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Monte L. McFadden

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THE CHANGING STANDARDS FOR OBSCENITY

In 1957 the Supreme Court decided that obscene matter, because it lacked any social importance, was not protected by the guaranties of the 1st and 14th Amendments of the United States Constitution, and therefore, could be proscribed by federal or state action.¹ As a standard for classifying matter as obscene or non-obscene (constitutionally non-protected or constitutionally protected), the Court established the following test: “. . . Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.”² A subsequent case added the requirement that before material can be classed as obscene it must be so offensive on its face as to affront current community standards.³ “Obscenity . . . thus requires proof of two distinct elements: (1) patent offensiveness; and (2) ‘prurient interest’ appeal. Both must conjoin before challenged material can be found ‘obscene’”⁴ The Court’s opinion (joined in by only two of the Justices) in *Jacobellis v. Ohio*⁵ stated a third requirement for a determination of obscenity. That is, the material, independent of the other two tests, must be utterly without redeeming social value.⁶ The other opinions did not consider this aspect of the requirements for establishing material as obscene.

At this point three main problems remained in achieving an understanding of the meaning of the Court’s definition of obscenity. These were: (1) what is the relevant community whose contempo-

¹ “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.” *Roth v. United States*, 354 U.S. 476, 484-485 (1957).

² *Roth v. United States*, 354 U.S. 476, 489 (1957).

³ “For we find lacking in these magazines an element which, no less than ‘prurient interest,’ is essential to a valid determination of obscenity . . . , and to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive to their face as to affront current community standards of decency—a quality that we shall hereafter refer to as ‘patent offensiveness’ or ‘indecentcy.’ Lacking that quality, the magazines cannot be deemed legally ‘obscene’” *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962).

⁴ *Manual Enterprises v. Day*, 370 U.S. 478, 486 (1962) (opinion of Harlan, J.).

⁵ 378 U.S. 184 (1964) (opinion of Brennan, J.).

⁶ “We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is ‘utterly without social importance.’ . . . Nor may the constitutional status of the material be made to turn on a ‘weighing’ of its social importance against its prurient appeal, for a work cannot be proscribed unless it is ‘utterly’ without social importance.” *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (opinion of Brennan, J.).

rary standards are to be applied in judging "patent offensiveness" and, whether the dominant theme of the material is an appeal to prurient interests; (2) to whose prurient interest must the material appeal—the average person in the community or the average person in a subsection or subgroup of the community; (3) is "without redeeming social value" a separate requirement for obscenity or is it only a factor in, and a result of the fulfillment of the other two requirements.

The first problem is still not conclusively resolved.⁷ In *Manual Enterprises v. Day* two justices stated that the relevant community is the nation, and that "patent offensiveness" and "prurient appeal" are judged by national, not local standards of decency.⁸ Two more justices agreed with this in *Jacobellis v. Ohio*.⁹ However in this same case, two other justices expressly stated that the community standard to be applied should be that of a community less than national.¹⁰ While there is no majority opinion on this point, if this problem arose as a determinative factor in a case, the practical result would probably be, that before the material could be adjudicated as obscene, the national standard of decency would have to be applied and affronted.¹¹

Problem number two is concerned with the question, what group establishes the criterion for the "average" person to whose prurient interest the material must appeal in order to satisfy the *Roth* test. Is this "average" person the average person of the community or is he the average person of a particular group less than the whole community? If the latter, what is that group and how is it defined? This problem was first presented to the Court in *Manual Enterprises v. Day*,¹² but was not decided by the Court in that case.

Four years more passed before the above issue was directly presented and decided by the Supreme Court. In the recent case *Mishkin v. New York*,¹³ the appellant had been convicted of prepar-

⁷ This question did not arise in the three latest Supreme Court cases dealing with obscenity. *Ginzburg v. United States*, 86 Sup. Ct. 942 (1966); *Mishkin v. New York*, 86 Sup. Ct. 958 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Mass.*, 86 Sup. Ct. 974 (1966). See *Ginzburg v. United States*, supra at 952 (Black, J., dissenting).

⁸ 370 U.S. at 488.

⁹ 378 U.S. 184, 192-93.

¹⁰ *Id.* at 200 (Warren, C.J., dissenting).

¹¹ Because Justices Black and Douglas maintain the position that even obscenity is protected by the 1st and 14th amendments, the requirements of the four justices advancing a national standard would have to be met on this issue before there would be a majority of the Court in agreement as to the obscenity of a given item. See *Ginzburg v. United States*, 86 Sup. Ct. 942, 968 (1966) (Black, J., dissenting); 86 Sup. Ct. 942, 969 (1966) (Douglas, J., dissenting).

¹² 370 U.S. 478, 482 (1962).

