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Thomas L. Shaffer
Notre Dame Law School

Joseph O'Meara
Notre Dame Law School

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OBSCENITY IN THE SUPREME COURT:
A NOTE ON JACOBELLIS v. OHIO

Joseph O'Meara*
Thomas L. Shaffer**†

"[S]hould not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence."

— Judge Learned Hand, in *United States v. Kennerley*,
209 Fed. 119, 121 (S.D.N.Y. 1913).

According to the opinion of Mr. Justice Brennan in *Jacobellis v. Ohio*,¹ the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country — all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion.

* Dean, Notre Dame Law School.

** Assistant Professor of Law, Notre Dame Law School.

† The general subject of obscenity has been worked over repeatedly in books and periodical literature, including four biennial surveys of its evolution in *THE LAWYER*; see 33 *NOTRE DAME LAWYER* 416, 436 (1958); 35 *NOTRE DAME LAWYER* 405, 537 (1960); 37 *NOTRE DAME LAWYER* 649, 686 (1962); and 39 *NOTRE DAME LAWYER* 427, 466 (1964); PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* (1961); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 *MINN. L. REV.* 5 (1960); Kalven, *The Metaphysics of the Law of Obscenity*, *THE SUPREME COURT REVIEW* 1 (1960); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956); Mulroy, *Obscenity, Pornography and Censorship*, 49 *A.B.A.J.* 869 (1963); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 *U. PA. L. REV.* 834 (1964); *Obscenity in the Mails: Post Office Department Procedures and the First Amendment*, 58 *NW. U.L. REV.* 664 (1963); *The Youth-Obscenity Problem — A Proposal*, 52 *Ky. L.J.* 429 (1964).

1 84 *Sup. Ct.* 1676 (1964). There was no opinion for the Court. Mr. Justice Brennan announced the decision and wrote an opinion. Mr. Justice Goldberg concurred in the judgment and in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Black and Douglas concurred in the judgment on the ground that motion pictures

Though we are frankly critical, we intend nothing derogatory. We revere the Court as an institution and have the utmost respect for its members, all able and dedicated men. Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelops the problem of obscenity as a result of the opinions in some recent Supreme Court cases and the entire absence of opinion in others.²

It is evident to us that the right to life itself is no less sacred than the right of free expression. Let's suppose a man is on trial in a capital case involving complex and inter-related issues. Did he fire the shot, for example, which caused the fatal wound? Did he do this deliberately and with premeditation, or did he act on impulse in the heat of sudden anger? Was he legally

cannot constitutionally be censored at all. (Would they hold, we wonder, that the Constitution protects a man who falsely shouts "fire" in a crowded theatre? See *Schenck v. United States*, 249 U.S. 47 [1919].) Mr. Justice Stewart, concurring in the judgment, noted in a separate opinion that the Constitution permits censorship only of hard-core pornography, which the motion picture at issue, he said, was not:

I shall not attempt further to define the kinds of material I understand to be embraced within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Mr. Justice Clark joined the Chief Justice in a dissenting opinion, pointedly rejecting the "national standard" which Justices Brennan and Goldberg say the Court must apply. The opinion of the Chief Justice indicates that he and Mr. Justice Clark attach greater weight to the finding of juries and trial courts than do the other members of the Court. Mr. Justice Harlan dissented on the ground that states should be accorded virtual autonomy in obscenity cases; see note 24, *infra*. Mr. Justice White concurred in the judgment but did not join in any of the opinions and wrote no opinion of his own.

