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Redeeming Social Importance Held Decisive in Determining Question of Obscenity

Recent Decision:
Redeeming Social Importance Held Decisive in Determining Question of Obscenity

The Ohio Supreme Court affirmed the conviction of a theater operator for possessing and exhibiting an obscene film, "The Lovers," in violation of a state obscenity statute. The United States Supreme Court reversed the conviction and *held* that in this area it could not "avoid making an independent constitutional judgment on the facts of the case" utilizing a national community standard, and that an allegedly obscene work could not be proscribed unless it is "utterly" without social import. *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

In holding *Tropic of Cancer* entitled to constitutional protection in the case of *Grove Press, Inc. v. Gerstein*[1] and by posing a "national standard" for obscenity in *Jacobellis,*[2] the Supreme Court has, in effect, limited the definition of obscenity to hard core pornography. *Tropic of Cancer* has been described by some as being in the precise fringe area short of hard core pornography.[3] Thus, the attendant difficulties in determining a *national* consensus with regard to whether *Tropic of Cancer* is obscene are apparent.[4]

More important than the clarification of definitive standards in any area, however, is the provision for their application. With this in mind, the Court in *Jacobellis,* by providing for an independent constitutional judgment on the facts of each case, has established a procedural basis for enforcing its views on obscenity. State courts, wary of reversal and apprised of the fact that their factual determinations might *not* remain inviolate, will probably adhere to the prescribed standards.

The confusion which spawned the *Jacobellis* decision resulted from comments made by the Supreme Court in the landmark case of *Roth v. United States.*[5] There, Mr. Justice Brennan, writing for the Court, stated that in determining "whether to the *average person,* applying contemporary *community* standards, the dominant theme of the material taken as a whole appeals to prurient interest,"[6] cognizance must be given the fact that the rejection of obscenity as "*utterly* without redeeming social importance" was implicit in the history of the first amendment.[7]

The controversy which followed the *Roth* decision was based primarily on Mr. Justice Brennan's concentration on the "prurient interest" test. The emphasis which was to be accorded social importance thus assumed a central role in the discussion of obscenity standards. In the New York Court of Appeals the test of "redeeming social importance" was held to be irrelevant and *Tropic of Cancer* was consequently found obscene based on the strict "prurient interest" test.[8] The highest

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[1] 378 U.S. 577 (1964) (per curiam).

[2] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[3] See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 60 (1960).

[4] *Id.* at 112; Regan, *Freedom of the Mind and Justice Brennan,* 9 CATHOLIC LAW. 269, 278-79 (1963).

[5] 354 U.S. 476 (1957).

[6] *Id.* at 489. (Emphasis added.)

[7] *Id.* at 484. (Emphasis added.)

[8] People v. Fritch, 13 N.Y.2d 119, 125, 192 N.E.2d 713, 716-17, 243 N.Y.S.2d 1, 6-7 (1963).

court of California in *Zietlin v. Arnebergh*[9] rejected a test which would have balanced social importance against "prurient interest," and consequently ruled that *Tropic of Cancer* was constitutionally protected. In prescribing a standard, the California court stated that the word *"utterly,"* as employed in the phrase "utterly without redeeming social importance," connoted any work totally devoid of social import. Thus, the opinion concluded that the mere *presence* of matters of social import in questioned material would *recover* for it a constitutionally protected position. This interpretation of the *Roth* standard, apparently applicable to the companion case of *Grove Press, Inc. v. Gerstein,* was cited with approval by Mr. Justice Brennan in the instant case.[10]

The established obscenity test would thus seem to necessarily assume a dual complexion: first, it must be determined by the court whether the questioned material appeals to the "prurient interest" of the average man; second, the Supreme Court will evaluate the material to determine if it has any social value. If it possesses this quality, then its protected position will be recovered. It is interesting to note that this two-fold examination leads to the anomalous situation in which a book may be found appealing to the "prurient interest" of the average man, and yet may not be banned, because an intellectual, critic, writer, or literary "buff" — someone far above the average—finds literary merit in the work. Stated conversely, save for the social value test, the intellectual would be reduced to reading only what is fit for the average person.[11]

If the above test is employed, a combination of factors will unite to limit the obscene to that which is hard core pornography. Utilizing such a test, social value can be characterized as an emergency lever, inoperative until a particular work is first judged as appealing to "prurient interest." The latter test then can be classified as the *primary* and *preliminary* standard.

