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Obscenity Decisions Based on Procedural Mechanisms are Patiently Offensive

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OBSCENITY DECISIONS BASED ON PROCEDURAL MECHANISMS ARE PATENTLY OFFENSIVE

I. INTRODUCTION

The obscenity doctrine was born on a cold night in old England when a naked man perched himself on a balcony railing and showered onlookers below with bottles of his own urine.[1] His act was quickly labelled "obscene" by the Common Law Courts. This event served as a legal baptism for a complex doctrine which would plague American courts for many years to follow.

The first amendment of the United States Constitution guarantees freedom of speech to state citizens through the fourteenth amendment.[2] The first amendment, however, does not provide an unlimited right. In *Roth v. United States,*[3] the Supreme Court determined that obscenity was not within the scope of protected speech. Consequently, any speech identified as "obscene" can be silenced.

In *Gascoe, Ltd. v. Newtown Township,*[4] *("Gascoe")*, a Pennsylvania district court stated that it would go beyond the chain of Supreme Court cases dealing with the zoning of pornography.[5] The actual focal point of the case was a local obscenity ordinance. The *Gascoe* court found the ordinance unconstitutional because it failed to provide procedural safeguards for determining whether the questioned speech was protected by the first amendment or obscene based on local community standards.[6] However, the court failed to consider in its analysis the substantive impact of the obscenity ordinance on protected speech, and whether the ordinance's definition of obscenity violated standards established by the Supreme Court for defining obscenity.

II. FACTS

In *Gascoe,*[7] a Pennsylvania corporation, ("Gascoe Ltd."), entered

1. Sir Charles Sydlyes Case, 1 Keble 620 (K.B. 1663).

2. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

3. 354 U.S. 476 (1957).

4. 699 F. Supp. 1092 (E.D. Pa. 1988).

5. *Id.* The court sought to determine: "[W]hether a municipality may, consistent with the First and Fourteenth Amendments, use its zoning power to prohibit entirely the distribution of adult films within its jurisdiction." *Id.*

6. *Id.* at 1099.

7. *Id.* at 1092.

into a lease agreement with Newtown Village Partnership to open a video store in a Bucks County, Pennsylvania shopping center. Gascoe Ltd. sought to obtain a conditional use permit[8] prior to the store's opening in compliance with the Newtown Zoning and Planning Ordinance.[9] This process required obtaining approval from both the Township Planning Commission and the Board of Supervisors. Gascoe Ltd. received approval from the Planning Commission, but the Board denied the application because the video store intended to carry X-rated films in addition to its family-oriented selections.[10] The Board based its action on Section 1301(B) of the Township Joint Municipal Zoning Ordinance, which made it illegal to grant conditional use permits for any business deemed detrimental to the community.[11] According to the Board, distribution of X-rated films did not satisfy the standards set forth in the ordinance and would be detrimental to the community.[12]

The Board believed that permitting the rental and sale of X-rated films in a shopping center would degrade the surrounding community. The Township Solicitor furthered this argument by stating that the sale and/or rental of X-rated films in a shopping center frequented by the general public would do nothing to maintain or improve the community's general welfare.[13] Given these arguments, the Board tentatively approved Gascoe Ltd.'s application on the condition that the store refrain from renting and/or selling any X-rated films.[14]

Gascoe Ltd. reapplied for a conditional use permit, hoping to reassure the Board that issuance of the proposed permit would not jeopardize the general welfare of the community.[15] Gascoe Ltd. produced previous lease agreements from its other stores to illustrate the new store's proposed rental procedures. In its other stores, Gascoe Ltd. had segregated the adult-oriented material in a small, isolated area in the back of the

8. The Township required businesses to obtain a "conditional use permit" prior to commencing business operations. This requirement was akin to a licensing procedure for operating a business. The granting of the permit was subject to a determination that the "improvement [for which the applicant seeks approval] . . . [is] not . . . a detriment to . . . property in the immediate vicinity and [is] in the best interests of the municipality . . . ." Brief in Support of Plaintiff's Motion for Preliminary Injunction at 4, *Gascoe* (No. 88-7131).

9. *Gascoe,* 699 F. Supp. at 1093.