¹³ 86 Sup. Ct. 958 (1966).

ing, publishing and possessing with intent to sell, obscene books in violation of New York Penal Law section 1141. The evidence fully established that the books were concerned primarily with sadism and masochism and that the books were primarily prepared for and distributed to persons with sadistic or masochistic tendencies.¹⁴ The appellant pleaded that the *Roth* "prurient appeal" test for obscenity had not been satisfied because the books "do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.'" ¹⁵ If the "average" person in the *Roth* test is derived from the whole community, then the appellant's plea would probably have been sound and the books in question would not have been obscene and thus would be constitutionally protected.

The Court rejected the appellant's argument as being an incorrect interpretation of the *Roth* prurient-appeal requirement. The Court went on to present what is the correct interpretation of this requirement.

Where the material is *designed for and primarily disseminated to a clearly defined deviant sexual group*, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of *that group*. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since 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 [test]¹⁶

This would indicate that three requirements must be met before the base for determining the average person can be shifted from the community to a subgroup of such community. First there must be a clearly defined deviant sexual group; second, the material in question must be primarily designed for such group; and third, such material must have as its intended and probable recipients that defined group.

The reasoning behind this change in, or addition to the *Roth* test is probably based on the realization that much of the material to which censors and society most object would not be legally obscene if the prurient-appeal requirement depends for its satisfaction on an appeal to the prurient interests of the community based average or normal person. Sadistic or masochistic material as in the *Mishkin*

¹⁴ *Id.* at 964.

¹⁵ *Mishkin v. New York*, 86 Sup. Ct. 958, 963 (1966).

¹⁶ *Id.* at 963-964. (Emphasis added.)

case or certain homosexual publications or other abnormal sexual material might well not have as its dominant theme prurient interest appeal to the sexually normal person. Thus, it would be constitutionally protected and could not be proscribed. Yet, it is the accessibility of just such material that arouses great indignation on the part of parents and probably a large segment of society. The failure of the *Roth* test as originally interpreted to logically include sexually deviant material would seem to account for this reinterpretation of the *Roth* requirement by the Supreme Court.

A question that immediately arises from the *Mishkin* case is, are there groups or classes of persons other than sexually deviant groups for which material might be designed and distributed which would come within this new application of the *Roth* requirement for prurient-appeal. To what extent is the base for the "average" person to be changed from the community to various possible sub-classifications in the community? At the present time this question is unanswerable. However, certain considerations exist which would suggest that this variation of the class of the "average" person will be restricted and will not become a means of censorship simply because material appeals to the prurient interest of a group into whose possession the material may fall.¹⁷ The two requirements for design and distribution to a defined group plus the other general requirements for establishing obscenity (patent offensiveness and probably, utter lack of social value) will restrict the effect of this new interpretation of the *Roth* test. But a more important factor in limiting the Court in the expansion of the possible applicable groups is that here the Court is dealing with total, rather than partial or temporary proscription of material. In *Roth* the Court expressly rejected the *Regina v. Hicklin*¹⁸ test which made the possibility of censorship turn on the material's impact on the most susceptible group.¹⁹ However it is possible that the *Mishkin* concept of variable "average" persons could be applied to more diverse groupings and still not infringe on the rights of the remainder of society. This expansion may be possible through a careful and restricted interpretation and application of the *designed for* and *distributed to* requirements.²⁰

The third problem as to the status of the social value criterion was presented and considered in *A Book Named "John Cleland's*

¹⁷ See *Butler v. Michigan*, 352 U.S. 380 (1957), which eliminated children as a measure for defining obscenity.

¹⁸ [1868] L.R. 3 Q.B. 360.

¹⁹ The Court expressly reiterates this position. 86 Sup. Ct. at 964.

²⁰ For a discussion of a similar concept, but one which would extend the possible variations of the meaning of obscenity, see Lockhardt & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

Memoirs of a Woman of Pleasure v. Mass.²¹ (Hereafter referred to as *A Book Etc. v. Mass.*) The Massachusetts Supreme Court had held that this book was obscene because its dominant theme was an appeal to prurient interest, it was patently offensive, and any minimal literary value the book possessed was insufficient in social importance to overcome the other two factors.²² This raised the issue of whether "utter lack of social value" of material is a separate and additional requirement which must be met before declaring a work obscene or is the question of a work's social value only a factor in determining its dominant appeal and patent offensiveness and only a factor to be weighed against the other two requirements in deciding the question of obscenity. The only prior discussion of this issue was in *Jacobellis v. Ohio*,²³ which represented, on this issue, the opinion of only two justices.

