Case Western Reserve Law Review

Volume 16 | Issue 3 Article 15

1965

Constitutional Law--Deprivation of Personal Rights--Possessing and Exhibiting Film--Evolution of an Obscenity Standard (*Jacobellis v. Ohio*, 378 U.S. 184 (1964))

Leslie Crocker

Recent Decisions

CONSTITUTIONAL LAW — DEPRIVATION OF PERSONAL RIGHTS — POSSESSING AND EXHIBITING FILM — EVOLUTION OF AN OBSCENITY STANDARD

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

The petitioner, manager of a motion picture theatre, was convicted of possessing and exhibiting an allegedly obscene film.[1] The Ohio Supreme Court upheld the conviction.[2] The United States Supreme Court reversed,[3] holding that the motion picture was not obscene according to the standards set forth in *Roth v. United States*,[4] and that exhibition of the film was protected by the guarantees of the first and fourteenth amendments.[5]

The first obscenity standard was enunciated in the early English case of *Regina v. Hicklin*.[6] There, the court held that a work would be obscene if in the opinion of the least sophisticated elements of the

1. The opinion of the lower court is not reported. The conviction was by three judges after waiver of jury trial, for violating OHIO REV. CODE § 2905.34:

> No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such article or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.
>
> Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

2. State v. Jacobellis, 173 Ohio St. 22, 179 N.E.2d 777 (1962).

3. Jacobellis v. Ohio, 378 U.S. 184 (1964).

4. 354 U.S. 476 (1957).

5. Jacobellis v. Ohio, 378 U.S. 184 (1964).

6. L.R. 3 Q.B. 360 (1868), where Chief Justice Cockburn stated: "I think the test of obscenity is this, whether the *tendency of the matter charged as obscenity* is to deprave and corrupt *those whose minds are open to such immoral influences*, and into whose hands a publication of this sort may fall." *Id.* at 371. (Emphasis added.)

community any isolated part of the work appeared as such. This rigid test was long utilized in most American jurisdictions,[7] and was not seriously challenged until 1913 in *United States v. Kennerley.*[8] The *Hicklin* standard was rejected twenty-one years later in *United States v. One Book Entitled "Ulysses,"*[9] which fully recognized the inadequacy of the test and the necessity of examining a work in its entirety and the purpose of its contents. The Supreme Court's first serious consideration of the obscenity issue occurred in 1957 with the decision in *Butler v. Michigan.*[10] There the Court declared that communities could not foreclose adults from access to material that might tend to corrupt minors. But the significance of the *Butler* decision was soon overshadowed by the Court's decision in *Roth v. United States,*[11] decided in the same term. The *Roth* case reached two important conclusions. First, the Court adopted a standard by which obscenity must be judged: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[12] Second, the Court held that obscenity is not protected by the first amendment as it is utterly without redeeming social importance.[13] Obscenity was defined as material dealing with sex in a manner appealing to the prurient interest, *i.e.*, material with a tendency to excite lustful thoughts.[14] The Court emphasized that any idea with "even the slightest redeeming social importance" is fully protected by the Constitution unless the work infringes on another more important interest.[15]

7. See generally Lockhart & McClure, *Censorship of Obscenity: the Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

8. 209 Fed. 119, 120-21 (S.D.N.Y. 1913). The relevant portions of this opinion are considered in the *Jacobellis* decision itself.

9. 72 F.2d 705 (2d Cir. 1934).

10. 352 U.S. 380 (1957); see Lockhart & McClure, *supra* note 7, at 6, 13-18. This was the first time the Court confronted the constitutional problem. Nine years earlier, in Doubleday Co. v. New York, 335 U.S. 848 (1948), the Court had affirmed per curiam Doubleday's conviction for publishing Edmund Wilson's *Memoirs of Hecate County.*

11. 354 U.S. 476 (1957).

12. *Id.* at 489. This test was not new, but rather a test which some American courts had already adopted in lieu of the offensive *Hicklin* test. *Id.* at 489 n.26. The Court noted that the lower courts — the federal district court in the *Roth* case and the California state court in *Alberts v. California, Roth's* companion case — had properly applied the test. *Id.* at 489.

13. *Id.* at 484-85.

14. *Id.* at 487 n.20.

