctrinal shift expounded in *Miller v. California* (1973) and its companion cases. Holding all other variables constant at their means, in pre-*Miller* cases, circuit judges are 44.6 percent likely to vote in a liberal/libertarian manner. In post-*Miller* cases, circuit judges are only 34.9 percent likely to do the same. While the negative coefficient is not as large as that found in the work of Songer and Haire (1992: Table 2, 976), the simple fact that *Miller* reaches to cases involving strictly matters of due process and/or statutory construction says much about the power of High Court doctrine in circuit-level cases.

The Supreme Court's change in legal regimes (Richards 1999) appears to alter the judicial behavior of judges in district-level obscenity cases. As expected, the coefficient for the presence of *Miller* is negative and is statistically

significant (at .05 in Model Four and .10 in Model Five). This parallels previous circuit court obscenity scholarship, which finds that "the impact of changing Supreme Court precedent appears to be substantial" (Songer and Haire 1992, 976). In other words, circuit and district courts do adhere to the spirit of the law by changing their collective decision trends to fit the conservative nature of the *Miller* decision. The judicial hierarchy appears to influence judges of all presidential and regional backgrounds, regardless of the types of litigants involved as well as the issues brought forth in the courtrooms.

One potentially intervening factor is the influence of case selection on the analysis. As noted in Chapter 2, there are certain types of cases considered borderline (e.g. requiring special regulations on adult entertainment establishments) because they do not relate as directly to obscenity as do other types of cases (e.g. challenging warrants intending to search and seize allegedly obscene materials). As a result, one might find *Miller* to have a similar if not greater influence because it is associated more with cases involving obscenity directly than with other cases. In order to account for the potential influence of case selection, separate maximum likelihood models for circuit and district court judges (Models Three and Six, respectively) removed those types of cases that did not involve obscenity directly. Excluding these borderline cases reduced the number of judges' votes to 961 at the circuit level and 391 at the district level. Do the results change dramatically after removing borderline cases from the

analysis?

A glance at the coefficients suggests there is not much change at the circuit level. Comparing Models One and Three, one finds only one significant alteration: the decreasing importance of adult businesses in the analysis. Given the fact that Model Three excludes a significant number of cases focusing on issues of great relevance to such businesses, there should be little surprise. The *Miller* decision does remain an influential part of circuit court judicial decisions. Comparing Models Four and Six, the district level one finds one interesting change, with adult businesses no longer having a substantial impact. Most importantly for the present research, one finds *Miller* to have a similar influence on both levels as in previous models although the influence of *Miller* remains weak or close to insignificant for district judges.

One further possibility is that circuit and district court judges view Supreme Court precedent with a more approving eye when it applies more directly to the case at hand. Do circuit and district court judges pay greater attention to Supreme Court obscenity precedent (*Miller v. California*) when they must scrutinize the materials as part of the case? To account for this, separate analyses for circuit and district judges (Models Seven and Eight, Table 5-3, and Models Nine through Eleven, Table 5-4) touched upon this theme by analyzing only "factual" obscenity cases.[200] This severe restriction on the dataset reduced

[200] As noted in Chapter Three, "factual" obscenity decisions at both the circuit and district court

the number of judges' votes to 242 at the circuit level and 102 at the district level. One would expect not only that judges deciding these cases will pay attention to *Miller* by ruling more often in a conservative direction but the effects of such precedent will prove stronger. In addition, as it was more appropriate that judges consider the types of materials at hand when deciding the obscenity of materials, the models included two representations of case facts (whether there is a film in the case, and whether there is a text such as a book in the case).

A few preliminary items prove worthy of consideration at the circuit level. The magnitude of the Southern coefficient indicates that these potential explanations are more pronounced in "factual" cases. The importance of various litigant claims grows stronger in "factual" cases: First Amendment allegations lead to a greater likelihood of a liberal/libertarian vote. Perhaps judges of all levels take this claim more seriously as the case issue revolves around the scrutiny of the materials themselves. Holding all other variables at their means, there is an 11.3 percent chance of a liberal vote when there is no First Amendment claim but a 31 to 45 percent chance when a litigant does argue

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levels were defined as those decisions which included at least one of the following as a deciding issue in the opinion:

- The judge makes a factual decision on the materials at hand
- The judge rules that the magistrate or lower-court judge has or does not have sufficient cause to declare the materials at hand obscene
- The judge rules the lower court evidence is or is not sufficient to sustain an obscenity conviction
- The judges rules upon whether the jury properly found the materials obscene

such a constitutional violation (Models Seven and Eight, respectively). When non-governmental litigants claim procedural misconduct (e.g., a Fourth Amendment violation) judges still choose to hand out more conservative decisions. Last, it appears that presidential intentions matter little in factual cases, with only Johnson appointees showing any significant degree of liberalism and neither Republicans nor Carter appointees demonstrating any considerable levels of conservatism or liberalism. This differs with previous circuit-level research on obscenity cases, which finds presidents to have a greater role in circuit-level decisions (Songer and Haire 1992).

One should also notice that a few changes occur when only factual obscenity cases are analyzed at the district level (Table 5.4). First, the magnitude of the influence of the federal prosecutor variable is greater in factual cases, perhaps suggesting both that federal litigators selected these types of cases to maximize their success or else that such resources simply worked best when allegedly obscene materials were placed under scrutiny.

Second, the negative influence of procedural claims increases in factual, but First Amendment claims again do not matter. Given their function as triers of fact with an eye toward constitutional issues as well (in particular, the line between protected and unprotected speech), it is surprising that district judges do not find themselves persuaded by First Amendment claims. Perhaps it is in part a function of case selection, as federal prosecutors choose to select those

cases in which they are more likely to achieve victory (that is, a declaration that the materials are obscene); however, in the absence of more information this remains speculation. Once again, the results suggest that district court judges tend either not to agree with such legal claims or else do not consider them important enough to influence their votes when determining the actual obscenity of the materials at hand.

Third, the influence of presidential intentions has signs that are contrary to hypothesis though only the dummy variables for Nixon and Carter appointees would have achieved significance (using a two-tailed test). Nixon judges actually tended to vote in a more liberal direction than their Democratic-appointed counterparts. Last, it appears that adult businesses incur a greater degree of scrutiny themselves in these types of cases. Holding all other variables constant at their means, Model Four shows that cases without an adult business as litigant have an approximately 31 percent chance of a liberal vote; that drops dramatically to roughly 5 percent when an adult bookstore is included! Thus it appears that litigant effects are somewhat conditional, in that they occur more strongly when district cases focus on more fact-related issues.

What do lower federal courts make of both films and textual materials in their courtrooms? The majority of available judicial politics literature suggests that judges at the lower federal levels are responsive to the presence of various case facts (Songer and Haire 1992; Songer, Segal and Cameron 1994; Wenner

and Dutter 1988; but see Cook 1977). This led to the expectation that such judges would treat textual materials (e.g. books) with a greater degree of First Amendment protection (and thus rule in a liberal direction) because they left more to the reader's imagination than other materials and thus one would find a positive relationship between the presence of text in the case and the chance of a liberal vote. In addition, one would expect that judges will scrutinize films with a conservative view because of their more visual nature and thus there would be a negative relationship between the presence of a film and the chance of a liberal vote. Overall, the results suggest something contrary to expectations: the positive and statistically significant coefficient for the film variable in Model Seven suggests that cases involving both textual materials (books) and films were met with a greater likelihood of a liberal decision by circuit judges, something rather surprising given the more visual nature of films. Cases without a film under scrutiny are met with a 23.5 percent chance of a liberal vote; surprisingly, this rises to 44.3 percent when a judge is part of a case dealing with a film (whether by itself or including other types of materials). As far as circuit court judges are concerned, perhaps films are not "more likely to offend the sensibilities of those who view them" (McGuire 1990, 52).

As anticipated, textual materials receive a more liberal treatment: cases without books, for example, are met with a 24.5 percent likelihood of a liberal vote, but cases with textual materials have a 38.5 percent likelihood of the same.

Thus, as textual materials "did not involve visual characterizations" (Songer and Haire 1992, 972) there is a lesser likelihood of ruling such materials as outside First Amendment protections.

In contrast, judicial behavior in district-level factual obscenity cases tends not to focus upon the types of material involved: neither has any appreciable impact upon district-court decisions when accounting for other variables. If the results in Models Nine through Eleven are correct, district-court judges appear not to be particularly disturbed by various films nor overly protective of textual materials. While district-court judges might be triers of fact, certain facts appear not to matter within their collective courtrooms.

These conflicting findings are intriguing. The empirical results at the circuit level do confirm that textual materials are considered to leave "more to the imagination" of the audience than other materials, yet holding all else constant, the same also occurs with films of various types. These findings conflict in part with McGuire's findings that neither films nor texts receive any different treatment within the Supreme Court (1990: Table 1, 59) and Hagle's discovery that photographs, printed materials, movies or live performances do not influence the likelihood of a conservative vote in Supreme Court decisions (1991: Table 1, 1046). These findings also diverge in part from those of Songer and Haire, that cases involving films and/or magazines actually lead to more conservative votes from circuit court judges at the circuit court level (1992: Table

2, 976). However, the lack of significant findings for either films or texts at the district court level is quite surprising, and there appears to be no ready explanation for their overall lack of influence. Perhaps the influence of extra-legal factors is not as strong within the district courtrooms as some might expect.

