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Obscenity: Significance of Literary Value

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tions"²⁶ were necessary, and that there was no clear yardstick by which the permissible area could be delineated from that constitutionally prohibited.²⁷ Mr. Justice Goldberg reasoned that "the First Amendment does not prohibit practices by which any realistic measure create none of the dangers which it is designed to prevent and which do not so *directly* or *substantially* involve the state in religious exercises. . . ."²⁸

The Court presented a few examples which are indicative of the intimacy which exists between religion and the federal government.²⁹ Oaths of office from President to alderman conclude with the humble statement "So help me God." Likewise each session of Congress is opened with a prayer provided by its chaplain. Each session of the Supreme Court is commenced by a crier, who in a short ceremony invokes the grace of God. Furthermore, chaplains are provided in our military forces for spiritual guidance.³⁰

²⁶ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305-306 (1963) (concurring opinion of Justice Goldberg).

²⁷ *Id.* at 306.

²⁸ *Id.* at 308. (Emphasis added.)

²⁹ *Id.* at 213.

³⁰ It is interesting to note that the Congress which provided for chaplains in the Houses of Congress and in the armed forces, was the same Congress that wrote the first amendment.

The fact situation in the principal case seems clearly to fall within the spirit of the types of activity which are not violative of the first amendment. Although the examples in *Abington* are specific, they were certainly not intended to be exhaustive. It would clearly be unreasonable not to distinguish between the recitation of a prayer or the reading of a Bible in a classroom and the authorization given to a group of people to erect a religious display on public grounds at their own expense. The significant recognition by the Court in the principal case is that some distinction must be made regardless of what the distinction is branded. The Court here has chosen to label the degrees of involvement as "active" and "passive." These labels may not necessarily be the most appropriate. The Supreme Court in subsequent cases may refuse to adopt this precise language—whether or not they do is not of major concern. The case under discussion points up at least this—whether there has been a violation of the "establishment clause" is a question of the degree of state involvement in a particular religious activity. The Supreme Court, if faced with a similar fact situation, might very well categorize the degree of involvement here present among its enumerations of sanctioned activities and might well conclude that such a determination was implicitly mandated by *Abington*.

Recent Decision: Obscenity: Significance of Literary Value

In recent years obscenity has been the source of frequent litigation. There have been conflicting decisions in which the courts

have tried to balance the basic constitutional rights of the individual and the state's police power of censorship.

In the case of *People v. Fritch*,¹ the de-

¹ 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).

defendants were convicted of selling an obscene book in violation of Section 1141 of the New York Penal Law.² The book, Henry Miller's *Tropic of Cancer*, abounded in narrations dealing with sex in the most colloquial sordid terms. The defendants contended that the passages had literary value depicting the depressed post-World War I conditions in Paris. The Court of Appeals, in a 4-3 decision, held that the book was obscene despite the fact that it might possess "substantial literary merit."

There is no precise definition of obscenity.³ The Supreme Court, however, in the case of *Roth v. United States*,⁴ set down the following standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."⁵ The *Roth* case also held that ideas of even "the slightest redeeming social importance" are protected by the first amendment.⁶ Because of this apparent contradiction as to the weight to be given literary value vis-a-vis appeal to "prurient

interest," various cases, both before and after *Roth*, have advanced diverse solutions to this problem.

In the case of *Grove Press, Inc. v. Christenberry*,⁷ a post-*Roth* case, it was held that the general theme of *Lady Chatterly's Lover* did not appeal to the "prurient interest." In support of its holding the court stressed the literary value of the book as a whole.⁸ However, in the case of *Commonwealth v. Isenstadt*,⁹ a pre-*Roth* case, the court found the defendant guilty of selling an obscene book and stated that it was irrelevant whether the book possessed literary merit.¹⁰

In *United States v. Levine*,¹¹ another pre-*Roth* case, a third approach was adopted. The test used was the weighing of the literary merit of the material against its effect on "the salacity of the reader to whom it is sent."¹² Thus the above three cases follow different standards in determining obscene literature. While the *Isenstadt* case finds literary merit of no importance, *Grove Press* emphasizes this. The *Levine* case's balancing approach falls somewhere in the middle.¹³

² N.Y. PENAL LAW § 1141 provides: "A person who sells . . . any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose . . . is guilty of a misdemeanor. . . ."

³ Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 48 (1960).

⁴ 354 U.S. 476 (1957).

⁵ *Id.* at 489. The standards expounded in *Roth* are essentially the same as those advocated by the American Law Institute in its Model Penal Code of 1962. MODEL PENAL CODE § 251.4 (Proposed Official Draft, May 4, 1962). However, in that same year the Supreme Court expanded its requirements for a finding of obscenity. Not only must a work appeal to the "prurient interest," but it must also be "patently offensive to current community standards of decency." *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482 (1962).

