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Note

NOTE

CONSTITUTIONAL LAW—OBSCENITY NOT PROTECTED BY FIRST OR FOURTEENTH AMENDMENTS—"PRURIENT INTEREST" IS DECLARED CURRENT CONSTITUTIONAL TEST FOR OBSCENITY.—On June 24, 1957 the United States Supreme Court in two cases combined on appeal, ruled for the first time that an obscene utterance was not within the area of constitutionally protected free speech or press.[1]

In the first case, *Roth* v. *United States*,[2] the defendant conducted a business in New York for the publication and sale of books, photographs and magazines, with circulars and advertising matter used to solicit sales. He was convicted of mailing obscene circulars and advertising, and an obscene book in violation of the federal obscenity statute.[3] In the second case, *Alberts* v. *California*,[4] the defendant conducted a mail order business from Los Angeles. He was convicted of selling obscene and indecent books, and of writing, composing, and publishing an obscene advertisement for them, which acts are in violation of the California Penal Code.[5] Justice Brennan, speaking for five members of the Court, held that the statutes in question do not violate the rights of freedom of speech and the press as contained in the First or Fourteenth Amendments. On other collateral questions, the Court upheld the statutes against allegations of unconstitutionality. It also ruled that the federal statute was within the postal power of Congress[6] and did not encroach upon the powers reserved to the states in the Ninth and Tenth Amendments by its preempting the regulation of the mailing of

[1] Roth v. United States and Alberts v. State of California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[2] Roth v. United States, 237 F. 2d 796 (2d Cir. 1956), *cert. granted,* 352 U. S. 964, 77 S. Ct. 361, 1 L. Ed. 2d 319 (1957).

[3] 18 U. S. C. § 1461 was originally passed as § 148 of the act of June 8, 1872, 17 Stat. 302, and thence derived from Rev. Stat. § 3893 (1875): "Every obscene . . . or filthy book, pamphlet, picture . . . or other publication of an indecent character; and . . . ."

". . . .

"Every . . . advertisement or notice of any kind giving information . . . where, or how, . . . or by what means any of such mentioned matters, articles or things may be obtained. . . ."

". . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ."

[4] Alberts v. State of California, 138 Cal. App. 2d Supp. 909, 292 P. 2d 90 (1955). Probable Supreme Court Jurisdiction noted in 352 U. S. 962, 77 S. Ct. 349, 1 L. Ed. 2d 319 (1957).

[5] CAL. PEN. CODE ANN. § 311 (West 1955): "Every person who wilfully and lewdly either:

". . . .

"3. writes . . . prints, publishes, sells . . . keeps for sale or exhibits any obscene or indecent writing, paper, or book . . . or otherwise prepares any obscene or indecent picture or print . . . or,

"4. writes, . . . or publishes any notice or advertisement of any such writing, paper, book, picture . . . or figure; . . . ."

". . . .

"6. . . . is guilty of a misdemeanor. . . ."

[6] U. S. CONST. Art. I, § 8, Cl. 7.

obscene matter so as to bar application of the California statute to the defendant Alberts.

The word "obscenity" is by its nature difficult to define because it constitutes a moral determination;[7] it was, therefore, a considered opinion that the statutes in question would be attacked for the reason that they do not provide reasonably ascertainable standards of guilt. The majority of the Court met this issue head-on, however, by showing that the lack of precision is not, per se, offensive to the requisites of the due process clause. It cited to support its view, that part of the opinion in *United States* v. *Petrillo*[8] which states that: "The Constitution does not require impossible standards," and that all that is required is that the language "conveys sufficiently definite warning as the proscribed conduct when measured by common understanding and practices." The Court submitted that there would be marginal cases in which it would be difficult to determine on which side of the line a particular fact situation falls, but that this should not be sufficient reason to hold the language too ambiguous to define a criminal offense.

