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# First Amendment; Freedom of Speech; Obscenity; Pinkus v. United States

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in the disputed constitutional issue. The focus of the court in *Metpath* on the fact that the proposed advertisements contain "information concerning scientific studies of 'general public interest' "[59] establishes the fact that the public interest which the disputed speech serves to benefit or further is of paramount importance in allowing certain speech of a commercial form to fall within the protective embrace of the first amendment. "Public interest" has become the watchword of first amendment protection in the commercial speech area.

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[59] 450 F. Supp. at 117.

# CONSTITUTIONAL LAW

## *First Amendment • Freedom of Speech*

## *Obscenity*

*Pinkus v. United States,* 98 S. Ct. 1808 (1978).

IN its latest attempt to define a workable standard for obscenity rulings, the United States Supreme Court has held that children may not be included in a court's instruction as to the social group to whom the material would or would not be obscene. However, the Court held that sensitive persons and deviant groups may be included without unduly lowering the threshold of a finding of obscenity. Thus, *Pinkus v. United States*[1] clarified the "community" whose judgment should define obscenity.

William Pinkus was convicted by jury on eleven counts of sending obscene material through the U.S. mail.[2] The conviction was reversed on appeal as the violation occurred in 1971 and Pinkus had been tried under the *Miller v. California*[3] standards enunciated by the Supreme Court in 1973.[4] Pinkus was then convicted on the same eleven counts on retrial under the standards set forth in *Roth v. United States*[5] and *Memoirs v. Massachusetts,*[6] the conviction this time being affirmed by the court of appeals.[7] The

[1] 98 S. Ct. 1808 (1978).

[2] The charges were for criminal violations of 18 U.S.C. § 1461 (1970).

[3] 413 U.S. 15 (1973).

[4] United States v. Pinkus, No. 73-2900 (9th Cir. Feb. 5, 1975).

[5] 354 U.S. 476 (1957).

[6] 383 U.S. 413 (1966).

[7] United States v. Pinkus, 551 F.2d 1155 (9th Cir. 1977).

Supreme Court granted certiorari and Pinkus charged, *inter alia*, that it was error for the trial court to include children, sensitive persons and deviant groups in various portions of the jury instructions relating to the determination of obscenity.[8]

The Court held that it was error to include children of the community in prosecutions of this sort, and based its reversal primarily on that error. The instruction, as given by the trial court, had been: "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religous and the irreligous, men, women, and *children* from all walks of life."[9] The Court stated that there was no evidence the material in question was likely to be received by children or that the petitioner intended it to be received by children, and that, if children were included in the consideration of the issue by the jury, the threshold of a finding of obscenity might be much lower.[10] To the extent that inclusion of a particular subset of people would facilitate a finding that material, otherwise protected, is obscene, the Court's reasoning is grounded on the very basis of the *Roth* decision.[11]

> The trial court's instruction to include sensitive persons read:
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> Thus the brochures, magazines, and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly *sensitive or insensitive* person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard, you must include the *sensitive and the insensitive*, in other words, you must include everyone in the community.[12]

It should be noted that in this instruction the district court made the conceptual change from community standards applied by the average person to the standard of the average person in the community. The shift is important in determining the propriety of sensitive person inclusion by the court.

If such a thing as a community standard were to exist within a given community, it would be the standard held by a majority of the people in the community. If what was sought were a standard held by a majority of the people making up the community, individual characteristics would not be a proper subject for consideration by the jury unless it was first shown

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[8] 98 S. Ct. at 1809.

[9] *Id.* at 1811 (emphasis added).

[10] 98 S. Ct. at 1812. The Court, however, chose to ignore the similar effect which might occur due to other subsets which were included in the instructions.

[11] *See* notes 22-23 and accompanying text, *infra*.

[12] 98 Sup. Ct. at 1812 (emphasis added).

that those characteristics were shared by that majority. In other words, if the standard were really to be a "community" standard, for sensitive persons to be included as such, it should first be shown that the group of persons holding the majority position was composed of sensitive persons in at least some significant part.[13]

On the other hand, if the standard used were that of the average man in the community (*i.e.*, an "average" community standard), it may well be proper to add together the views of *all* persons in the community, attempting to arrive at a common denominator. The Supreme Court in *Pinkus* states that "the term 'average' person as used in this charge means what it usually means, and is no less clear than 'reasonable' person used for generations in other contexts."[14] But to the extent that the average man in the context of obscenity cases is to include sensitive persons, he would seem to bear little resemblence to the average or reasonable man of other contexts.

