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Constitutional Law: Obscenity Censorship in Wisconsin

Michael S. Nolan

pared to continue whittling away at immunities which no longer have any real reason for their existence.

FREDERICK A. MUTH

Constitutional Law: Obscenity Censorship in Wisconsin—The district attorney of Milwaukee county, acting under statutory authority,[1] commenced action seeking to have Henry Miller's *Tropic of Cancer* declared obscene. The challenged book, an autobiographical novel, recounts the experiences of an American artist living in Paris during the depression. A substantial portion of the narrative delineates in detail through the use of vulgar language, sexual experiences of the author and his associates. "References to the sexual episodes . . . are made in short English words of ancient origin and wide, but not often printed usage."[2] *Tropic of Cancer,* nevertheless, has received considerable attention as a serious literary work, and has been held to demonstrate substantial writing ability.

The circuit court, after a trial without jury, concluded that "the book is repugnant to decency and the moral standards of the community, and has no literary, cultural, social or educational value."[3] On appeal from this judgment the Wisconsin Supreme Court in a four to three decision reversed the circuit court's finding of obscenity.[4]

Justice Fairchild, writing the majority opinion, reiterates the court's previous determination[5] that the word "obscene" in the Wisconsin statute is the equivalent of the definition enunciated by the United States Supreme Court and referred to as the *Roth* test.[6] The test outlined was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[7] "All ideas having even the slightest redeeming social importance" were to enjoy full constitutional protection.[8]

In light of these statements, the Wisconsin court concludes that there can be no declaration of obscenity without consideration of such factors as "the seriousness of the author's purpose, the social importance of the idea expressed, or the artistic quality of expression."[9] A balancing of factors is declared essential for a determination of the dominant

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[1] WIS. STAT. §269.565 (1961).
[2] McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 145, 121 N.W. 2d 545, 551 (1963).
[3] *Id.* at 147, 121 N.W. 2d at 552.
[4] McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W. 2d 545 (1963).
[5] State v. Chabot, 12 Wis. 2d 110, 112, 106 N.W. 2d 286, 288 (1960).
[6] McCauley v. Tropic of Cancer, *supra* note 4, at 138, 121 N.W. 2d at 547.
[7] Roth v. United States, 354 U.S. 476, 489 (1957).
[8] *Id.* at 484.
[9] McCauley v. Tropic of Cancer, *supra* note 4, at 142, 121 N.W. 2d at 549.

theme and "where a work of apparent serious purpose is involved, the scales will not be readily tipped toward a determination of obscenity."[10]

Justice Fairchild's opinion also considers the role of the appellate court in obscenity cases. If the ordinary civil rule were followed, a lower court's finding of fact could be reversed only if contrary to law or the great weight and clear preponderance of the evidence. The majority of the court feels that a determination of obscenity is not a mere finding of fact, but involves a most vital constitutional issue. Hence, "when constitutional protection is claimed, the judge or appellate court must make an independent review of the material," especially since in obscenity cases the evidence is predominantly documentary.[11] The opinion concludes that the book itself constitutes the most weighty evidence and the "appellate court should not be bound by the decision of the trial court based upon its own reading of the pertinent matter."[12]

As a result of their independent reading, the majority of the court concludes that the trial court gave too much weight to the author's use of vulgar language and the description of incidents violative of ordinary standards of conduct, and insufficient consideration to the book as an important literary work. They decide that some of the episodes, taken alone, appeal to prurient interests, but that "the dominant theme of the book taken as a whole, does not."[13]

Chief Justice Brown in his dissenting opinion, joined by Justice Currie, denies the permissibility of reversing the circuit court findings which he believes to be in accord with the weight of the evidence. The judgment must, therefore, be affirmed unless upon perusal of the book itself, it is found as a matter of law that *Tropic of Cancer* is not constitutionally obscene. The dissent warns that expert testimony received by the trial court cannot be ignored by the appellate court and declares that an independent reading of the book would not in any case lead to a conclusion contrary to that of the trial court. A re-reading even in light of the added requirement of a "patently offensive portrayal" cannot but lead to a determination of constitutional obscenity.[14]