15. *Id.* at 484. In four later per curiam decisions, the Court reversed courts of appeal decisions upholding obscenity censorship. Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Mounce v. United States,

The *Roth* decision raised a number of fundamental questions, many of which remain unanswered today. *Jacobellis v. Ohio* does, however, clarify one element in the *Roth* test:[16] the contemporary community is the nation, not a state or local unit, and the standards are determined by society at large, not the local community.[17] In reaching this interpretation, the Court recognized that it was confronted with reconciling the rights of many and diverse

355 U.S. 180 (1957); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957). For a discussion of these cases, see Lockhart & McClure, *supra* note 7, at 5, 32-33 nn.163 & 164. Later, in Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N. Y., 360 U.S. 684 (1959), the Court struck down a New York decision which prohibited the exhibition of the motion picture, "Lady Chatterly's Lover," and made clear that ideological censorship will not be tolerated. Also in 1959, in Smith v. California, 361 U.S. 147 (1959), the Court found that the ordinance under which appellant was convicted eliminated any scienter from the crime, thereby substantially restricting freedom of expression and violating the constitutional guarantees in this area.

16. Before reaching this issue, Justice Brennan emphasized that questions of fact require *de novo* review and that the Court will make an independent constitutional judgment on the facts of each case to determine whether the material involved is constitutionally protected. It is the Court's duty to ascertain the "dim and uncertain line" that often distinguishes obscenity and constitutionally protected material, consistent with its duty to enforce constitutional guarantees. Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964); see also Lockhart & McClure, *supra* note 7, at 116-19. The Court relied heavily on this article, not only on this point, but on several others. It did so justifiably, as the article is an extensive critical analysis of what the Court had done in the area of obscenity prior to 1960, with an appraisal of possible future paths for the Court to follow. On this particular point the authors emphasize, and the Court quotes:

> It may be true . . . that judges "possess no special expertise" qualifying them "to supervise the private morals of the Nation" or to decide "what movies are good or bad for the local communities." But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court. Jacobellis v. Ohio, 378 U.S. 184, 188-89 n.3 (1964).

17. 378 U.S. 184, 193 (1964). The Court points out that Judge Learned Hand was the first to express the concept of "contemporary community standards" as follows:

> Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" 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*? . . . To put thought in leash to the *average conscience of the time* is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose

communities throughout the country with the overall rights of individuals. In determining the balance in favor of the individual, the Court pointed out that the mobility of the American people rendered the concept of any definable local community meaningless. In addition, the Court found that social pressure would cause many communities to suppress material if permitted to adopt a local standard, since few would risk disseminating in their community what had already been deemed obscene in another. Thus, material which the state could not constitutionally suppress directly would nevertheless be withheld from the public — a result previously indicated to be intolerable by the Court.[18] This broad interpretation of the "contemporary community standards" aspect of the *Roth* test is consistent with the Court's view of the federal system as demonstrated in other areas.[19] The standard is now a national one which might vary from time to time, but not from town to town or region to region. And there is justification for this enlargement. In its early history, this country was composed of a group of distinct and fairly autonomous states, each determining a local standard of mores for its particular citizens. Communications were poor. Surely the prevailing morality of the West during its early years of development was far different from that of New England at the same time.[20] However, regional autonomy is today superficial and shrinking. With the advent of revolutionary developments in communications, this country has become politically and culturally unified; the same radio and television programs, the same books, magazines, and motion pictures are disseminated

---

that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent . . . . *Id.* at 192-93.

It should be pointed out that although in *Jacobellis* the Court intimated that this meaning of "contemporary community standards" was intended in *Roth* as well as in Learned Hand's opinion, an examination of both decisions does not affirmatively support such a view. Justice Brennan, speaking for the Court in *Roth*, stated that the trial courts below properly applied the test for determining obscenity. The trial record indicates that the judge emphasized the concept of the community as a *whole*, rather than any one segment of it, but does *not* support any particular definition of a local or national "community." Further, in *Roth*, the Court referred to Learned Hand's opinion as one which had "adopted" the *Hicklin* standard. Roth v. United States, 354 U.S. 476, 489 (1957). It is suggested here that just as the Court relies upon Lockhart & McClure, *supra* note 7, in support of other theories advanced in the case, so it found in that study an excellent method of justifying an interpretation of "contemporary community standards" which, if intended in *Roth*, was never made clear.

18. Jacobellis v. Ohio, 378 U.S. 184, 193-94 (1964).

19. Consider, for example, the area of search and seizure and the decisions in Ker v. California, 374 U.S. 23 (1963) and Mapp v. Ohio, 367 U.S. 643 (1961).

20. See generally WILLIAMS, CURRENT & FREIDEL, A HISTORY OF THE UNITED STATES (1959).

throughout the fifty states. Application of a concept of "national community" — and the Court emphasized that it never had any other in mind[21] — only recognizes that today the concept of local cultural autonomy is no more than a fiction. No community can truly isolate itself.[22]

Another question, perhaps, is whether a national standard is practicable. It has been pointed out that there is probably no national consensus as to what constitutes obscenity beyond the consensus on hard-core pornography; hence, any national standard is illusory.[23] Nevertheless, even though the Court appears to have limited obscenity to hard-core pornography, there is *no* readily definable standard of obscenity. But the advantage derived from this more progressive and sophisticated concept compensates for the difficulties in application.

