

Obscenity? What is obscenity? Obscenity depends on the viewer's personal tastes. There is no universal standard.

Very few of us could provide a definition; the Supreme Court continues to lack an operational definition of what obscenity is. What appears to be a guiding viewpoint, however, is what Supreme Court Justice Potter Stewart famously wrote, in his concurring opinion holding that the Constitution protected all obscenity except 'hard-core pornography', in the Jacobellis v. Ohio (1964) case, "...I know it when I see it".

The test that the Supreme Courts uses to define obscenity was promulgated in the landmark case Miller vs. California, 413 U.S. 15 (1973). The *Miller* Court provided a three part test that must be met (all three parts) for a work in question to be labeled 'obscene':

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,
2. Whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory function specifically defined by applicable state law,
3. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

This is a good example of Legal Positivism where the morals of society have been codified.

It is facially apparent, when reviewing this test, that there is a tremendous amount of ambiguity in the defining what is obscene. This is because the Supreme Court recognized that free speech is a fundamental right (Natural Law); what is considered obscene in one community might not be considered obscene in a neighboring community.

Laws are nothing more than morals with precision (Natural Law being proscribed through Legal Positivism). Historically, societies legislate the prevailing moral code as adopted by the actions of community members (the Universal Declaration of Human Rights is a good example of this).

I have a problem with the term 'fundamentally wrong' because this leads to ethnocentric and egocentric behavior that prompts the moral entrepreneurs to crusade against the perceived offenders, often using physical force to achieve 'moral' goals...and to write the subsequent narrative that becomes accepted history.

The term 'fundamentally wrong' is determined by those with the power to define such in any given society (those in control of the narrative). Those that provide the definitions create the reality which social members must live by (Legal Positivism). Therefore, a 'fundamental wrong' is never part of Natural Law; it is correlated as such because of the shared reality construction that social members agree upon.

I enjoy that the *Miller* test is still employed and is very ambiguous. Freedom of Speech is a fundamental right in our country and it facilitates discourse in the marketplace of ideas. The danger of proscribing specific obscenity laws is that they usually are overbroad and encompass speech that is not obscene. I hold that the *Miller* test is the correct definition and test to be used in determining obscene material today.