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Constitutional Law—A New Definition of Obscenity

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"establishment" clause of the First Amendment.¹² However, the Court decided that the prayer is non-sectarian. To reach this conclusion, the Court had to determine which are the "recognized" religions, and that the common denominator of these religions is belief in God. The Court is over-stepping its authority when it delves into the intricacies of religious beliefs. Furthermore, the Court's decision is of necessity limited to the wording of this particular twenty-two word prayer. If the wording of the prayer should be changed, or a different prayer used, the courts might again be asked to determine whether this new prayer is sectarian. Thus, the court, an arm of the state, becomes the final arbiter in matters of religious orthodoxy. Such a situation is contrary to the provisions of the First Amendment which renders each person's religious opinion as valid and weighty as that of any other person or institution.

The fact that the tenets of most of the religions existing in the United States include belief in a Supreme Being does not justify this decision. Although the majority generally prevails over the minority in a democracy, this principal does not apply in the area of religion. The "establishment" clause of the First Amendment sought to prevent majority rule over the minority in religious matters by insuring governmental neutrality toward religion. The United States Supreme Court has stated that "neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions. . . ."¹³ The Supreme Court has also said that "neither [a state nor the Federal Government] can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."¹⁴ The Constitution guarantees freedom of religion; not just freedom of religion if you believe in God. The effect of the Court's decision is to sanction the establishment in the public schools of those religions that believe in a Supreme Being.

The danger of this decision lies in the direction in which it leads. Judge Dye expressed it as "the gradual erosion of the mighty bulwark erected by the First Amendment."

P. A. L.

A NEW DEFINITION OF OBSCENITY

The United States Constitution, in the First and Fourteenth Amendments, guarantees freedom of speech and of the press.¹⁵ That which is obscene is not entitled to these constitutional protections.¹⁶ Thus, the federal¹⁷ and state

12. *Supra* note 8.

13. *Everson v. Board of Education*, *supra* note 8 at 15.

14. *Torcaso v. Watkins*, *supra* note 10 at 495.

15. *Roth v. United States*, *Alberts v. California*, 354 U.S. 476, 479 (1957). The freedoms of speech and the press expressed in the First Amendment are included in the liberties protected from state action by the "Due Process Clause" of the Fourteenth Amendment.

16. *Id.* at 481.

17. Censorship has traditionally been regarded as one of the powers reserved to the states under the Tenth Amendment. Federal censorship arises in cases where there is use of the mails, *Sunshine Book Co. v. Summerfield*, 249 F.2d 114 (3d Cir. 1957); or there in an attempt to import obscene literature, *United States v. 42000 Copies International Journal*, 134 F. Supp. 490 (E.D.N.D. 1955).

governments¹⁸ in the exercise of their police powers are free to impose criminal sanctions upon those who distribute materials found to be obscene. The police power cannot operate without limitations. It cannot operate in such a manner as to suppress any constitutionally protected activity,¹⁹ and must be reasonably related to a legitimate end in order to come within the bounds of due process of law.²⁰

New York's attempt to suppress obscenity dates back to a statute of 1786 which provided that "nothing in this Act shall . . . authorize any Person or Persons to . . . publish any book . . . that may be profane, treasonable, defamatory, or injurious to Government, Morals or Religion."²¹ Through the years the statute has been revised in order to reflect the needs and values of society. In its present form, the New York Penal Law prohibits the distribution or showing of any "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . picture. . . ."²² This year, the Court of Appeals in *People v. Richmond County News*,²³ held that this provision could be constitutionally used to censor only what it classified as "hard-core" pornography.

The basic problem is that of determining exactly what is obscene under such statutes. The statutes tend to be general and vague, so that the determination of a standard for obscenity has been left largely to judicial interpretation.²⁴ The era prior to the Civil War was marked by an almost complete absence of litigation in this field. It was during the reform period following the war that litigation first appeared in any quantity,²⁵ and it has since increased steadily with a large number of important cases having been decided in the last few years²⁶ and others currently on the court calendars.²⁷ The earlier cases dealing with obscenity adhered faithfully to Victorian concepts of morality.²⁸ They firmly established, as the standard for obscenity, the rule of *Regina v. Hicklin*²⁹ which provided that books could be censored as obscene if they had a tendency to deprave or corrupt those, whose minds are open to immoral influ-

18. *Kingsly Books Inc. v. Brown*, 354 U.S. 437 (1957).

