Washington University Law Review

Volume 1971 | Issue 4

January 1971

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THE APPLICATION OF A LOCAL OR NATIONAL STANDARD OF DECENCY IN THE USE OF THE ROTH-MEMOIRS OBSCENITY TEST

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The members of the Providence Bureau of Licenses instituted an action in a superior court, petitioning the court to declare the movie "Without a Stitch" obscene and to issue a permanent injunction enjoining the defendants from showing the film. In a proceeding prescribed by Rhode Island Statute,[1] the prayer was granted. On appeal, the Rhode Island Supreme Court *held:* the standard of decency by which the film is to be characterized should be a national standard rather than the Rhode Island standard used by the trial court. The upper court also found that it could not make any definite finding that the film affronted such a national standard since the Bureau, which had the burden of proving obscenity, had failed to present evidence on that issue.

The case is a product of *Roth v. United States,* which established a three part test for determining if the material in question is obscene. First, the dominant theme of the work, taken as a whole, must appeal to prurient interests in sex; secondly, the material must be patently offensive and affront contemporary community standards relating to the description and representation of sexual matters; thirdly, the material must be utterly without any redeeming social value.[2] On superficial examination, the second part of the test, the question of an affront to contemporary community standards, would appear capable of application with few complications. Just what "contemporary community standards" means, however, has provoked considerable uncertainty.

In *Manual Enterprises, Inc. v. Day*[3] Justice Harlan first suggested that a national standard should be applied in determining community standards. The first major attempt by the Supreme Court at clarification of this standard appeared seven years after *Roth* in *Jacobellis v. Ohio.*[4] Justice Brennan stated in his opinion for the court that a national standard was to apply since, "It is, after all, a national Constitution we are expounding."[5] Even if the lower court properly applies the national

1. R.I. GEN. LAWS ANN. § 5-22-5 (1956), *as amended* Pub. L. 1966, ch. 260, 1. The amended statute empowers the Bureau of Licenses to institute court action to enjoin the showing of the film within forty-eight hours of the application for a permit to publicly present the film.

2. Roth v. United States, 354 U.S. 476 (1957).

3. 370 U.S. 478 (1961).

4. 378 U.S. 184 (1964).

5. *Id.* at 195.

standard, however, Justice Brennan indicated the possibility of Supreme Court review:

> Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court.[6]

The practicality of applying the opinion's guidelines were immediately questioned. In his dissent in *Jacobellis,* Chief Justice Warren insisted that it was unlikely that a local justice or jury could divine a national standard of decency when the Supreme Court had been unable to articulate one. He also argued that the Court should review only to see if there was sufficient evidence for the findings of the lower court; otherwise, the Supreme Court would become a Super Censor.[7] Commentators have also questioned the efficacy of the national standards test.[8]

Even more basic than the controversy over the practicality of a national standards test is the uncertainty over whether such a national guideline need be applied at all.[9] The alignment of the Court in *Jacobellis* in part gave rise to the continuing debate. Only two Justices aligned with the theory of national standards and only two more agreed to an independent review by the Court. The rest of the majority concurred on other grounds.[10] The lack of unanimity led one federal judge to declare, "The question of national versus community or other standards has not yet been determined. . . ."[11] Although written in 1967, this declaration accurately reflects the law today as evidenced by the diversity of the opinions. Some federal jurisdictions have applied a national standard of

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6. *Id.* at 188.

7. *Id.* at 203.

8. *See* O'Meara and Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio,* 40 NOTRE DAME LAW. 1, 8-9 (1964):

> The jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple. . . . [I]n short, the only viable standard is the standard of the jury, for, in our jurisprudential system, the jury is the community.

9. An amicus brief cited in Meyer v. Austin, 319 F. Supp. 457, 465 n.11 (M.D. Fla. 1970), asserted that six federal courts of appeal and four states have followed a national standard, three states have adopted a statewide standard, five states have retained a local community standard, and four states are confused as to what standard controls.

10. Only four justices approached the question of national standards, two of them supporting the concept and two attacking it. Justice Harlan indicated a willingness to apply national standards to a federal law, but not to a state law proscribing obscenity. *See* Seaton, *Obscenity: The Search for a Standard,* 13 KAN. L. REV. 117 (1964).