Justice Hallows in a separate dissent rejects a limitation of censorship to hard-core pornography and the balancing of factors to determine the dominant theme of any material. He supports the view that "the difference between obscenity, pornography, and hard-core pornography, is an extra-legal mythical distinction. All pornography is obscene."[15] With respect to the balancing process, it is his opinion that purpose and literary quality, or social value will not in themselves pre-

[10] *Id.* at 143, 121 N.W. 2d at 550.
[11] *Id.* at 148, 121 N.W. 2d at 552.
[12] *Id.* at 148, 121 N.W. 2d at 553.
[13] *Id.* at 151, 121 N.W. 2d at 554.
[14] *Id.* at 154, 121 N.W. 2d at 556.

vent a determination of obscenity. "It is fallacious to argue what would be otherwise obscene is not obscene because it has social significance or some literary merit."[16]

Justice Hallows believes that the majority in arriving at their decision have ignored the testimony of the expert witnesses, called by the respondent, concerning the effect of the challenged book on the average person as judged by the community standard. He also believes that too much weight was given to the testimony of appellant's witness as to the dominant theme of the book—a theme which the majority is hard put to express.[17]

The present case presents two questions deserving of closer attention: the correct application of the *Roth* test in a concrete situation and the proper role of the appellate court in an obscenity case.

In the *Roth* case, the Court discussed obscenity on a highly theoretical basis, determining the constitutionality of a federal obscenity statute. The Court held that no issue was raised as to the obscenity of the particular material involved: "Both the *Alberts* and *Roth* cases reached the United States Supreme Court at a very high level of abstraction—a level so high that the facts of the two cases had become literally irrelevant."[18] Only Justice Harlan in his dissenting opinion attempted to apply the majority's obscenity test to the pertinent material.[19] The majority opinion, however, left a residue of doubt concerning the concrete application of the generalized verbalization which is the *Roth test*. The question remains, just what type of material is constitutionally obscene.

The majority opinion did indicate that the term "obscenity" was to be construed narrowly. All ideas of even the slightest social value were to enjoy constitutional protection; obscenity was that which had no social importance. The metaphorical door of governmental intrusion into obscenity censorship was to be "kept tightly closed and opened only the slightest crack necessary."[20]

In light of the *Roth* decision, Justice Fairchild apparently draws the dual conclusion that a balancing process is necessary for a determination of obscenity and that only hard-core pornography is constitutionally obscene. Certainly the first part of this conclusion is reasonable. The very use of the term "dominant theme" involves the connotation of a balancing relationship. Appeal to prurient interest must be measured against other factors. Only if it dominates and over-balances literary and social value will the material be declared obscene.

This is not to say that an obscene work will be spared because of

[15] *Id.* at 156, 121 N.W. 2d at 557.
[16] *Id.* at 156, 121 N.W. 2d at 556.
[17] *Id.* at 159, 121 N.W. 2d at 558.
[18] Lockhart and McClure, *Censorship or Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 25 (1960).
[19] Roth v. United States, *supra* note 7, at 502.
[20] *Id.* at 488.

some subservient literary skill or lofty purpose exhibited by the author. If such were the position of the majority, Justice Hallows' criticism would indeed be a telling one. Literary skill obviously would serve to make a dominant pornographic theme more effective.[21]

Recent United States Supreme Court decisions lend some credence to the belief that only hard-core pornography will be found obscene. Four per curiam decisions have apparently indicated the strict limitation to be placed on the scope of obscenity censorship; each case involved a reversal of a previous obscenity finding.[22] A more recent decision has added the requirement of a "patently offensive portrayal" for a judgment of obscenity.[23] The belief in a limitation of constitutional obscenity to unadulterated pornography devoid of any literary pretense was also reiterated in a recent Massachusetts decision.[24] The problem is that the hard-core standard is an absolute one and involves no need for balance and comparison. If hard-core pornography has no literary value, then any matter with even the slightest literary credentials would enjoy constitutional protection. A balancing process would be meaningless since the presence of any social or literary appeal would be found to dominate over the appeal to prurient interest. A finding of obscenity would be made only when the sole theme, not the dominant theme, of the material appeals to prurient interest.

The question of the appellate court's proper role in obscenity cases presents a most crucial problem. The majority opinion espouses a policy of independent review; the dissents hold the appellate court bound by the factual findings of the lower court unless against the preponderance of the evidence.