High Court doctrine proves influential in factual obscenity cases at the circuit level: the coefficient for the *Miller* variable is negative and statistically significant, even after accounting for competing explanations such as the presence of various litigants, the type of judge involved, and even the types of litigant claims made in the courtrooms. The size of the variable coefficient also suggests its importance as one can see in Model Nine: whereas pre-*Miller* cases were met with a 37.3 percent likelihood of a liberal/libertarian vote, this drops to 17.5 percent upon the establishment of *Miller*. Although the differing sample sizes prohibit one from comparing the coefficients directly, one can note that the size of the conservative shift is larger when judges deal with "factual" cases than when judges deal with a larger host of issues and thus a greater number of cases (Model One). This coefficient remains significant even when accounting for the potential influence of ideology-conscious presidential appointments (Model Ten). Is it the case that *Miller* is more influential among district court judges, when they consider the degree to which certain materials in fact are obscene or not obscene? The results suggest otherwise: the magnitude of the change (from 26.02 percent prior to *Miller*, to 14.05 after *Miller*; Model Nine) is

not much greater than when judges review all types of obscenity cases (from 61.29 percent prior to *Miller*, to 52.5 percent after *Miller*; Model Four). Thus, while the Supreme Court doctrine is still important it does not become significantly more influential as judges are called upon to decide the obscenity of various materials.

Last, I investigate whether district court judges are attuned to the most recent circuit court obscenity precedent when contemplating the obscenity of certain materials as suggested by previous research. Model Eleven, focusing strictly upon "factual" obscenity decisions at the district court level, assesses the influence of circuit precedent upon cases more closely related to the relevant circuit precedent.[201] If it is true that district judges decide to align themselves closely to their upper-court superiors (appellate judges in the circuit courts above them) and their jurisprudence, one should expect a positive relationship between the latest circuit court precedent and the chance of a liberal vote. When accounting for rival explanations such as various case characteristics and claims as well as certain litigants, the most recent circuit precedent has a negative coefficient, contrary to hypothesis: a liberal circuit court factual decision

[201] While it would be most idea to assess the influence of all circuit court precedents in all district court cases rather than using a narrower set of circumstances here (analyzing only "factual" cases), the diversity of case issues in both circuit and district court decisions made it difficult to determine an effective means to matching circuit and district cases. In order to test the effectiveness of circuit court precedent, while finding a more narrow issue area to match circuit and district cases, it was helpful to narrow down the universe of cases to those in which judges ruled on the nature of the materials themselves (the type of case most closely parallel to the heart of both the *Roth* and *Miller* decisions).

is met with a greater likelihood of a conservative decision by district court judges under the authority of that same circuit. It appears that district judges tend not to view recent circuit court precedents with as high a regard as expected. Perhaps the suggestions of such scholars as Eisenstein (1973) and Carp and Rowland (1983) might reward speculation, as district judges may simply decide to avoid responding to circuit courts despite the potential for reversal. As this is only a first glance at the potential influence of circuit court precedent on district court behavior, however, one must be careful not to move too far beyond speculation.

Chapter Summary

This chapter provided statistical analyses of the relationship between higher court precedent and lower court judicial behavior. Maximum likelihood estimators were used to analyze judicial behavior in circuit- and district-level obscenity cases from 1957 to 1998. The results suggest a series of unexpected contrasts between circuit and district court judges. First, the influence of presidential intentions is actually greater at the circuit rather than the district level. When accounting for other variables, presidential administrations tend to exert some influence on judges in circuit-level obscenity cases, although this does not hold true when focusing on "factual" cases. Second, there is support for the influence of region in circuit cases, with Southern judges voting conservatively more often than their non-Southern counterparts; the same does not hold true, however, for district judicial decisions.

The influence of case and litigant characteristics as well as legal claims are mixed within the circuit courtrooms: both films and textual materials receive a more liberal/libertarian treatment in lower federal courts, yet neither type of material actually matters within the district courtrooms, even when narrowing the analysis only to "factual" cases. The results for litigant characteristics offer a unique contrast. Individuals tend to have a more difficult time than others in the circuit courtrooms, and adult businesses encounter similar difficulties in the district courtrooms; this tend to hold true when judges focused upon the factual obscenity of various materials. Various speech and procedural claims proved to have a mixed effect within the circuit courts, with First Amendment claims tending to lead to liberal votes and (surprisingly) procedural concerns to conservative/proscriptionist votes. Interestingly, various speech and procedural claims are met with either insignificant or negative results in the district courts; thus, either judges choose to report certain claims in order to argue against them or else such claims simply do not have the impact that previous judicial politics scholarship would suggest.

One thing that both levels have in common, however, is the legal power of the federal government. Federal prosecutors attain a higher degree of success than other litigants at both the circuit and district levels, with such cases receiving a lesser likelihood of a liberal obscenity vote. This remains true even when removing 'borderline' cases or else centering on only factual cases. Thus,

the executive branch still holds a remarkable authority within the federal lower courts across time, regardless of whether they present their arguments before trial or appellate courts.

Most importantly, the *Miller* doctrine leads to a significant conservative shift within the circuit courts even after separating cases across type of judge, type of president and type of issue. In other words, as far as the circuit courts are concerned, High Court doctrine has a significant impact. The *Miller* doctrine also did influence district court decisions, whether one concentrates on the entirety of obscenity decisions (including borderline cases) or more narrowly on factual cases. In addition, the latest circuit court factual precedent decision is met with an opposite reaction; a liberal circuit decision leads to a greater likelihood of a conservative district court decision in factual cases.

TABLE 5-1: LOGIT ESTIMATES OF LIBERAL VOTES IN ALL CIRCUIT COURT OBSCENITY DECISIONS (CIRCUIT JUDGES ONLY), 1957-1998[A]

	Model One		Model Two		Model Three (no borderline cases)	
	Coeff.	Z	Coeff.	Z	Coeff.	Z
Intercept	0.4722	2.39*	0.1303	0.69	0.4213	2.04*
Political Influences						
Politicized Appointments						
Republican appointees	-0.3456	-2.67**			-0.3498	-2.49**
Nixon judges			0.1850	0.93		
Reagan judges			-0.0885	-0.36		
Johnson appointees			0.7657	4.14**		
Carter appointees			0.3833	1.72*		
Social Attributes						
Southern Judges	-0.2516	-1.75*	-0.3224	-2.19*	-0.2472	-1.57+
Case-Fact Patterns						
Litigant Characteristics: "Underdogs"						
"Adult" Business	-0.2614	-1.55+	-0.2084	-1.22	-0.053	-0.29
Individual	-0.5483	-3.23**	-0.5617	-3.02**	-0.5022	-2.88**
Litigant Characteristics: "Upperdogs"						
Federal Prosecutor	-0.6184	-4.19**	-0.6364	-4.27**	-0.6576	-4.29**
Litigant Claims						
First Amendment	0.5975	4.19**	0.5921	4.11**	0.6270	4.00**
Procedural Claims	-0.5937	-4.85***	-0.6258	-5.03***	-0.5574	-4.36***
Judicial Impact						
Higher Court Impact/Signal						
Miller Decision	-0.4044	-2.84**	-0.3562	2.42**	-0.3981	-2.71**
Model X^2 ($p < .0001$ for all)	105.65		119.08		92.43	
Null Correct	60.71%		60.71%		61.39%	
Correctly Predicted	66.22%		67.02%		67.22%	
Reduction of Error	14.03%		16.06%		15.09%	
N	1125		1125		961	

[a] Probability statistics reported using one-tailed tests (except intercept).
** $p < .01$ * $p < .05$ + $p < .10$
*** Contrary to hypothesis, but two-tailed significant.

TABLE 5-2: LOGIT ESTIMATES OF LIBERAL VOTES IN ALL DISTRICT COURT OBSCENITY DECISIONS (DISTRICT JUDGES ONLY), 1957-1998[A]

	Model Four		Model Five		Model Six (no borderline cases)	
	Coeff.	Z	Coeff.	Z	Coeff.	Z
Intercept	1.2184	4.93**	1.1667	4.46**	1.2385	4.59**
Political Influences						
Politicized Appointments						
Republican appointees	-0.2167	-1.07			-0.3315	-1.40^{+}
Nixon judges			-0.323	-1.05		
Reagan judges			-0.666	-1.78*		
Johnson appointees			-0.007	-0.03		
Carter appointees			0.292	0.83		
Social Attributes						
Southern Judges	0.0154	0.07	-0.0088	-0.04	0.0516	0.20
Case-Fact Patterns						
Litigant Characteristics: "Underdogs"						
"Adult" Business	-0.4323	-1.94*	-0.3877	-1.73*	-0.2430	-0.94
Individual	-0.2013	-0.73	-0.2051	-0.72	0.0119	0.04
Litigant Characteristics: "Upperdogs"						
Federal Prosecutor	-1.3390	-5.00**	-1.3329	-4.88**	-1.4002	-4.93**
Litigant Claims						
First Amendment	0.1101	0.54	0.0948	0.46	0.0023	0.01
Procedural Claims	-0.4025	-2.62***	-0.3894	-2.53***	-0.4942	-2.88***
Judicial Impact						
Higher Court Impact/Signal						
Miller Decision	-0.3578	-1.72*	-0.3102	-1.28^{+}	-0.3788	-1.63^{+} (p=.052)
Model X^2 (p < .0001 for all)	52.03		57.54		50.02	
Null Correct	56.08%		56.08%		54.73%	
Correctly Predicted	65.10%		65.10%		67.26%	
Reduction of Error	20.54%		20.54%		27.68%	
N	510		510		391	

[a] Probability statistics reported using one-tailed tests (except intercept).

