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# Constitutional Law

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# CONSTITUTIONAL LAW

## I. OBSCENITY STATUTE DEEMED UNCONSTITUTIONALLY OVERBROAD

In *Vernon Beigay, Inc. v. Traxler*[1] the Fourth Circuit Court of Appeals held portions of the South Carolina obscenity statute unconstitutionally overbroad. The unconstitutional sections allowed the prosecutor to introduce evidence of "the character of the audience for which the material was designed or to which it was directed"[2] and of what "the predominant appeal of the material would be for ordinary adults or a special audience and what effect, if any, it would probably have on the behavior of such people"[3] in prosecutions for dissemination of obscene materials.

*Beigay* is inconsistent with *Miller v. California*,[4] *Hamling v. United States*,[5] and *Mishkin v. New York*,[6] each of which allows the trier of fact to consider the prurient appeal to specific deviant or perverted groups when determining the obscenity of material directed to that group. The *Beigay* court, however, correctly struck the statute, presumably because of its potentially broad application to material *not* directed to deviant groups and because the language of the two sections does not comport with particularity to the narrow holdings of *Hamling* and *Mishkin*.

An officer of the Greenville County Sheriff's Department informed Beigay of complaints that several video stores in the area

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1. 790 F.2d 1088 (4th Cir. 1986).

2. S.C. CODE ANN. § 16-15-280(1) (Law. Co-op. 1985).

3. S.C. CODE ANN. § 16-15-280(4) (Law. Co-op. 1985).

4. 413 U.S. 15, 33 (1973)("[S]o far as material is not aimed at a deviant group, it will be judged by its impact upon an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.").

5. 418 U.S. 87, 129 (1974) (upholding a jury instruction which allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined sexual group).

6. 383 U.S. 502, 508 (1966) ("Where the material is designed for and primarily disseminated to a clearly defined sexual group, rather than the public at large, the prurient-appeal requirement . . . is satisfied if the dominant theme taken as a whole appeals to the prurient interest in sex of the members of that group.").

were distributing obscene tapes.[7] After viewing some of the tapes, the sheriff concluded that the complaints were legitimate. The officer advised Beigay that the distribution of obscene materials was unlawful and requested that he discontinue the activity or bear the risk of prosecution.[8]

Beigay sued in the District Court of South Carolina, seeking monetary damages under 42 U.S.C. § 1983[9] and injunctive relief restraining enforcement of the statute. The plaintiff alleged that the statute was void for vagueness and was unconstitutionally overbroad.[10] Judge Wilkins denied the plaintiff's constitutional challenge and request for monetary relief in a summary judgment ruling. Beigay appealed the order. The Fourth Circuit Court of Appeals affirmed the decision in part, but reversed on the issue of overbreadth. The defendants filed a petition for rehearing.[11]

The court held that the statute failed to conform with each of the three prongs of the *Miller* test.[12] The three guidelines for determining whether the material is obscene are as follows:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
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> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
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> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[13]

Relying on *Roth v. United States*,[14] the court reasoned that the statute allowed the trier of fact to ignore the *Miller* standards of prurient appeal to the *average* person. The court found that the statute improperly allowed the trier of fact to consider the character of the audience or the predominant appeal to a select group, and the resulting behavioral effects on them. The

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7. 790 F.2d at 1090.
8. *Id.*
9. 42 U.S.C. § 1983 (1982).
10. 790 F.2d at 1090.
11. Defendants' petition for rehearing was filed May 9, 1986.
12. 790 F.2d at 1094.
13. 413 U.S. at 24 (citations omitted).
14. 354 U.S. 476 (1957). *Roth* is a pre-*Miller* decision holding that the obscenity may not be tested by its impact upon most susceptible persons. *Id.* at 488-89.

court also concluded that the statute allowed the trier of fact to consider only portions of the work and to ignore its scientific, artistic, political or social value.[15]

The court correctly stated that these sections, considered alone, do not specifically comply with *Miller*. The section in controversy, section 16-15-280, addresses specific sorts of evidence that "shall be admissible" in a "prosecution for an offense involving dissemination of obscenity."[16] This section, however, cannot be interpreted fully without reference to section 16-15-260 which defines obscenity and which clearly tracks the suggested language of *Miller*.[17] Subsections one and four of section 16-15-280 do not purport to replace the standards defined in section 16-15-260. Instead, these subsections only permit admission of evidence to provide some factual data upon which the trier of fact may make his determination according to *Miller* standards.