⁶ *Id.* at 484.

⁷ 276 F.2d 433 (2d Cir. 1959).

⁸ *Id.* at 437.

⁹ 318 Mass. 543, 62 N.E.2d 840 (1945).

¹⁰ *Id.* at 847.

¹¹ 83 F.2d 156 (2d Cir. 1936).

¹² *Id.* at 158.

¹³ For cases holding literary value irrelevant, see *People v. Dial Press, Inc.*, 182 Misc. 416, 48 N.Y.S.2d 480 (Magis. Ct. 1944); *People v. Friede*, 133 Misc. 611, 233 N.Y. Supp. 565 (Magis. Ct. 1929); *People v. Seltzer*, 122 Misc. 329, 203 N.Y. Supp. 809 (Sup. Ct. 1924). For cases declaring literary value of utmost importance, see *St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N.Y. Supp. 582 (Sup. Ct. 1909); *People v. Gonzales*, 107 N.Y. S.2d 968 (Magis. Ct. 1951). For cases considering literary value to be of varying degrees of importance, see *Capitol Enterprises v. City of Chicago*, 260 F.2d 670 (7th Cir. 1958); *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E.2d 585, *appeal denied*, 348 U.S. 979 (1954).

Recently there have been three decisions contrary to *People v. Fritch* on the same subject — Henry Miller's *Tropic of Cancer*. First, in *Zeitlin v. Arnebergh*,¹⁴ the California Supreme Court held that this book was not obscene. The City of Los Angeles, the defendant, contended that "redeeming" should be the word emphasized in the phrase "utterly without redeeming social importance" (the test from the *Roth* case), and thus, the true test is the weighing of the social importance of the material against its "prurient appeal." The court rejected this contention and emphasized the word "utterly," a term which permits no such balancing. The California court stated that if any matter of social importance exists, this will "recover for the material its position as constitutionally protected utterance."¹⁵

In *McCauley v. Tropic of Cancer*,¹⁶ the court applied the "prurient interest" test,¹⁷ but also stated that a work possessing "redeeming social importance" will not readily be declared obscene.¹⁸ In the third case, *Attorney General v. Book Named "Tropic of Cancer"*,¹⁹ the Supreme Judicial Court of Massachusetts, in emphasizing the guarantees of the first amendment, used an obscenity test which included only "hard core pornography" without "redeeming social importance."²⁰

¹⁴ 31 Cal. Rptr. 800 (1963).

¹⁵ *Id.* at 813.

¹⁶ 20 Wis. 2d 134, 121 N.W.2d 245 (1963).

¹⁷ *Id.* at —, 121 N.W.2d at 554.

¹⁸ *Id.* at —, 121 N.W.2d at 550. "Where a work of apparent serious purpose is involved, the scales will not readily be tipped toward the determination of obscenity." *Ibid.*

¹⁹ — Mass. —, 184 N.E.2d 328 (1962).

²⁰ *Id.* at —, 184 N.E.2d at 333-34. "With respect to material designed for general circulation, only predominantly 'hard core' pornography without redeeming social significance, is obscene in the constitutional sense." *Ibid.*

In the present case, however, the majority opinion found *Tropic of Cancer* obscene, stating that it appeals to the "prurient interest," is "patently offensive," and is "hard core pornography."²¹ The Court rejected the defendants' contention of "substantial literary merit" stating that this is not the test as laid down in *Roth*. The majority reasoned that although *Roth* stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" . . . it does not follow that the converse is true; indeed, if such were the case the holding in *Roth* would be vitally eroded. . . .²² In its decision the majority relies on a report by the New York Academy of Medicine Committee on Public Health which states that the sale of salacious literature to the adolescent has gone beyond thoughts, and has, in fact, led to deleterious actions such as illicit sexual relations, promiscuity, illegitimacy and venereal disease.²³ This is an unusual approach in that the Court has looked beyond mere thoughts and has discussed the possible influences of salacious literature on the actions of individuals. Thus the Court, although not following the common-law rule which held a literary work obscene if some of its words had an adverse effect upon the most susceptible person's *thoughts*,²⁴ seems to be concerned with the book's effect upon the *actions* of the most susceptible —

²¹ *People v. Fritch*, 13 N.Y.2d 119, 123, 192 N.E.2d 713, 716, 243 N.Y.S.2d 1, 5 (1963).

²² *Id.* at 125, 192 N.E.2d at 717, 243 N.Y.S.2d at 6-7.

²³ "It can be asserted, however, that the perusal of erotic literature has the potentiality of inciting some young persons to enter into illicit sex relations and thus of leading them into promiscuity, illegitimacy and venereal disease." *Id.* at 122 n. 4, 192 N.E.2d at 715 n.4, 243 N.Y.S.2d at 4 n.4.