10. *Id.*

11. *Id.* Section 1301(B) of the Newtown Township Zoning Ordinance describes an "acceptable business" as follows: "An improvement which shall not be a detriment to the property in the immediate vicinity and which shall be in the best interests of the municipality, the benefit of the community and the public welfare." *Id.*

12. *Id.*

13. *Gascoe,* 699 F. Supp. at 1093.

14. *Id.*

15. *Id.*

store. The X-rated films could not be observed by the general public, and Gascoe Ltd. did not advertise their availability.[16] Furthermore, Gascoe Ltd. implemented age restrictions for both the customers renting the X-rated films and the employees handling the films.[17] Despite Gascoe Ltd.'s efforts, its application for a conditional use permit was again denied.[18] This time the Board based their denial on the Newtown Township Obscenity Ordinance ("Ordinance"),[19] under which the X-rated films were found obscene and thus unprotected as speech under the first amendment. Gascoe Ltd. appealed.[20]

Gascoe Ltd. filed a complaint with the Eastern District Court of Pennsylvania, alleging that the Board's repeated refusal to issue the permit was an unconstitutional prior restraint[21] on Gascoe Ltd.'s right to free speech under the first amendment.[22] Gascoe Ltd. based its claim on the case law interpreting the first amendment.[23] Gascoe Ltd. argued that these cases recognized a strong presumption against suppressing speech prior to a judicial determination that such speech was not protected under the first amendment.[24] Additionally, a prompt hearing had to be provided after imposition of a prior restraint in order to determine whether the speech at issue was to be afforded protection under the first amendment as "protected speech" or whether it was "unprotected speech," such as obscenity, which could be restricted.[25]

The films in question were never screened prior to the Board's denial of the use permit nor was a subsequent hearing provided.[26] Based on these facts, the district court reasoned that the Ordinance's failure to allow for a prompt judicial review after denying Gascoe Ltd.'s right to free speech violated the prior restraint doctrine.[27] Consequently, the court concluded that the Ordinance violated constitutional safeguards against

16. *Id.* at 1093 n.1.

17. Brief in Support of Plaintiff's Motion for Preliminary Injunction at 1, *Gascoe* (No. 88-7131).

18. *Gascoe,* 699 F. Supp. at 1094.

19. *Id.*

20. *Id.* at 1097 (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

21. Prior restraints may be placed on speech for a limited time until the speech is determined to be either "obscene" or "protected" through judicial review. Applying prior restraints for an indefinite period, without judicial review, violates the constitutional promptness standard put forth by the Supreme Court in Freedman v. Maryland, 380 U.S. 51 (1965).

22. *Gascoe,* 699 F. Supp. at 1094.

23. *Id.* at 1095.

24. *Id.* at 1097. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-34, at 1040 (1988).

25. *Gascoe,* 699 F. Supp. at 1097 (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

26. *Id.* at 1098-99.

27. *Id.* at 1099.

infringing upon protected speech and was unconstitutional both on its face and as applied.[28]

III. THE *GASCOE* COURT'S ANALYSIS

In evaluating the Township's actions, the *Gascoe* court initially focused on the local zoning ordinance to determine whether it met current constitutional requirements.[29] The court applied the requisite standards set forth by the United States Supreme Court in *Young v. American Mini Theatres,* [30] (*"Young"*), and later upheld by *City of Renton v. Playtime Theatres, Inc.,* [31] (*"Renton"*). In *Young,* the Supreme Court upheld a zoning ordinance which limited the licensing of adult theaters to areas not within 1,000 feet of other regulated forms of adult entertainment nor within 500 feet of a residential area.[32] Likewise, the Court in *Renton* upheld a zoning ordinance that prohibited the location of adult theaters within 1,000 feet of residential dwellings, churches, or parks and within one mile of schools.[33] The purpose behind both the *Young* and the *Renton* ordinances was to protect the community from the secondary effects that adult theaters were likely to produce. The Court pointed to increased crime rates and moral deterioration of the community as some of the secondary effects likely to occur when pornographic businesses were concentrated in certain areas.[34] The Supreme Court's conclusion in both of these cases was that the zoning ordinances at issue were acceptable because they promoted "substantial governmental interests"[35] without banning these potentially protected forms of speech from an entire city.[36]

Although the *Gascoe* court initially focused upon the Township's zoning ordinance, it failed to draw any conclusions based upon its analysis of the zoning ordinance alone. Instead, the court maintained that the Township's zoning ordinance, when used in conjunction with the local obscenity ordinance, resulted in an unconstitutional regulatory scheme.[37] The *Gascoe* court likened the Township's regulatory scheme

28. *Id.* "On its face" refers to the text of the ordinance, whereas "as applied" refers to the way in which the Supervisors enforced the ordinance. The district court found the ordinance lacking in both of these respects. *Id.* at 1099.

