



1961

Constitutional Law - Obscenity - The Evolving Definition of Obscenity

Michael R. Bradley

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Michael R. Bradley, *Constitutional Law - Obscenity - The Evolving Definition of Obscenity*, 7 Vill. L. Rev. 287 (1961).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol7/iss2/7>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

CONSTITUTIONAL LAW—OBSCENITY—THE EVOLVING DEFINITION
OF OBSCENITY.

People v. Richmond County News, Inc. (N.Y. 1961).

Monfred v. State, (Md. 1961).

In *People v. Richmond County News, Inc.*, defendant was convicted of the sale and distribution of obscene books and articles¹ under the New York obscenity statute.² In the Appellate Division, defendant raised the problem of scienter under the New York statute and won a reversal.³ The state thereupon appealed to the New York Court of Appeals, which did not treat the scienter issue but affirmed the reversal of defendant's conviction, with three judges dissenting, *holding* that the New York statute ". . . should apply only to what may properly be termed 'hard core pornography.'"⁴ The court concluded that the magazine sold by defendant was not "hard core pornography." *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

In *Monfred v. State*, the defendants were tried under a similar obscenity statute.⁵ Defendants contended that the statute applied only to "hard core pornography," that their magazines were not of that class, and that therefore they were not guilty under the statute (citing, *inter alia*, *People v. Richmond County News, Inc.*). The trial court, sitting without a jury, applied the test set forth in *Roth v. United States*⁶ and found the defendants guilty. On appeal, the Maryland Supreme Court expressed its approval of the *Roth* test, but decided that one of the six magazines involved was not obscene under the test and reversed the convictions based on the sale of that magazine, while affirming the others. The court, with one judge dissenting, *held* that ". . . magazines presenting pictures of nude or semi-nude women interspersed with pointedly suggestive sex stories were obscene within the meaning of the state obscenity statute and within the power of the state to censor obscene matter."⁷ *Monfred v. State*, 226 Md. 312, 173 A.2d 173 (1961).

1. The prosecution was for distribution of a magazine which the court said was "similar to that of numerous other magazines which loudly proclaim their dedication to course sensuality." *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

2. N.Y. PEN. LAW § 1141 makes it a misdemeanor for any person to "sell . . . or have in his possession with intent to sell . . . any obscene, lewd . . . book, magazine or image."

3. 205 N.Y.S.2d 94 (App. Div. 1960).

4. *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 586, 175 N.E.2d 681, 685, 216 N.Y.S.2d 369, 375 (1961).

5. MD. ANN. CODE art. 27 § 418 Supp. 1957, makes it a misdemeanor for any person to "Knowingly . . . sell . . . any lewd, obscene, or indecent book, magazine . . . drawing or photograph."

6. 354 U.S. 476, 77 S. Ct. 1304 (1957); for the test, see text accompanying note 8 *infra*.

7. *Monfred v. State*, 226 Md. 312, 173 A.2d 173 (1961).

In holding, in *Roth v. United States*,⁸ that obscenity is not within the protection of the first amendment the Supreme Court, after repudiating the so-called *Hicklin*⁹ test, attempted to establish a workable test of what constitutes obscenity, which is “. . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”¹⁰ Since the first amendment’s guarantees of free expression are also applicable to the states through the fourteenth amendment’s due process clause,¹¹ the Supreme Court’s definition of obscenity in *Roth* is, to the extent that it states a constitutional limitation on the kinds of material that may be suppressed as obscene, binding on the state courts. However, it remains for the states to interpret and apply this rather abstract test to specific literary materials as they believe the Supreme Court meant it to be interpreted and applied. In the instant cases, New York and Maryland recognized this problem and reacted differently to it, thus indicating that *Roth*’s definition may not be as simple as it appears on its face. Both state courts properly proceeded first to determine what their state statute meant to include in the category of obscenity, and then whether *Roth* would permit such an inclusion.

The New York court, in the *Richmond County* case, felt that *Roth* was only suggestive of the permissible broad boundaries within which publications could constitutionally be proscribed as obscene,¹² and declined to construe the New York obscenity statute so as to suppress all the literature which could be included under a broad interpretation of the *Roth* test. After an historical review of obscenity law, the court concluded that the New York statute was meant to include only so-called “hard core pornography.”¹³ The concurring opinion of Judge Fuld approvingly adopts the *Roth* test but concludes that it was meant to include only “hard core pornography” anyway.¹⁴ In pointing up a weakness in the majority’s argument, the dissenting opinion suggests that the majority adopts a far more stringent test than is required under *Roth*, and asks:

8. 354 U.S. 476, 77 S. Ct. 1304 (1957).