2 In *Grove Press v. Gerstein*, 156 So.2d 537 (Fla. App. 1963), a jury found the defendants guilty under the Florida obscenity statute, FLA. STAT. ANN. chap. 847. The jury was instructed under the tests set down in *Roth v. United States*, 354 U.S. 476 (1957). On the same day it decided *Jacobellis*, the Supreme Court reversed, *per curiam*, the conviction and order of the Florida Court of Appeals, which affirmed the conviction. 84 Sup. Ct. 1909 (1964). See also *Tralins v. Gerstein*, 151 So.2d 19 (Fla. App. 1963), *rev'd per cur.* 84 Sup. Ct. 1903 (1964). In both reversals of the Florida court each member of the majority in the Supreme Court took note of his position in *Jacobellis*. The minority — i.e., the Chief Justice and Justices Harlan, White and Clark — voted to deny certiorari. *Grove Press v. Gerstein* involved *The Tropic of Cancer* and apparently nullifies as authority State court decisions finding that novel obscene. Yet there is not a single word of guidance to State courts which have divided on the issues presented by that novel. Even reading the opinions in *Jacobellis* into the *per curiam* orders, there is still no word from the Court because in *Jacobellis* there was no opinion for the Court, but four separate opinions concurring on differing grounds, as well as two separate opinions dissenting on differing grounds. According to the slip opinion in *United States v. Ginzburg*, Nos. 14742, 14743, 14744 & 14745, 3d Cir., Nov. 6, 1964, the Court of Appeals in that case said "Under the obscenity tests laid down by the Supreme Court, the Constitutional status of the publications '... must be determined on the basis of a national standard.'" That is a misreading of *Jacobellis*. The national standard tests has been espoused only by Justices Brennan and Goldberg; it has not been adopted by the Court. As to *The Tropic of Cancer*, see *People v. Fritch*, 13 N.Y.2d 119, 192 N.E.2d 713 (1963) (affirming conviction 4-3, without an opinion for the Court, but with two opinions for the majority and two for the dissenters); *McClauley v. Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W.2d 545 (1963), noted 47 MARQ. L. REV. 275 (1963) (affirming a trial judge's finding that the book was not obscene, 4-3, with two dissenting opinions); *Attorney Gen'l v. Book Named "Tropic of Cancer"*, 184 N.E.2d 328 (Mass. 1962) (reversing a trial judge's finding that the book was not obscene, 4-3, with a dissenting opinion); *Zeitlin v. Arnebergh*, 383 P.2d 152 (Cal. 1963) (upholding the publisher's ability to seek declaratory relief and finding the book not obscene). The book has also been found obscene in trial courts in Connecticut and Pennsylvania, and not obscene in Chicago; Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964). The Chicago decision was reversed by the Supreme Court of Illinois; *Haiman v. Morris*, 32 U.S.L. WEEK 2686 (Ill. 1964). But the Illinois court withdrew its opinion after *Jacobellis* was announced. See also *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953) (obscene); and *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962) (conviction reversed on other grounds).

sane at the time, capable of distinguishing right from wrong and not under a compulsion he was powerless to resist? These issues we leave to a jury, and if the verdict is guilty of murder in the first degree, in most States the defendant is subject to the death penalty. Nobody supposes for a minute that he has a constitutional right to an independent determination by the Supreme Court of the issues on which depend his very life.

But, if the Court itself must decide the issues in obscenity cases, why must it not decide for itself, for example, whether a convicted murderer, when he fired the fatal shot, was capable of distinguishing right from wrong and not under a compulsion he was powerless to resist?³ And, if there is no such duty in a murder case, why is there in an obscenity case? If there is such a duty in obscenity cases, is not the right of free expression thereby given priority over the right of life itself and, if so, what basis is there for this extraordinary preference?

No one doubts that our murderer is accorded due process of law when he is sent to his death on a jury's finding that he was sane when he inflicted the fatal wound; but the author or publisher or peddler, as the case may be, of *The Tropic of Cancer* is not accorded due process of law until the Supreme Court of the United States decides for itself issues which, if resolved against the defendant, would result, *at most*, in a fine of \$2,000 and a seven-year prison term in Ohio, or, in Florida, in a fine of \$10,000 and a term of five years in prison. Both the murder case and the obscenity case, notwithstanding the answer is "yes" in the former and "no" in the latter, involve the selfsame provision of the Constitution, namely, the due process clause of the Fourteenth Amendment.⁴

In his opinion in *Jacobellis*, Mr. Justice Brennan says:

The question of whether a particular work is obscene necessarily implicates a question of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. . . .

In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case.⁵

3 Mr. Justice Brennan cites two murder cases in support of his position that the Court itself must decide the issues in obscenity cases — *Lisenba v. California*, 314 U.S. 219 (1941), and *Napue v. Illinois*, 360 U.S. 264 (1959), cited at 84 Sup. Ct. 1676, 1679. In both cases, however, the Court *deferred to the jury*, seeking only to protect the fairness of its deliberations. In *Lisenba*, the Court held finally determinable under State law the questions of: (1) corroboration of accomplice testimony; (2) the disputed question whether or not state officers used testimony known by them to be false; (3) the admissibility of evidence of other crimes; and (4) the propriety of denying the defendant a continuance. The Court held, however, that the admissibility of the defendant's allegedly coerced confession, under State law, did not decide its admissibility as a matter of due process; and, relying on findings of fact made by the trial judge and the jury, affirmed the conviction. In *Napue*, the critical question was whether the prosecutor knowingly used false testimony, and the Court decided that question as a matter of due process (*i.e.*, fair trial), noting that the jury had not been allowed to decide the question of the prosecutor's awareness that he was using false testimony. Finally, the Court's opinion clearly demonstrates that the finding under review was a *legal conclusion* reached by the Supreme Court of Illinois. The jury's finding of guilt was not being reviewed in either this case or in *Lisenba*.