11. Reed Enterprises, Inc. v. Clark, 278 F. Supp. 372, 383 (D.D.C. 1967).

decency,[12] while at least one federal district court has found as acceptable a standard that is "not less than statewide."[13] The lack of uniformity is evident among the state courts to an even greater degree.[14]

In *Scuncio,* the finding that the use of a Rhode Island standard of decency was error is an affirmation of the intention of the Rhode Island Supreme Court to apply a national standard, a decision clearly stated by the opinion in *In re Seven Magazines.*[15] However, the use of a national standard creates two major problems, one of which confronted the court in the principal case.

First, the need to determine the defendants' rights as soon as possible may preclude the use of a jury in the *Scuncio* situation, but some jurists believe that the use of a national standard with independent review by the judiciary minimizes the utility of juries in obscenity cases in general. Judge Friendly has concluded that, "Placing the decisional task upon the judges is a rational consequence of the emphasis on a national standard of decency."[16] The Court of Appeals for the Second Circuit has

12. *See* United States v. "Language of Love," 432 F.2d 705 (2d Cir. 1970); United States v. "I Am Curious-Yellow," 404 F.2d 196 (2d Cir. 1968); Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); Meyer v. Austin, 319 F. Supp. 457 (M.D. Fla. 1970); United States v. One Carton of Positive Motion Picture Film, 247 F. Supp. 450 (S.D.N.Y. 1965), *rev'd* 367 F.2d 889 (1966).

13. Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated for improper jurisdiction,* 401 U.S. 200 (1971). The same court held in Newman v. Connover, 313 F. Supp. 623 (N.D. Tex. 1970), that a statewide standard of decency in applying a Texas obscenity statute was a sufficient constitutional standard.

14. Some courts holding that a national standard controls: State v. Locks, 97 Ariz. 148, 397 P.2d 949 (1964); State v. Vollmar, 389 S.W.2d 20 (Mo. 1965); State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963); In re Seven Magazines, 268 A.2d 707 (R.I. 1970), State v. Burgin, 178 S.E.2d 325 (S.C. 1970). State courts that have applied or attempted to apply less than national standards: Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965), *rev'd,* 386 U.S. 767 (1967); In re Gianinni, 69 Cal.2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), *cert. denied,* 395 U.S. 910 (1969); Felton v. Pensacola, 200 So. 2d 842 (Fla. Ct. App. 1967); State v. Henry, 250 La. 682, 198 So. 2d 889, 895 (1965), *rev'd,* 392 U.S. 655 (1968); People v. Bloss, 27 Mich. App. 687, 184 N.W.2d 299 (Mich. Ct. App. 1970), *rev'd* 402 U.S. 938 (1971); Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475 (1971).

15. 268 A.2d 707 (R.I. 1970).

16. United States v. "I am Curious-Yellow," 404 F.2d 196, 202 (2d Cir. 1968)(concurring opinion). For a discussion of the logical nexus between the independent review concept and the national standards test, *see* Seaton, *Obscenity: The Search for a Standard, supra* note 10, at 122:

> The use of a "local" standard by a judge or jury in Kansas or New York, assuming one to be ascertainable, would eliminate meaningful review by the Supreme Court. The Justices in Washington lack the experience of Kansas or New York standards which local judges and juries would presumably possess.

For warnings that the national standard will render the jury of little value in obscenity cases, *see* O'Meara and Shaffer, *supra* note 8.

lent added weight to that opinion by its holding that in obscenity cases the jury can have no more than an advisory role.[17]

Secondly, the use of the *Roth* test with the *Jacobellis* elaboration seems to necessitate the admission of expert testimony, a conclusion reached by Justice Frankfurter: "Community standards . . . can as a matter of fact hardly be established except through experts . . . ."[18] It is on this issue that the *Scuncio* case was decided, since the Bureau had failed to present any evidence of obscenity. Although the Rhode Island court has held that the allegedly offending work alone is insufficient evidence of obscenity,[19] there are few guidelines which the prosecution can follow in ascertaining what evidence to present. Indeed, the *Scunico* court points to the impossibility of legislatively defining obscenity because of the absence of definite Supreme Court guidelines.[20]