** p < .01 * p < .05 $^{+}$ p < .10

*** Contrary to hypothesis, but two-tailed significant.

TABLE 5-3: LOGIT ESTIMATES OF LIBERAL VOTES IN CIRCUIT COURT FACTUAL OBSCENITY DECISIONS (CIRCUIT JUDGES ONLY), 1957-1998[A]

	Model Seven		Model Eight	
	Coeff.	Z	Coeff.	Z
Intercept	-0.1415	-0.26	-0.4731	-0.91
Political Influences				
Politicized Appointments				
Republican appointees	-0.3194	-0.97		
Nixon judges			0.1288	0.25
Reagan judges			0.8760	0.69
Johnson appointees			0.7910	1.71*
Carter appointees			0.0447	0.04
Social Attributes				
Southern Judges	-1.1673	2.64**	-1.1577	-2.50
Case-Fact Patterns				
Case Characteristics: Materials				
Film	0.9508	2.34***	0.8923	2.16***
Text	0.6553	1.72*	0.5673	1.45^{+}
Litigant Characteristics: "Underdogs"				
"Adult" Business	-0.8005	1.72*	-0.6854	-1.45^{+}
Individual	-0.3932	-0.93	-0.3089	-0.73
Litigant Characteristics: "Upperdogs"				
Federal Prosecutor	-1.2940	-2.81**	-1.2048	-2.59**
Litigant Claims				
First Amendment	1.9010	3.75**	1.8471	3.49**
Procedural Claims	-1.8268	-3.94***	-1.9255	-4.01***
Judicial Impact				
Higher Court Impact/Signal				
Miller Decision	-1.0303	-2.55**	-1.2204	-2.60
Model X^2 ($p < .0001$ for all)	87.57		90.11	
Null Correct	61.57%		61.57%	
Correctly Predicted	76.03%		76.03%	
Reduction of Error	37.63%		37.63%	
N	242		242	

[a] Probability statistics reported using one-tailed tests (except intercept).

** $p < .01$ * $p < .05$ $^{+}$ $p < .10$

*** Contrary to hypothesis, but two-tailed significant.

TABLE 5-4: LOGIT ESTIMATES OF LIBERAL VOTES IN DISTRICT COURT FACTUAL OBSCENITY DECISIONS (DISTRICT JUDGES ONLY), 1957-1998[A]

	Model Nine		Model Ten		Model Eleven	
	Coeff.	Z	Coeff.	Z	Coeff.	Z
Intercept	0.9065	1.06	1.1503	1.30	1.0873	1.18
Political Influences						
Politicized Appointments						
Republican appointees	0.8672	1.40+			0.9058	1.45+
Nixon judges			2.2920	2.46***		
Reagan judges			NA[b]			
Johnson appointees			0.4750	0.66		
Carter appointees			2.0473	1.74*		
Social Attributes						
Southern Judges	1.1919	1.63+	0.6639	0.88	0.7860	1.00
Case-Fact Patterns						
Case Characteristics: Materials						
Film	-0.3795	-0.60	-0.3443	-0.53	-0.0941	-0.14
Text	-0.2109	-0.28	-0.3934	-0.51	0.1510	0.19
Litigant Characteristics: "Underdogs"						
"Adult" Business	-2.1892	-2.53**	-2.5604	-2.73**	-2.35	-2.55**
Individual	0.1679	0.25	0.1689	0.22	0.3123	0.45
Litigant Characteristics: "Upperdogs"						
Federal Prosecutor	-2.2578	-3.35**	-2.3475	-3.17**	-2.66	-3.67**
Litigant Claims						
First Amendment	0.0534	0.08	0.0947	0.14	0.0901	0.13
Procedural Claims	-1.8933	-2.48***	-1.5842	-2.24***	-2.14	-2.60***
Judicial Impact						
Higher Court Impact/Signal						
Miller Decision	-0.7661	-1.28+	-1.5901	-2.00*	-1.07	-1.72*
Most recent circuit factual precedent					-0.70	-2.10***
Model X^2 ($p < .0001$ for all)	35.06		40.50		39.93	
Null Correct	69.61%		69.61%		69.61%	
Correctly Predicted	80.39%		83.33%		80.39%	
Reduction of Error	35.48%		45.16%		35.48%	
N	102		102		102	

[a] Probability statistics reported using one-tailed tests (except intercept).
[b] Variable dropped because it predicted zero (conservative vote) perfectly.
** $p < .01$ * $p < .05$ + $p < .10$
*** Contrary to hypothesis, but two-tailed significant.

CHAPTER 6

CONCLUSIONS

At this point the research presented here comes full circle, back to the original question begun in Chapter 1: *to what extent does higher court precedent constrain (or influence) federal district and circuit court decision-making*? As stated by Congressman Otto Passman, does it appear true "that at least some federal judges take their orders directly from the Supreme Court" (Rosenberg 1991, 673)? According to this conception of the judicial hierarchy, it was expected that because of their judicial training and socialization lower-court judges would accept higher-court doctrines even when such doctrines were 'wrong' (e.g. Lyles 1997), not only by including such doctrine in their opinions but by changing their collective voting behavior in the face of change—that is, after the *Miller v. California* decision.

The Letter of the Law: Usage and Application of *Roth* and *Miller* in Lower-Court Opinions

Within All Obscenity Cases. As a first step toward answering this question, Chapter 3 assessed the usage and application of Supreme Court precedent in lower-court opinions. It was expected that owing to their judicial socialization and training as part of the judicial hierarchy, as well as the potential (whether real or imagined) threat of reversal and remand, lower-court judges would adopt

both the *Roth v. United States* and *Miller v. California* doctrines in their opinions, not only by having both *Roth* and *Miller* as controlling or persuasive elements in the case but also by applying (and not just mentioning or discussing) the actual standards in the case. One finds, however, that the effects of such High Court doctrine are not all-encompassing but are rather narrow. Although both circuit and district court opinion-writers are do cite the doctrines within their opinions, there is a substantial portion of obscenity cases in which judges did not cite the prevailing doctrine, let alone apply the case and its standards in the analysis. In only 23.5 and 30 percent of cases do circuit and district court opinion-writers cite *Roth* rule four, and only in 14.8 and 9.3 of cases do judges cite *Miller* rule two. Last, although a certain minority of judges applies the standards, the failure to mention the actual *Roth* or *Miller* standards hovers around 60 percent in circuit and district court cases. These initial results lead to the conclusion that there is no strong judicial hierarchy, at least not one strong enough to lead lower court judges to tailor their opinions in all obscenity cases. As an indirect indication of the judicial hierarchy one finds the usage of *Roth* decreases even further upon the adoption of the *Miller* decision, which suggests that judges do at least acknowledge the change in High Court obscenity doctrine.

While the results do not provide complete confirmation of the judicial hierarchy, neither do they validate completely the notion of bureaucratic resistance within the federal judiciary. There is still a significant portion of cases

(roughly 40 to 52 percent) in which lower-court opinion writers do cite *Roth* or *Miller*.

Were circuit judges more attentive than district judges to higher-court doctrine when they crafted their judicial opinions, as expected by the judicial hierarchy? The results in Chapter 3 show that circuit and district opinion-writers tended to use and apply the *Roth* and *Miller* doctrines (and their standards) at similar rates. Although circuit judges were somewhat more likely to cite *Miller*'s rule two in their opinions, district judges were slightly more likely than circuit judges to cite *Roth*'s rule four and use *Roth*'s "prurient interest" standard. Altogether, it appears circuit courts are not significantly more receptive to higher-court obscenity doctrine.

In line with the predictions of organizational theory within the judiciary, I expected lower-court judges to be more likely to use the prevailing standards when it suited their own interests. First, because of their greater familiarity with what is feasible (e.g. what kinds of rulings do not lead to remands) and their time-hardened views about obscenity, I expected circuit and district judges appointed prior to the *Miller* decision ("holdover" judges) to be less likely than newer judges to adopt *Miller* and the prevailing standards. In addition, I expected that holdover judges would be unlikely to change their voting behavior significantly after the introduction of a newer Supreme Court precedent. The results, however, suggested the reverse. Holdover judges were more likely than

new judges to find the *Miller* decision controlling or persuasive, and, at the circuit level, holdover judges were more likely than newer judges to apply the *Miller* standards in their analysis. Judicial experience does not decrease the likelihood of lower-court judges complying with Supreme Court doctrine.

Another method of discovering the importance of organizational theory tested the potential influence of partisanship and presidential intentions. I expected that, because of their more conservative outlook on social policy, Republican presidential appointees to the lower courts would be more likely than their Democratic counterparts to use the prevailing rules of law found in both *Roth* and *Miller* as well as their standards. The results in counsel otherwise: both Republican and Democratic appointees tend to use both *Roth* rule four and *Miller* rule two at low levels, with a slightly greater usage by circuit Democrats than Republicans, although district-level Republican appointees are more likely than their colleagues to apply the *Roth* standards. All of this should not obscure the fact that in most instances there is no clear partisan cleavage at the circuit or district levels. Thus, to the extent that lower-court judges are attentive to a Supreme Court doctrine and its implication and use it, it is not clearly linked to any partisan or presidential considerations.

As a test of the communications and 'legal' model, it was expected that lower-court judges would be more attentive to the *Roth v. United States* (6.5-2.5) decision than to *Miller v. California* (5-4) because of the greater support given to

the former. The results suggest either no significant difference or actually a greater support for the *Miller* ruling. Neither circuit- nor district-level opinion writers are likely to have either *Roth* or *Miller* as a controlling or persuasive element in the case, but they are more likely to apply *Miller* rule four (15.6 and 17.6 percent, respectively) than *Roth* rule two (8.3 and 6.7 percent). Circuit and district judges are likely to use the *Roth* and *Miller* standards in roughly equal measure, although district judges are somewhat more likely to use *Roth*'s "prurient interest" standard (31.4 percent) than the average *Miller* standard (23-25 percent). All of this implies that lower-court judges are not looking to Supreme Court unity when choosing to apply or avoid the prevailing obscenity doctrine and standards.

Last, as another test of the communications and 'legal' model, I expected that lower-court judges would be more attentive to the prevailing precedent in the first few years after its adoption, and then be less likely to adopt the precedent in later years. The results in Chapter 3 lead to the conclusion that federal lower-court judges were somewhat more likely to use each precedent in earlier years than in later ones; however, the clearest case is for the use of the *Miller* doctrine and standards. Thus, to the extent that precedent is subject to a 'half-life' it appears more prominently with the *Miller* doctrine.