4 It is this provision, of course, which is relied upon to protect the right of free expression against invasion by the States. The Ohio statute against obscenity, involved in *Jacobellis*, is OH. REV. CODE § 2905.34, quoted in 84 Sup. Ct. 1676, 1677; the Florida statute at issue in *Grove Press and Tralins* (discussed in note 2, *supra*) is FLA. STAT. ANN. § 847.011.

5 84 Sup. Ct. 1676, 1678-79.

The cases cited for that proposition, however, do not speak to the question. They deal (1) with preliminary, procedural issues arising out of the conduct of police officers,⁶ or (2) with questions traditionally decided by judges,⁷ or (3) with the Court's earlier treatment of jury trial in obscenity cases, which earlier treatment contradicts Mr. Justice Brennan's present position.⁸ A few of the cases cited by the Justice do not fall into any of these categories; these latter cases, except for an occasional dictum, are just not in point at all.⁹ In short,

6 *Haynes v. Washington*, 373 U.S. 503 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Watts v. Indiana*, 338 U.S. 49 (1949); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940).

7 *Craig v. Harney*, 331 U.S. 367 (1947); *Pennacamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). All three of these decisions reversed findings of criminal contempt, no jury trial being involved; in each case the Court devoted its energy to clarifying the "clear and present danger" test. Mr. Justice Brennan also cites *Fiske v. Kansas*, 274 U.S. 380 (1927), and *Norris v. Alabama*, 294 U.S. 587 (1935), which involved, respectively, racial discrimination in jury selection and the validity of an anti-subversion statute. It is interesting to note, in the *Norris* opinion, the Court's limitation of its review of facts to those on which questions of law, determined below, depended. And, even then, the Court said it was only "analyzing" evidence; it was not finding facts.

Issues of procedural due process and fair trial are analytically questions of fact, but administratively they are questions of law; that is, they are decided by judges. Substantive questions of guilt or innocence are both analytically and administratively questions of fact. Mr. Justice Brennan therefore does not meet the issue when he cites cases involving administrative questions of law such as *Craig*, *Pennacamp* and *Bridges*, referred to in this note, and the cases cited in note 6, *supra*. See *Morris, Law and Fact*, 55 HARV. L. REV. 1303 (1942); *Vogel, Judges of the Facts*, 34 N.D.L. REV. 308 (1958); *Hogan, Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958); *Reid, A Peculiar Mode of Expression: Judge Doe's Use of the Distinction Between Law and Fact*, 1963 WASH. U.L.Q. 429.

8 In *Roth v. United States*, 354 U.S. 476, 490 (1957), in which conviction on a jury's verdict was upheld, Mr. Justice Brennan quoted with approval this paragraph from the trial judge's instructions:

In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious — men, women and children.

And, in *Kingsley Books v. Brown*, 354 U.S. 436, 448 (1957), Mr. Justice Brennan said, concurring:

The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.

His position in *Kingsley Books* is also the position taken in lower Federal courts and in many State courts when the jury-trial issue has come up; see, e.g., *Collier v. United States*, 283 F.2d 780 (4th Cir. 1960); *Alexander v. United States*, 271 F.2d 140 (8th Cir. 1959); *Volanski v. United States*, 246 F.2d 843 (6th Cir. 1957); *Commonwealth v. Moniz*, 143 N.E.2d 196 (Mass. 1957); *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A.2d 440 (1950).

In his *Jacobellis* opinion, Mr. Justice Brennan cites, finally, three per curiam orders of reversal in obscenity cases — *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *One, Inc. v. Olesen*, 355 U.S. 371 (1958); and *Times Film, Inc. v. Chicago* 355 U.S. 35 (1957). These orders were cited in support of his opinion that the Court "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." 84 Sup. Ct. 1676, 1679, n. 6. Not one of these per curiam orders, however, stated grounds for reversal except a citation to *Roth* or *Alberts*; and neither *Roth* nor *Alberts* had anything to do with this problem. Of course, Mr. Justice Harlan's concurring opinion in *Roth* argues for "independent constitutional judgment"; see note 10, *infra*. But a concurring opinion, not specifically referred to, can hardly be the basis for subsequent per curiam decision. In any event, *Alberts* did not involve a jury verdict and *Roth* upheld a jury verdict.

9 *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), cited at 84 Sup. Ct. 1676, 1679, n. 4, involved the validity of a tax laid by a State on goods brought from outside the country and still in their original package. The State court upheld the tax; the Supreme Court

the cited cases demonstrate that it is simply not a fact that "in other areas involving constitutional rights . . . the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts."

