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DePaul Law Review

Volume 12
Issue 2 *Spring-Summer 1963*

Article 18

Obscenity - Admissibility of Evidence of Contemporary Community Standards - People v. Finkelstein, 11 N.Y.2d, 300, 183 N.E.2d 661 (1962)

DePaul College of Law

limited the union entity concept for tort actions to a violation of those duties growing out of the union-member relationship, leaving open the question of recognition of union entity for a violation of a duty owed to the members in common, such as negligent maintenance of a union parking lot.

The California Court in the *Marshall* case extended the entity concept to include all union torts. Consequently two states, California and in certain factual situations Wisconsin, allow recovery in suits by union members against the unincorporated union. All the other states, including Illinois, uphold the concept that voluntary unincorporated associations may not be sued by their members.

The minority view seems to be the better reasoned holdings. Labor unions are developing institutions and with their tremendous growth in importance and power they have come to be more akin to large corporations than fraternal orders or partnerships.[20] These organizations, no longer being comparable to voluntary fraternal orders or partnerships, are *sui generis* and approximate corporations in their methods of operation and power.[21] Since labor unions have more of the characteristics of corporate entities than of partnerships, it appears far more logical to treat them as legal entities for purposes of tort liability than to apply rules of partnerships.

[20] Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512, 230 P. 2d 71 (1951).

[21] *Ibid.*

OBSCENITY—ADMISSIBILITY OF EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS

Two booksellers were convicted of violating the obscenity statute of New York State.[1] A New York detective, representing himself as a prospective customer, entered a bookstore managed by one of the defendants. He observed two particular books on display, purchased said books, and thereupon arrested the defendant for selling pornographic material. Later in the same day the detective entered the store of the other defendant and repeated the procedure, arresting this defendant also. At the trial, the court applied the *Roth* test[2] to determine whether or not the

[1] See NEW YORK, PENAL LAW, § 1141 subd. 1, the relevant part of which provides; "a person who sells .... or has in his possession with intent to sell .... any obscene .... book .... is guilty of a misdemeanor."

[2] The test for obscenity was officially laid down to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957).

material in question was, in fact, obscene and therefore within the purview of the statute. Although the defendants neither testified nor called any witnesses on their behalf at the trial, they attempted to establish that the material was not obscene by cross-examining the arresting officer and offering other evidence. Upon cross-examination, the detective admitted that during the year preceeding the defendants' arrest, he had seen copies of other similar publications in bookstores and on magazine stands in New York City. In the attempt to link the detective's testimony to his defense, the defendant offered into evidence a book and several magazines openly sold in the community similar to the materials in question. The purpose of such evidence was to show the court that the material in question met the community standards[3] and was therefore not obscene. The evidence was excluded as being irrelevant to the issue as to whether or not the specific books sold by the defendants were obscene. The defendants were found guilty. As grounds for a second appeal,[4] the defendants assigned as error the trial court's exclusion of the proffered evidence claiming it violated due process. The Court of Appeals upheld the trial court's ruling with respect to the exclusion of such evidence and affirmed the conviction. *People v. Finkelstein*, 11 N.Y. 2d 300, 183 N.E. 2d 661 (1962).

The problem of determining what is and what is not obscene has always been a perplexing and confusing one. The word "obscene" does not lend itself to any constant and universal definition,[5] and it is precisely this difficulty which has necessitated judicial interpretation of this word from time to time. Under the most recent interpretation handed down in *Roth v. United States*,[6] the Supreme Court applied the following test: ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[7] Although the test, on its face, appears to be easily applicable, the instant case points out a practical difficulty in applying this test, which the courts have only begun to consider. Since the "community standards" have been made a criterion in judging obscenity, the problem which has arisen is: does the defendant have a constitutional right in obscenity prosecutions to introduce into evidence other publications, magazines, books, etc. and/or expert testimony to show the court what the contemporary community standards are, and how his material com-

[3] *Ibid.*

[4] People v. Finkelstein, 9 N.Y. 2d 342, 174 N.E. 2d 470 (1961) (first appeal).

[5] State v. Becker, 364 Mo. 1079, 272 S.W. 2d 283 (1954); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954); Adams Theatre Corp v. Keenan, 12 N.J. 267, 96 A. 2d 519 (1953); Khan v. Leo Feist Inc., 70 F. Supp. 450 (S.D.N.Y. 1947), aff'd 165 F. 2d 188 (2d Cir. 1947); Walker v. Popenoe, 149 F. 2d 511 (D.C. Cir. 1945); United States v. Dennett, 39 F. 2d 564 (2d Cir. 1930).