Within "Factual" Cases Only. It is possible that lower-court judges view both *Roth* and *Miller* more narrowly. Since the core of each ruling is the definition of

obscenity for triers of fact and others, they are more likely to use each doctrine when they must rule on the obscenity of materials. To examine this possibility, I examined circuit and district cases “factual” and "other" obscenity decisions. The results demonstrated that judges are significantly more willing in factual cases (than in others) to apply the *Roth* and *Miller* standards in their decisions. This suggests that lower-court judges view both *Roth* and *Miller* narrowly, declining to apply them unless the case at hand dealt with making an actual determination of the obscenity of certain materials. This limited use of precedent suggests that support for the judicial hierarchy is mixed.

Do circuit courts tend to use the prevailing standards more often than do district judges in cases where judges must determine the actual obscenity of various materials? I expected that, as predicted by judicial hierarchy, circuit judges would be more receptive to higher-court doctrine. The evidence in Chapter 3 suggests this is true for the use of *Miller* but not for *Roth*. *C*ircuit judges were actually less likely to use the *Roth* standards than district judges. Thus, to the extent that institutional distance has an influence, it became important only after the adoption of the *Miller* doctrine.

The results advise against accepting the influence of bureaucratic resistance among federal judges. In only a minority of “factual” opinions do circuit and district judges apply either *Roth* rule four or *Miller* rule two when making their decisions. In addition, the application of the *Roth* “community” and

"prurient interest" standards by circuit judges occurs less than expected, given that such standards were well suited for "factual" cases. On the other hand, circuit and district opinion-writers do apply the *Miller* standards at high levels, and district judges tend to use the *Roth* "community" and "prurient interest" standards at a medium to high level. District and (to a lesser extent) circuit judges are thus not completely unaware of the prevailing standards and are willing in "factual" cases to put them to the test.

Last, the communications model produced the expectation that lower-court judges would decide to support the *Roth* decision to a greater degree than they would *Miller*. In fact, judges tended either to make no appreciable distinction or (in the case of circuit courts) to give greater credence to the *Miller* decision. Overall, this suggests that the legal model does not apply so neatly to obscenity decisions at lower-court levels.

The Spirit of the Law: The Impact of the *Miller v. California* Decision on Lower-Court Judicial Obscenity Votes

I expected that, because of the judicial hierarchy, judges would tend to vote more often in a conservative direction after the *Miller* doctrine than beforehand. The results in Chapter 4 suggest this is the case for circuit courts more than for district courts. One does find a greater conservatism among all judges after the *Miller* decision. However, this difference is significant only among circuit judges dealing with circuit-level cases. This suggests that judges

are attentive to alterations in Supreme Court doctrine. There appears to be strong evidence for the impact of judicial hierarchy among circuit court judges in circuit-level decisions, but less among other judges.

Strangely, however, one finds unexpected patterns among "factual" cases. Circuit judges in circuit-level cases cast a greater percentage of conservative votes after the *Miller* decision, but this trend of greater conservatism does not occur among most other groups to a statistically significant degree. Indeed, district judges tended to view "factual" cases with roughly the same degree of conservatism as before *Miller.*

Using more sophisticated multivariate techniques in Chapter 5 demonstrates that both circuit and district judges conform to the spirit of the *Miller* decision, with a significantly lesser likelihood of a liberal vote after the decision. In virtually all models the *Miller* dummy variable is statistically significant, although the effects tend to be weaker at the district level. The influence of Supreme Court obscenity doctrine is even stronger when examining only "factual" cases, with both circuit and district judges being generally more likely to vote in a conservative direction after the *Miller*. All of this leads to the conclusion that even after accounting for the influence of presidential wishes and other factors, both circuit and district judges were aware of and attentive to the spirit of the High Court's obscenity doctrines.

Are there significant differences between circuit and district judges? The

judicial hierarchy model dictated an expectation that circuit judges would be more responsive to higher-court doctrine. Overall, circuit court judges were more responsive than their district-level colleagues to alterations in Supreme Court precedent. One potential pattern does appear: the effects tend to be more pronounced when narrowing down the analysis either by dropping out 'borderline' cases or else using only 'factual' cases. However, the effects of higher-court doctrine on district judges are weaker than expected. All this suggests that one aspect of the judicial hierarchy remains in place: that is, circuit court judges were more responsive to alterations in Supreme Court doctrine than were their district-court counterparts.

As a side issue, it turns out that district-court judges are not significantly persuaded by their circuit court authorities. It was expected that as a further extension of the judicial hierarchy, district judges in "factual" cases would be more likely to vote in a liberal direction if the latest circuit "factual" decision was in a liberal direction, and the reverse for conservative circuit "factual" decisions. In fact such circuit precedents are met with contrary findings: district court judges react to liberal decisions by their appellate-court superiors by increasing the chances of a conservative vote!

In line with expectations based on organizational theory, I expected (1) that Republican presidential appointees would be more likely than their Democratic associates to vote in a conservative direction, and (2) given *Miller's*

more conservative spirit, that the split between Republicans and Democratic appointees would be greater after the *Miller* decision. The results in Chapter 4 suggest, suggest a lack of partisan split among the judges themselves before *Miller*. The gaps seen after the *Miller v. California* decision suggest that partisan tensions began to amplify after the decision, but only among circuit judges.

The more sophisticated analyses in Chapter 5 also suggest that presidential intentions are not as influential as one might expect. In none of the district court models is there at least a 95 percent chance that Republicans are significantly more conservative than Democrats. Separate analyses using dummy variables to represent the effects of specific presidents yield conflicting results: Reagan judges tend to be conservative in all cases, and Carter judges in "factual" cases, Nixon judges actually are more liberal in such cases. More broadly, one finds no consistent pattern of greater conservatism by Republican appointees. The circuit courts do tend to be influenced by presidential intentions, both in the restricted set of factual cases: Republican presidential appointees tend to be significantly more conservative than others, but perhaps because of a significantly reduced N such presidential intentions do not influence circuit judges in "factual" cases. Looking at the effects of individual appointing presidents, Johnson appointees tend to be more liberal both overall and in "factual" obscenity cases. Neither Nixon, Reagan, and Carter judges show no significant conservative or liberal tendencies. Overall, then, it appears

that presidential intentions have a greater effect at the circuit rather than the district level.

The results in Chapter 5 suggest that geography also has a stronger effect at the circuit court level. Circuit-level Southern judges showed a distinctly conservative point of view in obscenity cases, district-level judges Southern judges did not.

In another test of the influence of organizational theory, I asked whether a judge's choice to adopt *Miller* rests upon the time of his or her appointment. I expected that newer judges would be more likely to adopt *Miller* because of the uncertainty of their position within the courts, and that judges appointed prior to the emerging *Miller* doctrine would be more resistant because their personal views on obscenity were more long-standing and thus more resistant to change. The results in Chapter 4 document that pre- and post-*Miller* differences are influential only among circuit judges and only in circuit-level cases. As expected, newer judges (post-*Miller* appointees) tend to vote more often in a conservative direction than their more seasoned colleagues but, except in the very small N category of district judges in circuit court cases, the differences between the holdover and the new judges do not attain statistical significance. Within the circuit courtrooms the reverse is true: holdover judges are actually more conservative than newer judges!

Were judges receptive to the types of litigants entering the courtrooms as

well as the types of legal claims they made? The results in Chapter 5 indicate that the federal government as litigant is quite successful at both the circuit and district levels: regardless of the appointing president, the legal claims made by litigants, and other factors, judges tend to vote significantly more often in a conservative direction when the federal government is party to a case. Adult businesses, generally, have a tougher time in the federal courtrooms. At the district level, when such businesses are part of the case at hand, judges are considerably more likely to vote in a conservative direction regardless of whether such litigants claimed a First Amendment violation or asserted any type of violation of due process or procedure. A similar pattern occurs with circuit court judges, but only when looking at "factual". Last, an individual as litigant tends not to receive any unusual treatment by federal court judges, except in the circuit courts as they review all types of obscenity cases; where they are likely to receive more conservative outcomes.

Last, do the types of legal claims made by litigants have any impact? I expected that judges would be attentive to certain claims made by litigants—specifically, to First Amendment claims and procedural violations—and be more likely to rule in a liberal direction when such claims were present. The results in Chapter 5 suggest this is not the case. Claims of First Amendment violations do lead to a greater chance of a liberal vote by circuit judges, but not by district judges. Consistently contrary to hypothesis was the finding that claims of

procedural violations actually led to a greater likelihood of a conservative vote, regardless of whether the case is under consideration in circuit or district courts and whether the case deals with an official determination of obscenity.

Summary

What, then, do these complex findings say about the influence of higher-court precedent? Most prominently, it appears that the judicial hierarchy is more influential among the circuit than the district courts, and has greater influence on the votes of lower-court judges than on their opinions. Chapter 3 illustrated the tendency for circuit and district judges to use either *Roth* or *Miller* was unexpectedly low, with only a few making use of either doctrine as the controlling or persuasive element in their opinions and applying the standards to the case at hand. One does find some indication that lower-court judges at both levels are aware of the change in obscenity policy inaugurated by the *Miller v. California* decision, as their overall usage and citation of *Roth* drops markedly. There are indications that lower-court judges are more likely to use the High Court's obscenity doctrines in cases that are most similar—in cases where the judge makes a factual determination about a variety of materials. Circuit and district judges used *Roth* and *Miller* standards much more often in factual cases than in others. Thus, it appears that although judges were reluctant to use each doctrine and its standards in all of their opinions, they were more likely to apply the core of each doctrine—the standards—much more often in factual cases. To

the extent that a hierarchy exists that influences opinion-writers, then, it is more prominent among factual cases and most strongly.