According to our recollection, it was Mr. Justice Harlan who first stated, without citing authority, that it is the duty of the Court to make its own independent decision of the issues in obscenity cases.¹⁰ With or without authority, the Court appears to have assumed exactly that obligation. In so doing it has taken on a literally impossible task. The sheer weight of the burden of deciding independently the issues in obscenity cases will drive the Court, sooner or later, to find some way of escape.

This Nation is in a headlong flight from Puritanism. More and more books and moving pictures and plays will be produced which will offend local communities and, consequently, will be attacked by them.¹¹ Just about every

reversed. It reversed, however, not because it assessed the facts differently, but solely because it read the Constitution differently (Art. I, § 10). *New York Times v. Sullivan*, 376 U.S. 254 (1964), cited at 84 Sup. Ct. 1676, 1679 n. 5, turned on the effect to be given the First and Fourteenth Amendments in libel cases involving public officials, and not on an assessment of the evidence. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

10 *Roth v. United States*, 354 U.S. 476, 497-98 (1957) (concurring):

[I]f "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind. . . . In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.

Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 708 (1958) (concurring): "In the very nature of things the problems in this area are ones of individual cases. . . ." *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962) (for the Court): "Are these magazines offensive on their face? . . . That issue, involving factual matters entangled in a constitutional claim . . . is ultimately one for this Court." In *Roth*, he cited no authority; in *Kingsley*, he cited his opinion in *Roth*; in *Manual Enterprises*, he cited *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960), which relied in part on his concurring opinion in *Roth* and in part on an editorial in *The New York Times*. The issue in *Grove Press, Inc. v. Christenberry* was not only whether the material there involved was obscene, but whether the Postmaster General had unreviewable power to determine that it was.

In the dissenting opinion in *Roth*, which also was Mr. Justice Harlan's concurring opinion in *Alberts v. California*, 354 U.S. 476 (1957), he said that he was reluctant to review the moral judgment of State courts; this point of view is also expressed in his dissenting opinion in *Jacobellis*, 84 Sup. Ct. 1676, 1686. See also *Swearingen v. United States*, 161 U.S. 446 (1896), and *United States v. Limehouse*, 285 U.S. 424 (1932), which involved independent judicial definitions of "obscene," but only as far as necessary to construe statutes.

11 *The New York Times*, Sept. 1, 1964, p. 37, col. 8, reports the formation of Operation Yorkville, an organization in New York City which, in cooperation with the New York Board of Trade, attacked the Court for having "virtually promulgated degeneracy as the standard way of American life." The statement was signed by clergymen of the Protestant, Jewish and Roman Catholic faiths, among them a Methodist bishop, three Roman Catholic bishops and three rabbis; it attacked expressly the Court's decisions in *Jacobellis* and *Grove Press v. Gerstein*:

These decisions cannot be accepted quietly by the American people if this nation is to survive. Giving free rein to the vile depiction of violence, perversion, illicit sex and, in consequence, to their performance, is an erring sign of progressive decay and decline.

* * *

In approving "Tropic of Cancer," five judges disapproved the rulings of the courts of several states, including Illinois, Florida and New York, which had found the book to be vile and obscene.

* * *

Justices William J. Brennan and Arthur J. Goldberg decided on their

one of these will get into the courts and, in view of last June's green light from the Supreme Court, the publisher or producer or exhibitor will now insist on presenting his case before that tribunal. The resulting pressure on the Court's time and energy will give it no alternative. It will be forced to find some means of deliverance from an intolerable burden.¹²

Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

As a matter of *fact* there is no national community standard.¹³ Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well.¹⁴ One is inclined to assume, for

baffling concept of a "national community standard" that the book was not obscene. Accordingly they decreed that this degraded national standard must be imposed upon Illinois, Florida and New York.

Justices Hugo L. Black and William O. Douglas apparently believe in the name of freedom that nothing, however vile, can be obscene under the Federal Constitution. Justice Potter Stewart, expressing a personal evaluation, found that the book was not obscene.

See also Mulroy, *op. cit. supra* note †, at 875, arguing for greater responsibility in local boards of censors; *Obscenity Regulation and Enforcement in St. Louis and St. Louis County*, 1964 WASH. U.L.Q. 118; Hoover, *Combatting Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT L. REV. 469 (1964).

12 A retreat to a hard-core pornography test, which some have suggested—see, e.g., Lockhart & McClure, *op. cit. supra* note †, at 67-74; Zeitin v. Arnebergh, 31 Cal. Rptr. 800, 383 P.2d 152 (Cal. 1963)—would only postpone an inevitable confrontation between semantics and reality. Mr. Justice Stewart, however, favors the retreat; see note 1, *supra*; and Mr. Justice Harlan's "patently offensive" test, see *Manual Enterprises v. Day*, 370 U.S. 478 (1962), may reduce to that; see also 39 NOTRE DAME LAWYER 427, 473 (1964).