In holding that the instruction was not reversible error, the Court raised a much greater issue than how a community standard is to be determined. Implicit in the instruction was that sensitive and insensitive persons were included to emphasize that the community was to include everyone. If it were proper to enumerate groups to emphasize that everyone is to be included in the concept of "community," it is difficult to reconcile a holding of reversible error in regard to the inclusion of children with a holding of no reversible error in regard to the inclusion of sensitive persons. Certainly the words "men, women and children" would seem to emphasize the requirement of all-inclusiveness, as well as, if not better than, "the sensitive and the insensitive." As with the evidence regarding children, there was no mention of evidence that sensitive persons were the intended recipients of the matetrial in question or that the petitioner had reason to know that sensitive persons were likely to receive the material. If the inclusion of children might cause a lowering of the threshold for a finding of obscenity, it would seem the inclusion of sensitive persons would be even more likely to lower that threshold. It was, after all, the fear of lowering the threshold to the point where material which should be protected might be found obscene that caused the Court in *Roth* to reject the previously used English standard and adopt the community standard test.[15]

In *Pinkus,* the Court stated that nothing in its prior opinions "suggests that 'sensitive' and 'insensitive' persons . . . are to be excluded from the community as a whole. . . ."[16] Under a literal reading of those cases, the

[13] *See generally* Bell, *Determining Community Standards,* 63 A.B.A.J. 1202 (1977).
[14] 98 S. Ct. at 1813.
[15] 354 U.S. at 488-89. *See* notes 18-19 and accompanying text, *infra.*
[16] 98 S. Ct. at 1813.

statement may be true, but the Court also observes that "[t]he vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials. . . ."[17] This is the very cornerstone of the *Roth* opinion and the community standard test. It is difficult to understand how a juror can avoid focusing upon sensitive persons after having been specifically instructed by the Court that he must include those persons in his evaluation of the community. To whatever degree sensitive persons are consciously included, to that degree they must be "focused" upon. If they are not to be considered and if the underlying principles of *Roth* are to be followed, it would seem that mention of sensitive persons, more than any other group, should be excluded from jury instructions.

In dealing with obscenity cases, the major problem facing the Supreme Court has not been whether obscenity is constitutionally protected, but rather the establishment of a standard or test by which obscenity could be defined. The British standard espoused in *Regina v. Hicklin*[18] was the first formally adopted by federal courts. Under the *Hicklin* standard, material could be found to be obscene if the effect of any excerpted part upon any person, even the most susceptible person, was to deprave or corrupt that person's morals.[19]

The Supreme Court took a fresh look at the *Hicklin* standard in *Roth v. United States.*[20] As defined in *Roth,* obscene material "deals with sex in a manner appealing to prurient interest."[21] Expressing the fear that legitimate material might be found to be obscene by sensitive persons judging isolated parts, the Court expressly rejected *Hicklin* as unconstitutionally restrictive.[22] The new test set forth was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[23] The Court stated that obscenity was not protected as it was "utterly without social importance."[24] Thus began a series of attempts, continuing to the present, to define a standard by which to determine obsenity.

The process of delineation of the *Roth* standard led to the decision of

[17] *Id.*

[18] L.R. 3 Q.B. 360 (1868). *See* Roth v. United States, 354 U.S. 476 (1957); Burgess, *Obscenity Prosecution: Artistic Value and the Concept of Immunity,* 39 N.Y.U.L. REV. 1062 (1964); Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295 (1954).

[19] United States v. Rosen, 161 U.S. 29 (1896); MacFadden v. United States, 165 F. 51 (3rd Cir. 1908); United States v. Bennett, 24 F.Cas. 1093 (C.C.S.D.N.Y. 1879).

[20] 354 U.S. 476 (1957).

[21] *Id.* at 487.

[22] *Id.* at 488-89.