²⁴ *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

the adolescents.

Finally, the majority stated that "flagrant obscenity" is not eliminated by the favorable comments of a few literary critics.²⁵

The dissent relied on the literary merit of the book as a factor precluding a holding of obscenity. Judge Dye discussed the dominant theme of the book, and found it not to be obscene because of the literary message conveyed, that is, the depressed condition of post-World War I Paris.²⁶ Judge Fuld, in a separate dissenting opinion, emphasized the literary value of the book as attested to by various critics, and therefore found it not obscene.²⁷

Thus, the Court in *People v. Fritch* has interpreted the apparent contradiction in *Roth* in favor of "appeal to the prurient interest," rather than "utterly without redeeming social importance." In so doing, it appears that the Court has applied a more stringent interpretation of the *Roth* case than have the courts of Massachusetts, California and Wisconsin in dealing with the same subject matter. Since all four cases rely primarily on *Roth* and the standard it provides, the results appear to be irreconcilable. While the decisions against obscenity emphasize "redeeming social importance," the principal case states implicitly that *Roth*

does not establish this test as a rule of law.²⁸

With the exception of the present case, the trend has been toward assigning greater importance to the aesthetic values of material in accordance with the standards of *Roth*.²⁹ The principal case also differs from the weight of authority on the issue of the role of the literary critic in the determination of obscenity. The majority in *Fritch* stated that favorable comments from several literary critics could not be used as an indication of the non-obscenity of a book as "this would permit the substitution of the opinions of authors and critics for those of the average person in the contemporary community."³⁰ Most courts, however, indicate a preference for the use of literary reviews as an aid in determining whether a piece of literature is obscene.³¹ Furthermore, some experts believe that the opinions of literary critics are so crucial that "its admission ought to be raised to the level of a constitutional requirement."³² They state that without the assistance of literary authorities many of our appellate courts will

²⁵ *People v. Fritch*, *supra* note 21, at 125, 192 N.E.2d at 717, 243 N.Y.S. 2d at 7.

²⁶ *Id.* at 131, 192 N.E.2d at 721, 243 N.Y.S.2d at 12. "Like 'Ulysses,' it is a 'tragic and very powerful commentary' on the inner lives of human beings caught in the throes of a hopeless social morass." *Ibid.*

²⁷ "Since 'Tropic of Cancer' is a serious expression of views and reactions toward life, however alien they may be to the reader's philosophy or experience, and since the book is not without literary importance as attested by recognized critics and scholars, it is our own judgment that the First Amendment does not permit its suppression." *Id.* at 133, 192 N.E.2d at 722, 243 N.Y.S.2d at 14.

²⁸ *Id.* at 125, 192 N.E.2d at 717, 243 N.Y.S.2d at 6. It should be noted the New York Court of Appeals has stated that the *Roth* test is not binding on the state's interpretation of its obscenity statute. *People v. Richmond County News*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

²⁹ Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 96 (1960).

³⁰ *People v. Fritch*, *supra* note 21, at 125, 192 N.E.2d at 717, 243 N.Y.S.2d at 7.

³¹ *United States v. One Book Called "Ulysses,"* 5 F. Supp. 186 (S.D.N.Y. 1933), *aff'd sub. nom. United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir. 1934); *Halsey v. New York Soc'y for Suppression of Vice*, 234 N.Y. 1, 136 N.E. 220 (1922); *People v. Geothan Book Mart, Inc.*, 158 Misc. 240, 285 N.Y. Supp. 563 (Magis. Ct. 1936); see MODEL PENAL CODE § 251.4 (Proposed Official Draft, May 4, 1962).

³² Lockhart & McClure, *supra* note 29, at 98.

be unable to conduct an intelligent review of obscenity decisions.³³

Today the area of obscenity has reached a state of confusion because of the conflicting interpretations of the *Roth* case. The principal case stands in opposition to the recent trend which places emphasis on the "redeeming social importance" in determining obscenity. This interpretation is questionable because of the increased danger of infringing on the constitutional rights guaranteed the individual by the first amendment. On the other hand, it is advantageous in that some form of censorship of obscene material is absolutely essential to preserve a

high moral standard in the community, and censorship will indeed be seriously impaired if a work of minor "redeeming social importance" falls under the protection of the first amendment. Therefore, perhaps the true test should be the weighing of the work's "prurient appeal" against its social importance, the outcome determining whether or not a work may be judged obscene. If the Supreme Court determines that the protection of community morals is outweighed by the infringement of the first amendment, it will have to clarify its position, and thus formulate guides for other courts.³⁴

³³ *Ibid.*

³⁴ *Id.* at 121.
