OBSCENITY AND THE FIRST AMENDMENT

In 1965 the Commonwealth of Pennsylvania filed a suit in equity to enjoin the sale and publication of the allegedly obscene book, *Candy*, by Dell Publications, Inc. The lower court ruled that the book was obscene within the meaning of the Pennsylvania Act[1] and thus was not afforded the protections of the first and fourteenth amendments. It granted a permanent injunction prohibiting the book's sale and distribution, from which Dell Publications appealed.

The Supreme Court of Pennsylvania[2] reversed, citing as error the lower court's interpretation of the obscenity-test guidelines as outlined by the United States Supreme Court[3]. Although the majority did not approve of *Candy* they felt that it did not meet the requirements of "legal obscenity."[4]

The evolution of these tests for legal obscenity has been unclear and contradictory[5]; however, two types of obscenity have been recognized by the courts—obscenity *per se* or the constant obscenity approach[6], and obscenity *per quod* or the variable obscenity approach[7]. Underlying each type is the power and right of the federal and state governments to express or suppress obscene materials for the prevention of nuisances[8] and anti-social conduct[9] and for the preservation of the character of the people[10]. Although the courts have not directly rejected these valid governmental interests, they have assumed their existence without comment and have placed greater emphasis on the formulation of a precise definition of obscenity[11].

The first attempt at this definition was in 1868 where the court stressed in *Regina* v. *Hicklin*[12] the immoral influences of the writings on susceptible people[13]. This per quod test was initially accepted by this country[14] but eventually, reacting to the anti-Victorian temper of the early 1900's, the courts either modified the test or repudiated it[15]. What emerged was a shift in emphasis from the effect on people to whom the work might influence to the work itself and whether its "dominant theme"[16] was obscene.

Despite this shift the *Hicklin* test was not completely defeated until 1957 in *Roth* v. *United States*[17] where the Supreme Court held the test for obscenity to be the following:

> . . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest[18].

Despite this expansion of the definition by the Court, the test for obscenity still remained vague[19] as exhibited by the fact that from 1957 until 1966 the Supreme Court rendered only two full opinions[20] while in the others they issued per curiam decisions, preferring not to tackle the meaning of obscenity[21].

The need for a clearer and more precise test was apparent. Proceeding toward that goal, the Supreme Court in 1966 in *Memoirs* v. *Massachusetts*[22] enlarged the definition of legal obscenity by stressing that the material must also be patently offensive and utterly without redeeming social value[23]. This emphasis was fully consistent with the trend toward the *per se* or constant obscenity approach.

On the same day however, the Court announced two other cases which signaled a reshifting from this constant approach to the variable obscenity approach. In *Ginzburg* v. *United States*[24] the Court judged the materials as obscene on the basis of the advertising by the publisher in which he exploited the interests in titillation through pervasive treatment or description of sexual matters[25]. Similarly, the Court in *Mishkin* v. *New York*[26] placed the emphasis not only on the subject matter of the books, but also on whether it was "designed for and primarily disseminated to a clearly defined deviant sexual group."[27]

These judgments generated much criticism and confusion among the courts and legal scholars[28] for it continued the uncertainty of how equitably to determine the correct standard for obscenity[29]. Should the courts base their determinations solely on the book itself? Should they look to extrinsic factors and if so, which factors are vital in ruling the materials obscene?

It has been in this framework of questions and uncertainty that the courts have been forced to work, groping for a practical solution to obscenity. From the cases that have been decided since 1966 it is apparent that the courts have chosen to lay great weight on the *per se* definition of obscenity, following the precedents of the *Memoirs* decision, and ignoring the *per quod* approach of *Ginzburg* and *Mishkin* unless specifically raised by the parties themselves.[30]

The majority in *Dell Publications* followed this trend by adopting the constant obscenity test and discounting, as inapplicable the variable obscenity test[31]. In a vigorous dissent, Justice Musmanno urged the court to exercise its valid state power in upholding the moral standards of the American people by declaring *Candy*[32] obscene and to disregard the perplexing standards of obscenity as outlined by the Supreme Court.[33]

Until the Court can clarify these criteria for obscenity by formalizing either the *per se* approach, the *per quod* approach, or some other standard, as urged by the dissent in *Dell Publications*[34], the courts are going to have to make a case-by-case determination, which will lead to continued confusion and inconsistentcy in the law of obscenity.