13 This was the thrust of the Chief Justice's dissenting opinion in *Jacobellis*, 84 Sup. Ct. 1676, 1684-86. The problems in applying a non-existent national standard are nowhere more evident than in cases arising under the immigration laws' requirement that immigrants show "good moral character." This standard has always been tacitly applied in reference to local community tolerance. Compare *Rousseau v. Weedon*, 284 Fed. 565 (9th Cir. 1922) (a convicted "jointist," that is, a person who operated an illegal drinking establishment, lacked good moral character) and *Rudolph v. United States ex rel. Rock*, 6 F.2d 487 (D.C. Cir. 1925) (violation of the National Prohibition Act demonstrated bad moral character because it was "a social evil condemned by every standard of private and public morals"), *cert. denied*, 269 U.S. 559 (1925), with *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949) and cases cited (a wide variety of illicit sexual practices was found consistent with good moral character) and *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947) (a mercy killer was found to lack good moral character, but told to reapply for citizenship). See also Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938), discussing the enforcement of obscenity statutes in a large metropolitan area.

14 Some of the periodical writers on obscenity are afraid that anything less than a national standard would subject defendants to trial by standards prevailing outside their home communities—this particularly in mail obscenity cases. Lockhart & McClure, *op. cit. supra* note †, at 98. But what is there in the Constitution which enables a non-resident to impose on a local community standards it finds offensive? The argument assumes that *only* the defendant is to be protected. See Judge O'Sullivan's opinion in *United States v. Frew*, 187 F. Supp. 500, 506 (E.D. Mich. 1960):

[D]efendants' briefs urge that they should not be required to anticipate what may be the community standards of each urban or rural community whose youth may succumb to the allure of defendants' merchandise. . . . If so, what the community of Los Angeles may have found not obscene may meet a different standard in Michigan. Contemporary 1960 may likewise be different than 1957 unless we must assume that the standards of all communities in America are in a state of continuous deterioration. . . . If, by using the Los Angeles proceedings as an irrevocable license and imprimatur, without limit as to time or place, these defendants can send their merchan-

example, that Americans of our time have accepted divorce. Nonetheless, there appear to be communities in the deep South where a divorced person is a social outcast. And to go back to population, the standard varies from one large city to another.¹⁵ Thus, it appears that practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

Further examples of the *fact* that standards vary from one community to another come readily to mind. Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? And what about Mississippi and Alabama and the subversion of justice in their courts as part of a deliberate, determined denial of Negro rights? Is there no difference between the standards of Alabama and Mississippi and those, say, of the agricultural Middle West?

Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say, Washington, D.C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

Even as regards the big cities, there is no "community standard." There are many and conflicting standards; and our legal institutions provide judges no mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard.¹⁶ But that is historically the role and

disseminate wherever they please, then indeed they are the ones who will set the standard for every community they choose as their market.

Our view is clear from what we have said: the Constitution does not confer on the moral standards of a State — the State in which the questioned material originates — any such extraterritorial operation. It is the defendant who takes the initiative. If he mails his material into another community, whose standards are stricter, on what ground can he justly complain when those stricter standards are applied against him? Does anyone *really* suppose that the Constitution gives him a right thus to invade another community with impunity, that is, without subjecting himself to the same standards applied in the case of resident defendants? If the Constitution does require this discrimination against resident and in favor of non-resident defendants, is there not the danger of declining moral initiative in local communities against which the Chief Justice warned:

[P]rotection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent *de novo* judgment on the question of obscenity.

84 S. Ct. 1676, 1686.

¹⁵ The movie at issue in *Jacobellis*, for instance, ran afoul of local officials in Cuyahoga County, Ohio, even though it had been shown without incident in "approximately 100 of the larger cities in the United States, including Columbus and Toledo," and had been reviewed nationally, some reviewers disparaging it, but at least two finding that it had "best film" quality. 84 Sup. Ct. 1676, 1682.

¹⁶ District Judge Woolsey, deciding the celebrated *Ulysses* case, consulted not only his own cultivated conscience, but those of two respected friends; these three observers agreed that the novel was not obscene, *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), and their view was sustained on appeal. But Judge Manton, dissenting in the Court of Appeals, said:

Who can doubt the obscenity of this book after a reading of the pages referred to, which are too indecent to add as a footnote to this opinion?

function of the jury.¹⁷ The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community.¹⁸ And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple.

Its characterization as obscene should be quite unanimous by all who read it.