19. *Smith v. California*, 361 U.S. 147, 155 (1959).

20. *Fiener v. New York*, 340 U.S. 315, 320 (1951).

21. An Act To Promote Literature, Act of April 29, 1786, ch. LIV § IV, 1 Laws of N.Y. (Jones and Varrick).

22. N.Y. Penal Law § 1141.

23. 9 N.Y.2d 578, 216 N.Y.S.2d 369 (1961).

24. Lockhart and McClure, *Obscenity in the Courts*, 20 Law and Const. Prob. 587 (1955).

25. See *Swearingen v. United States*, 161 U.S. 446 (1896); *People v. Muller*, 96 N.Y. 408 (1884).

26. Lockhart and McClure *supra* note 24 at 580; see *Roth v. United States*, *supra* note 15, *Kingsly Books v. Brown*, *supra* note 18; *Butler v. Michigan*, 352 U.S. 380 (1957); *Kingsly International Pictures v. N.Y. Board of Regents*, 360 U.S. 684 (1959).

27. See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 60 (1960), where there is a discussion of important cases now pending before the Supreme Court.

28. *People v. Muller*, 96 N.Y. 408 (1884). The Court of Appeals upheld censorship of photographs of paintings which had been publicly displayed in art galleries in Paris and Philadelphia.

29. L.R. 3 Q.B. 360 (1868), adopted in *People v. Muller*, *supra* note 28.

ences, who may come in contact with them. This test completely ignored the literary, artistic or social value of the work being censored. As the test was applied, selected passages or parts of a book could be judged out of context, and if they were found to be obscene the entire book was subject to censorship.³⁰ Despite this drawback the rule became so well ingrained in American law,³¹ that Judge Learned Hand, in one of his most famous opinions, felt constrained to follow it, while criticizing it as the product of mid-Victorian morality having the effect of reducing our literary and artistic treatment of sex to the standards of a child's library.³² The *Hicklin* rule remained in full force until rejected by the Second Circuit in *United States v. One Book Ulysses*.³³ The *Ulysses* decision altered the rule significantly so that no longer could the courts consider portions of a book out of context, but rather they must judge the dominant effect of the book as a whole. If the dominant theme of a book is obscene, it cannot be a vehicle for the expression of a constitutionally protected idea, and so it is properly subject to censorship. The decision, however, did not alter the basic definition of obscenity as set forth in *Hicklin*. *Hicklin* has some influence today as the courts still try to determine obscenity on the basis of the effect of a work on its reader's morals.³⁴

In determining the effect of a work on its reader's morals, the standard to be applied is its effect on the average adult rather than its effect on a particular segment of the community. In *Butler v. Michigan*,³⁵ the Court held that it was improper to censor literature available to adult readers using the standards of juvenile morality. Thus, a statute which had as its standard the tendency of the material to deprave or corrupt children was held unconstitutional because it was "not reasonably restricted to the evil with which it is said to deal."³⁶ The requirement of the standard of the average adult member of the community was important in subsequent litigation where publications designed specifically for nudists³⁷ and homosexuals³⁸ were censored. In these cases it was argued that the publications would not be considered obscene by the respective groups. The Court rejected this argument on the grounds that the publications were available to the general public, and the community as a whole cannot be governed by the standards of a small segment of the population.

Among the most important censorship cases are *Roth v. United States* and *Alberts v. California*, decided together by the Supreme Court in 1957.³⁹ The

30. Lockhart and McClure, *supra* note 24 at 589-590.

31. See *United States v. Clark*, 38 F. 500 (E.D. Mo. 1889); *United States v. Harmen*, 45 F. 414 (D. Kan. 1891); *United States v. Smith*, 45 F. 476 (E.D. Wis. 1891).

32. *United States v. Kennerly*, 209 F. 119, 120-121 (S.D.N.Y. 1913).

33. 72 F.2d 705 (2d Cir. 1934).

34. *Supra* note 15 at 489; *One Inc. v. Olson*, 241 F.2d 772, 776 (9th Cir. 1957), *aff'd*, 355 U.S. 371 (1958).