[23] *Id.* at 489.

[24] *Id.* at 484.

*Memoirs v. Massachusetts*.[25] Here, the "utterly without social importance" basis for rejection of obscenity became part of the standard itself.[26] Now the test could be expressed as a three-part formula: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value."[27]

By way of expressing its dissatisfaction with the third section of the *Memoirs* test, the Court altered the standard in *Miller v. California*.[28] The test became:

> (a) whether "the average person applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks literary, artistic, political, or scientific value.[29]

While retaining both the "prurient interest" and "patently offensive" portions of the *Roth/Memoirs* test,[30] the Court thus made clear that the work was to be considered as a whole and could be found obscene even though not totally lacking in "redeeming social value."[31]

The use of a community standard as a norm against which to judge obscenity, first adopted by the Court in *Roth*, thus survived subsequent Supreme Court obscenity cases with only one exception. The single exception, which was to apply to material specifically aimed at deviant groups, was created in *Mishkin v. New York*.[32] There, the Court held that:

> [w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[33]

However, each part of the three-part test must be satisfied. A finding

[25] 383 U.S. 413 (1966).

[26] *Id.* at 419.

[27] *Id.* at 418.

[28] 413 U.S. 15 (1973).

[29] *Id.* at 24.

[30] The Court has viewed *Memiors* as refining the *Roth* test, rather than as overruling it, with the result that the two tests are viewed together as a unified standard. *See* Hamling v. United States, 418 U.S. 87, 99 (1974).

[31] 413 U.S. at 24.

[32] 383 U.S. 502 (1966).

[33] *Id.* at 508.

that the material appealed to the prurient interest of a specific deviant group to which it was directed would not alone be sufficient to support the conclusion that the material is obscene. Even when the deviant group exception is applicable, community standards must still be used in a determination of whether the work is patently offensive.[34]

The basic concept that material should be judged by the vehicle of the average person applying contemporary community standards had thus survived the alterations made in the *Roth* test and was fundamental to the rejection of *Hicklin* by the Court. This concept appears to have originated in a district court opinion by Judge (later Justice) Learned Hand, *United States v. Kennerly*.[35] Although, as Mr. Justice Brennan has observed, Judge Hand probably did not intend for "community" to be defined beyond the concept of contemporary society at large,[36] the Court has since attempted to define it at least on a geographical basis. A national community standard was often thought to be required[37] until *Miller* held that the use of a state community was not constitutional error.[38]

While recognizing that a national standard probably does not exist due to the pluralism of the nation,[39] the Court did not approach the question of whether a community standard was improbable on the same grounds within a smaller locality.[40] While later cases have left unclear whether the state or some smaller area is to be used, the Court has held that, although state laws dealing with obscenity might give some indication of community standards, they do not set those standards;[41] it is for the jury to determine the community standards[42] as well as whether expert testimony is needed.[43]

From the above and the wording of the standard itself, it would appear that to find material obscene, the jury must first determine the standards of

[34] Although the patently offensive section of the *Miller* test does not include the phrase "community standards," it remains the standard by which offensiveness is to be determined in cases tried under the *Miller* test. *See* Smith v. United States, 431 U.S. 291, 300-01 (1977).

[35] 209 F. 119 (S.D.N.Y. 1913).

[36] Jacobellis v. Ohio, 378 U.S. 184, 193 (1964).

[37] *Id.* at 195.

[38] 413 U.S. at 31.

[39] *Id.* at 32-33.

[40] *See generally* Bell, *supra* note 13. This article contains an excellent discussion of the possibility that a local community standard, insofar as that concept is understood to mean a consensus of opinion, may not in fact exist. It also illustrates how a jury might have a completely erroneous view of what the community standard is, or how the jury might believe they know what the standard is when none exists. *See also* Comment, *Community Standards and the Regulation of Obscenity*, 24 DEPAUL L. REV. 185 (1974); Note, 23 EMORY L.J. 550 (1974).

[41] Smith v. United States, 431 U.S. 291, 308 (1977).

[42] Hamling v. United States, 418 U.S. 87, 100 (1974).