Does the judicial hierarchy influence the actual decisions of lower-court judges? The results in Chapters 4 and 5 suggest that the answer is yes for circuit judges, but less so for district judges. Both circuit and district judges tended to be more conservative after the *Miller* decision in all cases and in factual cases, but this difference was significant only at the circuit level. The multivariate results reported in Chapter 5 revealed that circuit courts were indeed responsive to the spirit of the *Miller* doctrine, voting significantly more often in a conservative direction regardless of the types of cases analyzed or the interplay of a variety of other factors. District judges were less likely to do so; as the findings suggest a moderate to weak relationship between the introduction of the *Miller* decision and the likelihood of a liberal vote depending on the types of factors used for statistical modeling. Thus, although the judicial hierarchy is not all-commanding upon lower-court judges, it at least does make a significant difference among circuit judges when they assess the facts and claims made within their courtrooms.

If the *Roth* and *Miller* doctrines did not command the complete attention of lower-court judges, to what extent did one find some groups more attentive than others? Was it true, for example, that Republican appointees were significantly more likely to use the *Miller* doctrine; were they more likely to vote in a

conservative direction? It appears that Republicans did not view the *Miller* decision with a more permissive eye than did Democrats, as Chapter 3 reported no significant difference among their usage of the rules of law or the standards. Interestingly, one also finds that while district Republican appointees tended to use the *Roth* standards more often, circuit Democratic tended to do the same with the *Roth* rules of law. Also, while both Republicans and Democrats tended to vote more often in a conservative direction after the *Miller* decision, this difference was statistically significant only for circuit-level Republican appointees in circuit level cases. Presidential partisanship was also unimportant in district-level decisions when accounting for other explanations of judicial decision-making, showing no uniform tendency of Republican appointees to be significantly more conservative than their Democratic brethren. Overall, then, presidential partisanship tended to matter only at the circuit level and not in "factual" cases.

There also appears to be little reason to believe that judicial experience makes a substantial impact in the lower courts. I expected newer judges to be more willing than their more experienced colleagues to adopt the emerging obscenity doctrines, this was not the case. Newer judges were not significantly more likely to use either *Roth* or *Miller* in their opinion-writing. In addition, newer judges not only did not vote in a significantly more conservative direction than "holdover" judges, one finds that "holdover" judges at the circuit (but not the

district) level were indeed more conservative after the *Miller* doctrine (Table 4-4). Thus, judicial experience was not responsible for the reactions of circuit and district judges to the *Roth* and *Miller* doctrines.

Was it true that the responses of lower courts to the *Roth* and *Miller* decisions were in part a reflection of the Supreme Court's greater support for the *Roth* decision than the *Miller* decision or a greater willingness to support it in its earlier years? The evidence in Chapter 3 suggest that the communications/'legal' model is not important for opinion-writing: circuit and district judges did not tend to give any significantly higher support for the *Roth* decision, its rules of law or its standards, although circuit judges were somewhat more likely to use the *Roth* standards in earlier years. It does appear that judges were a little more likely to use the *Miller* standards in its first five years than in later years. This suggests that if the 'half-life' proposition is true, then it is more applicable to judges in the post-*Miller* era than before.

Last, there appears to be mixed support for the influence of the judicial hierarchy as a way of explaining lower-court responses to Supreme Court obscenity doctrine. Although there was no overwhelming pattern of judges adopting the *Roth* and *Miller* rules of law or standards in their opinions (Tables 3-2 to 3-4), judges in factual cases did tend to adopt the *Roth* and *Miller* standards to a greater extent when the case involved a determination of the character of materials at hand. Furthermore, circuit judges generally tended to

vote significantly more often in a conservative direction after the *Miller* decision, but even when accounting for a variety of competing explanations such as the party of the appointing president and types of litigants in the courtrooms, the *Miller* doctrine proved influential. The effects of the *Miller* doctrine were more subdued at the district level. Overall, then, the use of the Supreme Court's doctrine in obscenity cases is greater among circuit judges and in cases that are similar in substance to the *Roth* and *Miller* decisions—in "factual" cases.

APPENDIX A

OBSCENITY CASES CODING SHEET

Case Name: _____ Coder: _____
Case Citation: _____ F. Supp. 2d. 3d. WL _____ Date: ___ - ___ - ___ (yy-mm-dd)
___ Opinion Type ___ Procedural?
___ Remanded from higher court? ___ Criminal case?
___ Seek: permanent injunction (1), motion to suppress (2), temp. injunction (3), nothing (0)
___ Amicus brief? Whom? _____

Judge-Related Information

	Judge's Full Name	District/Circuit	Vote (0 = conservative, 1 = liberal)
Judge #1:	_____	____	____
Judge #2:	_____	____	____
Judge #3:	_____	____	____

Case Characteristics:

Litigant #1: Non-governmental; suing government
___ Role of party/parties ___ Pornographer/Type of client
Litigant #2: Governmental entity
___ Level of Government ___ Role of Government

Materials Under Investigation:
___ Film? ___ Magazine?
___ Text? ___ Photographs?
___ Miscellaneous? (e.g. topless dancing, audio tapes, "still" photos) **Specify:** _____

Regulation of Materials:
___ Sent through U.S. mail? ___ Gov't uses licensing program (e.g. films)
___ Gov't seizes obscenity? ___ Was there regulation of time/place/manner?
___ Was the validity of search and seizure the main issue in the case?

Litigant Claims:
___ No scienter (Alleges prosecution failed to prove accused knew the contents of materials)
___ First Amendment violation claimed? ___ Privacy violation claimed?
___ Prior restraint of expression claimed? ___ Due process violation? claimed?
___ Law/statute/etc. claimed void: vagueness? ___ Law/etc. claimed overbroad?
___ Literary/scientific/political/artistic claim? ___ Social value claimed?
___ Fourth Amendment violation?

Compliance Information:

Roth v. United States decision: Roth standards	Mention	Discuss	Apply
Average person; contemporary community stds	___	___	___
Dominant theme of mats. leads to prurient interest	___	___	___
Utterly without socially redeeming value (**note if "socially redeeming importance")	___	___	___

Miller v. California: Miller standards	Mention	Discuss	Apply
Average person; contemporary community stds	___	___	___
Dominant theme of mats. leads to prurient interest	___	___	___
Depicts/describes sexual conduct in patently offensive way	___	___	___
Lacks serious literary/artistic/scientific/politic value	___	___	___

APPENDIX B

CODE BOOK FOR OBSCENITY CASES

CASE-RELATED INFORMATION

Name of the case

** Make certain to write in only the official name (the citation name)

Case Citation (e.g. 123 F.Supp. 1112, 1989 WL 123456)

Date

** Write in date of actual decision (not hearing date)

Decision by Precedent

1 Post-*Roth* only (June 24, 1957 to June 22, 1964)
2 *Jacobellis* to *Memoirs*/*Ginzburg* (June 23, 1964 to March 21, 1966)
3 *Memoirs*/*Ginzburg* to *Ginsberg* (March 22, 1966 to April 22, 1968)
4 *Ginsberg* to *Miller* (April 23, 1968 to June 21, 1973)
5 Post-*Miller* (June 21, 1973)

Opinion (Opinion Status)

1 Published, and signed opinion
2 Published *per curiam* opinion
3 Published memorandum decision
4 Unpublished, but signed decision
5 Unpublished, *per curiam* opinion
6 Unpublished, memorandum decision
7 An *en banc* decision
8 Second or subsequent *en banc*

Response to Lower Court Decision (Treatment)

1 Affirm decision, or dismiss appeal
2 Affirm in part, reverse in part
9 Certification to another court
3 Reverse, vacate, remand; reverse/remand
4 Denies review of petition
5 Writ of mandamus issued

Procedural

1 Procedural case
*Adversary hearing; civil case; collateral estoppel; evidence; prosecute importation; language of indictment or 'pandering' stated in indictment; 'vagueness'

Criminal Case (2 if criminal label in case: e.g. CR, Crim.; but not criminal below)

0 Civil case
Censorship board
Declaratory judgment proceedings: determine obscene before prosecution; either side can seek
Injunction: prohibit sale of books or showing of films
Licensing: licensing system, movie classification
Prior restraint doctrine
Seizures
Zoning ordinance, or other controls

1 Criminal case
Criminal declaration of obscenity
Issue of scienter
Issues of evidence, predisposition
Entrapment charges

Case Level (for data analysis, variable is caselvl)

0 Used for all analysis

1 Nude/topless dancing cases *(focuses on Barnes or California analysis, including:
* Challenges to ordinance (whether 21st Amendment question involved or not)
* Buttocks/pasties/G-string/etc. requirements (even wearing license)
* Zoning of facilities
* Licensing requirements

2 Challenges to ordinances (e.g. 1,000 foot ordinances; *Renton* or *Young*-type cases) and other time/place/manner restrictions such as removing doors off of movie booths (*Schad* or *Erznoznik*-like cases)

3 "Obscene to minors" cases (e.g. challenge to 'obscene to minors' or 'sexually offensive to minors' statute) and related cases

4 Cases dealing with "indecency", "sexually explicit" or "lewdness" (including Communications Decency Act)

Remand

1 Case remanded by the Supreme Court 2 Remanded by a circuit court

0 No remand

Original case?