[6] 354 U.S. 476 (1957).

[7] *Id.* at 489.

pares with such standards? Since this test was not judicially proclaimed until 1957, the decisions specifically answering this problem are few, and of these there is already a split of authority, which will be discussed below.

This specific problem was never encountered prior to the *Roth* decision. The reason is apparent from an examination of the earlier interpretations of obscenity. Probably the first test employed in the courts of this country was that in *U.S. v. Bennett*.[8] In that case, the defendant was convicted of depositing an obscene book in the U.S. mails in violation of a federal statute. The defendant challenged the court's ruling that the book was obscene and sought a new trial. In denying him a new trial, the judge declared that the test for judging obscenity was: "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[9] This test was taken from an earlier English decision[10] and was subsequently followed in this country for quite a number of years with only very minor changes, especially in the state courts.[11] By the very language of this definition, what was obscene depended upon the influence the material had on "those whose minds are open to such immoral influences" and not upon the impact of the material on the community as a whole. Since there was no consideration of the community standards involved, it was obviously irrelevant to allow the defendant to show what other similar publications and writings were being circulated in the community. Expert testimony was also considered inadmissible for generally two reasons: (1) obscenity was considered a matter of judgment within the knowledge and experience of ordinary jurymen and therefore the testimony of an expert was not needed,[12] and (2) expert testimony tended to invade the province of the jury by predetermining the issue of whether or not the material was obscene and therefore, withholding such evidence was proper.[13] The standard employed only called for a consideration of the "tendency" of the material in question; therefore the "tendency" of other materials, and expert testimony were superfluous to this issue. Since such evidence was irrelevant, the state courts held that its omission or inadmissibility did not violate the defendant's constitutional right to due process. Therefore, in the judgment of the

[8] 24 Fed. Cas. 1093, case no. 14571 (1879).

[9] *Id.* at 1102.

[10] Regina v. Hicklin, L.R. (1868), 3 Q.B. 360, 371.

[11] People v. Wepplo, 78 Cal. App. 2d 959, 178 P. 2d 853 (1946); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. 2d 840 (1945); People v. Grossan, 87 Cal. App. 5, 261 Pac. 531 (1927); U.S. v. Kennerley, 209 Fed. 119 (1913); People v. Muller, 96 N.Y. 408 (1884).

[12] People v. Muller, 96 N.Y. 408 (1884).

[13] People v. Wepplo, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947).

state courts, a constitutional problem never arose. Despite the fact that the criterion has changed in the state courts to comply with the *Roth* decision, their position as to the exclusion of such evidence has remained unchanged in many states, as exemplified by the instant case in New York.

The trend of admitting evidence in obscenity cases has developed differently, however, in federal decisions. As early as 1913, the court indicated, in the form of dictum, that the *Hicklin* test[14] was perhaps too "old-fashioned" and some consideration should be given to the "compromise between candor and shame at which the community has arrived here and now."[15] This appears to be the first indication in a court decision that the community standard ought to be given some weight. Then, in *U.S. v. One Book Entitled Ulysses,*[16] the court indicated that book reviews and appraisals of competent critics would be admissible evidence to enlighten the court on the community standards. This contention was sanctioned in *U.S. v. Levine*[17] where Justice Learned Hand noted that he would allow published reviews of qualified critics as evidence, but not as expert testimony. Shortly thereafter, expert testimony received the approval of the federal courts in *Parmelee v. U.S.*,[18] where it was held that in borderline cases, expert opinions of psychologists and sociologists would be helpful, if not necessary. The court's increasing concern over the inclusion of community standards as an important element in defining obscenity manifested itself in the *Roth* case.[19] The problem which has arisen since this decision is whether the refusal of the court to allow any such evidence violates the defendant's constitutional right to due process.

There are a few recent decisions which deal directly with the due process consideration. Perhaps the most significant of these is *Smith v. California,*[20] in which the defendant was convicted for having pornographic books in his bookstore. At the trial, the defendant attempted to introduce expert testimony to show that the books were not obscene and therefore not subject to censorship. The trial court refused the evidence. The defendant excepted to this and other alleged errors and appealed to the Supreme Court of the United States. The conviction was reversed by the majority, although on other grounds. However, in a concurring opinion, Justice Frankfurter stated, as dictum, that evidence such as expert testimony should be a constitutional requirement and therefore the refusal of any court to allow such evidence would be a violation of due process. In

[14] Regina v. Hicklin, L.R. (1868), 3 Q.B. 360, 371.