72 F.2d 705, 709 (2d Cir. 1934). See also *People v. Pesky*, 230 App. Div. 200 (1930), *aff'd* 254 N.Y. 373 (1930); *Larkin v. G. P. Putnam's Sons*, 200 N.E.2d 760, 762 (N.Y. 1964):

The differential examination of [obscenity] cases suggests at once . . . the large measure of judicial subjectivity inherent in the process.

17 This fact pervades the modern, comprehensive English obscenity statute, the Obscene Publications Act of 1959, which probably will be copied in Australia—see Whitmore, *Obscenity in Literature: Crime or Free Speech*, 4 SYDNEY L. REV. 179 (1963). ROLPH (ed.), *THE TRIAL OF LADY CHATTERLY* (1961), describes the first celebrated jury trial under the new statute; see also Krash, Book Review, 71 YALE L. J. 1351 (1962); Note, 16 STAN. L. REV. 463 (1964), discussing *United States v. Darnell*, 316 F.2d 813 (2d Cir. 1963), *cert. den.* 375 U.S. 916 (1963); *Thomas v. United States*, 262 F.2d 844 (6th Cir. 1959); *Volanski v. United States*, 246 F.2d 843 (6th Cir. 1957); *Verner v. United States*, 183 F.2d 184 (9th Cir. 1950); *People v. Muller*, 96 N.Y. Crim. 411 (1884).

The early federal cases on obscenity recognized the vital role of juries in giving common-law and statutory concepts of obscenity practical application; see *Rosen v. United States*, 161 U.S. 29 (1896); *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936).

18 II POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 624 (2d ed. 1952); see text at note 21, *infra*.

Questions of community judgment which involve negligence or prudence or reasonableness are familiar instances in which juries provide the "opinion of the community"; see, e.g., *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. den.* 376 U.S. 950 (1964), noted at 49 CORNELL L.Q. 664 (1964), which confirmed a right to jury trial in a derivative action brought in the name of a corporation. Not only are these questions submitted to juries, but the normal and acknowledged function of appellate courts is to protect the jury's ability fairly to decide them, and not to substitute judicial opinion for the opinion of the community, *i.e.*, the jury; see Shaffer, *Appellate Judges and Prejudiced Verdicts*, 26 U. PITT. L. REV. 1 (1964).

Common-law crimes which depend on moral judgments are an ancient example of this deference to the community. The crime of being a "common cheat," for example, is punishable in Rhode Island as a common-law offense. GEN. LAWS R.I. § 11-1-1 (1956). The Rhode Island court has defined it as "the fraudulent obtaining of the property of another by any deceitful or irregular practice . . . which is of such a nature that it directly affects or may directly affect the public at large." *State v. McMahon*, 49 R.I. 107, 140 Atl. 359 (1928). The issues of "deceitful or irregular practice" and of affecting the public are questions for the jury. *State v. Colangelo*, 55 R.I. 170, 179 Atl. 147 (1935), which affirmed the conviction of a religious leader.

The crime of being a common scold involves the same kind of community judgment on a woman who creates a nuisance and disturbs the peace by "brawling and wrangling among [her] neighbors." The issues under the indictment are triable by jury. See Chief Judge Cranch's learned discussion in *United States v. Royall*, 27 Fed. Cas. 906, 907 (Nos. 16,201 and 16,202) (C.C.D.C. 1829). In *Commonwealth v. Mohn*, 52 Pa. St. 243 (1866), the court held triable by jury issues under an indictment which charged that the defendant:

was on a day certain . . . a common scold and disturber of the peace of the neighbourhood, and of all good citizens . . . and . . . being an evil-disposed person, and contriving and intending as well of youth as of divers other citizens . . . to debauch, and corrupt, did openly and publicly with a loud voice, in the public highways, wicked and scandalous and infamous words utter in the hearing of citizens. . . .

In *Baker v. State*, 53 N.J.L. 45, 20 Atl. 858 (1890), the court reversed a conviction because the trial judge instructed that guilt could be found by the jury without a finding of habitual conduct:

The charge did not correctly point out to the jury the facts required to warrant a conviction, nor submit to their judgment, as it should, the question whether such facts were proved. A woman does not necessarily become a common scold by scolding several persons on several occasions. It is the

As appears from what has been said, we respectfully suggest that the issues in obscenity cases should be sent, as they are in Britain,¹⁹ to the jury under proper instructions — whatever instructions the Court ultimately decides are proper. It is no part of our purpose to discuss what should and what should not be considered obscene. Others have done that with notable unsuccess. We have come to the conclusion that we don't know what is and what is not obscene. This confession of our ignorance might be more painful were it not for the fact that we have distinguished company — including the members of the Nation's highest tribunal.