The Court further declared that the First Amendment was not intended to protect every utterance, and that obscenity should be restrained because it has no redeeming social value. It cited the international agreement signed by over fifty nations[9] and also the laws of the forty-eight states,[10] both of which reject the use of obscenity. This declaration is similar to the proposition of Judge Desmond of the New York Court of Appeals, who in his concurring opinion in *Brown* v. *Kingsley Books*,[11] suggests that obscenity is not protected by the First Amendment and therefore any statute that curbs it is constitutional. The *Kingsley Book* case dealt with a court order to destroy booklets entitled "Nights of Horror." The statute[12] under which the order was issued provided for a civil injunction, the quintessence of which was a proceeding to determine whether the book was obscene. If it was found obscene the seller was compelled to surrender all his copies to the sheriff, who was directed to destroy them. If the seller continued to sell the book he would be charged with knowledge of the contents.

On the same day that the instant cases were decided, the Supreme Court in a five to four decision upheld the New York Court of Appeals decision in the *Kingsley Book* case.[13] These cases, it would appear, indicate that any challenge to the constitutionality of an obscenity statute will generate little sympathy or support from our Supreme Court.

[7] "The fundamental reason that obscenity is not susceptible of exact definition is that such intangible moral concepts as it purports to connote vary in meaning from one period to another." CARDOZO, PARADOXES OF LEGAL SCIENCE § 37 (1928).

[8] 332 U. S. 1, 7-8, 67 S. Ct. 1538, 1542, 91 L. Ed. 1877 (1948).

[9] Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511 T. S. No. 559 (1911); see TREATIES IN FORCE No. 209 (U. S. Dept. State, October 31, 1956).

[10] Hearings before Subcommittee to Investigate Juvenile Delinquency, of the Senate Committee on the Judiciary, pursuant to S. Res. 62, 84th Cong. 1st Sess. 49-52 (May 24, 1955).

Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N. M. STAT. ANN. § 14-21-3, 14-21-12 (1953).

[11] 1 N. Y. 2d 179, 134 N. E. 2d 468 (1956). See, *Statutory Innovation In the Obscenity Field,* 6 BUFFALO L. REV. 305 (1957), and *Enjoining Distributions of Obscene Literature Not An Unconstitutional Prior Restraint,* 8 SYRACUSE L. REV. 106 (1956).

[12] N. Y. CODE OF CRIM. PROC. § 22(a).

[13] Kingsley Books v. Brown, 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

The Court's crystallization of the current standard or test for judging "obscenity" is perhaps its most signal contribution. The appellants strenuously had urged that these statutes violate the Constitution because they have not been shown to be related to antisocial conduct, though they admittedly incite obscene thinking. This contention was rebutted by the Court stating that in the same manner as libelous utterances,[14] it is not necessary for the Court to consider whether there exists any clear and present danger that the expression involved will compel one to commit an evil act.[15] It is sufficient if the expression appeals to a prurient interest which has been defined as "a shameful or morbid interest in nudity, sex or excretion."[16]

It was this prurient interest test that came under the heaviest attack by the dissent. Justice Douglas, joined by Justice Black, declared that one of the basic principles of our society is that the government functions by controlling the acts, not the thoughts, of its members, and that the prurient interest test was therefore unconstitutional because it does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit.[17] The dissent further reasoned that obscenity is not inherently like libel,[18] and there was, in fact, no historical evidence that literature dealing with sex was even intended to be treated in a special manner by those who drafted the First Amendment. Vigorous dissents were also voiced relative to the adequate definiteness of the statutes by stating that ". . . any test that turns on what is offensive to the communtiy's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment." The dissent concluded that by such a test ". . . the role of the censor is exalted, and society's values in literary freedom are sacrificed."

Chief Justice Warren, in a separate opinion, concurred in the result, but expressed doubts as to the wisdom of the broad language used in the majority opinion. He would restrict the opinion to only the present facts. He emphasized that the tests applied in these two cases were not to be taken as a carte blanche of constitutionality for all similar obscenity statutes. His dissenting opinion in the *Brown* v. *Kingsley Books*[19] case demonstrates that he will consider each such statute on its own merits.