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

[16] 72 F. 2d 705 (1934). [17] 83 F. 2d 156 (1936). [18] 113 F. 2d 729 (1940).

[19] Roth v. United States, 354 U.S. 476 (1957).

[20] 361 U.S. 147 (1959)—see also People v. Smith, 161 Cal. App. 2d Supp. 860, 327 P. 2d 636 (1958).

a concurring opinion, Justice Harlan expressed the belief that the defendant must be allowed to bring *some* evidence bearing upon community standards, though it need not necessarily be expert testimony.

In a recent review article,[21] two authorities on the subject of obscenity expressed their opinion as follows:

> It seems to us that the admission and thoughtful consideration of such evidence are essential to an intelligent appraisal of material alleged to be obscene, for without such evidence courts are forced to assume the role of critic and expert in many fields of human endeavor—a role that few courts, if any, are competent to play. . . . We think that the admission of such evidence, when proffered by either side in an obscenity case, should be made a constitutional requirement.[22]

The article goes on to indicate, however, that whether or not such evidence attains the level of a constitutional requirement can only be determined by future decisions. One recent decision, *In re Harris*,[23] has taken this position. In that case, the defendant was convicted of selling obscene books, violating a California statute. The defendant was not allowed to introduce expert testimony, or comparable writings adjudged to be not obscene, or similar writings sold in the community. On appeal, the Supreme Court of California held that the exclusion of the evidence proffered by the defendant deprived him of due process. The case is significant because it represents the first decision since the *Roth* case which declares that the exclusion of evidence bearing upon community standards is violative of due process.

The importance of the *Finkelstein* case becomes apparent because of the majority's refusal to accept the California Supreme Court's position that the inclusion of such evidence in obscenity cases is a constitutional requirement. The majority opinion simply rejected such evidence as being irrelevant to the issue as to whether or not the material in question is obscene. One of the concurring opinions did, however, attempt to give a perspective to the use of evidence on community standards by stating that such evidence would be admissible but only in borderline cases. In Judge Voorhis' concurring opinion, the necessity for such evidence is obviated by relying upon judicial notice of the community standards. Both of the concurring opinions attempt to justify the court's refusal of the defendant's proffered evidence. In so doing, they affirm and approve of the court's earlier decisions.[24] This writer feels that neither of the con-

[21] Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960–61).

[22] *Id.* at 98, 99.

[23] 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961).

[24] People v. Muller, 96 N.Y. 408 (1884).

curring opinions adequately resolves the dilemma because: (1) it is not always possible to determine which are borderline cases, and (2) it would appear to be rather difficult to judicially notice the standards of a large community like New York or Chicago. There was, however, a strong dissenting opinion which basically followed the California court's position,[25] citing the opinions of Justice Frankfurter and Justice Harlan in *Smith v. California*[26] as authority. This dissent indicated a dissatisfaction with the reasoning of the majority and a firm conviction that excluding the defendant's evidence in obscenity cases does violate due process.

As was pointed out previously, certain members of the Supreme Court of the United States and experts in the field of obscenity appear to be leaning more and more toward the position that the admissibility of comparable writings and/or expert testimony as evidence of the community standards is a constitutional guarantee. Indeed this position appears to be the more sensible one. The fact is, there is such a plethora of ideas and philosophies which compose present-day societies, that to extract a particular community standard from this mass is an extremely difficult task for any judge or jury to perform without the help of any guide lines. In light of the increasing strength gathering behind this position, and the fact that the New York court has a strong dissent, it would appear as though New York will ultimately have to change its position and admit such evidence in obscenity cases. In the meantime, the *Finkelstein* case represents the view opposed to the California position, and accounts for the split of authority on this problem to date.

[25] In re Harris, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961).

[26] 361 U.S. 147 (1959).

PARENT AND CHILD–STATE'S RIGHT TO TAKE CUSTODY OF A CHILD IN NEED OF MEDICAL CARE

John Perricone, a blue baby, was brought to the Bedford S. Pollack Hospital by his parents. When the infant was admitted, Mrs. Perricone consented to the performance of any surgical operations as the physicians of the hospital thought necessary for the welfare of the boy. However, she instructed that it be noted on the progress record "the parents are Jehovah Witnesses–request no usage of blood transfusions." Blood transfusions became necessary and they were refused by John's parents. Thomas J. Finn, superintendent of the hospital, brought an action in the Juvenile and Domestic Relations Court of Hudson County, Jersey City, New Jersey, to have a special guardian appointed for the purpose of administering the necessary transfusions. A special guardian was appointed