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Obscenity: A Separate Standard for Minors; Effect of Psychological Factors in Custody Proceedings

POSTSCRIPTS

Obscenity: A Separate Standard for Minors

In response to a number of decisions pertaining to obscenity regulations, *The Catholic Lawyer* published a symposium in its Autumn, 1964 issue entitled "Obscenity and the Law." In "Obscenity Control and Minors—The Case for a Separate Standard,"[1] Dr. Edward T. Fagan, Professor of Law at St. John's University School of Law and Editor of *The Catholic Lawyer,* advocated that a separate standard should be recognized for the determination of what constitutes suppressible obscene material with respect to minors.

In *People v. Bookcase, Inc.,*[2] the New York Court of Appeals declared unconstitutional a statute which was intended to provide protection solely for minors, against those who sought to distribute obscene material to them for profit. Commenting upon this case, Dr. Fagan stated that:

> The net result . . . has been to leave the children of New York State almost completely vulnerable to the poison dispensed by those who traffic in obscenity for profit. It is imperative, therefore, that all responsible members of the community take immediate action to reestablish appropriate legal safeguards for children against this danger.[3]

It was proposed that a separate obscenity standard could best be established through the state's right to limit the first amendment freedoms of children in protection of public morality. Dr. Fagan contended that although there was conflicting evidence of the causal relationship between constant exposure of children to obscene materials and moral degeneracy and juvenile delinquency, nevertheless, the legislature could justifiably act in this area "despite the fact that it results in some curtailment of adult freedom of press."[4]

Reacting to the need for legislation in this area, New York enacted two Sections

[1] 10 CATHOLIC LAW. 270 (1964).
[2] 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).
[3] Fagan, *Obscenity Control and Minors—The Case for a Separate Standard,* 10 CATHOLIC LAW. 270, 271 (1964).
[4] *Id.* at 278.

of the Penal Law, 484-h and 484-i, dealing with the problem of preventing minors from being exposed to harmful or pornographic materials.

In *Bookcase, Inc. v. Broderick,*[5] plaintiffs, a retail bookstore and its president, attacked these statutes. It was conceded that the particular book which the plaintiffs intended to continue selling, "The Memoirs of a Woman of Pleasure" by John Cleland (popularly known as "Fanny Hill"), contained "details, descriptions or narrative accounts of acts of sexual intercourse and 'is embraced within the scope and intendment of said statutes.' "[6]

The court, in upholding the constitutionality of the sections in question, stated that:

> A statute which prohibits the sale to minors of matter which is not obscene in the hands of adults, but which is deemed harmful to children, would (always assuming it was carefully drawn) be constitutional. Whether justification is sought by redefining obscenity in terms of its impact on the young so that there are in effect two standards of obscenity, or whether it is done without regard to the traditional legal concept, "obscenity," the state has a legitimate interest in preventing the dissemination of material deemed harmful to children. Contrary to plaintiffs' assertions, the Federal Constitution, and specifically the First Amendment thereof, does not secure to children the same, almost absolute, right assured to adults to judge and determine for themselves what they may read and what they should reject.[7]

The court concluded that the plaintiffs' challenge to the constitutionality of these sections, based *solely* on the contention that the state cannot interfere with the plaintiffs' right to sell books on the basis of the age of the purchaser, was meritless.[8]

Thus, the court has in effect recognized Dr. Fagan's proposals—that there be a separate classification, in law, of minors as a prospective audience for obscenity; and that there be a separate standard for the determination of what is suppressible obscene material with respect to such minors.

Dr. Fagan also provided suggestions and caveats to draftsmen for the formulation of this separate standard.[9] In addition, he explored possible collateral aids to implement the enforcement of such a separate standard, once it had been statutorily defined. One such aid would be a permanent advisory committee, to be established by the state or municipality, and staffed by qualified legal, psychological and sociological experts in the field of obscenity control. "This committee would function primarily as an advisory board to law enforcement officials, indicating to them what, in its opinion, would be adult-level material in the current book market."[10]

It was recognized that such a committee *might well be attacked* as an illegal prior restraint, since its determination of obscenity would be made in advance of any hearing on the question. Yet, it was noted, that a prior restraint was not per

[5] 267 N.Y.S.2d 415 (Sup. Ct. N.Y. County 1965).
[6] Bookcase, Inc. v. Broderick, 267 N.Y.S.2d 415, 417 (Sup. Ct. N.Y. County 1965).
[7] *Id.* at 418.
[8] *Ibid.*
[9] *Supra* note 3, at 281-82.
[10] *Id.* at 282-83.

se prohibited: "Given a justified reason for such legislation, coupled with adequate constitutional safeguards, such legislation would probably be held not to violate constitutional safeguards."[11] One necessary safeguard would be "a provision for an appeal from the committee's determination."[12] These views have received general support in a recent Supreme Court case which held that pre-showing censorship of motion pictures was not proscribed, so long as the statute included a provision for prompt, judicial review of the censor's actions.[13]

With the judicial recognition of a separate standard of obscenity for minors in New York, the present area of concern is enforcement. While the opinion of an advisory committee will not preclude judicial review, nevertheless, it will function effectively in removing from the courts the burden of passing on every item of literature on an *ad hoc* basis.