1 Case begun in district court

0 Appealed from state court decision

Lower Court

**Write in name of the lower court that made the previous decision, if such information available
**Also include name of lower court judge/s, if available

Lower Court Case Citation

Amicus: Number

Number of groups filing *amicus* brief; write in name of each group; count by number of briefs, not groups

Amicus: Ideology 0 = conservative; 1 = liberal

Judge-Related Information

Judge's Name

**If more than one judge, list them in order according to the Court's opinion

Court District/Circuit

**See last three pages of codebook

Region

1 Southern State (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia)
2 Eastern State (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont)
3 Border State (Delaware, District of Columbia, Kentucky, Maryland, Missouri, Oklahoma, West Virginia)
4 Other States (any not included in above categories)

Southern Circuits

1 Decisions from Fourth, Fifth, or Eleventh Circuits
0 Otherwise

President

13 Herbert Hoover (1929-1932)
14 Franklin D. Roosevelt (1933-1944)
15 Harry S. Truman (1945-1952)
16 Dwight D. Eisenhower (1953-1960)
17 John F. Kennedy (1961-1963)
18 Lyndon B. Johnson (1963-1968)
19 Richard M. Nixon (1969-1974)
20 Gerald R. Ford (1974-1976)
21 James E. Carter (1977-1980)
22 Ronald W. Reagan (1981-1988)
23 George H.W. Bush (1989-1992)
24 William J. Clinton (1993-present)
25 Magistrate
99 Don't know/NA

Opinion Author

0 Join majority opinion
1 Yes
2 First dissenting opinion
3 Joins first dissent
4 Second dissenting opinion
5 Joins second dissent
12 Join majority opinion
6 First concurring opinion
7 Join first concur
8 Second concurring opinion
9 Join second concur
10 Per curiam opinion
11 Concur/dissent

Appt Date

Appointment Date by Precedent

**Note: recess appointments used for appointment date

**Also, when promotion from district judge, use date of circuit appointment

0 Pre-*Roth*
1 Post-*Roth*, Pre-*Jacobellis* (before June 22, 1964)
2 *Jacobellis* only (June 23, 1964 to March 21, 1966)
3 *Memoirs*/*Ginzburg* (March 22, 1966 to April 22, 1968)
4 *Ginsberg* (April 23, 1968 to June 21, 1973)
5 Post-*Miller* (after June 22, 1973)

Judge's Actual Vote: Sample Issues (0 = conservative; 1 = liberal; 2 = mixed)

	Conservative/proscriptionist	Liberal/libertarian
Obscenity		
Obscenity *vel non*	Obscene	Not obscene
Magistrate/jury had sufficient basis for obscenity declaration?	Yes	No
Evidence sufficient for conviction?	Yes	No
Person 'predisposed' to obscenity?	Yes	No
Nude dancing 'protected' expression?	No	Yes
Procedural Safeguards		
Government must provide an adversary hearing prior to seizure?	No	Yes
Defendant harmed using both *Roth*, *Miller*?	No	Yes
Search Warrants		
Is *ex parte* warrant valid?	Yes	No
Affidavit has sufficient proof for prob. cause?	Yes	No
Jury Instructions and Activity		
Jury permitted to cross-examine witnesses?	No	Yes
Jury need be informed about *scienter*?	No	Yes
Jury given faulty instructions?	No	Yes
Regulation of Materials		
Ordinance violates First Amendment?	No	Yes
Regulation based on content permitted?	Yes	No
Inspection of premises is content-based?	No	Yes
Ordinance must give fair hearing prior to determination?	No	Yes
Ordinance is a valid time, place manner restriction?	Yes	No
Movie classification valid regulation?	Yes	No
Licensing Boards (e.g. liquor establishments)		
Licensing board must:		
Give adequate notice of the law?	No	Yes
Show clear standards of review?	No	Yes
Ordinance must provide jury trial?	No	Yes
Statutory Definitions		
Statute must adequately define its terms? "prurient," "patently offensive," "lascivious," "harmful to juveniles" or "harmful to minors"	No	Yes
Miscellaneous		
Defendant has right to privacy for materials?	No	Yes

Litigant Characteristics: Litigant # 1
(Non-governmental litigant; charged with allegedly obscene materials, or challenging regulations)
Role of Party/Parties
1 Prosecution/appellant
2 Defendant/respondent

Type of Party (when multiple parties, look for 'strongest' party when made clear)

10	Individual	25	Other media
20	"Adult" store/theatre	26	Adult book publisher/movie producer
21	Regular bookstore/newsstand	27	Adult club (e.g. topless/nude dancing)
22	Newspaper/magazine	28	Non-adult distributor
23	Radio/TV station	29	General business
24	Movie studio/producer or theatre; live theatre producer	30	Non-profit org., school, University
		31	Adult distributor of materials
		99	Other

Notes:
a. Not necessarily coding by first defendant/plaintiff; code as one with most resources
b. If individual is editor/publisher/employee of corporation (e.g. adult book publisher), code as corporation, etc. and not merely individual
c. On rare occasion, looked up other cases with same litigant to discover whether adult or not
d. In cases where listing "X Copies of Non/Obscene Merchandise" would code as Individual (10) when:
Someone is specifically noted as claimant in the case
A person is listed in title of case, even if d/b/a some business/company
e. Code as adult store or theatre when:
Judge specifically says it is an "adult" theatre

Litigant Characteristics: Litigant # 2 (This litigant considered federal/state/local government)
Level of Government

1	Federal	2	State
3	Local	9	Other/non-governmental

Role of Party/Parties

1	Prosecution/Appellant	3	Amicus/Intervenor
2	Defendant/Respondent	4	No role in case; other

Materials Under Investigation
Film 1 = yes; 0 = no
Magazine 1 = yes; 0 = no
Text 1 = yes; 0 = no (e.g. books, newspapers, advertisements/circulars of textual nature, short stories, poems; does not include advertisements/circulars with photographs)
Photographs 1 = yes; 0 = no
Miscellaneous 1 = yes (e.g. topless dancing, audio tapes, paintings, "still" photographs)

Notes:
a. Code as misc. when case does not make clear what mats. involved
b. Make certain to specify actual materials under this category; materials must be related
c. If adult bookstore or theatre, assume that it has films, books, magazines, pictures

Regulation of Materials

Mail	1	Alleged obscenity sent through the United States mail
	0	Not sent
Seized	1	Government seizes allegedly obscene materials
	0	Not seized
Search/Seize	1	Actual validity of search and seizure is main issue in the case (including whether needed adversary hearing prior to seizure)
	0	Not main issue (perhaps one of many competing issues)
License	1	Govt. requires pre-clearance from state prior to public availability
	0	Not required **Most often considered, as motion picture licensing
TPM	1	Some form of time, place, manner regulation (e.g. nude bars)
	0	No such regulation

Litigant Claims: Libertarian

No Scienter

1 Litigant alleges prosecution failed to prove scienter or statute failed to include scienter element (scienter: knowledge of the contents of materials)

0 No such allegation made

First Amendment Violation

1 General First Amendment violation claimed, or free-speech claim

0 No such claim made

Note: be careful not to double count

e.g. First Amendment vagueness claim; count as vagueness but not First Am.

e.g. First Amendment prior restraint claimed: code only as prior restraint

Privacy Violation

1 Litigant claims invasion of privacy; favor private possession of materials by adults

0 No such claim made

Prior Restraint Violation

1 Litigant claims prior restraint of expression

0 No such claim presented

Due Process Violation

1 Litigant claims due process violation (includes lack of adversary hearing prior to seizure; must watch for other Fifth Amendment claims!)

0 No such claim presented

Literary, Scientific, Artistic Value
1 Litigant claims literary value
2 Litigant claims scientific value
3 Litigant claims artistic value
4 Litigant claims political value
5 Litigant claims literary and scientific value
6 Litigant claims literary and artistic value
7 Litigant claims scientific and artistic value
8 Litigant claims literary, scientific and artistic value
9 Litigant claims social value
0 None of the above claimed

Fourth Amendment Violation
1 Litigant claims Fourth Amendment violation
0 No such claim presented

Vagueness
1 Litigant claims statute/ordinance/regulation/etc. void for vagueness
0 No such claim presented

Overbroad
1 Litigant claims statute/ordinance/regulation/etc. overbroad
0 No such claims presented

Compliance Information: *Roth v. United States*

Use of *Roth v. United States* Standards

0 Court opinion does not include this standard

1 Court opinion **mentions** standard in passing (e.g. quote) but not outline/explain in meaningful way

2 Court opinion **discusses** (explains) this standard, but will not apply standard in the court's analysis

3 Court opinion **applies** this standard, as part of its analysis

**Code separately for

(a) Average person, using contemporary community standards

(b) Dominant theme of the material, taken as a whole, leads to prurient interest

(c) Utterly without social value

Compliance Information: *Miller v. California*

****Use of *Miller* Standards (Use highest number possible)**

0 Court opinion does not include this standard

1 Court opinion **mentions** standard in passing (e.g. quote) but not outline/explain in meaningful way

2 Court opinion **discusses** (explains) this standard, but will not apply standard in the court's analysis

3 Court opinion **applies** this standard, as part of its analysis

**Code separately for

(a) Average person, using contemporary community standards

(b) Dominant theme of the material, taken as a whole, leads to prurient interest

(c) Depicts/describes sexual conduct in a patently offensive way

(d) Lacks serious literary, artistic, political, scientific value

Treatment of Cases:
Roth v. United States (1957)

Number of case citations (number of pages with citation)

0	Does not cite case	21	Cite once; two rules of law
1	Once in opinion; no rules of law	22	Cite twice; two rules of law
2	Twice in opinion; no rules of law	23	Cite three times; two rules of law
3	Three times in opinion; no rules of law	24	Cite more than three; two rules of law
4	More than three times; no rules of law	31	Cite once; three rules of law
11	Cite once; as one rule of law	32	Cite two times; three rules of law
12	Cite twice; at least once as rule of law	33	Cite three times; three rules of law
13	Cite 3x; at least once as rule of law	34	Cite more three times; three rules of law
14	More than 3x; least once as rule of law	44	More than 3 times; more than three rules

Use of decision by opinion writer

0 No specific use of opinion, and no citation
1 No specific use, but actual case cited once or twice
2 No specific use, but case cited more than twice
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* maybe different from present case, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Use of rules of law in opinion

Roth rule number one: Upholding constitutionality of 18 U.S.C. 1461 and Roth's conviction (Shepard's headnote number one)