In the Court's opinion—which only three justices joined—in *A Book Etc. v. Mass.*,²⁴ Justice Brennan said:

The Supreme Judicial Court of Mass. erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene". A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criterion is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed. . . .²⁵

Justice Clark²⁶ and Justice White²⁷ stated that the making of "utter lack of social value" a separate and third requirement for obscenity was a basic rejection of *Roth*. They would hold that lack of social value is a result of a materials meeting the requirements of requisite prurient appeal and patent offensiveness. To them, social value is not a separate question, but a factor in and the effect of determining the other two requirements. They also disagree that before material can be found obscene it must have *no* social value. Even if material had some slight social value, but it was so outweighed by its prurient appeal and patent offensiveness, the material could be judged obscene. The other four justices did not consider this issue in their

²¹ 86 Sup. Ct. 975 (1966).

²² A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Mass., — Mass. —, 206 N.E.2d 403 (1965).

²³ 378 U.S. 184, 191 (1964) (opinion of Brennan, J.).

²⁴ 86 Sup. Ct. 975 (1966) (opinion of Brennan, J.).

²⁵ *Id.* at 978.

²⁶ A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Mass., 86 Sup. Ct. 975, 989 (1966) (Clark, J., dissenting).

²⁷ *Id.* at 999 (White, J., dissenting).

opinions. As a result, only five justices considered this issue and they are split three to two in favor of "utter lack of social value" as a separate and third requirement for determining obscenity.

The practical result of this three-two split is that before any material is determined to be obscene, it will have to meet *three* requirements, not two. In effect, until one of the justices changes his position, "utter lack of social value" is a third requirement for obscenity. This results from the position of Justices Black and Douglas,²⁸ that even obscenity cannot be censored, and from Justice Stewart's position that only hard-core pornography can be censored.²⁹ Without the joinder of the three justices who maintain "utter lack of social value" as a separate requirement, no majority of the Court in favor of terming an item obscene could be reached.

This leaves another question in the law governing obscenity. That is, what is social value? Perhaps this is a phrase which does not submit itself to delineation and exactness and one should not expect such. To date the only attempt to give any content to this phrase was in *Jacobellis v. Ohio*.³⁰ There, the Court said, "Material dealing with sex in a manner that advocates ideas . . . or that has *literary* or *scientific* or *artistic* value or *any other form* of social importance, may not be branded as obscenity. . . ."³¹ While such general language certainly does not present any exact legal boundaries, it probably does provide the closest thing possible to a legal definition of the "utter lack of social value" requirement.

This general definition will permit much evidence and debate as to the existence or non-existence of any saving value of the work to society. Herein lies the value of this requirement. By permitting proof that a work has worth to any area of life or segment of society even though such work to the average person would only have prurient appeal or be offensive, the rights and interests of the non-average person are protected more than with only the prior two requirements which were based on the average person concept. This additional requirement is a recognition of the rights of the minority as well as those of the majority. Certain works may have value to the artist, the social or literary historian, or to other fields of specialized endeavor, which to the layman represent only sex or offensiveness. The addition and enforcement of this third requirement is a means of preserving material with value to a minority from proscription by the majority.

²⁸ *Supra* n. 11.

²⁹ *Ginzburg v. United States*, 86 Sup. Ct. 942, 956 (1966) (Stewart, J., dissenting).

³⁰ 378 U.S. 184 (1964).

³¹ *Id.* at 191 (opinion of Brennan, J.). (Emphasis added.)

With the decision in *Ginzburg v. United States*,³² the three requirements for determining the status of material as obscene or non-obscene take a new aspect and are further complicated and confused. In the cases since *Roth* and prior to *Ginzburg*, the Court had concerned itself only with the materials in question. The question as to the class of the materials in issue was decided on the basis of the material. Evidence as to any factors not concerned with the material itself was not considered. The question was, does this item in the abstract meet the requirement so as to be obscene? The Court has "regarded the materials as sufficient in themselves for the determination of the question of obscenity."³³ There was some deviation from this approach presented in *Mishkin*. There the Court allowed evidence as to primary design, distribution and recipient group as a factor in determining the existence of the requisite prurient appeal. But the significant break from the past "in the abstract" approach to a decision on the question of obscenity comes in *Ginzburg*.

The lower courts in holding certain publications obscene had admitted evidence as to the conduct of the purveyor in and the circumstances of production, sale, and the publicizing of the material. The Supreme Court said, "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity"³⁴ "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."³⁵ Thus, no longer is material to be judged only in the abstract, but the purveyor's attitude and actions concerning the material may be considered in evaluating such material. When the accused publications originate or are sold "as stock in trade of the sordid business of pandering—the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."³⁶—they may be deemed obscene because of such context.

