The Catholic Lawyer

Volume 9
Number 1 *Volume 9, Winter 1963, Number 1*

Article 10

September 2016

Recent Decision: Obscenity and the Concept of Patent Offensiveness

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

be that there is nothing constitutionally improper with commitment without a hearing provided the purpose of the commitment is to allow an opportunity for examination of the committed in order to determine his sanity. The evil which the committee fears is that once committed, a person may not receive the treatment necessary to secure his eventual release. The possibility that such would occur is not at all unlikely in light of the overcrowded conditions of the state's mental hospitals.

However, the suggestion that a system of periodic review be established does not seem very practicable. No doubt, the implementation of such a system would be extremely burdensome on the judiciary which is already heavily laden with work. Of the two proposals which would overcome the constitutional shortcomings of the commitment statutes, Judge Fahy's suggestion would seem to be the more desirable since it would not be as burdensome on the judiciary as would a system requiring periodic review of all patients. In any event, both positions point out that some action is necessary to prevent the detention of persons in mental hospitals unless founded upon some type of judicial authority.

However, notwithstanding the fact that the District of Columbia has held that its mandatory commitment statute is constitutional, the Supreme Court, when squarely faced with the question of commitment without a prior hearing, may hold to the contrary. In the present case the Court was only required to pass on the applicability of the District of Columbia statute. Nonetheless, it is interesting to note that the Court found that if mandatory commitment were applicable to one who did not plead insanity, an anomalous disparity would exist—section 24-301(d) would compel post-trial commitment on the mere doubt of the jury, while section 24-301(a) would prohibit pretrial commitment unless the Government could prove the insanity of the accused by a preponderance of the evidence.[37]

Therefore, the question of the validity of a statute requiring commitment of those acquitted of crimes by reason of insanity when *insanity is pleaded as a defense* is still in doubt. The Supreme Court may well find that a jury's mere doubt as to sanity as the basis for commitment without a precommitment hearing is, with respect to due process requirements, unconstitutional.

[37] Lynch v. Overholser, 369 U.S. 705, 713-14 (1962).

Recent Decision:
Obscenity and the Concept of Patent Offensiveness

The problem of formulating an adequate judicial standard by which the community can be safeguarded from obscenity without infringing on freedom of speech or of the press has long been a perplexing one. In the recent case of *Manual Enterprises, Inc. v. Day,*[1] the Supreme Court was confronted with magazines which the petitioners published and placed in the mails in Alexandria, Virginia to be forwarded to Chicago, Illinois. These magazines contained photo-

[1] 370 U.S. 478 (1962).

graphs of nude and nearly nude male models and advertisements as to where more of the same could be obtained. The magazines appealed primarily to homosexuals. The postmaster at Alexandria refused to forward the magazines to their destination on the ground that they were obscene. This action was affirmed by a Post Office Judicial Officer, the district court, and the court of appeals. But the Supreme Court, in reversing, held that the magazines were not "patently offensive," and enjoined the Post Office from interfering with their mailing.

The first attempt at formulating a satisfactory judicial definition of the term "obscenity" was made in England in 1868 when *Regina v. Hicklin*[2] was decided. According to the *Hicklin* rule, a work was labelled "obscene" merely if isolated passages would have a "tendency to deprave" the most susceptible minds which might have access to them.[3] Shortly thereafter that test was given judicial recognition in this country in the case of *United States v. Bennett.*[4]

In *United States v. Kennerley,*[5] Judge Learned Hand launched one of the earliest attacks upon the *Hicklin* rule. He condemned the emphasis placed on judging a work in light of the most susceptible persons and argued that such a test would reduce the subject matter available to the general public to the level of a "child's library." It was urged that a work be judged in terms of the community standards of decency.[6] Subsequent judicial definitions of obscenity have been both varied and numerous,[7] but they have all highlighted the abandonment of the *Hicklin* rule by requiring that the work be judged as an entirety and by its effect on the average person rather than the susceptible few.[8]

The final deathblow to *Hicklin* was rendered in *Roth v. United States,*[9] wherein the Supreme Court held that a work may be adjudicated obscene only if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest."[10] This case, however, did not solve some significant problems incident to adjudging a work obscene. Under this test, material "utterly without redeeming social importance" was specifically excluded from constitutional protection.[11] *Roth* apparently leaves unsolved the question of the weight to be giv-

[2] L.R. 3 Q.B. 360 (1868).