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* due to intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Roth rule number two: uphold constitutionality of CA law, Alberts' conviction (Shepard's headnote #2)

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Roth rule number three: obscenity not protected by 1st Am. or due process (Shepard's headnote number three)

*First Amendment not protecting "every utterance"
*Speech/press protections there "for the bringing about of political and social changes desired by the people"
*Ideas with "slightest redeeming social importance" protected, but obscenity does not have this

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Roth rule number four: no constitutional violations for obscenity convictions under "clear and present danger" (Shepard's headnote number four)

*Obscenity "deals with sex in a manner appealing to prurient interest…tendency to excite lustful thoughts"

*In judging obscenity, materials not dealing with prurient interest must be protected

*Standards for judging obscenity: "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

*Both trial courts followed appropriate standard, and used "proper definition of obscenity"

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Roth rule number five: applying proper obscenity standard, 18 U.S.C. 1461 does not violate freedom of speech or due process (Shepard's headnote number five)

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Roth rule number six: applying proper obscenity standard, California obscenity law does not violate freedom of speech or due process (Shepard's headnote number six)

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Roth*
4 Distinguish: distinguishes case from *Roth*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Roth* in significant way
6 Follow: relies upon *Roth* as controlling or persuasive authority
7 Harmonize: *Roth* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al.. v. Attorney General of Massachusetts. (1966)

Number of case citations (number of pages with citation)

0	Does not cite case	21	Cite once; two rules of law
1	Once in opinion; no rules of law	22	Cite twice; two rules of law
2	Twice in opinion; no rules of law	23	Cite three times; two rules of law
3	Three times in opinion; no rules	24	Cite more than three times; two rules
4	More than three times; no rules	31	Cite once; three rules of law
11	Cite once; as one rule of law	32	Cite two times; three rules of law
12	Cite twice; at least once as rule	33	Cite three times; three rules of law
13	Cite 3x; at least once as rule of law	34	Cite more than three; three rules
14	More thn 3x; at least once as rule	44	More than 3; more than three rules

Use of decision by opinion writer: general

0 No specific use of opinion, and no citation
1 No specific use, but cited once or twice
2 No specific use, but cited more than twice
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differ from *Memoirs*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Memoirs* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Memoirs*

Use of rules of law in opinion

Memoirs rule of law: standard for judging obscenity (Shepard's headnote number one)
"Dominant theme of the material taken as a whole appeals to a prurient interest in sex"
"The material is patently offensive because it affronts contemporary community standards"
"The material is utterly without redeeming social value"

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Roth*

Memoirs rule of law (*Shepard*'s headnote number two)
Massachusetts Supreme Court mistakenly interpreted standards, because need to consider whether materials "utterly without redeeming social value"

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differing from *Roth*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Memoirs* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Memoirs*

Memoirs rule of law (Shepard's headnote number three)
Assuming materials have prurient appeal, are patently offensive, and only slight social importance, in different proceedings triers of fact may use "evidence of commercial exploitation" to justify lack of constitutional protection

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differ from *Memoirs*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Memoirs*

Douglas *Memoirs* opinion: even using *Roth* standard, can't hold book obscene because substantial evidence shows it has literary, artistic, social importance (Shepard's headnote number two)

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differing from *Memoirs*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Memoirs*

Douglas *Memoirs* opinion: (Shepard's headnote number four)
History does not support *Roth* view that "obscene" speech not protected by the First Amendment

0 No specific use of opinion, and no citation
1 No specific use, but case cited at least once
2 No specific use, but rule of law cited
3 Criticize: disagrees with the reasoning in *Memoirs*
4 Distinguish: distinguishes case from *Memoirs*; case at hand differ from *Memoirs*
5 Explain: interprets or clarifies *Memoirs* in significant way
6 Follow: relies upon *Memoirs* as controlling or persuasive authority
7 Harmonize: *Memoirs* may be different from case at hand, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Roth* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Memoirs*

Brennan *Memoirs* opinion: is the majority opinion; code same as regular

Jacobellis v. Ohio (1964)

Number of case citations (number of pages with citation)

0	Does not cite case	21	Cite once; two rules of law
1	Once in opinion; no rules of law	22	Cite twice; two rules of law
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3	Three times in opinion; no rules	24	Cite more than three; two rules
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13	Cite 3x; at least once as rule of law	34	Cite more than three; three rules
14	More thn 3x; at least once as rule	44	More than 3; more than three rules

Use of decision by opinion writer

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3 Criticize: disagrees with the reasoning in *Jacobellis*
4 Distinguish: distinguishes case from *Jacobellis*; case at hand differing from *Jacobellis*
5 Explain: interprets or clarifies *Jacobellis* in significant way
6 Follow: relies upon *Jacobellis* as controlling or persuasive authority
7 Harmonize: *Jacobellis* maybe different from present case, opinion reconciles difference or inconsistency in reaching its decision
8 Question: questions continuing validity or precedential value of *Jacobellis* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Jacobellis*

Use of rules of law in opinion

Jacobellis rule number one: Motion pictures can be constitutionally protected by freedom of speech, but obscenity not protected (Shepard's headnote number one)

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9 Dissenting opinion cites *Jacobellis*

Jacobellis rule number two: Court can't avoid judging whether allegedly obscene material here gets constitutional protection (Shepard's headnote number one)

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9 Dissenting opinion cites *Jacobellis*

Jacobellis rule number three: (Shepard's headnote number three)

Obscenity test is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"

*Can't outlaw materials unless "utterly without redeeming social importance," any materials dealing with sex advocating ideas or with literary/scientific or other social importance can't be obscene
*Not permitted to "weigh" social importance against prurient appeal
*Materials must go beyond "customary limits of candor in description or representation" to be obscene
*We consider "contemporary community standards" to be those of the nation as a whole

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8 Question: questions continuing validity or precedential value of *Jacobellis* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Jacobellis*

Jacobellis rule: (Shepard's headnote number four)
Interest in stopping materials "deemed harmful to children" not enough; review by appropriate strict standard

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Jacobellis rule number five: (Shepard's headnote number five)
Using the appropriate standard, the film is not obscene

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Brennan opinion: same as majority opinion

Black opinion: “a conviction for exhibiting a motion picture violates the First Amendment, which is made obligatory on the States by the Fourteenth Amendment”

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9 Dissenting opinion cites *Jacobellis*

Goldberg opinion: “there is no justification here for making an exception to the freedom-of-expression rule, for by any arguable standard this film is not obscene.”

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Miller v. California (1973)

Number of case citations (number of pages with citation)

0	Does not cite case	21	Cite once; two rules of law
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Use of decision by opinion writer

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9 Dissenting opinion cites *Miller*

Use of rules of law in opinion

Miller rule of law (Shepard's headnote number one):
Obscenity not protected by First Amendment; materials can be regulated by states if:
*The work, taken as whole, appeals to prurient interest
*Portrays sexual conduct in patently offensive way (as defined by state law)
*Taken as whole, has no "serious literary, artistic, political, or scientific value"

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6 Follow: relies upon *Miller* as controlling or persuasive authority
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8 Question: questions continuing validity or precedential value of *Miller* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Miller*

Miller rule of law (Shepard's headnote number two)
Obscenity guidelines for triers of fact:
(a) whether "the average person, applying contemporary community standards" finds the work, taken as a whole, appeals to the prurient interest"
(b) whether work "depicts or describes, in a patently offensive way, sexual conduct" defined by state law
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value
If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary

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Miller rule of law (Shepard's headnote number three)
Rejects "utterly without redeeming social value" as constitutional standard

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Miller rule of law: juries permitted to measure "prurient appeal" and "patent offensiveness" by local community standards; need not use national standard (Shepard's headnote number four)

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Ginsberg v. New York (1968)

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9 Dissenting opinion cites *Ginsberg*

Use of rules of law in opinion

Ginsberg rule of law (Shepard's headnote number one):

"The magazines here involved are not obscene for adults and appellant is not barred from selling them to persons 17 years of age or older."

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8 Question: questions continuing validity or precedential value of *Ginsberg* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Ginsberg*

Ginsberg rule of law (Shepard's headnote number two):
Obscenity not protected speech (*Roth*); obscenity not issue here, since appellant does not argue materials are "harmful to minors"

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8 Question: questions continuing validity or precedential value of *Ginsberg* because of intervening circumstances, including judicial or legislative overruling
9 Dissenting opinion cites *Ginsberg*

Ginsberg rule of law (Shepard's headnote number three):
"It is not constitutionally impermissible for New York, under this statute, to accord minors under 17 years of age a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read and see"

*States may adjust definition of obscenity when applied to minors, since state's authority over minors is greater than that over adults
*Parents have authority over rearing of children and their well-being, and legislature should support this
*"The state has an independent interest in protecting the welfare of children and safeguarding them from abuses"
*We can't say there is no relation between the statute and the goal of safeguarding children

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Ginsberg rule of law (Shepard's headnote number four):
"Subsections (f) and (g) of 484-h are not void for vagueness."
*NY Appeals Court said statute's definition of "harmful to minors" closely enough to *Memoirs* def'n
*Scienter definition adequate, according to NY state law

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Case Types: Issues Up For Debate