29. *Id.* at 1095-97.

30. 427 U.S. 50 (1976).

31. 475 U.S. 41 (1986).

32. *Young,* 427 U.S. at 52.

33. *Renton,* 475 U.S. at 44.

34. *Young,* 427 U.S. at 71 n.34; *Renton,* 475 U.S. at 48.

35. *Renton,* 475 U.S. at 41; *Young,* 427 U.S. at 72.

36. *Gascoe,* 699 F. Supp. at 1095 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47).

37. *Id.* at 1096.

to those found constitutionally unacceptable in *Schad v. Borough of Mount Ephraim,* [38] (*"Schad"*), and *Erznoznik v. City of Jacksonville,* [39] (*"Erznoznik"*).

In *Schad,* the Supreme Court declared invalid a zoning ordinance which completely excluded live entertainment, including nude dancing, in the New Jersey town of Mount Ephraim.[40] The Court struck down the ordinance because its dual purposes of catering only to residents' immediate needs[41] and avoiding problems associated with live entertainment,[42] were not government interests sufficiently substantial to warrant the banning of all live entertainment.[43] Similarly, the *Erznoznik* Court declared unconstitutional an ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen was visible from a public street.[44] Like *Schad,* the *Erznoznik* statute was struck down because it singled out a particular form of speech for punishment without providing a sufficient governmental interest to justify such punishment.[45] The ordinances in *Schad* and *Erznoznik* placed too broad a burden on constitutionally protected speech because the ordinances were all inclusive in nature, banning, rather than regulating protected speech.[46]

The *Gascoe* court focused on the decisions in *Young, Renton, Schad,* and *Erznoznik* as support for the proposition that all inclusive regulatory schemes are unconstitutional.[47] In accordance with precedent, the *Gascoe* court declared the Township's regulatory scheme unconstitutional because it banned all X-rated films from the locality.[48] After reaching this conclusion, the *Gascoe* court reviewed the ordinances in light of the prior restraint doctrine, which was ultimately identified as the source of the shortcoming in the Township's regulatory scheme:

> By using the zoning permit requirements of section 1301(B) in conjunction with the township's obscenity ordinance, the Board

38. 452 U.S. 61 (1981).
39. 422 U.S. 205 (1975).
40. 452 U.S. at 65.
41. *Id.* at 72.
42. *Id.* at 73.
43. *Id.* at 74-75.
44. 422 U.S. at 206-07.
45. *Id.* at 217-18. "We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential."
46. *Erznoznik,* 422 U.S. at 213; *Schad,* 452 U.S. at 77.
47. *Gascoe,* 699 F. Supp. at 1096.
48. *Id.* at 1097.

> has taken a blunderbuss [shot gun] approach to the regulation of films in Newtown Township and effectively placed an unconstitutional prior restraint on [Gascoe's] right to distribute protected films.[49]

The *Gascoe* court supported its finding that the Township's regulatory scheme was unconstitutional by reasoning that the requisite safeguards to be employed when imposing a prior restraint on speech were absent from the regulatory scheme.[50] The *Gascoe* court cited *Freedman v. Maryland,* [51] (*"Freedman"*), in support of its decision. *Freedman* involved an appellant who was convicted for exhibiting a sexually explicit motion picture in a Baltimore theater without submitting it to a Maryland censorship board prior to distribution.[52] The United States Supreme Court reversed Freedman's conviction, declaring that the Maryland rule[53] was void because it failed to provide a procedural mechanism which could determine whether a film was constitutionally protected prior to its being shown in the community, or shortly thereafter.[54] *Freedman* enumerated the following safeguards which must be applied when imposing prior restraints on speech:

> (1) the censor must bear the burden of proving that the film is unprotected speech under the First Amendment;
> (2) any restraint prior to judicial review must be limited to preservation of the status quo and for the shortest period compatible with sound judicial procedure; and
> (3) a prompt final judicial determination of obscenity must be made.[55]

Citing the *Freedman* requirements, the *Gascoe* court reasoned that the Township's regulatory scheme was lacking in two respects. First, the restraint of speech was not limited to a brief period of time.[56] Second, the regulatory plan did not allow for a prompt judicial determination of whether the speech was protected by the first amendment.[57] Given these problems, the *Gascoe* court concluded that the regulatory scheme violated the prior restraint provisions delineated in *Freedman:* as such, the

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49. *Id.* at 1096.
50. *Id.*
51. 380 U.S. 51 (1965).
52. *Id.* at 52.
53. *Id. See* MD. CODE ANN. Art. 66A § 2 (1957).
54. 380 U.S. at 60.
55. *Gascoe,* 699 F. Supp. at 1097 (quoting Freedman v. Maryland, 380 U.S. 51, 58-59 (1965)).
56. *Id.* at 1098.
57. *Id.*

regulatory scheme was an unconstitutional restriction on protected speech.[58]

After the zoning and obscenity ordinances were evaluated as a single regulatory scheme, the *Gascoe* court narrowed its focus to analyze the obscenity ordinance alone.[59] The court dismissed the zoning ordinance from consideration because it found that the Board's "interpretation" of the zoning ordinance was deficient, not the content which complied with constitutional standards.[60] Conversely, the court found the obscenity ordinance lacking in its content and warranted further analysis.[61]

The Township's obscenity ordinance was modeled after the Pennsylvania Obscenity Ordinance,[62] which incorporated the United States Supreme Court's definition of obscenity as explained in *Miller v. California,* [63] (*"Miller"*). In *Miller,* the appellant was convicted for mailing unsolicited sexually explicit books.[64] This activity violated a California statute prohibiting the knowing distribution of obscene material.[65] In upholding the statute, the *Miller* Court provided the current standard for defining obscenity:

> 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.[66]

The *Miller* Court intentionally failed to define what constituted "patently offensive" for the purposes of the standard, stating that the task of defining "patently offensive" was reserved for the states.[67] Accordingly, the Township supplied its own definition of "patently offensive":

> "Patently offensive," means conduct so offensive on its face as to affront current standards of decency, and shall be deemed to include any of the following described forms of sexual conduct,

58. *Id.* at 1099.
59. *Id.* at 1098.
60. *Id.*
61. *Gascoe,* 699 F. Supp. at 1099.
62. PENNSYLVANIA OBSCENITY ACT, 18 PA. CONST. STAT. § 5903 (Purdon 1983).
63. 413 U.S. 15 (1973).
64. *Id.* at 18.
65. *Id.* at 16.
66. *Id.* at 24 (citations omitted).
67. *Id.* at 25.

> if they are depicted so as to affront current standards of decency:
>
> a.) An act of sexual intercourse, normal or perverted, actual or simulated, real or animated, including genital-genital, anal-genital or oral-genital intercourse, whether between human beings or between a human being and an animal.
>
> b.) Sadomasochistic abuse meaning flagellation or torture or sexual gratification, by or upon a person who is nude or clad in under-garments or in a revealing costume, or the condition or [sic] being fettered, bound or otherwise physically restrained on the part of the one so clothed.
>
> c.) Masturbation, excretory functions, and lewd exhibition of the genitals, including any explicit close-up representation of a human genital organ or spread-eagle exposure of female genital organs.
>
> d.) Physical contact or simulated physical contact with the clothed or naked pubic area or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals in an act of apparent sexual stimulation or gratification.
>
> e.) Fellatio, cunnilingus, anal sodomy, seminal ejaculation, or any excretory function.[68]

Applying a *Miller* analysis, the *Gascoe* court did not cite any shortcomings in the obscenity ordinance's definition of "patently offensive."[69] However, the court did find that the Township's obscenity ordinance failed to include certain procedural mechanisms required by *Freedman,* and incorporated into the Pennsylvania Obscenity Ordinance.[70] In particular, the Township's obscenity ordinance did not provide for a prompt adversarial hearing in order to determine whether the X-rated films were constitutionally protected speech following the Board's conclusion that they were "obscene."[71] If the X-rated films were found to be obscene during the hearing, then constitutional protection would not be afforded.[72] Since the obscenity ordinance did not provide for this essential

68. 699 F. Supp at 1094 n.2.