One thing, however, is made clear by reading some of the older cases involving alleged obscenity: it is impossible to consider this question out of context. It must be considered in relation to the time and place of the sale or exhibition of the disputed item.²⁰ In short, the only viable standard is the standard of the community of the *time* and *place*; that is to say, the standard of the jury, for, in our jurisprudential system, the jury *is* the community.

The identification of the jury with the community has been a characteristic of juries from their earliest development in the 13th century as quasi-judicial finders of fact:

The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a "country," a neighborhood, a community. . . . [T]he voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community. The

habit of scolding . . . which is criminal, and whether the scoldings to which the state's witnesses testified were so frequent as to prove the existence of the habit, and whether the habit was indulged under such circumstances as to disturb the public peace, were questions which the jury alone could lawfully decide. . . .

Mitran v. Williamson, 197 N.Y.S.2d 689 (1960), is a striking and recent example of the modern function of the jury as the voice of community conscience. That case involved the "intentional infliction of mental suffering," as that tort is defined in RESTATEMENT, TORTS § 46 (1948 Supp.). The defendant sent to the plaintiff a picture which, the plaintiff said, was obscene. The critical question was whether the defendant's conduct "has gone beyond all reasonable bounds of decency," and was "conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable." *Id.*, comment g. The court left this question to the jury; 197 N.Y.S.2d 690-91:

A jury under all of the circumstances in this case could find defendant's conduct so shocking that plaintiff, as alleged, suffered emotional disturbance and resulting physical injuries for which defendant would be liable.

* * *

It will accordingly be for the trier of the facts to determine whether the conduct of defendant was "outrageous" and whether in fact it was the proximate cause of the mental disturbance and physical injuries claimed by her.

19 See note 17, *supra*. The English system contemplates that the jury will determine in the first instance whether the challenged work is obscene. It must then — if the defense is raised — determine whether the book has literary merit, and on this issue it may hear expert testimony. Finally — and, theoretically, without expert assistance — the jurors must weigh literary merit against obscenity and decide whether the book, on balance, is still contrary to the public good. In the *Lady Chatterly* case, the jury read the entire book, each juror to himself, in the courtroom; they were told to consider the book as a whole; evidence of other books and attempts to call specific passages to the jury's attention were not permitted. The English statute owes a great deal to the research in St. John-Stevas, *op. cit. supra* note †; see also Williams, *The Obscene Publications Act*, 1959, 23 MOD. L. REV. 285 (1960); Whitmore, *op. cit. supra* note 17.

20 See CRAIG, *THE BANNED BOOKS OF ENGLAND AND OTHER COUNTRIES* (1962); Commonwealth v. Gordon, 101 Pa. D. & C. 101 (1949).

[royal] justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.

This traditional and characteristic function of the jury has been expressed engagingly in modern, American terms:

Its underlying principle is that the sanctity of law arises not from the fist of any potentate, however benevolent, nor from the vote of any majority, however enlightened, but from the common judgment and consent of the whole body of the people. . . . In other words, no consideration of trial by jury can be adequate which ignores its political and legislative significance, and seeks to reduce it to the mere method of finding facts which the passion for logic of judges and lawyers has tried to make it.²¹

Yet defendants in obscenity cases want nothing so little as a jury trial.²² Are they not telling the justices that they believe they can prevail *only* if the community standard is *not* applied? The Court hasn't gotten the message. It has denied a jury determination to those few defendants who want it, and has relieved those who do not of the burden of the community's judgment, which other criminal defendants must suffer.

If the suggestion here advanced were adopted by the Supreme Court, it would follow that what is obscene in one State might not be in another. Why not?²³ What is murder in one State is not necessarily murder in other States or in any other State. Nobody thinks that intolerable.²⁴ And the penalty varies

21 The first quotation is at POLLOCK AND MAITLAND, *op. cit. supra* note 18; the second is at WINDOLPH, *THE COUNTRY LAWYER* 58 (1938).

22 Bromberg, *Five Tests for Obscenity*, 41 CHICAGO BAR RECORD 416, 418 (1960):

Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested method of trial by jury.

23 In the "good moral character" cases, some of which are discussed in note 13, *supra*, marriage to one's niece was fatal in one case, safe in another, even though the same statute and the same system of courts were involved; and even though the marriage in each case was illegal. *United States v. Francioso*, 164 F.2d 163 (2d Cir. 1947); *United States ex rel. Devine v. Rogers*, 109 Fed. 886 (D. Pa. 1901). Marriages between first cousins, voidable in some states, absolutely void in others, are another example; see *Mazzolini v. Mazzolini*, 168 Oh. St. 357, 155 N.E.2d 206 (1958).