Obscenity as Issue

100 Judge makes factual decision on obscenity vel non of materials
101 Judge decides whether materials are child pornography
104 Whether the materials are "hard-core pornography"
105 Judge makes statement about the material's obscenity
106 Whether reasonable prosecution would believe probable cause of violating statute
107 Whether judge provides adequate conclusions of law regarding obscenity
108 Whether lower court judge applied *Miller* correctly, or whether retroactive application of *Miller* OK
110 Magistrate/lower court has/not sufficient cause to declare materials obscene
115 Post Office had sufficient evidence to take action (e.g. stop importation)
116 Whether must have trial and not just "summary judgment"
117 Whether prosecution must show "pandering"
120 Lower court evidence is/not sufficient to sustain obscenity conviction (lower court judge properly found them obscene)
125 Whether jury properly found materials obscene
126 Whether government actually proved pandering
127 Whether trial judge abused discretion when ruling on materials
128 Whether may consider pandering evidence as part of case
129 Whether judge (not just magistrate) must personally view the materials
130 Whether person proven to be "predisposed" to obscenity
140 Whether nudist dancing (and related acts) considered "protected expression"
150 Whether jury likely to find obscene
160 Whether defendant's activities have First Amendment protection
161 Whether government failed to refute redeeming, LAPS, etc. claims
165 Whether the prosecution sufficiently proves scienter
166 Whether evidence supports conspiracy to ship, or simply to mail, materials
167 Whether defendant engaging in sexual exploitation
168 Whether defendant "knowingly" possessed materials
169 Whether the defendant properly subject to interception of mail
175 Generally, whether scienter proven

Procedural Safeguards

194 Whether probable cause for arrest
195 Whether evidence discovered in search of defendant's home, etc. was admissible
196 Whether permitted to hold materials past expiration of order
197 Is plaintiff the victim of selective prosecution?
198 Do plaintiffs have standing for the case?
199 Whether informal warning, considered prior restraint
200 Judge determines whether government adequately provided adversary prior to seizure of materials
201 Whether government provided safeguards
202 Whether permissible for private company to hand materials over to FBI
203 Whether permissible if government did not hold adversary hearing
204 Whether judge has wide latitude regarding comparable materials
205 Whether government officials must give warning, regarding the materials
206 Whether task forces or other activities are prior restraint
207 Whether scienter necessary to be proven in the case at hand
208 Generally, permissibility of arrest
209 Whether jury given proper instructions
210 Judge determines whether government adequately provided "procedural safeguards", or

whether 'entrapment' shown
211 Whether court upholds a subpoena duces tecum
212 Whether police must get a judicial determination of obscenity
213 Whether government engaged in 'outrageous conduct'
214 Whether can discern/prove relevant community standards
215 Whether the statute provides procedural safeguards
217 Whether statute/ordinance includes adversary hearing
218 Whether statute/ordinance provides adequate scienter provision
219 Whether case is 'double jeopardy' case

Search Warrants
220 Is an *ex parte* warrant considered valid?
221 Whether restraining order is denial of due process
222 Whether questioning permissible
223 Whether need to return all but one copy of materials
224 Whether evidence for warrant is "stale"
225 Whether magistrate had probable cause
226 Probable cause was adequately proven, prior to seizure
227 General, whether warrant valid or probable cause for warrant
228 Whether permissible for someone to give consent to search, as agent of defts.
229 Whether airline "search" permissible
230 Whether affidavit for warrant provides sufficient proof of probable cause
231 Whether indictment particular enough
232 Whether consent given after seizure began
234 Whether government can hold property
235 Whether affidavit particular, sufficient enough
236 Whether warrant particular enough for intended search
237 Whether general OK of seizure
238 Whether government shows pattern of 'bad faith' harassment or 'outrageous conduct'
239 No warrant given prior to search-permissible?

Jury Instructions and Activity
240 Whether permitted to cross-examine witnesses
250 Jury was/not adequately informed about nature of scienter
260 Jury was/not given adequate jury instructions
265 Whether new trial is necessary, based on new evidence
270 Whether arrest is prior restraint
280 Whether government may introduce evidence of predisposition
285 Whether must include the public in the actual trial
289 Whether must determine if materials are "patently offensive"
290 Whether government shown to have tainted testimony
291 Whether jury may consider pandering evidence if even defendants not charged
292 Whether jury must use "national committee," "average person" test
293 Whether judge/jury must use most up-to-date test
294 Whether must use the "serious literary", etc. test
295 Grand jury problems; or whether must have expert testimony
296 Whether necessary for jury to see the materials
297 Generally, whether discretion of judge permitted
298 Whether there is a right to a jury trial in the case at hand
299 Whether jury failed to follow jury instructions

Regulation of materials

**Does ordinance/statute regulating "adult" establishments violate First Amendment

300 Whether regulation based solely on content, and/or inspection of premises content/based
304 Whether FCC order (e.g. revoking license) permissible
305 Whether government used least restrictive means
306 Whether there is harassment of premises
310 Whether ordinance provides fair hearing prior to obscenity determination
320 Whether ordinance considered valid time/place/manner restriction
330 Whether statute/ordinance considered overbroad
340 Whether statute/ordinance considered vague
345 Whether statute/ordinance is prior restraint
350 Whether statute/ordinance must include *Miller* standards
355 Whether ordinance must apply up-to-date obscenity standards
360 Whether statute/ordinance incorrectly applies the *Miller* standards
361 Whether statute must require scienter provision
362 Whether government may destroy building
363 Whether ordinance is covered under state's "police power"
364 Whether need to require viewing areas to be visible
365 Whether conditional use permit permissible
366 Whether statute violates ex post facto clause
367 Whether school board's action permissible
370 Generally, whether statute/ordinance is valid
380 Whether statute applies in this case
385 Must the plaintiff wait until criminal prosecution to challenge statute
400 Whether movie classification system withstands scrutiny
410 Whether restraint of movie (refusal to show) permissible
420 Whether statute is prior restraint

Licensing boards and forfeiture (e.g. liquor establishments)

500 Does licensing board give adequate notice of the law
510 Does licensing board show clear standards of review
520 Whether licensing board provides proper procedures for hearing on review
530 Whether licensing scheme includes proper procedural safeguards
540 Whether licensing fees are considered content-neutral
550 Whether government has proper authority to refuse building permit
560 Whether license fee considered excessive
570 Whether forfeiture penalty permissible
575 Whether forfeiture of materials by government permissible
580 Whether revocation of license considered prior restraint
590 Definition of 'obscene'

Statute definitions challenged

600 "prurient" or "prurient" interest
610 "patently offensive"
620 "lascivious"
630 "harmful to juveniles" or "harmful to minors"
640 Some combination of two of the above
650 Some combination of three of the above
651 "sexually explicit conduct" or "sexual conduct"
652 "knowing"
653 "obscene materials"
654 General questions regarding definitions

655 “indecent”
656 General wording of statute
657 “indecent”

Miscellaneous case

700 Whether defendant has a right, pursuant to *Stanley v. Georgia*’s “right to privacy” of obscene materials, to receive and possess obscene materials?
705 Whether statute infringes on the right to privacy
706 Whether prosecutorial discretion abused
710 Whether lower court (or present court) should have abstained from deciding case
720 Whether writ of mandamus is necessary
730 Did district court err in determining a live case or controversy?
740 Does defendant have standing to challenge the search/seizure?
750 Whether judge should have required a 3-judge panel
760 Whether district judge abused discretion

State	District	State Code	District Code	Circuit Code
Alabama	Northern	1	1	11
	Middle	1	2	11
	Southern	1	3	11
Alaska	District	2	4	9
Arizona	District	3	5	9
Arkansas	Eastern	4	6	8
	Western	4	7	8
California	Northern	5	8	9
	Eastern	5	9	9
	Central	5	10	9
	Southern	5	11	9
Colorado	District	6	12	10
Connecticut	District	7	13	2
Delaware	District	8	14	3
Florida	Northern	9	15	11
	Middle	9	16	11
	Southern	9	17	11
Georgia	Northern	10	18	11
	Middle	10	19	11
	Southern	10	20	11
Hawaii	District	11	21	9
Idaho	District	12	22	9
Illinois	Northern	13	23	7
	Central	13	24	7
	Southern	13	25	7
Indiana	Northern	14	26	7
	Southern	14	27	7
Iowa	Northern	15	28	8
	Southern	15	29	8
Kansas	District	16	30	10
Kentucky	Eastern	17	31	6
	Western	17	32	6

State	District	State Code	District Code	Circuit Code
Louisiana	Eastern	18	33	5
	Middle	18	34	5
	Western	18	35	5
Maine	District	19	36	1
Maryland	District	20	37	4
Massachusetts	District	21	38	1
Michigan	Eastern	22	39	6
	Western	22	40	6
Minnesota	District	23	41	8
Mississippi	Northern	24	42	5
	Southern	24	43	5
Missouri	Eastern	25	44	8
	Western	25	45	8
Montana	District	26	46	9
Nebraska	District	27	47	8
Nevada	District	28	48	9
New Hampshire	District	29	49	1
New Jersey	District	30	50	3
New Mexico	District	31	51	10
New York	Northern	32	52	2
	Eastern	32	53	2
	Western	32	54	2
	Southern	32	55	2
North Carolina	Eastern	33	56	4
	Middle	33	57	4
	Western	33	58	4
North Dakota	District	34	59	8
Ohio	Northern	35	60	6
	Southern	35	61	6
Oklahoma	Northern	36	62	10
	Eastern	36	63	10
	Western	36	64	10
Oregon	Eastern	37	65	9
	Western	37	66	9

State	District	State Code	District Code	Circuit Code
Pennsylvania	Eastern	38	67	3
	Middle	38	68	3
	Western	38	69	3
Rhode Island	District	39	70	2
South Carolina	District	40	71	4
South Dakota	District	41	72	8
Tennessee	Eastern	42	73	6
	Middle	42	74	6
	Western	42	75	6
Texas	Northern	43	76	5
	Eastern	43	77	5
	Western	43	78	5
	Southern	43	79	5
Utah	District	44	81	10
Vermont	District	45	82	2
Virginia	Eastern	46	83	4
	Western	46	84	4
Washington	Eastern	47	85	9
	Western	47	86	9
West Virginia	Northern	48	87	4
	Southern	48	88	4
Wisconsin	Eastern	49	89	7
	Western	49	90	7
Wyoming	District	50	91	10
District of Columbia	District	51	92	12
Puerto Rico	District	52	93	1
Virgin Islands	District	53	94	3
Guam	District	54	95	9

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