In citing *Roth* for the proposition that the trier of fact may not consider the impact upon a specified group of people,[18] the court ignored two important considerations. First, *Roth* held that material may not be determined to be obscene by reference to its appeal or effect upon the most susceptible person.[19]

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15. The court illustrated this point by using a hypothetical situation: A medical anatomy textbook, if used other than for its intended purpose, may have a prurient appeal to certain people. If the use of this book resulted in morbid sexual behavior, or lewd and lascivious desires, the trier of fact could find the material obscene. 790 F.2d at 1094-95 n.12.

16. S.C. CODE ANN. § 16-15-280 (Law. Co-op. 1985).

17. S.C. CODE ANN. § 16-15-260 (Law. Co-op. 1985) provides in part as follows:

> (a) "Obscene or obscenity" means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational or scientific value. In order for any matter to be determined "obscene" the trier of fact must find:
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> (1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and
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> (2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and
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> (3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

18. 790 F.2d at 1094 n.10.

19. 354 U.S. at 488-89.

Subsections one and four of section 16-15-280 do not purport to allow this effect. Subsection one allows admission of evidence of the character of the audience to which the material is directed. This type of person can hardly be equated with the most susceptible person.[20] Subsection four allows evidence of the predominant appeal to *ordinary* adults or to a special audience if any. A more appropriate criticism of subsection four is that it allows the trier of fact to consider evidence of the probable effect on the behavior of these people. Not only is this evidence conjectural, but also the question of prurience involves appeal to the viewer, not the behavior of persons once exposed to the material.

The second consideration ignored by the Fourth Circuit in *Beigay* is that *Miller*[21] expressly modified *Roth*. *Miller* specifically excepted from its "average person" standard material that is directed to a well-defined perverted or sexually deviant group.[22] *Hamling*[23] restated and elaborated upon the *Miller* holding. Possibly the only method to show the prurient appeal of material directed to a sexually deviant group is to introduce evidence of the character of the group. This exception to the *Roth* standard is justified because such material may have no prurient appeal to the average person, but may appeal, nonetheless, to the prurient interests of the group targeted by the material.

The *Beigay* court could have limited the application of these two subsections to cases dealing with material directed to a sexually deviant or perverted group.[24] Although both the plaintiff and the defendants addressed the possibility of limiting the statute's application,[25] the court, without elaboration, applied the overbreadth doctrine. Courts are more likely to strike a statute using the overbreadth doctrine when the statute is cen-

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20. *See* Mishkin v. New York, 383 U.S. 502, 509 (1966) ("[S]ince our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test."). *Roth* overruled the *Hicklin* test. 353 U.S. at 488-89.

21. 413 U.S. at 36-37.

22. *Id.* at 33.

23. 418 U.S. at 129.

24. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

25. *See* Opening Brief of Appellant; Opening Brief of Appellees.

sorial in nature.[26]

While the result may be correct, it is unclear how the court reached its decision. The lack of explanation will make redrafting the statute difficult. How the court would react to legislation aimed specifically at material directed to sexually deviant groups is also unclear since the court did not address the issue in its opinion.

*Beigay* leaves South Carolina practitioners without statutory authority to justify admission of evidence showing the prurient appeal of sexually deviant materials. Often proof of the prurient appeal of these materials can be established only by evidence of the character of the group and of the prurient appeal to that group, since it has no such appeal to the average person. Practitioners must resort to *Hamling* and *Mishkin* for authority to admit this type of evidence. Should the legislature propose new legislation to provide for the admission of this evidence, the statute should limit admissibility of the evidence to cases involving clearly defined sexually deviant or perverted groups in strict compliance with *Mishkin* and *Hamling.*

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## II. GENDER-BASED STATUTE HELD UNCONSTITUTIONAL

In *In re Estate of Mercer*[27] the South Carolina Supreme Court held that a statute designed to prevent married men from substantially disinheriting their wives or legitimate children was unconstitutional. The statute, section 21-7-480 of the South Carolina Code, prohibited married males from leaving more than one-fourth of their estates to their paramours or children born to them out of wedlock.[28] The court based its decision on the

26. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 920-21 (1970). The overbreadth doctrine is applied to statutes censoring first amendment activity because of its chilling effect on that activity. *Id.* at 853. The South Carolina definition itself is not unconstitutional; the provisions struck by the court in *Beigay* related only to evidentiary matters and arguably did not have a chilling effect on Beigay's activity.

27. 288 S.C. 313, 342 S.E.2d 591 (1986).