In its capacity as the first hurdle on the road to suppression, "prurient interest" has not been left at rest in its embryonic state. In *Manual Enterprises v. Day,*[12] a case involving the publication of a magazine for the benefit and use of homosexuals, Mr. Justice Harlan, writing for the Court and declaring the magazine constitutionally protected, stated that the "current community standards" aspect of the *Roth* rule would necessitate a national standard for violations of *federal* law.[13] However, this rule is not controlling on the facts of the *Jacobellis* decision, since in *Jacobellis* the Court was dealing with a violation of *state* law.

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[9] 59 Cal. 2d 901, 912, 383 P.2d 152, 164-65, 31 Cal. Rep. 800, 812-13 (1963). *But see,* McCauley v. "Tropic of Cancer," 20 Wis. 2d 134, 121 N.W. 2d 545 (1963). Compare Attorney Gen'l v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962).

[10] Jacobellis v. Ohio, *supra* note 2, at 191.

[11] See Lockhart & McClure, *supra* note 3, at 113-14.

[12] 370 U.S. 478 (1962). Prior to *Manual Enterprises,* the Supreme Court rendered several per curiam decisions citing only the *Roth* case in reversing the court of appeals, which upheld the obscenity of the material involved: a nudist magazine, Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); a magazine for homosexuals, One, Inc. v. Olesen, 355 U.S. 371 (1958); and a film dealing with the seduction of a sixteen-year-old boy by an older woman and other "illicit sexual intimacies and acts," Times Film Corp. v. Chicago, 355 U.S. 35 (1957).

[13] Manual Enterprises v. Day, 370 U.S. 478, 488 (1962).

Nothwithstanding this distinction, the instant case applied a national standard to a state court decision involving the violation of a state statute. The rationale for this now solidified approach regarding a national standard covers the gamut of traditional reasoning. Mr. Justice Brennan posed the query that since the Constitution is national, should not its standards be nationwide?[14] He also traced the history of the use of "community" in this context and concluded that the word, as first employed by Judge Learned Hand in *United States v. Kennerley,*[15] was intended to indicate "society at large."[16] In addition, Mr. Justice Brennan posed the inevitable hypothetical which would follow as a result of establishing local community standards as opposed to a national standard. He reasoned that the result of sustaining "the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene . . . ." [17] This, the opinion concluded, would necessarily follow, since purveyors would defer from risking criminal conviction by testing the differences in standards among various locales.

Obviously, the establishment by the Supreme Court of a national standard and a clarification of the import of social value would be ineffective, if lower courts could continue to circumvent this standard by declaring that the issue of obscenity is a factual question within the exclusive domain of a jury. To dispel any such notions and to insure adherence to the standard, the Court, as indicated above, provided for an independent constitutional judgment on the facts of each case. In support of this proposition, Mr. Justice Brennan cited *Pennekamp v. Florida,*[18] a case in which a disputed question of fact was examined by the Court and possibly relied on as being decisive in its determination.[19] Thus, it would appear that the Court intends not only to give lip service to its theory of review, but also to employ it to the fullest extent.

In his dissent in *Jacobellis,* Mr. Chief Justice Warren objected to this theory on the basis that the Court would thus be acting as the "Super Censor of all the obscenity purveyed throughout the Nation."[20] The alternative solution suggested by the Chief Justice took the form of an empirically specific " 'sufficient evidence' standard of review—requiring something more than merely any evidence but something less than substantial evidence. . . ." [21]

Jacobellis is significant because it clarifies the conflict and ambiguity generated by

[14] Jacobellis v. Ohio, *supra* note 2, at 195.

