THE NEW STANDARD OF OBSCENITY

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

The Supreme Court granted writs of certiorari to Roth and Alberts who had been convicted under respective federal and state obscenity statutes. Appellants contentions were two-fold: one, the statutes constituted a *per se* encroachment of the guarantees of free speech and press embraced in the First Amendment, and two, the jury instructions had been unconstitutional as the clear and present danger test was not included. The obscenity of the books, as such, was not a material issue in the case although samples of the "stag" pictures and "filthy" comic books had been submitted by the Justice Department and reviewed by the Court. The Supreme Court determined initially that obscenity is not within the area of constitutionally protected speech and press. In defining obscenity, the Court held that material is obscene only when the work as a whole, judged by contemporary standards, would appeal to an average man's prurient interest.

The initial reaction to this decision is that it was a victory for those who favor broad powers of censorship. However, a closer analysis reveals quite the contrary.[1] Since the power to censor had always been assumed, the Court's verbalization of this is by itself insignificant. Rather, the real importance of the case arises from the narrow definition of obscenity that was authoritatively endorsed by the Court.

The classical definition can be found in *Regina v. Hicklin*[2] where the material was judged by its tendency to effect particularily susceptible persons. This test, as initially interpreted, included an irrebuttable presumption that the author intended the consequences of his act,[3] thereby excluding praiseworthy intentions from the jury. The rule was adopted in the United States in 1879,[4] and continued to be a potent weapon of "moralists" as late as the 1930's despite criticism from both intellectuals and jurists.[5] The inherent evils of this unrestricted standard are best illustrated in the Massachusetts case in which Theodore Dreiser's *An American Tragedy* was proscribed on the basis of a few isolated passages.[6] Even though the appellate court conceded that it possessed both "artistic worth" and an "impelling moral lesson", they refused to overrule the trial court's ruling that only the isolated passages need be submitted to the jury.[7]

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[1] Lewis, *Censorship Limited in "Obscenity" Cases,* N.Y. Times, January 19, 1958, Sec. E., p. 9, col. 6.

[2] Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868): "Whether its tendency is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it may fall." Common law jurisdiction of this offense was first assumed in Rex. v. Curl, 2 Str. 788, 93 Eng. Repr. 849 (K.B. 1727).

[3] Steel v. Brannan, L.R. 7 C.P. 261, 267 (1872).

[4] United States v. Bennett, 24 Fed. Cas. No. 14,571 (C.C.S.D. N.Y. 1879); People v. Mueller, 96 N.Y. 408 (1896); but see In re Worthington, 30 N.Y. Supp.

Led by the "dominant effect" test enunciated by the Second Circuit Court of Appeals in the *Ulysses* case,[8] this strict application of the *Hicklin* rule was curtailed in the early 1930's. Joyce's *Ulysses* had also been assailed on the basis of a few isolated passages, but in dismissing the contentions of the prosecution the court said that the matter is obscene only when the publication "contains prohibited matter in such quantity or of such a nature as to flavor the whole and impart to the whole any of the qualities mentioned in the statute, so the book as a whole can fairly be described obscene."[9] In subsequent cases, *Hicklin's* unrestricted frame of reference, "into whose hands it may fall" was replaced by the "average man" and "community standards of decency" as part of the more liberal judicial attitude.[10]

The Supreme Court made it quite clear in decisions handed down in 1957 that an attempt to invoke the residual portions of the classical standard would be incompatible with the First Amendment.[11] Justice Frankfurter, writing for the majority in *Butler v. State of Michigan*,[12] held that a statute prohibiting the sale to the general public of a book having a tendency to corrupt youth constituted an arbitrary restriction of free speech.[13] In the *Roth* decision, the *Hicklin* rule was explicitly held unconstitutional because its "utilization might well encompass material legitimately treating with sex. . . ."[14] However, before formulating a standard to replace *Hicklin*, it was necessary to dispose of the petitioner's

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361 (Sup. Ct. 1894); St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N.Y. Supp. 582 (1909), where the lower courts refused to follow the *Hicklin* rule in proceedings against books of high literary merit.

[5] See United States v. Kennerly, 209 Fed. 119 (S.D. N.Y. 1913), where Judge Hand, although personally rejecting the test, felt constrained to follow it. See ST. JOHN STEVAS, OBSCENITY AND THE LAW, Chapt. II (1956); and Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954), for a scholarly presentation of the criticisms of the test.

[6] Commonwealth v. Fried, 271 Mass. 318, 171 N.E. 472 (1930).

[7] *Id.* at 322, 171 N.E. at 474.

[8] United States v. One Book Entitled "Ulysses", 72 F. 2d 705 (2d Cir. 1930).

[9] *Id.* at 707.