What role does this new element of the purveyor's conduct play in regard to the other three requirements for determining the question of obscenity? It would seem to be an evidentiary role. The setting of the material is evidence to be considered in determining whether the material has the requisite prurient appeal, patent offensiveness and utterly lacks social value.³⁷ This evidence would

³² 86 Sup. Ct. 942 (1966).

³³ *Id.* at 944.

³⁴ *Ginzburg v. United States*, 86 Sup. Ct. 942, 944-945 (1966).

³⁵ *Id.* at 947.

³⁶ 86 Sup. Ct. at 945.

³⁷ *Id.* at 945, 947, 949.

become important and perhaps decisive in cases where there was "ambiguity or doubt"³⁸ or in "close cases"³⁹ concerning whether the three requirements had been satisfied. In fact, evidence of pandering by the purveyor may be enough to classify the material as obscene even though such material by itself or in a different context would not be obscene.⁴⁰ The Court does not seem to mean that any material could be classed as obscene just because of the purveyor's treatment of it; but that in borderline cases, evidence of pandering may be enough to push the material over the line into the obscene, at least in that particular context.

By allowing this exterior evidence of a material's setting to control its decision, and by recognizing that the material in question might not be obscene in another context, the Court has created a realm of material which is situationally obscene with resulting situational proscription and criminal conviction under a proper statute. The Court said, "A conviction for mailing obscene publications, but explained in part by the presence of this element [purveyor's conduct], does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use."⁴¹ Material that is obscene not because of itself but because of its setting (which will support a criminal conviction of its purveyor) is not subject to total proscription by state or federal action, but in a different setting can be distributed free from censorship laws (and the purveyor is not guilty of any crime).

Two serious objections exist as to this method of deciding whether or not material is obscene. One is it confuses the actions of the purveyor with the quality of the material. Two is that because of one or two person's treatment of material, such material, which would otherwise be constitutionally protected, may be severely suppressed as to its distribution and availability to those with a legitimate use for it.

If the Court desired to see pandering of material made a crime, it should have in some way made this known and then waited for proper statutes to be effected. The method used only confuses obscenity laws more and leaves a potential group of material which can shift its status as to being or not being obscene with a resulting shift in law enforcement rights and individual rights concerning such material. Is a person who is in possession of one of the publications declared obscene in *Ginzburg* guilty of possessing obscene material

³⁸ 86 Sup. Ct. at 947.

³⁹ *Id.* at 949.

⁴⁰ 86 Sup. Ct. at 950; *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Mass., 86 Sup. Ct. 975, 996 (1966).

⁴¹ 86 Sup. Ct. at 949.

under a state law prohibiting such? Can a state or the federal government proscribe these publications without re-trying the issue of their obscenity each time a new person sells them? The answers to these and similar questions must await future cases in which the effect of this decision creating this class of obscene material is determined.

In the past the Court has gone to great lengths to strike down obscenity laws which might have the effect of suppressing or proscribing non-obscene material.⁴² Yet, here it has established a potential group of material that of itself is constitutionally protected but which because of the purveyor's actions toward it becomes unprotected to some unknown extent. For the Court to say that subjecting the purveyor to criminal conviction for distributing obscenity creates no threat to the first amendment guaranties⁴³ seems unrealistic. By classifying material as obscene even under limited circumstances, a threat of criminal charge and conviction is made to anyone else who takes up the sale and distribution of that material. This threat could result in the suppression of the material because no one will risk the possible expense of trial and conviction. In practice this type of decision may result in de facto censorship if not de jure censorship. In such a case the guaranties of the first amendment are certainly threatened.

CONCLUSION

At the present time three requirements exist for proving material obscene: (1) it must have as its dominant theme, applying contemporary community standards, an appeal to the prurient interest of the average person, which "average" person is generally based on the community, but given material primarily designed for, and distributed to, a clearly defined sexually deviant class, that class may form the base for the average person; (2) the material must be so offensive on its face as to affront current community standards of decency; (3) the material must be utterly without redeeming social value. Each of these requirements is independent of the others, and all three must coalesce before material can be judged obscene.

In determining whether these three requirements exist, evidence of the purveyor's conduct regarding the material is admissible and in close cases may control. Because of the creation of a class of situationally obscene material, before one can determine whether the material is totally censurable (inherently obscene), or only ob-

⁴² E.g. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959).

⁴³ 86 Sup. Ct. at 949.

scene at times, and the resulting legal rights involved, one must look to the basis of the Court's decision in classifying the material. Material that was obscene may not be obscene in a different setting, and material that was not obscene may become so in a proper setting.

"The central development that emerges from the aftermath of *Roth v. United States* . . . is that no stable approach to the obscenity problem has yet been devised by this Court."⁴⁴

Monte McFadden

⁴⁴ A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Mass., 86 Sup. Ct. 975, 996 (1966) (Harlan, J., dissenting).