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Obscenity--Search for Practical Statutes

CONSTITUTIONAL LAW: OBSCENITY — SEARCH FOR PRACTICAL STATUTES

"Congress shall make no law . . . abridging the freedom of speech . . ."[1]

In 1957 the United States Supreme Court reaffirmed that obscenity is not within the area of constitutionally protected speech or press.[2] Nonetheless, states have continuously met with frustration when trying to define or enforce obscenity statutes. Oklahoma is no exception.

In *Ramirez v. State*[3] the defendant had been convicted of the crime of exhibiting an obscene motion picture. The only testimony offered by the state was that of the arresting officer; however, the film was shown to the jury. After receiving the trial court's instructions the jurors were left to speculate as to the obscenity of the film. The Oklahoma Court of Criminal Appeals held that the state failed to show that the film appealed to prurient interests because: (1) the issues of fact were not properly presented to the jury and (2) the evidence was insufficient to support the verdict of the jury, as the only evidence introduced was the film itself.[4]

This case, following closely *Holding v. Nesbitt*[5] *and Blankenship v. Holding*[6], has virtually left Oklahoma without any statutes to deal with obscenity. The latter two cases held the provisions of the Oklahoma Literature Act unconstitutional for attempting an administrative ban of literature before judicial determination of obscenity, and for vagueness. The problem in the past has usually been one of definition, but Okla-

[1] U.S. CONST. amend. I
[2] Roth v. United States, 354 U.S. 476 (1957).
[3] Ramirez v. State, 430 P.2d 826 (Okla. Crim. App. 1967).
[4] *Id.*
[5] Holding v. Nesbitt, 387 U.S. 94 (1967).
[6] Blankenship v. Holding, 387 U.S. 95 (1967).

homa has a constitutionally acceptable definition.[7] The problem in *Ramirez* was a procedural one. The court held that the arresting officer's testimony did not show in any manner how the complained of film fell within the definition of "obscene".[8] The state did not attempt to show that the motion picture appealed to the officer's prurient interests, nor did the state attempt to show that it appealed to the prurient interests of the spectators present in the theater when the officer viewed it. Instead, the film was shown to the jury who were left to speculate as to the film's obscenity. There was no evidentiary basis upon which the jury could recognize any appeal to the prurient interests of any class of people.[9] The jury had no means of judging the film in terms of prurient interests other than by their own independent understanding of these terms. Because the jury was given no basis for understanding exactly how and why the film appealed to its audience, it readily determined by its own value judgment the film to have "prurient appeal."[10] The court indicated that if the state had called as witnesses the people viewing the film when the arresting officer was present, and by direct testimony established that the film appealed to their prurient interests, that the conviction would have been sustained.

Mr. Chief Justice Warren, in *Jacobellis v. Ohio,* said:

> Courts are often presented with procedurally bad cases, and, in dealing with them appear to be acquiescing in the dissemination of obscenity. But, if the cases were

[7] OKLA. STAT. tit. 21, § 1040.9 (1966 supp.).
"Obscene literature" shall mean any literature which, considered as a whole in the light of contemporary standards, has as its predominant theme an appeal to prurient interests.
OKLA. STAT. tit. 21, § 1040.12 (1966 supp.).
"Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material as a whole appeals to prurient interests.

[8] 430 P.2d at 827.

[9] *Id.* at 828.

[10] *Id.* at 829.

> well prepared and were conducted with the appropriate safeguards, courts would not hesitate to enforce the laws against obscenity. Thus enforcement agencies must realize there is no royal road to enforcement; hard and conscientious work is required.[11]

This statement indicates the fault lies with the enforcement agencies and the prosecuting attorneys. However, the guidelines supplied by the court are vague, and attempts by the various states to provide practical standards frequently have been struck down on various constitutional grounds.

New York may have found the answer with its "variable obscenity" laws, which have been upheld by the Supreme Court.[12] These laws restrict the sale of obscene material to minors on the basis of definitions of obscenity drawn expressly with minors in mind. The responsibility and authority of the state are greater and its power more extensive when it legislates for the protection of children. This is because children may be denied the constitutional right of access to communication as children may, in the exercise of that right, be damaged to a greater degree than adults.[13] The New York statute reads ". . . posed or presented in such a manner as to exploit lust of persons under the age of 18 or to their curiosity as to sex or to the anatomical differences between sexes. . . ."[14]

Oklahoma's present definition of obscenity falls within the approved definitional guidelines which have been upheld by the Court, and would be sufficiently definitive for adults.[15]

Revamping of our obscenity laws with new ideas and old safeguards is required. There must be:

1. Legislative consideration of the possibility of variable obscenity definitions.

[11] Jacobellis v. Ohio, 378 U.S. 184, 202 (1964), *quoted in* Ramirez v. State, 430 P.2d 826, 830 (Okla. Crim. App. 1967).
[12] Ginsberg v. New York, 390 U.S. 629 (1968).
[13] *Id.*
[14] N.Y. PENAL LAW § 484-i (McKinney 1967).
[15] *See* Roth v. United States, 354 U.S. 476 (1957). Oklahoma's definition is similar to the one suggested in Roth.

2. Procedural preparation and preciseness.
3. An adversary proceeding to see if the material meets the standards.[16]
4. A licensing board for movies which must either grant a license or get a restraining order to prevent the showing within a certain period of time.[17]
5. Avoidance of prior restraint in literature.[18]

In the past state courts have been reluctant to deal with the problem of obscenity, either choosing to dismiss it on procedural grounds, or leaving the ultimate decision to the higher courts. The courts try to avoid this area because they do not desire to appear to be approving of obscenity. The first step must be taken by the legislatures in the drafting of new obscenity statutes. The ultimate fate of the statutes will remain with the courts. As always, the answer to the problem must depend on whether the method adopted for coping with obscenity is kept within the narrowest bounds necessitated by the situation in order not to impinge on the full measure of guarantees afforded by the first amendment.

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[16] Holding v. Nesbitt, 387 U.S. 94 (1967).

[17] *See* Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

[18] *See, e.g.*, Bantam Book v. Sullivan, 372 U.S. 558 (1963). A state juvenile delinquency commission made "informal" recommendations to book distributors as to which publications were objectionable for sale to youths, which recommendations were followed up by threats of court action, visits from the police, etc., and distributors were given no notice or hearing before their publications were listed objectionable; Court held that compliance by distributors with commission's directions was not voluntary and constituted censorship.
But cf. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). A state-instigated *civil* suit to determine whether a publication is obscene, and following such determination an injunction against any further publication or sale, is an acceptable procedure. The injunction *after* judicial determination is not a prior restraint because it does not put the bookseller in the predicament of not knowing whether his sale of a book may subject him to criminal prosecution.