[43] *Id.*

its community and then apply those standards to the material in question in a manner which the jury believes the hypothetical average man would apply them. However, the Court is inconsistent in its application of the test. In some instances, a community standard applied by the average person is used, while in others the standard becomes that of the average person of the community.[44] If the test is used in the latter form, the community is simply the determinant of the average man rather than the determinant of the standard, and that average man becomes the basis of the standard.

Whether the standard is that of the community or that of the average man in the community, the Supreme Court asserted, from the time of *Roth* until as recently as 1977[45] that, except for the *Mishkin* deviant group test, obscenity was not to be determined by its impact on a particularly sensitive or prudish person or, indeed, on any specific type of person.[46] The degree to which that assertion remains valid is left in doubt by the Court's decision in *Pinkus*.

While the Court in *Pinkus* did not break fresh ground by upholding the trial court's instruction pertaining to deviant groups, it did widen the furrow considerably. The trial court instructed the jury that the first test it should apply was whether the material "when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole *or* the prurient interest of members of a deviant sexual group at the time of mailing."[47] When the Supreme Court introduced the deviant group exception in *Mishkin*, it stated that for the exception to be applicable, the material must be "designed for and primarily disseminated to a clearly defined deviant sexual group" instead of the general public.[48] In *Miller* the Court affirmed the position holding any portion of the material which was not specifically intended for a deviant group required the application of the community standards test.[49] Reviewing the

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[44] In fact, the inconsistency often appears within the same case. Thus, for example, in Hamling v. United States, 418 U.S. 87 (1974), the Court states that "a juror is entitled to draw on his knowledge of the views of the average person . . . ," but on the next page states that "[t]he result of the *Miller* cases . . . is to permit a juror sitting in obscenity cases to draw on the knowledge of the community or vicinage from which he comes . . . ." *Id.* at 104, 105. Again, in Smith v. United States, 413 U.S. 291 (1977), the opinion reads "obscenity is to be judged according to the average person in the community . . . ," but later states "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community . . . ." *Id.* at 304, 305.

[45] Smith v. United States, 431 U.S. 291 (1977).

[46] *Id.* at 300 n.6.

[47] 98 S. Ct. at 1814 (emphasis added).

[48] 383 U.S. at 508.

[49] 413 U.S. at 33. That position was affirmed in Hamling v. United States, 418 U.S. 87, 128-30 (1974).

material at issue in *Pinkus*, the Supreme Court concluded that, while its prurient interest might be of a greater magnitude to members of deviant groups,[50] "it is equally clear that they were intended to arouse the prurient interest of any reader or observer."[51] The Court also held that, except in the "extreme case," expert testimony is not needed and the jury is presumed to know what the reaction of deviant groups to the material will be.[52] Thus, it need no longer be shown that material was primarily intended for a deviant group in order for the jury to utilize the exception to the community standard test. It appears that if the jury, based on its own knowledge, believes that the material is likely to appeal more strongly to the prurient interest of a deviant group, it may use that group rather than the community as a whole in regard to prurient appeal.

Supreme Court decisions from *Roth* until *Pinkus* started by making a finding of obscenity more difficult, but gradually eased that difficulty. However, the standard by which obscenity was to be judged remained, until *Pinkus*, within the confines of the community standard doctrine, the sole deviation from the doctrine being the deviant group exception. To the extent that the Court has attempted to delineate the relevant community, either on a geographical basis or through its insistence that the community includes all adults within its physical boundaries, the Court has altered Judge Hand's concept of a community standard. But to the extent that *Pinkus* allows any specific subset to be noticed by the trier-of-fact in determining a standard against which to assess alleged obscene material, whether that subset is composed of sensitive, insensitive, deviant or any other type of persons, the Court has turned its back on the underlying doctrine of *Roth* and returned to the nineteenth century standard of *Regina v. Hicklin*. It would thus appear that the Court is in less than complete agreement with the view of Judge Hand, who said: "To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."[53]

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[50] There was expert testimony at the trial to the effect that some of the material would appeal to the prurient interests of particular deviant groups, as well as to the prurient interests of the average person. 98 S. Ct. at 1811.

[51] 98 S. Ct. at 1814.

[52] *Id.* at 1814-15.

[53] 209 F. at 121.