9. *Regina v. Hicklin*, 1868 3 Q.B. 360, 371. The *Hicklin* test, almost universally accepted at one time was “. . . 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.” This test was properly criticized and finally overruled in *Roth* because under it: (1) any part of a work taken out of context could be used to declare the entire work obscene; and (2) the tendency of the work to influence adolescents or others abnormally susceptible was the test of obscenity.

10. 354 U.S. 476, 489 (1957).

11. *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931); *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625 (1925).

12. *Supra* note 1, 9 N.Y.2d 578, 586, 175 N.E.2d at 685, 216 N.Y.S.2d at 374.

13. The court defines “hard core pornography” by description and example rather than generally. “It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Depicting dirt for dirt’s sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness . . .” *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 377 (1961).

14. *Supra* note 1, 9 N.Y.2d 578, 589, 175 N.E.2d at 687, 216 N.Y.S.2d at 378.

"Why is it necessary for us to strain against the definition laid down by the highest court in the land, in order to permit the continued distribution of material which the average person would unhesitatingly condemn as obscene and lewd?"¹⁵

The Maryland court, on the other hand, felt bound by the *Roth* test¹⁶ and interpreted its statute as broadly as permitted by that test, thus including not only "hard core pornography" but also that area on the periphery of "hard core pornography" which it felt would be considered obscene by *Roth's* "average person applying contemporary community standards."

For purposes of analysis, it is possible to distinguish four classes of literature: (1) "hard core pornography," which is unquestionably included in any definition of obscenity; (2) that material on the periphery of "hard core pornography," which is the vague area of obscenity under current standards;¹⁷ (3) that material which is not obscene for adults but may be denied to minors;¹⁸ (4) that material which clearly is not obscene for anyone. The fundamental problem is whether or not to include the material in class (2) within the scope of censorable obscenity. The *Roth* test on its face would seem to be open to two opposite interpretations: first, that class (1) and class (2) materials are included in the definition of obscenity (the interpretation accepted by the Maryland court in the *Monfred* case); second, that only class (1) materials are so included. Only when the Supreme Court itself is squarely presented with the issue as to which of the above interpretations to adopt will there be a definite answer to this enigma.

The advocates of more strict censorship laws, of course, have attempted to show the harm done to the community by literature of the class (2) type and thus the catastrophe which would result if the Supreme Court fails to include literature of that type in its definition.¹⁹ On the other hand, advocates of complete free speech with minimal restriction, will point to the infringement of the minority's rights of freedom of speech and press.²⁰ The final determination of this problem is not yet in sight. Since the *Roth* case in 1957, the Supreme Court in four *per*

15. *Supra* note 1, 9 N.Y.2d 578, 591, 175 N.E.2d at 689, 216 N.Y.S.2d at 380.

16. The court emphatically points this out: "But, until the Supreme Court specifically speaks further in this uncertain area, we think we are bound by what we understand the *Roth* test requires." *Monfred v. State*, 226 Md. 312, 173 A.2d 173, 178 (1961).

17. See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). This article deals with the *Roth* decision and speculates as to what the eventual standard may be.

18. *Butler v. Michigan*, 352 U.S. 380, 77 S. Ct. 524 (1957), differentiates between material fit for adults and that fit for youths, holding that a state obscenity standard cannot limit the reading matter available to adults to that fit only for children.

19. The dissent in *People v. Richmond County News, Inc.*, *supra* note 1, would align itself with this faction.

20. Mr. Justice Douglas and Mr. Justice Black in their many dissents in the free speech cases urge this view. See the dissent by Justice Douglas in *Roth v. United States*, 354 U.S. 476, 508 77 S. Ct. 1304, 1321 (1957).

curiam decisions²¹ has failed to further clarify the test laid down in that decision. In these cases, involving materials that the lower federal courts had found to be clearly obscene under the *Roth* test, the Supreme Court reversed without opinion, citing *Roth*. Although no final conclusions can be drawn on so limited a basis, this would seem to be some indication that the Supreme Court is moving in the direction of limiting the obscenity test to "hard core pornography" and thus excluding the peripheral area.²² The dissenting judge in *State v. Monfred* (like Judge Fuld in the New York case), after an analysis of these cases, also comes to this conclusion.²³ Thus, although there may be a visceral tendency to align with the majority decision of the Maryland court and include both class (1) and class (2) materials in obscenity, the New York court appears to have more nearly aligned itself with the position indicated by the Supreme Court's *per curiam* decisions in deciding to exclude literature of the class (2) type from its obscenity definition (although, as indicated above, it has done so on the basis of statutory interpretation).