[10] E.g., Walker v. Popenoe, 80 U.S. App. D.C. 129, 149 F. 2d 188 (1945); Parmelee v. United States, 72 App. D.C. 203, 113 F. 2d 729 (1940); United States v. Levine, 83 F. 2d 156 (2d Cir. 1936); United States v. Dennett, 39 F. 2d 188 (2d Cir. 1930); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954); Commonwealth v. Isenstadt, 381 Mass. 543, 62 N.E. 2d 840 (1945); Commonwealth v. Gordon, 66 Pa. Dist. & Co. R. 101, affirmed *sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A. 2d 389 (1949).

[11] U.S. CONST. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . ."; in Gitlow v. New York, 268 U.S. 652 (1952), this protection was extended to cover state action through the interpretation of "liberties" in the due process clause of the Fourteenth Amendment.

[12] 352 U.S. 380 (1957).

[13] *Id.* at 383, "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."

[14] Roth v. United States, 354 U.S. 476, 489 (1957).

contention that all censorship statutes are unconstitutional.[15]

A number of prior cases contained dicta in which no protection was assumed.[16] The most persuasive of these is Justice Murphy's analysis in *Chaplinsky v. New Hampshire*.[17] In that case, it was concluded that the "lewd and obscene" fall into those "narrowly limited classes of speech the prevention and punishment of which have never been thought to raise a constitutional question."

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[18]

This statement in *Roth* differs only grammatically from the ultimate conclusions reached by Chafee in his study, *Freedom of Speech*. However, in Chafee's analysis, an "appeal to prurient interest" or absence of "redeeming social importance" does not establish the necessary basis for denying protection.[19] In addition, to be obscene the words must:

> . . . inflict a present injury upon the listeners, readers, or those defamed, or else render highly probable an immediate breach of the peace. . . . The only sound explanation of the punishment of obscenity and profanity is that the words are criminal, not because of the ideas they communicate, but like acts because of their immediate consequences to the five senses."[20]

Whether this transformation of the words into acts is a necessary part of a rational nexus for balancing public morals against freedom of expression was the primary issue before the Court. Since all members of the Court agreed that freedom of speech is not an absolute freedom, the area of disagreement was necessarily limited to what constitutes the proper test of obscenity.

Justice Brennan, writing for the majority, relied extensively on the *Chaplinsky* dicta and concluded that a clear and present danger is not necessary to exclude. Instead, he authoritatively endorsed the

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[15] The petitioners contended that the statutes violated the due process requirement of "definitness" as well as being repugnant to the First Amendment. This argument will not be reviewed in this note; the *Butler* case, *supra* note 12, had already clearly rejected this extension of the Fourteenth Amendment. See Foster, *The "Comstock Lode"—Obscenity and the Law*, 48 J. CRIM. L., C. & P.S. 245, 253 (1957).

[16] Beauharnasis v. Illinois, 343 U.S. 250 (1951); Winters v. New York, 333 U.S. 507 (1947); Hannigan v. Esquire, Inc., 327 U.S. 146 (1945); Chaplinsky v. New Hampshire, 315 U.S. 568 (1941); Near v. Minnesota, 283 U.S. 697 (1930); Robertson v. Baldwin, 165 U.S. 275, 281 (1896); United States v. Chase, 135 U.S. 255, 266 (1889); *Ex parte* Jackson, 96 U.S. 727, 736, 737 (1877).

[17] 315 U.S. 568, 572 (1941).

[18] *Supra* note 14, at 485.

[19] CHAFEE, FREEDOM OF SPEECH, 171 (1920). He rejected the interpretation of constitutional intent and analogy to libel (two subordinate reasons utilized in the *Roth* opinion) as an insufficient basis for exclusion.

[20] *Id.* at 149-50.

prurient interest test of the Model Penal Code.

> Whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest.[21]

Although this is a narrower test than had been developed by common law, it is significant that it assumes the premise that provocation of mere thoughts is a sufficient criterion. The vitality of the endorsement is further neutralized by the Court's approval of the lower court instructions which were framed in terms of the "tendency to corrupt" standards developed by common law. This inconsistency is brought into focus by a comparison of footnote twenty of the majority: "We perceive no significant difference between the meaning of obscenity developed in case law and the definition of the Model Penal Code," with the drafters' comment: "We reject the prevailing tests of tendency to arouse . . . because regulation of thought or desire, unconnected with overt behavior, raises the most acute constitutional as well as practical difficulties."[22]

In the dissent of Justice Douglas, Justice Black concurring, the position was taken that before speech is punishable, there must be some relation to an overt action which can be penalized by the government.