69. *Id.* at 1099. The *Gascoe* court voluntarily elected to bypass consideration of the substantive aspects of the obscenity ordinance because it claimed that this was an issue which should be left to the states. *Id.*

70. 18 PA. CONST. STAT. § 5903(g) (Purdon 1983).

71. *Gascoe,* 699 F. Supp. at 1098-99.

72. *Id.* at 1099. *See also* Roth v. United States, 354 U.S. 476 (1957). Discussed *infra,* text accompanying notes 97-103.

hearing, the court declared the ordinance unconstitutional both on its face and as applied.[73]

IV. DEVELOPMENT OF THE LAW SURROUNDING THE *GASCOE* COURT'S ANALYSIS

An overview of the development and impact of prior restraint and obscenity doctrines is essential to the *Gascoe* court's finding.

A. Prior Restraint

As previously stated, there is a strong presumption against restraining speech prior to a court's determination of whether it is protected by the first amendment.[74] This presumption was first articulated by the United States Supreme Court in *Near v. Minnesota,* [75] (*"Near"*), which banned prior restraint of the press except under extreme circumstances.[76] The *Near* Court struck down a state statute which permitted censorship of any defamatory newspaper after the statute was used to permanently enjoin a publication that criticized local officials.[77]

Despite the historic reluctance to impose prior restraints on expression, the United States Supreme Court has allowed this form of censorship in cases which it deems "exceptional."[78] Prior restraints have been upheld under the following circumstances: "film licensing;[79] commercial advertising;[80] and permit requirements to use public places for expressive activities."[81] Even when prior restraints on speech are applied, speech

73. *Gascoe,* 699 F. Supp. at 1099.

74. Near v. Minnesota, 283 U.S. 697 (1931).

75. *Id.*

76. *Id.* at 716. In dictum, Chief Justice Hughes provided several examples of exceptional cases: "1) restraints during wartime to prevent the disclosure of military deployments or obstruction of the military effort; 2) enforcement of obscenity laws; and 3) enforcement of laws against incitement to acts of violence or revolution. *Id.*

77. *Id.* at 722-23.

78. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-36, at 1045 (1988).

79. *See, e.g.,* Times Film Corp. v. Chicago, 365 U.S. 43 (1961). Film licensing requirements will not be struck down simply on the grounds that they in fact constitute a prior restraint.

80. *See, e.g.,* Posados de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986). The Court held that Puerto Rico could curtail casino advertising focused at its own citizens by imposing specific regulations to that end. The Court reasoned that the legislature's power to ban certain activities entirely, such as gambling, meant that they had the lesser included power of banning any advertising related to those activities subject to legislative regulation. *Id.* at 345-46.

81. *See, e.g.,* Cox v. New Hampshire, 312 U.S. 569 (1941). A municipal ordinance requiring permits for all public meetings and parades was permitted when it was enacted in conjunction with a state statute which required hearings for such requests.

cannot permanently be withheld from the public without some judicial determination that it is not "protected speech" under the first amendment.[82] As established by the *Freedman* Court,[83] rigid safeguards must be adhered to when applying such restraints.

In particular, *Freedman* requires that any statute imposing a prior restraint must contain a procedural mechanism for determining promptly whether such speech is protected by the first amendment.[84] The rationale behind the *Freedman* measures is to prevent constitutionally protected speech from being silenced before it enters the marketplace of ideas: "Without these safeguards, it [might] prove too burdensome to seek review of the censor's determination."[85] As stated in *Freedman,* "in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation."[86] *Freedman* also points out that only a handful of states employ such censorship laws so that the exhibitor may simply choose to show his film in other areas of the country rather than become involved in litigation.[87] Gascoe Ltd., on the other hand, was not deterred from pursuing litigation by the absence of the *Freedman* requirements because the existence of its entire business was at stake, rather than merely the fate of a single film.