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FOOTNOTES

1. P.L. 1997 (1965), as amended 18 P. S. § 3832.1 (1956).
2. Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A. 2d 840 (1967).
3. The Pennsylvania Supreme Court based its decisions on the doctrine of Roth v. United States, 354 U. S. 476 (1957) and Memoirs v. Massachusetts, 383 U.S. 413 (1966).
4. *See generally*, Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302 (1967); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).
5. Chafee noted these tests as an anomaly in the law for as the law generally liked to be logical, sex was seldom wholly that, since by its very nature, it included a large element of irrationality. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 210-12 (1947).
6. The main thrust in this approach is upon the book itself and whether it is obscene within the standards established by the Supreme Court. It ignores extrinsic factors, as the conduct of the author and the audience to whom the work is directed. *See, e.g.*, United States v. One Book Entitled Ulysses, 5 F. Supp. 182 (S.D. N.Y. 1933), *aff'd.*, 72 F. 2d 705 (2d Cir. 1934); Roth v. United States, 354 U.S. 476 (1957); and Memoirs v. Massachusetts, 383 U.S. 413 (1966).
7. Obscenity per quod has been characterized as reliance upon extrinsic factors including the audience solicited and the circumstances of production, sale and distribution. Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L. J. 127, 128 (1966). This approach parallels that endorsed by Professors Lockhart and McClure in which the material is judged by its present appeal to and effect upon the audience to whom the material is directed. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). *See also*, CRAIG, SUPPRESSED BOOKS (1963) and PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961).
8. Ginzburg v. United States, 383 U.S. 463, 470 (1966).
9. This is difficult to prove and the authorities are hopelessly divided on the subject. Compare, Roberts, J. Commonwealth v. Dell Publications, Inc., 427 Pa. 189, - , 233 A. 2d 840, 841, 848-49 (1967) (majority opinion) with Musmanno, J., (dissenting opinion). *See*, Clark, J., Memoirs v. Massachusetts, 383 U.S. 413, 451-54 (1966) (dissenting opinion) and Frank, J., Roth v. United States, 237 F. 2d 796, 805, 812-17 (2d Cir. 1956) (concurring opinion).
10. The basis of this is not that anti-social conduct will result from the reading of obscene books or the watching of obscene motion pictures, but that the undermining of the character of the people and subsequently the nation will follow. Harlan, J., Roth v. United States, 354 U.S. 476, 504, 505 (1957) (dissenting opinion) and Musmanno, J., Commonwealth v. Dell Publications, Inc., 427 Pa. 189, - , 233 A. 2d 840, 861 (1967) (dissenting opinion). *See also*, Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, 306 (1967) and Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 409-11 (1963).
11. Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, 306. *See also*, Note, *More Ado About Dirty Books*, 75 YALE L. J. 1364 1402-05 (1966).
12. 3 Q.B. 360 (1868).
13. *Id.* at 369.
14. *See e.g.*, Rosen vs. United States, 161 U.S. 29 (1896) (*semble*); United States v. Males, 51 F. 41 (D. Ind. 1892); United States v. Smith, 45 F. 476 (E. D. Wis. 1891).
15. *See, e.g.*, United States v. Dennett, 39 F. 2d 564 (2d Cir. 1930); United States v. Kennerly, 209 F. 119, 201 2d Cir. 1913).
16. United States v. One Book Entitled Ulysses, 5 F. Sup. 182 (S.D. N.Y. 1933) *aff'd.*, 72 F. 2d 705 (2d Cir. 1934).
17. 354 U.S. 476 (1957).
18. *Id.* at 489. Chief Justice Warren urged a re-evaluation of the per quod or variable obscenity test, noting that the conduct of the defendant and not the obscenity of the book was the central issue. *Id.* at 495 (concurring opinion). Likewise, in United States v. 31 Photographs, 156 F. Supp. 350 (S.D. N.Y. 1957) the court held that the fact that the photographs were going to the Kinsey Institute and not to juveniles was a vital factor in judging their obscenity.
19. Within the decision itself four justices filed opinions, each determining what he felt the proper standards for obscenity should be. In addition, Justice Brennan, who delivered the opinion of the court, later admitted that the test was "not perfect" Jacobellis v. Ohio 378 U.S. 184, 191 (1964) and even spoke of the test's "inherent residual vagueness." Ginzburg v. United States, 383 U.S. 463, 475 n. 19 (1966).
20. Jacobellis v. Ohio, 378 U.S. 184 (1964) held that certain motion pictures were not obscene under the doctrine of *Roth*. It is important to note that once again Chief Justice Warren felt that not only the words or pictures should be considered, but also the use to which the various materials were put. *Id.* at 201 (dissenting opinion). In Manual Enterprises v. Day, 370 U.S. 478 (1962) Justice Harlan ignored the lower court's determination of obscenity and held that the proper test was the "reaction of the average member of the class for which the magazines were intended." He, however, did not have to rule on this problem as he held that the magazines lacked prurient interest and were not patently offensive, so as to be judged legally obscene. *Id.* at 486. It is important to observe that the arguments of Warren and Harlan were finally considered and adopted in the *Ginzburg* and *Mishkin* cases, respectively.
21. *See e.g.*, Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964); Tralins v. Gerstein, 378 U.S. 57 6(1964); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).
22. 383 U.S. 413 (1966).
23. *Id.* at 418.
24. 383 U.S. 463 (1966).
25. *Id.* at 475-76. This approach had been urged by Chief Justice Warren in Roth v. United States, 354 U.S. 476, 495 (1957) (concurring opinion) and in Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (dissenting opinion). In addition some scattered decisions had been rendered that held the manner of advertising and distribution were essential elements for the court to consider. United States v. Rebhuhn, 109 F. 2d 512 (2d Cir. 1940) and People v. Pesky, 230 App. Div. 200, 243 N.Y.S. 193 (1930), *aff'd.*, 254 N.Y. 373, 173 N.E. 227 (1930); *contra*, Attorney General v. Book Named Forever Amber, 323 Mass. 302, 308, 81 N.E. 2d 663, 666 (1948).
26. 383 U.S. 502 (1966).
27. *Id.* at 508. The basis for this decision may be traced back to Regina v. Hicklin, 3 Q.B. 360 (1868) and more recently to the discussion by Justice Harlan in Manual Enterprises v. Day, 370 U.S. 478 (1962).
28. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 477 (1966). *See also*, Dyson, *Looking Glass Law: An Analysis of the Ginzburg Case*, 28 U. of PITT. L. REV. 1 (1966); Magrath, *The Obscenity Tests: Grapes of Roth*, 1966 SUP. CT. REV. 7 (1966).
29. In 1967 the Supreme Court had an opportunity to clarify the 1966 tests, but declined and issued mere per curiam opinions e.g. Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Books v. Kansas, 388 U.S. 452 (1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967); Books Inc. v. United States, 388 U.S. 449 (1967).
30. In Attorney General v. A Book Named Naked Lunch Mass. 218 N.E. 2d 571 1966) the court held, without considering the commercial exploitation criteria of *Ginsburg*, that the book did have some social value as recorded by the many favorable literary reviews and criticisms. Justice Reardon however, felt the that case should be remanded so that the lower court could evaluate the commercial exploitation of the book. *Id.* at 576, (dissenting opinion). In a recent Pennsylvania decision, Commonwealth v. Baer, 209 Pa. Super. 349 - , 227 A. 2d 915, 917 (1967) the court held that since none of the parties brought up the point of pandering or commercial exploitation, the court would have to decide the case on a strict interpretation of the *per se* or constant obscenity test.
31. Commonwealth v. Dell Publications, Inc., 427 Pa. 189; 233 A. 2d 840 (1967).
32. This view has received little attention by the Supreme Court. The most consistent member of the Court to advocate the use of state interest to determine whether materials are obscene is Justice Harlan. In Jacobellis v Ohio, 378 U.S. 184, 203-04, (dissenting opinion) he gave a succinct statement of this view:

    > The more I see of these obscenity cases the more convinced I become that in permitting the States wide . . . scope in this field . . . lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws, and the protection of genuine rights of free expression.

    See also, Harlan J., Roth v. United States, 354 U.S. 476, 504 (1957) (dissenting opinion) and Memoirs v. Massachusetts, 383 U.S. 413, 458 (1966) (dissenting opinion).
33. In his usually colorful style, Justice Musmanno in his dissenting opinion in Commonwealth v. Dell Publications Inc., 427 Pa. 189 - , 233 A. 2d 840, 859, (1967) mocked the majority in its attempt to utilize the confusing obscenity test standards:

    > (T)he Majority apparently proceeds on the theory that since *Candy* is surpassed in degeneracy by other vile works, *Candy* should not be subject to injunction under Pennsylvania laws. This is like saying that a person in the early stages of a contagious venereal disease may not be excluded from waiting on the dining room table because there are syphilitics working in the kitchen.

34. In Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, the author pressed the Court to adopt the standard of state interest in determining obscenity. It was his belief that the decisions in *Ginsburg* and *Mishkin* represented an accommodation in that direction and that only by fully moving in that direction could the Court accurately balance the free speech values. *Id.* at 323, 324, 326. *See also*, Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 396-97, 399, 401, 413-414 (1963).