The *Jacobellis* case clarifies another area of confusion in the *Roth* decision involving the definition of obscenity. In *Roth*, the Court adopted the *Model Penal Code* test of the "appeal to prurient interest,"[24] but rejected its intended meaning by defining obscene material as "material having a tendency to excite lustful thoughts."[25] The *Model Penal Code* had rejected the latter definition as unrealistically broad for our society, and as involving constitutional and practical problems in attempting to regulate thoughts unconnected with overt behavior.[26]

While reaffirming *Roth* and the *Model Penal Code* test, the *Jacobellis* decision stressed a different element: the necessity that material not only have a predominant appeal to prurient interest, but that *in addition* it go "substantially beyond customary limits of candor in describing or representing such matters."[27] Thus, ob-

21. See note 17 *supra.*

22. This does not automatically foreclose the possibility of a community protecting itself, for example, by prohibiting dissemination of certain material or exhibition of movies to *minors* and enforcing these prohibitions. In *Jacobellis,* the Court recognizes a variable concept of obscenity in reaching its decision: any state or region may legitimately protect children from certain material that is not offensive when restricted to adult use. "The Lovers" film was exhibited to adults and consequently falls under the "strict standard" — strict in its limitation of obscenity to a very narrow area — applicable in determining the ambit of constitutionally protected expression. The implication is clear that had the film been exhibited to children, the standard and the result might well have been different. Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

23. Lockhart & McClure, *supra* note 7, at 112-13.

24. Roth v. United States, 354 U.S. 476, 487 n.20 (1957).

25. *Ibid.*

26. MODEL PENAL CODE § 207.10(2), comment 2(a) (Tent. Draft No. 6, 1957).

27. MODEL PENAL CODE § 251.4(1) (Proposed Official Draft, 1962). This more recent draft adds the words "in addition," thus stressing that this is a separate and distinct element of obscenity.

scenity now appears to require proof of three distinct elements:[28] (1) that the material considered as a whole appeal to prurient interest; (2) that this aspect of appeal predominate over other attractions or values in the material;[29] and (3) that the material be "patently offensive."[30] If any of these elements is lacking, the material cannot be constitutionally proscribed. In regard to the last element, the question still remains as to what is material that "goes substantially beyond customary limits of candor in description or representation," and what standard is to be applied. There can be little doubt that the Court intended that a national standard should be applied here too: "In the absence of deviation from *society's* standards of decency, we do not see how any official inquiry into allegedly prurient appeal of a work of expression can be squared with the guarantees of the First and Fourteenth Amendments."[31] Thus, an element of the *Roth* test, far from clear in that decision, has been explained, and censorship further restricted.

In evaluating the *Jacobellis* decision it becomes apparent that many of the problems raised in *Roth* and earlier cases remain unresolved. First, there remains the questionable validity of the "average person" standard in determining the value of allegedly obscene materials. A thoughtful examination of this hypothetical person reveals at best a paradox. Would the "average person" be capable of ascertaining what is "utterly without redeeming social importance," as distinguished from material with some literary, artistic, or other social value? And why should the "average person" establish the criterion of obscenity? The "average person" standard smacks too much of tort law where such a standard is certainly intellectually acceptable — if not essential — in determining what degree of care should be exercised by an individual. But surely that question is not as fundamental as any posed in confronting the most basic freedoms of self-expression and creativity.

The evolution of an obscenity standard in this country has

28. MODEL PENAL CODE § 207.10(2), comment 6(c) (Tent. Draft No. 6, 1957).

29. The Court stresses that portrayal of sex in itself is no reason to deny material constitutional protection, if it advocates ideas of social value, or has literary, scientific, artistic or *any* kind of social value. Only that material which is "*utterly* without redeeming social importance" can be proscribed. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

30. "[T]he appeal to prurient interest must be by description or representation going substantially beyond customary limits on free expression." MODEL PENAL CODE § 207.10(2), comment 6(c), at 29 (Tent. Draft No. 6, 1957); see Manuel Enterprises, Inc. v. Day, 370 U.S. 478, 482-88 (1962), referred to by the Court, where Justice Harlan refers to the quality of "patent offensiveness" or "indecency" as a distinct element of obscenity.