B. Obscenity

Although rules had been drafted limiting the distribution of obscenity,[88] American courts rarely attempted to define what constituted obscenity prior to the late nineteenth century. Early American cases handling this issue deferred to the English Common Law for an appropriate obscenity test.[89] The approach most often followed by American courts in the late 1800's was that put forth in *Regina v. Hicklin,*[90] (*"Hicklin"*). The *Hicklin* case formulated the following test for defining obscenity: whether the work, as a whole or in any portion, would tend to

82. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

83. *See infra* note 21 and accompanying text.

84. *Freedman,* 380 U.S. at 58.

85. *Id.* at 59.

86. *Id.*

87. *Id.*

88. 5 Stat. 566 (1842), in which Vermont prohibited importation of obscene pictures and postcards; 7 New York Stats. 309 (1868), in which New York made a move to prohibit obscenity; 17 Stat. 599 (1873), in which Congress declared it a criminal offense to send obscene material through the mails.

89. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 906 (1988). *See also* Roth v. United States, 354 U.S. 476, 488-89 (1957).

90. 3 L.R.-Q.B. 360 (1868).

inflame persons particularly susceptible to immoral influences.[91] This subjective test imposed a strict standard for gauging obscenity in which any potentially arousing passage might render an entire work "obscene."[92]

In American courts, the *Hicklin* test remained a popular means of determining obscenity for many years.[93] During the early to mid-twentieth century, support for *Hicklin* began to wane[94] because most contemporary literature was declared obscene under this subjective test.[95] By the late 1950's, *Hicklin* had been laid to rest.[96]

Hicklin's successor was *Roth v. United States,*[97] *("Roth")*. *Roth* posed a novel question:[98] whether obscenity was within the realm of constitutionally protected speech.[99] The United States Supreme Court readily decided that obscenity was not protected by the first amendment but the crucial consideration for the *Roth* Court was the development of an appropriate test for establishing what constitutes "obscene speech" as opposed to "protected speech."[100]

The *Roth* test was distinguishable from the *Hicklin* test in three distinct ways. First, *Roth* broadened the standard of review to embrace the values of the "average person" rather than applying the narrow focus on individuals "susceptible to immoral influences."[101] Second, *Roth* evaluated works as a whole rather than reaching conclusions based on "iso-

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91. *Id.* at 368.

92. *Id.*

93. *See, e.g.,* United States v. Clarke, 38 F. 500 (1889); McFadden v. United States, 165 F. 51 (1908); United States v. Kennerley, 209 F. 119 (1913); Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930); Commonwealth v. Delacey, 271 Mass. 327, 171 N.E. 455 (1930).

94. *See* United States v. One Book Called Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705 (1934). This case suggested that the standard for determining obscenity should be based on the average person rather than on those who are especially susceptible to arousal.

95. *See, e.g.,* Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930), in which Theodore Dreiser's *An American Tragedy* was declared obscene. *See also* Commonwealth v. Delacey, 271 Mass. 327, 171 N.E. 455 (1930), in which D. H. Lawrence's *Lady Chatterley's Lover* was also declared obscene under the *Hicklin* test.

96. Roth v. United States, 354 U.S. 476 (1957). "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons (citing Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868)). Some American courts adopted this standard but later decisions have rejected it." *Id.* at 488-89.

97. *Id.*

98. *Id.* at 481. Although no prior decision based its conclusion on the premise that obscenity was outside the scope of protected speech, the Supreme Court had previously assumed that obscenity was not covered by the first amendment.

99. *Id.* at 485.

100. *Id.* at 488-89. "It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press . . . ."