35. 352 U.S. 380 (1957).

36. *Id.* at 383.

37. *United States v. 42000 Copies International Journal*, *supra* note 17; *Sunshine Book Co. v. Summerfield*, *supra* note 17.

38. *One Inc. v. Olson*, *supra* note 34.

39. *Supra* note 15.

Court after finding the materials involved to be obscene, in significant dicta which provides a foundation for subsequent litigation on this point, discussed the need to protect the freedom of expression. The Court felt that protection should be extended to any idea of the slightest redeeming social value unless that expression, by being obscene or inflammatory in nature, would violate a more important interest. Sex and obscenity are not synonymous. Sex is a matter of public concern about which people should be allowed to express their ideas free from censorship. Obscene materials were defined as those which deal with sex in a manner appealing to prurient interests.⁴⁰ The test as stated in *Roth* is, that if in comparing the dominant theme of the material taken as a whole to the contemporary standards of morality of the average member of the community, the court finds the material to be such as to appeal to prurient interests, then the material is obscene.⁴¹

The Supreme Court broadened the application of the prevailing rule when it refused to censor the movie *Lady Chatterley's Lover*.⁴² The Court granted the movie protection on the ground that it was the legitimate expression of an idea, *i.e.*, that under the proper circumstances adultery might not only be a proper, but even a favorable mode of behavior. Thus the decision established as the standard, that which is not the expression of an idea, but rather is designed to appeal only to prurient interests thus being devoid of a redeeming social value. In *People v. Richmond County News*, the New York Court of Appeals, in refusing to censor a popular magazine, went beyond the dictates of the Supreme Court. The Court of Appeals held that it would be unconstitutional to censor anything short of "hard-core" pornography, even if the material was completely devoid of any artistic or scientific justification, or of any possible value to society. The Court defined "hard-core" pornography as that which goes beyond being ribald or bawdy. "Depicting dirt for dirt's sake, the obscenity is vile. . . . It smacks . . . of sexual perversion and sickness and represents . . . a debauchery of the sexual faculty."⁴³ This test, "hard-core" pornography, represents the conclusions of two concurring opinions based largely on the dicta in *Roth* expressing the need for a stringent test in order to insure the freedom to disseminate ideas. In one of the opinions, Judge Fuld argued that *Roth* is not binding on New York, so that the courts could adopt a more liberal standard. "Hard-core" pornography is the only test which he felt would open the door barring state intrusion "only the slightest crack necessary,"⁴⁴ and embody the most universal moral standards. Furthermore, while most previous tests set out by the courts have been vague, it is argued that the "hard-core" pornography test can be objectively applied.⁴⁵ Judge Desmond, concurring,

40. *Id.* at 487.

41. *Ibid.*

42. *Kingsly International Pictures v. N.Y. Board of Regents*, *supra* note 26.

43. *Supra* note 23 at 587, 216 N.Y.S.2d at 376.

44. *Supra* note 15 at 488.

45. Query: Is it easier to either define or apply the standard of "hard-core" pornography than any of the earlier tests, *i.e.*, "matter appealing to prurient interests?"

endorsed the standard of "hard-core" pornography as being within the *Roth* test, and concluded that the material in question was in no sense filthy or disgusting or so offensive as to be censored under contemporary standards of morality.

It would not be unreasonable to assume that under the *Roth* test the magazine was found to be obscene,⁴⁶ and that the Court may have been forced to announce the "hard-core" pornography standard in order to grant it protection. The obvious purpose of Section 1141 of the Penal Law is to censor obscene material. If we assume that the legislature intended the statute to be enforced to its fullest constitutional extent, the decision, in order to be in accordance with this intent, should have been rendered within the bounds of contemporary constitutional interpretation. Nowhere in the history of litigation has "hard-core" pornography been previously adopted as the standard for determining what is obscene. As Judge Froessel, in a strong dissenting opinion, points out, neither *Roth* nor the First Amendment as now interpreted requires such a stringent test, the effect of which is tantamount to the repeal of Section 1141. Quoting Judge Cardozo, Judge Froessel noted that;

"All we can say is that the line will be higher than the lowest level of moral principle and practice and lower than the highest." Yet the determination is promptly made that the statute should apply only to the lowest level, namely, "hard-core" pornography, despite Judge Cardozo's further statement. "It (the law) will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous."⁴⁷

