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The Finance Cases

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Projected Court Decision Extends Obscenity Ruling To Curb Man's "Base Instinct" of Culling a Fast Buck

In The Finance Cases, reported below, Jethro K. Lieberman, 2L, aroused by the recent decisions in the Obscenity Cases, cautiously predicts the next step in the trend.

The Finance Cases, 400 U.S. 1 (1972).

OPINION OF THE COURT

Appellants in these cases were convicted under the so-called Baser Instincts Act of New York (N. Y. Stat. §1,000,000) for the distribution of books dealing with financial investments and the stock market, and encouraging "ways of making money other than by hard work." Appellants do not deny the fact of publication or distribution but claim that the statute is unconstitutional on its face under the First Amendment as made applicable to the states by the Fourteenth, and that the language is so vague as to deny them due process of law.

I

As construed by the Court of Appeals of New York (whose construction is, of course, binding on us, Near v. Minnesota, 283 U. S. 697, 708 (1931), only those publications which clearly pander to a "pure pecuniary interest, a money for money's sake interest" are prohibited. The First Amendment is no more a bar to the prohibition against the publication and distribution of such books, the Court of Appeals says, than it is to the prohibition against the publication of obscene books. The Obscenity Cases, — U. S. — (1966). We agree.

It is of no moment, even if true, that the Act was passed in retaliation against the move of the New York Stock Exchange to Hoboken, New Jersey, during the summer of 1966. The Act clearly spells out its intent: "to stop the spread of man's baser instincts in the accumulation of wealth for wealth's sake" §1,000,000(a).

Social commentators and psychologists disagree about the dangers to society of such instincts. It is pointed out that animals do not seek after money. It is said that the lust for wealth causes alienation, which in turn causes social unrest, and even, "existential *Angst.*"

Others assert that the drive to gain money is crucial to a growth economy. If the Act had made it illegal to earn money by any means, we might agree that the economic growth argument had merit. But the Act merely prohibits the making of money for money's sake. There is a crucial difference.

Sheer Dogmatism

Against a background of such disagreement, it is not for this Court to say that New York is clearly wrong in its assessment of the danger. As Mr. Justice Frankfurter, dissenting, said in Winters v. New York, 333 U. S. 507, 529 (1942): "It would be sheer dogmatism in a field not within the professional competence of judges to deny to the New York legislature the right to believe that the intent of the type of the publications which it has proscribed is to cater to morbid and immature minds — whether chronologically or permanently immature."

It is not for us to tell a legislature it cannot prohibit those acts which it reasonably believes perpetuate man's baser instincts to the detriment of society. It is not for us to strike down New York's brave course in building a society dedicated to the pursuit of man's higher aspirations.

II

The only issue raised in this case is whether the publication can be prohibited. New York makes it a crime to engage in any acts with the motive of making money for money's sake. By an analogy to the statutes making fornication illegal (sex for sex's sake) we have today upheld the statute in a separate case. Mountebank v. New York, post. That being so, the question in this case is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress [or the State or City] has a right to prevent." Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47, 52 (1919).

In Davis v. Beacon, 133 U. S. 333 *(1890), this Court per Mr.* Justice Field held that no constitutional objection could be interposed to an Idaho statute

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What do you think — some kind of bluff?

Filthy Lucre

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prohibiting proponents of polygamy from voting or from holding state office. "It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society." 133 U. S. at 342.

Clear and Present

We do not think that making money for money's sake is any more immune from attack than polygamy. Nor is it necessary that the clear and present danger be immediate. Gitlow v. New York, 268 U. S. 652, 669 (1925).

III

We turn next to the argument that the Act is void for vagueness. We find no merit in appellants' contentions. Although we cannot define "hard work" (the element necessary to negative the presumption that wealth is being sought after for wealth's sake), we know it when we see it, and we do not see it here.

Playing the stock market is not such hard work that New York's proscription of it fails. We reserve the question of the permissible scope of "hard work" for a later case.

IV

It is argued that there is no evidence that the books in question pandered to a "pure pecuniary interest." We disagree. On the cover of the books was a graphic representation of money, riches, and treasure. It bore the legend: "Now you can learn the secrets of Wall Street." (Wall Street, as the lower court informs us, is "unhappily still regarded as the bastion of those who seek money for money's sake.")

The circulars sent for these books "stressed the . . . candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as unrestricted license allowed by law in the expression of" financial matters. Ginzburg v. United States, — U. S. — (1966). The intent is clear enough, and evidence enough.

V

It is argued that to sentence appellants to jail for five years "merely" for writing about financial matters is "cruel and unusual punishment," unconstitutional under the Eighth Amendment. But if a man could be sent to jail for the same period for selling pornographic books at a price so high that those who would be adversely affected could never obtain copies other than through libraries to which they never retire, it is inconceivable that these appellants cannot be jailed for selling books at a price so low that almost anyone could afford to purchase them.

Titillation and Eros

Eros Magazine, one of the offensive publications in *Ginzburg*, was titillation for the sophisticate; these books on finance are titillation for the masses. The penalty is not cruel and unusual.

Conviction affirmed.

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