101. *See Roth,* 354 U.S. at 489.

lated passages."[102] Finally, *Roth* interpreted the first amendment as protecting all speech which had even the slightest redeeming social value, so that only those works utterly lacking in social importance were deemed obscene.[103]

The test articulated in *Roth* was later revised in part by the United States Supreme Court in *Miller.*[104] The *Miller* decision altered the obscenity doctrine in several ways by building upon the *Roth* factors. The *Miller* Court broadened the scope of the obscenity inquiry to include not only works that utterly lacked redeeming social value,[105] but also those works which "lack[ed] serious . . . value."[106] This broader scope of works which could be determined obscene resulted in fewer works being protected under the first amendment.[107] Additionally, *Miller* added to the obscenity test the term "patently offensive," which was to "be determined by applicable state law."[108] This new prong of the test enabled state legislatures to devise their own standard of what was "patently offensive," thereby avoiding the imposition of a national standard.[109]

Miller empowered the states with the ability to define obscenity for themselves but this power was not absolute. The *Miller* case restricted state application of obscenity ordinances to "hard core" pornography:[110] "Under the holding announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ."[111] The intention behind this limitation was to place parties on notice that this form of speech ("hard core" pornography) was subject to regula-

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102. *Id.*

> The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating . . . sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Id. at 489. *See also One Book Called Ulysses,* 72 F.2d 705, 708 in which the *Hicklin* test was criticized for its subjectivity.

103. *Roth,* 354 U.S. at 484.

104. Miller v. California, 413 U.S. 15 (1973). *See infra* notes 63-66 and accompanying text for a further discussion of *Miller.*

105. *Roth,* 354 U.S. at 484.

106. *Miller,* 413 U.S. at 24.

107. *Id.* at 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . .") (quoting Kois v. Wisconsin, 408 U.S. 229, 231 (1972)).

108. *Miller,* 413 U.S. at 24.

109. *Id.* at 30.

110. *Id.* at 27.

111. *Id.*

tion.[112] However, applying this standard often proves problematic for local legislators, who must determine what constitutes "hard core" pornography in drafting legislation. For example, in *Gascoe,* the Township's obscenity ordinance defined "hard core" pornography so broadly in its definition of "patently offensive" that the ordinance failed to effectively place parties on notice of what types of speech were or were not subject to regulation.

V. ANALYSIS OF THE COURT'S APPROACH

The Township's obscenity ordinance was discussed only briefly by the court, yet the court's decision was based almost exclusively on the procedural aspects of the obscenity ordinance.[113] A more detailed analysis of the obscenity ordinance would have revealed a greater problem inherent within the ordinance's definition of what is considered "patently offensive." Instead, this problem escaped judicial review, thereby providing the Township with an opportunity to reinstate the ordinance simply by adding the missing procedural mechanism.

The *Gascoe* court concluded that the obscenity ordinance was unconstitutional because it failed to provide for a prompt adversarial hearing to determine obscenity.[114] Based on *Freedman,* failure to provide a prompt hearing within a reasonable time violates the doctrine of prior restraint[115] and has a chilling effect on potentially protected speech.[116] Thus, the *Gascoe* court's finding on this issue was technically accurate. However, its decision highlights a frequent problem in judicial analyses of obscenity ordinances. Courts use the procedural mechanism of the prior restraint doctrine as a quick way of remedying obscenity ordinances when those ordinances should command a more thorough review. For example, the *Gascoe* court held the Township's obscenity ordinance unconstitutional based on its procedural shortcomings, instead of engaging in a thorough analysis of the ordinance's substance. Such an analysis would have revealed the ordinance's overly broad definition of "patently offensive."

Courts frequently base their conclusions on procedural mechanisms rather than analyzing the particular statute's substance for possible shortcomings. In *Vance v. Universal Amusement Co.,* [117] (*"Vance"*), the

112. *Id.*
113. 699 F. Supp. at 1099.
114. *Id.*
115. *Id.* at 1098-99.
116. Freedman v. Maryland, 380 U.S. 51, 61 (1965).
117. 445 U.S. 308 (1980).

United States Supreme Court evaluated a public nuisance statute which allowed a judge to enjoin a theater from showing future films if the theater's prior showings had included obscene films. The ordinance granted the judge this power without providing the *Freedman* safeguards for the future films involved. The *Vance* Court declared the statute unconstitutional based solely on its violation of the prior restraint doctrine rather than considering the statute's substantive problems.[118]

The *Vance* decision generated criticism by scholars who labelled the Court's analysis as being "too simple."[119] The basic shortcoming cited in these criticisms was that the Supreme Court never considered the substantive effects of the obscenity statutes involved.[120] For example, the *Vance* Court never considered the potential chilling effect that such an obscenity-nuisance statute would have on individuals, who might now engage in excessive self-censorship to avoid an injunction.[121] Thus, potentially "protected speech" would be self-suppressed without ever being declared obscene. This discourages the free flow of ideas which is required under the Constitution.[122]