The danger of an independent review, based solely upon the appellate court's opinion of the questionable material has been clearly indicated.[25] The appellate court could establish itself as an arbiter of public taste and morals—a position it is not qualified to fill. Such a policy could also lead to a great deal of instability in the censorship field. On the other hand, the obscenity cases present not ordinary factual questions but issues with strong constitutional overtones. The rights involved in this area are so precious that the court cannot abdicate its power to consider the constitutional issues.

Justice Harlan's opinion in the *Roth* case emphasized the peculiar responsibility of the appellate court "to determine for itself whether the attacked expression is suppressable within constitutional standards."

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[21] McCauley v. Tropic of Cancer, *supra* note 4, at 156, 121 N.W. 2d at 556.
[22] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1955); Mounce v. United States, 355 U.S. 180 (1957); One, Inc. v. Olesen, 355 U.S. 371 (1958); and Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).
[23] Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).
[24] Attorney General v. Book Named "Tropic of Cancer," 184 N.E. 2d 328 (1962).
[25] Smith v. California, 361 U.S. 147, 165 (1959) (Frankfurter, J. concurring).

Every "suppression raises an individual constitutional problem" and the appellate court cannot "escape this responsibility by saying that the trier of fact has labelled the questionable matter obscene."[26] The Massachusetts Supreme Court recently expressed the same view while holding that the appellate court is in "essentially the same position as the trial judge" and may draw its own inferences from the facts since the only important evidence is documentary.[27]

A related problem not actually considered by the Wisconsin court is the role of expert testimony in an obscenity case. Justice Frankfurter in *Smith v. California* warned of the absolute necessity of expert testimony for a proper determination.[28] In the present case experts were consulted in an effort to determine the dominant theme of the book, the community standard, and the effect of the book. The majority of the court considered the book itself as the most important evidence but did refer to the testimony of appellant's witnesses concerning the literary quality of the book. Justice Hallows' dissent emphasized the testimony of respondent's witnesses as to the effect of the book judged by the community standards. The decision nevertheless, leaves unclear the real function of expert testimony and the importance that the appellate court should place upon it. For the court to totally ignore expert testimony could lead to imposition of the court's own personal taste and moral code upon the community.

Some mention should be made of the treatment accorded *Tropic of Cancer* in other jurisdictions. The book drew judicial attention in 1953 when a federal court upheld the bureau of custom's refusal to admit it into the country. The court ruled that "obscenity, though a part of a composition of high literary merit, will not be spared whether written in the style of the realists, surrealists or plain shock writers."[29] The court, however, was not applying a *Roth* type test but rather the traditional and now rejected *Hicklin* test based on the effect of isolated passages on the most susceptible reader.[30]

In 1962, the Massachusetts Supreme Court, construing an obscenity statute similar to Wisconsin's held the book not to be obscene and the statute to apply solely to hard-core pornography. The majority of the court held that:

> It is not relevant . . . that the book at many places is repulsive, vulgar and grossly offensive in the use of four letter words, and in the detailed and coarse statement of sexual episodes. That a serious work uses four letter words and has a grossly offensive tone

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[26] Roth v. United States, *supra* note 7, at 498.
[27] Attorney General v. Book Named "Tropic of Cancer," *supra* note 24, at 329.
[28] Note 25 *supra*.
[29] Besig v. United States, 208 F. 2d 142 (9th Cir. 1953).
[30] Regina v. Hicklin, (1868) 3 Q.B. 360.

does not mean that the work is not entitled to constitutional protection.[31]

Recently the highest courts of New York and California have also ruled on *Tropic of Cancer*. The New York court held that any book which does not pass the *Roth* test is hard-core pornography even though highly considered by the literary community. The book was declared obscene since the majority of the court felt that the favorable literary criticism accorded to it did not "expunge from its pages the flagrantly obscene and patently offensive matter that dominates the book as a whole."[32]

The California court, limiting obscenity to hard-core pornography, did not consider the book obscene. The court also declared that a limitation of obscenity to hard-core pornography "does not permit a balancing of the work's social importance against its prurient appeal. Rather, the presence of matters of social importance entitles a book to the protection of the First Amendment."[33]

In general, these cases indicate the growing limitation of obscenity censorship. The *Roth* test is no more than a reaction against the restrictive *Hicklin* test—a set of negative precepts in a positive formula. A work is no longer to be judged by isolated passages, by their effect upon the susceptible, or by antiquated standards. The court thus gave notice of how not to censor but did not indicate what material could be censored. There is no difficulty in the case of the serious literary work or of a purely pornographic work, but a very real problem arises in the case of borderline material.