Significantly, the Wisconsin Supreme Court, which seized on the lack of a true majority in *Jacobellis* to reject the national standard, has recently upheld obscenity convictions while affirming the use of state standards of decency and juries in such cases.[21] Moreover, the Wisconsin court held that no expert testimony was necessary to enable the jury to make a finding of obscenity.[22] A state that adopts a local standard of decency can argue further that a jury accurately reflects this standard. Since the jurors' attitudes as expressed in the jury findings are assumed

17. United States v. "Language of Love," 432 F.2d 705, 711 (2d Cir. 1970).

18. Smith v. California, 361 U.S. 147, 165 (1959). Similar sentiments are expressed in: United States v. Klaw, 350 F.2d 155 (2d Cir. 1965); Dunn v. State Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965); Duggan v. Guild Theatre, Inc., 436 Pa. 191, 258 A.2d 858, 863 (1969); House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572 (1969); State v. Kois, 51 Wis. 2d 668, 188 N.W.2d 467 (1971).

19. In re Seven Magazines, *supra* note 15.

20. Scuncio v. Columbus Theatre, Inc., 277 A.2d 924, 927 (R.I. 1971).

21. Court v. State 51 Wis. 2d 683, 188 N.W. 2d 475, 480 (1971):

> This court . . . has declined to approve the standards of a national community as has been suggested in Jacobellis, supra. In State v. Kois, 51 Wis. 2d 668, 188 N.W.2d 467, of even date herewith we have again stated, "[W]e use the contemporary community standards prevalent in the state of Wisconsin," and express our doubts that there is an ascertainable national standard.

22. State v. Kois, *supra* note 18, at 470:

> Obscenity is not such an elusive concept that it takes expert witnesses to tell a jury or judge what is the dominant theme of the material, what is the community standard, or what is the social value, or that a trial judge or an appellate court cannot find it as a matter of law or under the Roth-Memoirs test.

See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448 (1957)(Brennan, J., dissenting); United States v. "I Am Curious-Yellow," 404 F.2d 196, 203, 204 (2d Cir. 1968)(Lumbard, C.J., dissenting). For a general discussion of the problem, *see* Note, *Expert Testimony in Obscenity Litigation*, 1965 WIS. L. REV. 113.

to be the very manifestation of the local standard, no experts are needed to enlighten them on the matter. Such is not the case when a court accepts the national standard. Since the jurors' attitudes are presumably based on local experiences, they must be "taught" the elusive national standard of decency through expert testimony. The jurors are to employ this newly-gained national consciousness in deciding whether the materials are obscene by the *Roth* test.[23] But even when experts are produced, prosecutors are often unable to define a precise national standard which the jury could find has been affronted. On the other hand, the defense can often raise a presumption that a national standard has not been affronted by showing that the material in question has been received favorably in other parts of the nation, or even merely received without governmental prosecution.

If a national standard of decency is to be used in determining obscenity, manageable guidelines must be established for the application of this standard. The Rhode Island court in *Scunico* concludes only that the national standard is the applicable test. It does nothing to eliminate the confusion surrounding the application of the standard.[24]

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23. While applying a national standard of decency in State v. Childs, 252 Ore. 91, 447 P.2d 304 (1968), *cert. denied*, 394 U.S. 931 (1969), the Oregon Supreme Court advanced the interesting theory that no expert testimony on national standards was necessary since the average juror is constantly in touch with the national scene, exposed to national publications, movies, television and radio.

24. Possibly the Rhode Island dilemma and the *Roth* test itself may be rendered moot by gradual changes in the Supreme Court's obscenity doctrines. *See* Luros v. United States, 389 F.2d 200, 205-06 (8th Cir. 1968):

> In Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967), there is specific indication that a majority of the Supreme Court adopts standards not dissimilar to banning only "hard-core" pornography. Subsequent application of *Redrup* gives no contra-indication.

A similar observation is made in Haldeman v. United States, 340 F.2d 59, 62 (10th Cir. 1965).