[11] *Id.* at 283.

[12] *Ibid.*

[13] Freedman v. Maryland, 380 U.S. 51 (1965).

Effect of Psychological Factors in Custody Proceedings

A recent issue of *The Catholic Lawyer* cited the increased criticism of child custody proceedings by legal scholars.[1] It was the contention of the experts that "court battles often lose sight of the goal of the law, viz., to satisfy the best interests of the child."[2] A controversial Iowa custody case, *Painter v. Bannister*,[3] has recently been the recipient of much censure from the mass media.[4] In that case, the father, a widower, requested the aid of his deceased wife's parents in caring for his five year old son. The grandparents willingly accepted custody of the child. Seventeen months later, the father, having remarried, sought the return of his son, but this request was refused.

The Supreme Court of Iowa sustained the claim of the grandparents, and held that the divergent philosophies of life of the father and the grandparents were important as they related to the child and his special needs.[5] The Court relied heavily upon the testimony of a psychologist that the child was emotionally unstable and that his best interests would be served if he remained in the custody of his grandparents.[6]

The Court contrasted the conventional

[1] 11 CATHOLIC LAW. 51 (1965).

[2] *Ibid.*

[3] —— Iowa ——, 140 N.W.2d 152 (1966).

[4] "The Iowa Supreme Court acted this week to insure 7 year-old Mark Painter a 'conventional, middle-class, Middle West background.' . . . The Supreme Court's opinion . . . came out for traditional virtues and expressed the view that if the child's lot were cast with his father and stepmother he might be exposed to an 'arty, Bohemian' life." N. Y. Times, Feb. 13, 1966, p. 50, col. 1; see Lee, *Iowa Judge Raps City Life*, N. Y. Sunday News, March 6, 1966, § 2, p. 1; *Choosing Parents in Iowa*, Time, Feb. 25, 1966, p. 45; *Battle for a Little Boy*, Life, March 4, 1966, p. 101.

[5] Painter v. Bannister, —— Iowa ——, ——, 140 N.W.2d 152, 154 (1966).

[6] *Id.* at ——, 140 N.W.2d at 156.

Midwestern environment supplied by the grandparents with what it termed the "arty, Bohemian" life of the father, and concluded that the former would be more conducive to the emotional well-being of the child.[7]

The "best interests" of the child have always been controlling in the determination of custody suits in American courts.[8] Generally, when the dispute is between a parent and a third party, the natural right of the parent will prevail.[9] Any presumption of parental preference may be rebutted, however, by establishing the presence of an exceptional circumstance, such as the parent's unfitness[10] or the prolonged residence of the child with the contesting third party.[11] In addition, a concern for the psychological health of the child is both desirable and necessary in making a reasonable decision as to his best interests.[12]

In the instant case, the Court admitted that the father was a fit parent,[13] but awarded custody to the grandparents after the child had lived with them for two and one-half years.[14]

It was the opinion of the psychologist who testified at the trial that a change in custody was untimely inasmuch as *any* disruption at this critical point in the boy's life "would be detrimental to the child . . . ."[15] The Court reasoned that a return to the custody of the father under these circumstances would be likely to result in a "seriously disrupting and disturbing effect upon the child's development. . . ."[16]

Such an unusual cause and effect relationship, that a return to the parent would be detrimental to the child, would seem to qualify this case as one characterized by an exceptional circumstance.

Thus, it can be seen that, despite the heavy criticism the *Painter* opinion has drawn, it does not in fact represent any radical departure from established precedent. The Court attempted to make clear that it was not the father's unconventional way of life which was the basis of the decision. "It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so."[17] Clearly, the Court preferred the home of the grandparents,[18] but despite its personal views concerning child development, it awarded custody primarily on the grounds of the child's "psychological best interests in order to achieve the goal of maximization of the child's welfare."[19]

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[7] *Id.* at ——, 140 N.W.2d at 158.

[8] MADDEN, PERSONS & DOMESTIC RELATIONS 371 (1931).

[9] Simpson, *The Unfit Parent,* 39 U. DET. L.J. 347, 357 (1962).

[10] See MADDEN, *op. cit. supra* note 8, at 372.

[11] See, *e.g.,* Henry v. Janes, 222 Ark. 89, 257 S.W.2d 285 (1953); State *ex rel.* Rys v. Vorlicek, 229 Minn. 497, 40 N.W.2d 350 (1949).

[12] Note, *Child Custody Disputes,* 73 YALE L.J. 151, 157 (1963).

[13] Painter v. Bannister, *supra* note 5, at ——, 140 N.W.2d at 154.

[14] The child had been with his grandparents less than two years at the commencement of the action. *Id.* at ——, 140 N.W.2d at 153.

[15] *Id.* at ——, 140 N.W.2d at 157.

[16] *Id.* at ——, 140 N.W.2d at 156.

[17] *Id.* at ——, 140 N.W.2d at 154.

[18] "Were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child." *Id.* at ——, 140 N.W.2d at 156.

[19] *Supra* note 12.