> Like the standard applied by the trial judges below, that standard [prurient interest] does not require any nexus between the literature which is prohibited and action which the legislation can regulate or prohibit.[23]

Confronted with inadequate empirical evidence of any causal relation between obscenity and social harm, together with the historical precedent of irrational and indiscriminate censorship of obscenity, Justice Douglas felt that "any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."[24]

Chief Justice Warren, who concurred in the majority's result so

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[21] MODEL PENAL CODE, Sec. 207.10(2) (Tent. Draft No. 6 1957).

[22] *Id.* at p. 10.

[23] *Supra* note 14, 513. This approach, is not dissimiliar from the one taken by Judge Bok in 66 Pa. Dist. & Co. R. 101, affirmed *sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1949): ". . . [O]nly when there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as a perceptible result of the publication and distribution of the writing in question." The Supreme Court's refusal to approach the constitutional question in Doubleday & Co. v. New York, 355 U.S. 848 (1948), where the conviction of the publishing house was affirmed in a four-four no opinion decision is felt by some critics to be the catalyst of Judge Bok's bold step in analyzing obscenity in this framework. See MILTON R. KONOVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE, 159-160, 161 (1957); Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution,* 38 MINN. L. REV. 295 (1954).

[24] *Supra* note 14 at 512, See Lockhart and McClure, *ibid.* at 385-86.

far as the rejection of the clear and present danger test was concerned, posited a third position in which the conduct of the individual is the crucial element to be judged: "It is not the book that is on trial, it is the person."[25]

This approach seems the least tenable in that it fails to recognize that the only acceptable basis for the exclusion is not the defendant's insensitivity, but some adverse impact upon public morals. Chief Justice Warren's difficulty is that he is treating a civil liberties crime in the same manner in which ordinary criminal behavior has been traditionally evaluated. If inquiry into the defendant's mental attitude has any vitality, it is not as a nexus for the factual determination of obscenity, but as a factor to be weighed in assessing the quantum of criminal responsibility to be imposed.

In subsequent cases the Supreme Court has adopted the same policy with convictions under obscenity statutes as it had initially utilized in the disposition of movie censorship litigation—a case-by-case basis in which they personally review the allegedly obscene material.[26] In two recent memorandum opinions the Court reversed lower court convictions by a mere citation of *Roth*.[27] Likewise, in reviewing a Chicago ban on the movie *Game of Love*, the Court abandoned its customary approach of "too vague and indefinite" and reversed on the basis of *Roth*.[28] In essence, the decisions thus far indicate a reluctance on the part of the Court to tolerate censorship of any material which might express socially significant ideas. As a practical matter, so long as this policy continues, disposition in the majority of the cases will be the same as it would be under the clear and present danger test. However, one should not be oblivious of the fact that any test which is premised on thoughts provoked, rather than overt acts induced, latently possesses all the seeds of indiscriminate application that had prevailed under the *Hicklin* regime.

Although the explicit rejection of the *Hicklin* rule by the *Roth* decision is a progressive step forward, the boldest step remains to be taken. It seems elementary that the only acceptable standard is one in which the determinative criteria is co-extensive with the basis for denying

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[25] *Supra* note 14 at 495.

[26] Burstyn v. Wilson, 343 U.S. 495 (1952) ("sacreligious"); Gelling v. Texas, 343 U.S. 960 (Per curiam, 1952) ("prejudicial to the best interests of people of the city"); Superior Films Inc. v. Department of Education, 346 U.S. 587 (Per curiam, 1954) ("harmful," "immoral" and "tend to corrupt morals").

[27] One, Inc., v. Olsen, 26 U.S.L. WEEK 3203 (No. 290, Jan. 14, 1958), *cert. granted* and mail ban on magazine which discussed the problems of homosexuality reversed; Sunshine Book Co. v. Summerfield, 26 U.S.L. WEEK 3203 (No. 587, Jan. 15, 1957), *cert. granted* and postal ban of nudist magazine reversed.

[28] Times Film Corporation v. City of Chicago, 355 U.S. 55 (Memo Dec. 1957); see also, Excelsior Pictures Corp. v. Regents, 3 N.Y. 2d 31, ___. N.E. 2d __ (1957); where censorship of "Garden of Eden," a movie depicting life in a nudist colony, was reversed on the basis of *Roth*.

the words the guarantees of the First Amendment.[29] Until a reason more satisfactory than Chaffee's analysis[30] is presented, the clear and present danger test seems to be the only standard which adequately protects freedom of expression.

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[29] De Jonge v. Oregon, 299 U.S. 353 (1937): "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves from that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." Thornhill v. Alabama, 310 U.S. 88 (1940): "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evil arises. . . ." Musser v. Utah, 333 U.S. 95 (1948): "At the very least the line must be drawn between advocacy and incitement."

[30] *Supra* note 19.