Like the *Vance* Court, *Gascoe* applied a superficial analysis to the ordinance at issue. The *Gascoe* court should have considered the content of the Township's obscenity ordinance and the chilling effect it might have had on free speech in the community. Because of the ordinance's provisions, many video store owners may now refrain from carrying even R-rated films, fearing that they might face a lawsuit, revocation of their license, or an initial refusal for a conditional use permit to engage in business. This would result in chilling the availability of videos, and thus constrict the free flow and availability of ideas in the marketplace. Concern for potentially chilling speech is especially relevant in *Gascoe* because the substance of the Township's obscenity ordinance is overly broad in scope.

As put forth in *Miller,* states, as well as townships, have the freedom to draft their own definition of "patently offensive" in their obscenity

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118. *Id.* at 317.

119. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-36, at 1049 (1988). *See also* Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine,* 84 COLUM. L. REV. 1616 (1984).

120. *Id.*

121. *Id.*

122. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ." *See also Freedman,* 380 U.S. at 57 ("[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to possible consequences for constitutionally protected speech.") (quoting Marcus v. Search Warrant, 367 U.S. 717, 731 (1961)).

ordinances.[123] However, such local definitions are subject to limitation. It is particularly relevant that the *Miller* opinion limits the definition of "patently offensive" to "hard core" sexual conduct.[124] The Township's ordinance does not adhere to this specification. Because the Township's ordinance defines "patently offensive" to include acts which might be found in a PG movie rather than in "hard core" pornography, it should fail under the "hard core" sexual conduct requirement announced in *Miller.*

For example, the Township's ordinance considers contact with "clothed breasts and buttocks" as potentially "patently offensive."[125] Accordingly, even a passionate hug is not above reproach under the Township's community standard. *Gascoe's* definition of what constitutes "patently offensive" is broader than what the United States Supreme Court announced as acceptable under *Miller.* [126]

The *Gascoe* court's decision, like that of the Court in *Vance,* promotes the likelihood that protected speech might be suppressed before it enters the marketplace of ideas. In response to the *Gascoe* opinion, the Township may reinstate the same impermissibly broad obscenity ordinance by simply adding the required procedural safeguard. However, the hearing provided by *Freedman*, to determine whether an X-rated film is obscene under the Township's ordinance, is not sufficient because the community standard applied under the Township's ordinance is overly broad.

VI. CONCLUSION

The *Gascoe* court's final conclusion that the Newtown Township Obscenity Ordinance was unconstitutional is a technically correct decision; however, the route chosen by the court in reaching its conclusion presents future problems. Determining the validity of the substance of the Township's ordinance constitutes a more effective long-term judicial policy than invalidating the obscenity ordinance based on the prior restraint doctrine. The fact that the ordinance is amendable by the Township's Board of Supervisors, and that it could simply include the procedural mechanism without changing the substance of the ordinance, promotes the reinstatement of an impermissibly broad ordinance. That amended ordinance will still place an undue burden on otherwise constitutionally protected speech.

123. Miller v. California, 413 U.S. 15, 30 (1973).
124. *Id.* at 27.
125. *Gascoe,* 699 F. Supp. at 1094 n.2(d).
126. *Miller,* 413 U.S. at 27.

The *Gascoe* court stated that "the Board may not attribute obscenity to a film based solely on non-deviate sexual content or an X-rating from the Motion Picture Association of America."[127] However, the court failed to take the further step of concluding that the obscenity ordinance's definition of "patently offensive" was overly broad. Superficial decisions such as this place a greater burden on already crowded court dockets and tax our limited judicial resources by spawning unnecessary litigation. Why should courts decide twice what could have been decided once by an informed application of the law? Even more serious is that such an opinion creates an impermissibly broad ordinance which will chill "protected speech," and in some cases discourage necessary litigation. In the final analysis, the *Gascoe* decision merely applied a judicial bandage to a larger wound which will not be healed by such superficial measures.

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127. 699 F. Supp. at 1096.

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