28. S.C. CODE ANN. § 21-7-480 (Law. Co-op. 1976) provides as follows:

> If any person who is an inhabitant of this State or who has any estate therein shall beget any bastard child or shall live in adultery with a woman, such person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the woman with whom he lives in

equal protection clause of the United States Constitution.[29]

*Mercer* arose on a complex set of facts spanning five years. Clarence Mercer married Lavonia Perry (Perry) in October 1977. They separated after a month, and Mercer, with Perry's approval and assistance, obtained a Haitian divorce in February 1978. In May 1979, Mercer married Carol Saxon (Saxon). Soon thereafter, Mercer and Saxon executed a joint will, each leaving their entire estate to the other. A residuary clause provided that at the survivor's death the estate would be divided equally among Mercer's daughter and Saxon's three children. After Mercer died in August 1982, his daughter, Linda Taylor, and Perry contested the will.[30] The probate court found Mercer's Haitian divorce invalid,[31] making his second marriage bigamous and void. Consequently, Saxon was reduced to the status of a paramour and section 21-7-480 limited her share of the estate. The circuit court affirmed the probate court's ruling, and the executrix of Mercer's estate appealed to the South Carolina Supreme Court.

On appeal the supreme court focused on three issues:[32] the jurisdiction of the probate court to determine the validity of Mercer's second marriage,[33] the constitutionality of section 21-7-480, and the propriety of awarding Mercer's estate to his daughter, Linda Taylor.[34]

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adultery or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying his debts than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate.

29. U.S. CONST. amend. XIV.

30. Taylor contested Mercer's will because Mercer named her as the sole beneficiary under a previous will executed prior to Mercer's first marriage. Perry asserted that she was entitled to a dower right because Mercer died before May 22, 1984, the date that dower rights ended in South Carolina. *See* Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984).

31. The divorce was invalid because Mercer was a resident of South Carolina, not Haiti, at the time of his divorce. *See* S.C. CODE ANN. §§ 20-3-420 to -430 (Law. Co-op. 1985).

32. Brief of Petitioner at 1; Brief of Respondent at 1.

33. The supreme court summarily affirmed the circuit court's ruling on the first issue, finding that "[t]he probate court had the collateral authority to determine the validity of the divorce since that was a necessary step in determining the true heirs of the estate." 288 S.C. at 315, 342 S.E.2d at 592.

34. Because the other three residuary legatees were Saxon's children by a previous marriage, they were not covered by § 21-7-480 and, arguably, were entitled to share in

In addressing the pivotal issue of equal protection, the court applied the standard equal protection analysis, stating that "[c]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[35] Since no important governmental objectives were "suggested"[36] and the court "discern[ed] none,"[37] the court struck down the statute, making it unnecessary to address the intestacy issue.

Aside from the immediate practical result that married men may now freely devise their property, this decision has several interesting implications for practitioners faced with equal protection litigation. On its face, *Mercer* is inconsistent with *Wardlaw v. Peck*,[38] which upheld a statute making it actionable per se to impute unchastity to a woman. Indeed, the respondents in *Mercer* cited *Wardlaw* in urging the court to hold that the statute was applicable to both sexes.[39] The distinction between the two cases, however, is significant. In *Wardlaw* the court upheld the statute because the common law arguably provides men with the same protection women receive under the statute. In *Mercer*, however, the statute treated men and women differently because property is freely devisable by either sex at common law. Attorneys arguing equal protection cases may benefit, therefore, by exploring and contrasting the common law with the statute in question.

Moreover, the conclusory method that the court used in determining that the statute was gender-based raises an interesting question. The court placed great emphasis on the use of male pronouns in section 21-7-480 in summarily rejecting the idea that the statute treated men and women similarly. The *Mercer* pronoun analysis, taken to an extreme, raises the possibility that many other South Carolina statutes that obviously apply to both sexes, but which are replete with male pronouns,[40] could fall prey to equal protection arguments.

The importance which the *Mercer* court attached to the his-

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the estate.

35. 288 S.C. at 316, 342 S.E.2d at 592.

36. *Id.* at 317, 342 S.E.2d at 593.

37. *Id.*

38. 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984).

39. Brief of Respondent at 9.

40. *See, e.g.*, S.C. CODE ANN. § 59-26-20(e)(3) (Law. Co-op. Supp. 1985).

tory surrounding the statute's enactment, however, should signal that the court's holding does not extend to all gender-referenced statutes. More modern statutes using male pronouns, for example, were not passed at a time when great cultural and legal distinctions were made between the sexes. Consequently, the court is more likely to view the legislature's use of male pronouns as incidental rather than intentional.

*Mercer* should alert practioners to the opportunities and hazards in raising equal protection challenges to gender-referenced statutes. More importantly, *Mercer*, particularly when contrasted with *Wardlaw*, illustrates the value of exploring and contrasting the common law with the statute in question.

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