[3] *Id.* at 371.

[4] 24 Fed. Cas. 1093, 1102 (No. 14571) (S.D. N.Y. 1879). It should be noted however, that there is language in this case which indicates that in applying the *Hicklin* rule the effect on children is not considered.

[5] 209 Fed. 119 (S.D.N.Y. 1913).

[6] "Should not the word 'obsence' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" *Id.* at 121.

[7] *E.g.*, United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936) ("likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have"); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705 (2d Cir. 1934) ("tending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); Commonwealth v. Isenstadt, 318 Mass. 543, —, 62 N.E.2d 840, 844 (1945) ("tendency to deprave or corrupt").

[8] See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 49-54 (1960).

[9] 354 U.S. 476, *rehearing denied,* 355 U.S. 852 (1957).

[10] *Id.* at 489.

[11] *Id.* at 484-85.

en literary or scholarly value as a factor in determining obscenity. In at least one case "literary value" was found to be an important factor in determining a work to be of sufficient "social importance" so as to be precluded from being adjudicated obscene.[12]

Another unresolved issue was that of intended audience. No problem existed in this area, if the work was distributed through mass media since it was to be judged by its effect on the "average person." But what standard was to be employed when a work was directed toward a special audience rather than to the average member of the community? The lower courts which have been confronted with this problem have generally adopted a flexible standard whereby they judged the work in terms of its effect on the primary audience rather than the community at large.[13]

In the case of *Manual Enterprises, Inc. v. Day*,[14] the publications in question concededly appealed to the prurient interest of their primary audience (homosexuals) but would have no such effect on the "average person." The court of appeals found this prurient appeal to a particular group sufficient to constitute the matter obscene.[15] The Supreme Court did not reach the question of judging prurient effect when a work is designed primarily for a special audience. Instead, the Court based its decision upon a concept, which, though apparently implicit in the *Roth* case, had never been fully interpreted. Thus it was held that a work must be both "patently offensive" *and* have a theme predominantly appealing to a "prurient interest." The absence of either element will preclude a finding of obscenity. Though the Supreme Court had never before passed on this issue, its rationale was not without precedent, and there had been a noticeable trend toward this view in lower court opinions.[16]

The Court, in the present case, finding

[12] Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960) (involving D. H. Lawrence's *Lady Chatterley's Lover*). There the court placed substantial stress on the author's artistic prominence and the fact that the objectionable passages involved the author's exposition of his philosophy of "naturalness." *But see* Commonwealth v. Isenstadt, *supra* note 7, at —, 62 N.E. 2d at 846 (1945) (the fact that obscenity was written in a literary style may even *increase* its obnoxious effect).

[13] Manual Enterprises, Inc. v. Day, 289 F.2d 455 (D.C. Cir. 1961), *rev'd*, 370 U.S. 478 (1962) (magazines designed solely for homosexuals to be judged solely by their effect on this deviate group); United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957) (photographs held to be non-obscene because they would not appeal to the prurient interest of the research scholars for whom they were intended, regardless of what effect they would have on the "average person"). See also MODEL PENAL CODE §251.4 (3) (a) Proposed Official Draft, 1962. *But see* Butler v. Michigan, 352 U.S. 380 (1957) in which the Court struck down a statute (MICH. PEN. CODE §343) which made the effect on youth the test of the obscenity of materials designed primarily for youths.

[14] 370 U.S. 478 (1962).

[15] Manual Enterprises, Inc. v. Day, *supra* note 13.

[16] Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 499 (S.D.N.Y. 1958), *aff'd*, 276 F.2d 433 (2d Cir. 1959) (the work must be judged by its appeal to the "average man of normal sensual impulses" *and* "must also exceed the limits of tolerance imposed by current standards of the community"); Besig v. United States, 208 F.2d 142 (9th Cir. 1953); MODEL PENAL CODE §251.4 (1) Proposed Official Draft 1962. An inkling of what the Court's position would be when confronted with this question can be garnered from One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957), which was reversed per curiam by the Supreme Court. One, Inc. v. Olesen, 355 U.S. 371 (1958). The circuit court had adjudicated a homosexual magazine obscene without any consideration of "patent offensiveness."