It is generally agreed that "hard core pornography" is obscene and should be suppressed. If this is accepted as a premise the logical next step is to inquire into the reasons underlying this general policy. Probably the most basic policy reason for the suppression of pornography is its tendency to harm mentally and emotionally those persons not mature enough to avoid it. Realistically, it is necessary to bear in mind the difficulty in distinguishing between class (1) and class (2) literature. The distinction drawn between these classes, while analytically useful, is a very tenuous one in reality. Both classes include repeated detailed descriptions of wildly exaggerated, fantasy-like, erotic, adventures described in the frankest imaginable language. The only practical difference between class (1) and class (2) materials seems to be the total absence of any redeeming social value in the "hard core" publications as against the barest possible minimum²⁴ of such compensating value in the peripheral literature (possibly inserted for the very purpose of removing it from the "hard core pornography" category, thus bringing it within the law). If the social harm caused by the "hard core pornography" is due to its "dirtiness," it is difficult to see how less harm can come from literature which may be just as "dirty." Since the harm which it can cause is the essential reason for suppression of "hard core pornography," there

21. *One, Inc. v. Olesen*, 355 U.S. 371, 78 S. Ct. 364 (1958), reversing 241 F.2d 772 (9 Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957); *Times Film Corp. v. City of Chicago*, 355 U.S. 35, 78 S. Ct. 115 (1957), reversing 244 F.2d 432 (7 Cir. 1957); *Mounce v. United States*, 355 U.S. 180, 78 S. Ct. 267 (9 Cir. 1957), reversing 247 F.2d 148 (1957).

22. See Lockhart and McClure, note 17 *supra*.

23. *Monfred v. State*, 226 Md. 312, 173 A.2d 173, 186 (1961).

24. In his dissent in *People v. Richmond County News, Inc.*, 175 N.E.2d 681, 690 (1961), Judge Frossel, after illustrating the generally salacious content of the magazine involved, points out that, . . . "there is some mild attempt at face saving by the inclusion of some material that is free from smut."

would seem to be no valid reason for excluding literature of the peripheral type from that to be suppressed as obscene. If the harmful qualities are present in both, it would seem that both should be treated alike.

The Supreme Court has said many times that the rights of free speech and press are not absolute, and that obscenity is not constitutionally protected.²⁵ The *Roth* test certainly is susceptible to the interpretation that obscenity is to include not only "hard core pornography" but the peripheral material also. If "hard core pornography" is not constitutionally protected because of its harmful effects, the question remains why should materials which are difficult to distinguish from "hard core pornography" and equally as harmful as it, be shielded by the Constitution. Is there a significant enough difference between class (1) and class (2) literature to warrant outlawing the former and yet allowing the latter the protection of the law? If the Supreme Court is leaning towards restriction of the test to "hard core pornography" only, it would seem that strong policy reasons do not favor that interpretation, and that under the present *Roth* test, the "average person applying contemporary community standards" would also proscribe such peripheral literature.

Any final determination of the obscenity problem must involve balancing the constitutionally protected rights of freedom of speech and of the press against the possibility of serious social harm which the works in question may cause. Of course, it must always be remembered that it is not what the majority wants to read and hear that primarily must be protected by the Constitution; the majority's rights rarely require constitutional protection. It is the right to hold and express a minority opinion which primarily needs the protection of the law. But, if the publications attempted to be circulated would cause serious harm to the community, out of proportion to the individual's right of free expression, legal protection of the community's welfare would seem both permissible and necessary.

In conclusion, the one certain statement that can be made about the developing definition of obscenity is that it is yet unclear just what it encompasses. This case note proposes that it include at least (class 1) hard core pornography and that portion of (class 2) the peripheral literature in which the harmful effects clearly outweigh any social value the work may contain.

Michael R. Bradley

25. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572, 62 S. Ct. 766, 768, 769 (1942), where the court said ". . . the right of free speech is not absolute . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. *These include the lewd and obscene . . .*" [Emphasis added].