The "dominant theme" test places a heavy burden of literary criticism upon the courts and at the same time threatens the artist's freedom of expression. The situation is alleviated by the use of expert testimony to guide the court, yet the danger remains that such testimony may be ignored and the judgment grounded on personal tastes and moral viewpoint.

Alternatively, censorship may be limited to the totally inartistic. The threat to artistic freedom is decreased, but in all probability the protection afforded society is not appreciably lessened. The most offensive work remains subject to censorship and the material available to minors subject to control. At the same time, the dearth of judicial publicity and the very nature of the material will minimize the interest of the average reader. A danger still exists in the case of the emotionally immature, but even the *Roth* test does not offer complete security in this respect.

Perhaps a compromise position might even be found by allowing

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[31] Attorney General v. Book Named "Tropic of Cancer," *supra* note 24, at 334.
[32] People v. Fritch, 32 U.S.L. WEEK 1013 (U.S. July 23, 1963).
[33] Zeitlin v. Arnebergh, 32 U.S.L. WEEK 1013 (U.S. July 23, 1963).

censorship of a work not totally devoid of style, but whose artistry is completely subservient to an obvious pornographic aim. Whatever position is adopted in any jurisdiction, it may be hoped that it at least be a consistent one. Clearly the hard-core and balancing theories are incompatible. Unfortunately, the Wisconsin court speaks in terms of a balancing process, while the decision in effect limits censorship to hard-core pornography. MICHAEL S. NOLAN

Res Ipsa Loquitur: Application of the Doctrine Where a Plaintiff Is Contributorily Negligent—The plaintiff, Mrs. Wilma Turk, and her five year old son were riding an escalator in defendant, H. C. Prange's department store. In prior trips to defendant's store they had often used this escalator. Mrs. Turk's son's galosh became caught in the tread of the escalator. The boy began screaming and the plaintiff took hold of his waist trying to free him without success. The escalator continued moving, and the plaintiff lost her balance and fell, fracturing her wrist on the steel stair of the escalator. The trial court held that *res ipsa loquitur* did not apply, and in a special verdict, only the plaintiff was found to have acted negligently.

The supreme court, in *Turk v. H. C. Prange Co.*,[1] reversed the lower court's holding that the doctrine of *res ipsa loquitur* was applicable and that contributory negligence on the part of the plaintiff was not an absolute bar to its invocation. The court pointed out that, if the defendant were found negligent, the plaintiff's injury would be a "natural consequence" of the defendant's negligence.[2] It reasoned that in light of Wisconsin's comparative negligence statute:[3]

> . . . this third element of freedom from contributory negligence is not a requirement for the application of *res ipsa loquitur* and that if the defendant is found negligent, plaintiff's contributory negligence, if any, goes to the question of comparison of negligence as between the plaintiff and the defendant.[4]

The significance of this decision can be best understood in light of the function of the doctrine *res ipsa loquitur* as a rule of evidence in Wisconsin. The doctrine creates a permissible inference of negligence on the part of the person against whom it is invoked. It allows a jury to find causal negligence solely upon circumstantial evidence. The jury may accept or reject the inference, which is sufficient to support a verdict.[5] The defendant, to prevent the inference from arising, must meet or overcome it by explaining the occurrence, or by showing that

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[1] 18 Wis. 2d 547, 119 N.W. 2d 365 (1963).
[2] *Id.* at 550, 119 N.W. 2d at 371.
[3] WIS .STAT. §331.045 (1961).
[4] Turk v. H. C. Prange Co., *supra* note 1, at 551, 119 N.W. 2d at 372.
[5] Drechsler, *The Doctrine of Res Ipsa Loquitur*, WIS. BAR BULL. 13 (April, 1957).