24 Note Mr. Justice Harlan's opinion for the Court in *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962) (emphasis supplied):

We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the *intolerable* consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.

But with *that* compare his dissenting opinion in *Jacobellis*, 84 Sup. Ct. 1676, 1686-87:

The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws . . . and protection of genuine rights of free expression.

* * *

I would apply to the Federal Government the Roth standards as amplified in my opinion in *Manual Enterprises*. . . . As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

from State to State — life imprisonment here, electrocution there, the gas chamber some place else.

As a matter of fact, if our suggestion were followed, the same book might be held obscene in one county, not obscene in another. Why not? The morals and mores of its inhabitants may vary within a State, especially between a rural and a metropolitan community. The very same difference of attitude and outlook which might result in holding a book obscene in this county and not in that influences the result in murder and other criminal cases and always has. Yet nobody seems to think that violates the Constitution. On what ground, then, can it be held that there is a constitutional violation in the single instance of obscenity cases?

The very same case in the very same county may result in diametrically opposed verdicts on alternate days. That is not very likely to happen but it is an ever present possibility. And so, by way of a corrective, judges are allowed to overrule plainly wrong verdicts against criminal defendants. The chance that a wrong verdict will free a defendant who ought not be freed is a price we have always been willing to pay for the jury system.

The short of it, in our view, is that there is no ground for making a special case of obscenity and granting a preferred status to those charged with that offense. They are entitled to the same due process as defendants charged with other kinds of criminal misconduct — the same and no more. And they receive that when their guilt is passed on by a jury under proper instructions, subject only to the general supervisory control over verdicts which judges have traditionally exercised.

Mr. Justice Black has some wise and eloquent words about the jury in *Jackson v. Denno*.²⁵ It is an institution to which we trust our lives in capital cases. Lest we forget, it was a jury that acquitted John Peter Zenger and struck that first great blow for freedom of the press in this Country.²⁶ It is used

25 84 S. Ct. 1774, 1796 (1964), which involved jury determination of the voluntary nature of confessions. Mr. Justice Black dissenting:

[T]he Court's new constitutional doctrine is, it seems to me, a strange one when we consider that both the United States Constitution and the New York Constitution . . . establish trial by jury of criminal charges as a bed-rock safeguard of the people's liberties. The reasons given by the Court for this downgrading of trial by jury appear to me to challenge the soundness of the Founders' great faith in jury trials. Implicit in these constitutional requirements of jury trial is a belief that juries can be trusted to decide factual issues.

If it should ever seem possible that a convicted peddler of pornography approaches the Supreme Court in danger of losing his appeal, the defendant may argue that, since judges have decided the issue of obscenity throughout the process — as Mr. Justice Brennan now demands — he has been effectively deprived of his constitutional right to jury trial.

26 16 AMERICAN STATE TRIALS 1-39 (1928). See O'Meara, *Freedom of Inquiry Versus Authority: Some Legal Aspects*, 31 NOTRE DAME LAWYER 3-4 (1955), which gives this account of the Zenger case:

Zenger, publisher of a weekly newspaper in New York, had criticized the colonial governor. He was prosecuted under an information issued by a servile attorney general at the behest of the outraged governor.

After Zenger's New York lawyers had been disbarred for daring to represent an enemy of law and order, his defense was undertaken by Andrew Hamilton, one of the leading advocates of his day. Though 80 years old, Hamilton journeyed from Philadelphia to New York to conduct Zenger's defense; and he served without compensation.

* * *

In the Zenger case the court upheld the position taken by the prosecu-

in Britain in obscenity cases,²⁷ and we think it should be used in this Country as well. Until last June it had been assumed that a jury verdict in a State or Federal obscenity case would survive appeal if the jury was carefully instructed along the lines set down in *Roth v. United States*.²⁸ But that is no longer true as the Florida Court of Appeals learned the same day *Jacobellis* was decided.²⁹ It is now clear that no obscenity case is settled until the Supreme Court, already greatly overburdened,³⁰ has read the book or seen the movie. Does that make sense?

For the reasons we have attempted to outline in this note, we submit, with great respect and most earnestly, that the Supreme Court would be well advised to re-examine the problem of obscenity and, more particularly, to recognize the jury as the authentic alter ego of the community, reflecting its morals and mores more truly than even the wisest of judges.

tion; but the jury, disregarding the court's instructions, returned a verdict of not guilty.

27 Note : 17 and 19, *supra*.

28 354 U.S. 476 (1957).

29 Note 2, *supra*. See *City of Chicago v. Kimmel*, 201 N.E.2d 386 (Ill. 1964).

30 Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).