it necessary to consider only whether the standard of "patent offensiveness" had been breached,[17] makes a careful analysis of that term. In order for the magazines to be adjudicated obscene, they must be "so offensive on their face as to affront current community standards of decency—a quality which we shall hereafter refer to as 'patent offensiveness' or 'indecency.'"[18] The Court equated the *Roth* test of the "community standards of decency" with "patent offensiveness," and finding this first element lacking, a consideration of "prurient interest" became immaterial. Furthermore, the Court discountenanced the idea of the so-called "flexible standard"—judging the work by the norms of the average member of the special audience to whom the work is directed. The community which must be offended by the work was found to be as broad as the geographical boundaries of the United States, since the statute[19] which the work had allegedly violated is national in scope.[20] Judged then by this standard, it was found that these magazines, intended for an aberrational group, were not "patently offensive" and hence were mailable.[21] But the Court stated that it need not consider whether Congress could, by specific legislation, circumscribe the "community" into a more limited geographical area.[22]

Thus the Court in the present case has decreed by a literal interpretation of the *Roth* case that the magazines in question were not obscene. By implication, it would seem that even though it be admitted *arguendo* that the magazines appeal to the "prurient interest" of their purchasers, they do not violate the first element of the dual standard, "patent offensiveness," and hence are not obscene.[23] It would appear, therefore, that a work appealing only to an aberrational mind cannot be suppressed precisely because that is its only appeal.

The Court argues that *Roth's* rejection of the "isolated passages" and "susceptible persons" tests in *Hicklin* in effect set up a dual standard of "patent offensiveness" and "prurient interest," and that neither of these elements can ever be ignored in determining a work's obscenity.[24] In reaching the conclusion that a work in which the community-at-large has no interest must nevertheless be judged by that community's standards of decency, the main factor that prevented the Court from adjudging the magazines obscene appears to be the term "average person." Hence, if it can be shown that this term does not set up an inexorable standard, mandatory in all cases, it follows that the result in *Manual Enterprises* could have been avoided, so that the actual corruptive influence of a work, rather than a mere verbal formula can be the basis of determining obscenity.

It is submitted that *Roth* is susceptible of an interpretation which would have al-

[17] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).
[18] *Ibid.*
[19] 18 U.S.C. §1461 (1958). Under this statute an "obscene . . . publication" is "non-mailable" and anyone mailing such material is punishable as a felon.
[20] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 489 (1962), where the Court said: "We think that the proper test under this federal statute, reaching as it does, to all parts of the United States, whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."
[21] *Id.* at 491.
[22] *Id.* at 488.
[23] *Id.* at 482.
[24] *Id.* at 487.

lowed the Court in the present case to find the magazines obscene. The term "average person" must be interpreted not in a vacuum, but in the light of pre-*Roth* developments in the law of obscenity. Thus it can be argued that *Roth* was nothing more than a rejection of the *Hicklin* doctrine that materials *appealing to the general public* must be judged by their effect on the most susceptible member of that public.[25] Viewed in this light. *Roth* would impose the "average person" test only when the work is so marketed that there is at least a reasonable possibility that it will reach a representative cross-section of the community.

If this analysis of *Roth* is correct, and the "average person" requirement can be dispensed with when merited by the circumstances, two equally desirable results will follow:

Firstly, in cases in which the work appeals primarily to the "prurient interest" of the special audience, courts will be free to judge the work by the harm it actually does, without reference to the "average person" who has no contact with or interest in the work. A work which is having a corruptive effect on its audience will not escape censorship merely because it is so degenerate that it appeals only to a few deviates. The premium on perversity implicit in the holding of the instant case will thereby be eliminated.

Secondly, a work will not be labelled obscene even though it appeals to the "prurient interest" of the "average person" if it is primarily designed for an especially mature or educated audience on whom it would have no such effect. Thus a work containing objectionable material would be preserved for those who can appreciate its literary significance.[26]

In both instances the work would be judged by the harm it might actually cause rather than by some abstract standard bearing no relation to the realities of the case. This standard would allow a court to adjudicate a work obscene or non-obscene based on the extenuating circumstances of its special audience, though a contrary conclusion might be reached under the *Manual Enterprises* test.[27]

[25] See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 73 (1960).

[26] *Id.* at 72.

[27] Thus a court could hold pictures designed primarily for research scholars to be non-obscene regardless of what effect they would have on the "average person" and not violate any of the principles of Roth. United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957).