31. Jacobellis v. Ohio, 378 U.S. 184, 192 (1964). (Emphasis added.)

progressed from the dark ages of the *Hicklin* era to the middle ground of *Jacobellis*; from the judgment of the least sophisticated elements of a particular local community to the judgment of the average person throughout the nation. Perhaps a further step should now be taken: the substitution of the *most enlightened* element of our nation for that of the average person. This would be a variable concept. For example, in reviewing a book the judgment of those who create, read, or criticize books should be the criterion; in evaluating a painting, the judgment should be made by those who create or criticize paintings. These are the people best qualified to make so fundamental a determination — and they may well be the only people capable of making such a determination. Some may argue that such a step would encourage tyranny of a new minority — the élite — in place of the minority of the benighted which the *Hicklin* standard enshrined; or in place of the majority apparently envisioned at present by the Supreme Court. The philosophical and social question here is whether the democratic principle of majority rule is a standard conducive to creativity and to the experimentation which is so necessary to progress in the arts. It is true that a standard based on the judgment of the most enlightened sector of the public transposes the problem from the definition of the average man to that of the most enlightened. Still, the difficulties are no greater, but the concept is more progressive. In confronting the basic freedom of self-expression and creativity, the most intelligent or creative individual should not be harnessed to the criterion of the "average person" who, by definition to some, remains at the level of mediocrity, or at least non-creativity.

No consideration of this area should be concluded without raising the question of whether any censorship is necessary, a question unambiguously answered in the negative by two members of the Court. It is submitted here that censorship inherently reflects a lack of self-confidence of a society in its people, a feeling that moral tutelage is necessary even for adults. The more totalitarian a society, or the more primitive, the more extensive is the censorship. Society's efforts might well be more profitably expended in an attempt to better enforce prohibitions on sales or exhibition of certain materials to minors, rather than in proscribing these materials for all and harping upon an anxiety to preserve the moral fiber in society.[32] Thus, a rigid standard of proscription

32. In his dissent, Chief Justice Warren bases his justification on "protection of society's right to maintain its moral fiber and the effective administration of justice . . . ."

could be applied to material aimed at children, but all censorship of material aimed at adults could be abrogated, with the possible exception of "hard-core pornography" most narrowly defined.

In the evolution of the Court's attitude towards obscenity, several criteria have been established: first, in determining obscenity, the Court will give *de novo* review to questions of constitutional fact; second, no material may be examined as isolated parts, nor judged by the members of the community most susceptible to its appeal; third, a national standard will be applied; fourth, material with *any* amount of social importance will be afforded constitutional protection under the first and fourteenth amendments, but if the material is deemed obscene, dealing predominantly with sex in a manner appealing to prurient interest *in addition* to going beyond customary limits of candor in representation, it will not receive constitutional protection; and fifth, the concept of obscenity is a variable one, allowing a community to protect children from material that is not offensive when restricted to adult use. But the establishment of these criteria has not promoted unanimity in application. The general difficulty in the obscenity area is well demonstrated by the split among the members of the Court in the *Jacobellis* decision. Six different opinions were written in this case, reflecting the individualistic attitude of the Court's members and the lack of agreement in the area.[83] One may well wonder what this disparity will mean in terms of the future.

Taken as a whole, the *Jacobellis* decision represents a progressive step in the evolution of obscenity standards. It recognizes many of the problems raised by *Roth* and other earlier cases, and although

---

Jacobellis v. Ohio, 378 U.S. 184, 202 (1964). Since 1957, the Court has recognized the necessary distinction between censoring material aimed at minors and that aimed at adults. And in *Jacobellis*, it makes clear that the standard applied in the former instance would have to be stricter. See note 22 *supra.*

33. *Id.* at 195. Justices Black and Douglas concurred, adhering to their strict reading of the first amendment; Justice Stewart concurred; Justice Goldberg concurred; Justice Harlan dissented; Chief Justice Warren and Justice Clark dissented, expressing their belief that "community standards" referred to a local, not a national standard. "[T]here is no provable national standard and perhaps there should be none." *Id.* at 200. Chief Justice Warren and Justice Clark advocate a variable concept of obscenity, depending on the "use" to which the various materials are put — *e.g.*, if sold to children. Among other thoughts, these two justices would commit enforcement of the rule to appropriate state and federal courts and prevent the Supreme Court from "sitting as the Super Censor of all the obscenity purveyed throughout the Nation." *Id.* at 203. Thus, if the *Roth* test was properly applied in the court below, they would apply a "sufficient evidence" standard of review requiring something more than merely any evidence but something less than "substantial evidence on the record [including the allegedly obscene material] as a whole." *Ibid.*