Justice Harlan, who, in a separate opinion, concurred with the majority in the *Alberts* case, but held with the dissent in the *Roth* case, voiced the opinion that the Federal statute was unconstitutional because Congress has no substantive power to regulate public morals. Such powers as the Federal Government has in this field, he

[14] The Court cited the decision in Beauharnais v. Illinois, 343 U. S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), which declared that libelous utterances are not protected by the U. S. Constitution.

[15] Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). See THE LAW OF OBSCENITY, and the *Constitution,* 38 MINN. L. REV. 295 (1954).

[16] MODEL PENAL CODE, § 207.10(2) (Tent. Draft No. 6, 1957): ". . . . [A] thing is obscene if, considered as a whole, its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion . . . beyond customary limits of candor or representation of such matters."

[17] Freedom of expression can be inhibited only if it is so closely allied with illegal action as to be an inseparable part of it. Giboney v. Empire Storage and Ice Co., 336 U. S. 490, 498, 69 S. Ct. 684, 688, 93 L. Ed. 834 (1949); National Labor Relations Board v. Virginia Power Co., 314 U. S. 469, 477-478, 62 S. Ct. 344, 348, 86 L. Ed. 348 (1941). Cf. REPPY, CIVIL RIGHTS IN THE UNITED STATES, p. 81-82, 194, 261 (1951).

[18] The dissent noted that Beauharnais v. Illinois, 343 U. S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1925), was the only case that placed any form of expression beyond the pale of the absolute prohibition of the First Amendment, and indicated that it should be clearly restricted to similar facts dealing with libel.

[19] See note 13, *supra.*

stated, "are but incidental to its other powers, here the postal power, and are not the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric." He noted that one of the great strengths of our federal system is that we have, in the forty-eight states forty-eight experimental social laboratories. Different states will have different attitudes toward the same work of literature. The same book which is freely read in one state might be classed as obscene in another.[20] The Justice felt that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the states, so long as there is no uniform federal nation-wide suppression of the book. Federal censorship would result in a deadening uniformity. It was submitted that the Government should have power to inhibit what is ambiguously referred to as "hard-core" pornography.

Alberts presented the last issue to be disposed of by the Court when he argued that because his was a mail-order business, the California statute is repugnant to the Article 1, Section 8, Clause 7 of the U.S. Constitution, under which Congress allegedly preempted the regulatory field by enacting the federal obscenity statute. The Court stated that the federal statute deals only with the actual mailing and does not eliminate the power of the state to punish "keeping for sale or advertisement" obscene material. It was ruled that the state statute in no way imposes a burden or intereferes with the federal postal functions.

In summary, it can be stated categorically that this opinion will have profound impact on legislative attempts at raising the nation's moral standards, or, perhaps, preventing the lowering of the present standards.[21] Only time will tell whether the caveat sounded by the dissent, "that the test that suppresses a cheap tract today can suppress a literary gem of tomorrow," was worthy of notice.

[20] For example the book "God's Little Acre" was found obscene in Massachusetts, Atty. Gen. v. God's Little Acre, 326 Mass. 281, 93 N. E. 2d 819 (1950) and "Memoirs of Hecate County" was found obscene in New York, see Doubleday and Co. v. New York, 335 U. S. 848, 69 S. Ct. 79, 93 L. Ed. 398 (1949), yet there is no report that either of these books was found obscene in other states of the Union.

[21] AMERICAN BOOK PUBLISHER'S COUNCIL, BULLETIN No. 377, see Bok, CIVIL LIBERTIES UNDER ATTACK, pp. 117-120 (1951). Activity in this field has not been restricted to the legislatures. Many private groups have entered the censorship scene using persuasion and boycott as their weapons. REPORT OF BISHOP'S COMMITTEE SPONSORING THE NATIONAL ASSOCIATION FOR DECENT LITERATURE DRIVE FOR DECENCY IN PRINT (1939). See Harper's, Oct. 1956, pp. 14-20 for a critical analysis of the methods and effectiveness of the National Association for Decent Literature.