In spite of the strong criticism above, the majority decision is well-grounded in social theory, and at least one leading authority concurs that the "hard-core" pornography standard is the logical extension of the current rule, and may well be the next standard to be adopted by the Supreme Court.⁴⁸ Until the present decision, the courts have not relied upon an independent standard, but rather have tried to define obscenity in the light of the effect of material on its readers' morals.⁴⁹ This test has been criticized as being unrealistic.⁵⁰ How can the courts accurately determine the effect of a work on one's sexual impulses, morals, and desires? They cannot! The courts have no scientific instruments or rules with which to measure the libidinous effect of a book. There is a

46. 3 Judges at Special Sessions City of N.Y., 13 Misc. 2d 1068, 179 N.Y.S.2d 76 (1958); 3 Appellate Judges, 11 A.D.2d 799, 205 N.Y.S.2d 94 (1960); and 3 Court of Appeals Judges found the magazine to be obscene under the Roth-Alberts test. Also in *Alberts v. California*, supra note 1, the Supreme Court upheld a statute, censoring that which is "obscene and indecent," West's Cal. Penal Code Ann. 1955 § 311, which appears to be narrower in scope but analogous to the New York statute, supra note 22.

47. Cardozo, *Paradoxes of Legal Sciences* 37, cited, 9 N.Y.2d at 592, 216 N.Y.S.2d at 380 (1961).

48. Lockhart and McClure, supra note 27.

49. Supra note 15 at 489; *One Inc. v. Olson*, supra note 34.

50. Lockhart and McClure, supra note 24 at 590-596.

shortage of scientific and sociological literature which can enable the courts to adequately treat this problem. What literature does exist, is mostly devoted to criticizing the rule. Scientific studies have suggested that literature is not a primary source of sexual stimulation. They also tend to prove that those people who are most prone to be stimulated by these books, are also those who are least likely to read them.⁵¹

Freedom of expression is one of our most cherished freedoms and the courts must be very careful not to allow infringement on this freedom in the name of suppression of obscenity. In the past several years, there have been attempts to censor books which are chiefly concerned with sex, *i.e.*, Henry Miller's *Tropic of Cancer*,⁵² James Joyce's *Ulysses*,⁵³ and D. H. Lawrence's *Lady Chatterley's Lover*,⁵⁴ all of which later became best sellers. If the "hard-core" pornography standard had been applicable in these cases, it seems doubtful that the propriety of these books would even have been questioned. It is apparent from their acceptance by the public, that their censorship would not have been in accord with the desires of the community as a whole. Whenever the law circumscribes or even threatens to circumscribe an author's freedom to express himself on a topic, and a large percentage of the community wants to read what he has to say, there exists a serious threat to our freedom of expression.

In general it would seem that a large segment of the community is in favor of less censorship. This has been indicated by the acceptance by the public of books which have been previously censored, by the liberal trend in the decisions of the courts, and by the decreasing number of statutes dealing with special areas of censorship.⁵⁵ Censorship is a restriction on our basic freedom and as such should be as severely limited as possible. The New York Court of Appeals, by adopting the "hard-core" pornography test, has taken the lead in this direction with a more liberal application of our censorship statutes.

J. D. R.

STATUTE PROSCRIBING SALE OF OBSCENE MATERIALS REQUIRES SCIENTER

The New York Penal Law Section 1141 provides that, "A person who sells . . . or has in his possession with intent to sell . . . any obscene . . . book . . . is guilty of a misdemeanor." In 1958, after exhaustive analysis, the Appellate Division, Second Department, concluded in *People v. Shapiro* that the language employed in and the history of the statute invoked, as well as the statutes from

51. *Ibid.*

52. *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953).

53. *Supra* note 33.

54. *Supra* note 18.

55. *Entertainment: Public Pressure and the Law*, 71 *Harv. L. Rev.* 326, 328 (1957), lists New York, Maryland, Virginia and Kansas as the only states which still censor movies. *Excelsior Pictures v. Board of Regents*, 3 N.Y.2d 237, 165 N.Y.S.2d 42 (1957), points out that the Supreme Court has effectively destroyed most of the grounds upon which New York can censor movies.