[15] 209 Fed. 119, 121 (S.D.N.Y. 1913).

[16] Jacobellis v. Ohio, *supra* note 2, at 193.

[17] *Id.* at 194.

[18] 328 U.S. 331 (1946).

[19] Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases,* 14 STAN. L. REV. 328, 352 (1962). In the specific area of obscenity the Court has never before faced the review issue squarely, since there has not been a case in which the statute was construed as valid on its face with the defendant contesting the finding of obscenity. *Id.* at 355. *Compare* the above statement *with* Regan, *supra* note 4, at 278 *and* cases there cited. For statements of the extent of review undertaken by the Court in related areas see, *e.g.,* Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Traux v. Corrigan, 257 U.S. 312, 325 (1921).

[20] Jacobellis v. Ohio, *supra* note 2, at 203 (dissenting opinion).

[21] *Ibid.* For opinions of Mr. Chief Justice Warren espousing the theory of independent review in related first amendment areas, see Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957).

Roth. While it does not resolve the problem of what is obscene, viz., hard core pornography, it does establish the test to be used in making such a determination. Thus, with the criteria to be employed by the various courts in determining whether a material is obscene being firmly formulated, the courts can now concentrate on determining that issue without first having to interpret the somewhat ambiguous *Roth* decision.

Recent Decision: Narcotics Statute Ruled Inapplicable to Religious Use of Peyote

Three Navajo Indians were arrested while practicing an ancient religious rite involving the use of hallucination-producing peyote.[1] Upon appeal of their conviction for the illegal possession of narcotics, the defendants argued that the statutory prohibition against the possession and use of peyote contained in Section 11500 of the California Health and Safety Code abridged their constitutionally guaranteed right to the free exercise of religion. The state contended that Peyotism shackles the Indians to primitive conditions and undermines enforcement of narcotics laws. Reversing the judgment of the superior court, the California Supreme Court *held* that the state's compelling interest in law enforcement was insufficient to outweigh the constitutional guarantees of religious freedom invoked by appellants as to their bona fide use of peyote as a sacramental symbol. People v. Woody, — Cal.—, 394 P.2d 813, 40 Cal. Rep. 69 (1964).

There is little consistency among the cases interpreting the alleged infringement of first amendment religious liberty by state and federal statutes. A review of these cases reveals not only disparity in the forms of the religious practices involved but also diversity in the approaches taken by the courts in reaching these decisions.[2]

One of the leading cases in this field is *Sherbert v. Verner,*[3] in which the United States Supreme Court held that a Seventh Day Adventist was unconstitutionally deprived of the right to the free exercise of

[1] Peyote is a product of the plant *lophophora williamsii,* growing in small buttons on the spineless cactus indigenous to Texas and northern Mexico. Mescaline, its principal constituent, releases its effects when the buttons are chewed or a derivative tea is consumed by the user. The types of hallucinations produced vary from bright-hued kaleidoscopic patterns to the symptomatic visions of schizophrenia. The visual effects are usually coupled with a heightened sense of comprehension and friendliness toward others. Technically peyote is not a narcotic, but a non-addicting hallucinogen whose users suffer no after effects when the hallucinatory stage has passed. For further discussion, see N.Y. Times, Nov. 1, 1964, § 6 (Magazine), p. 96.

[2] See Braunfeld v. Brown, 366 U.S. 599 (1961), in which the Court denied relief to Orthodox Jewish merchants who sought relief from Pennsylvania's Sunday Closing Laws, holding that the statute did not deprive appellants of their religion, but only made their religious observance more expensive. *Compare* Board of Educ. v. Barnette, 319 U.S. 624 (1943), in which the Court granted relief to Jehovah's Witness schoolchildren whose religious refusal to pledge allegiance to the flag violated a state regulation, *with* State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952), in which the court denied religious exemption to a Christian Scientist student who protested an X-ray examination prerequisite to registration at the University of Washington.

[3] 374 U.S. 398 (1963).