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Constitutional Law, Freedom of Speech, Lack of Scienter in City Ordinance Against Obscenity Violates First Amendment

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—LACK OF SCIENTER ELEMENT IN CITY ORDINANCE AGAINST OBSCENITY VIOLATES FIRST AMENDMENT

The United States Supreme Court in a recent decision[1] has beaten back an attempt by the City of Los Angeles to place new fetters on the free speech guaranties of the First Amendment. The city passed an ordinance[2] making it unlawful for anyone to have in his possession any obscene or indecent book in any place of business where books were sold or kept for sale. Appellant, a bookseller, was prosecuted under the ordinance. He objected to its constitutionality on the ground that it was an imposition of strict liability with no requirement of scienter. Therefore a bookseller could be convicted with no showing on the part of the prosecution of knowledge that the material in his possession was in fact obscene. The Superior Court for Los Angeles County affirmed conviction[3] on the ground that the municipality had the right to pass such restrictive legislation since "the United States Supreme Court has held that obscenity is not within the area of constitutionally protected free speech or press."[4] The court felt the book concerned in the prosecution was obscene by any test hence appellant was without a valid constitutional argument since he was not selling protected material. In upholding the ordinance the Los Angeles court recognized that it did not require knowledge or scienter on the part of the bookseller. This, the court said, did not put the ordinance in conflict with the state obscenity statute[5] (which required a showing of "willful and unlawful" possession with "lewd" intent).[6] The City ordinance, not being in conflict with the statute need not yield to its supremacy. The court said the ordinance merely went one step further than the statute withdrawing the element of scienter. The court felt that

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[1] Smith v. California, 358 U. S. 926, 80 S. Ct. 215, 3 L. Ed. 2nd 299 (1959).

[2] Los Angeles, Municipal Code No. 41.01.1.

[3] 161 Cal. App. 2d 860, 327 P. 2d 636 (1958).

[4] Roth v. United States, Alberts v. California, two cases, 354 U.S. 476, at 485 (1957).

[5] Cal. Penal Code Ann. No. 311 (West, 1955).

[6] People v. Wepplo, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 (1947).

the city, acting within the scope of its police power, had a right to protect its citizens against the sale of articles dangerous or deleterious to the public or contrary to public morals. Ordinances basing conviction upon possession alone, without more, of other such dangerous articles have been held constitutional. Therefore said the court, "So with books."

The Supreme Court granted certiorari reversing the conviction with four justices concurring and one dissenting in part.[7] The court felt the ordinance, in excluding a requirement of *mens rea*, was unduly restrictive and was unconstitutional because of its tendency to inhibit free speech.[8]

The Supreme Court has made it clear from the first that the Constitution does not compel so high a value to be placed on freedom of expression that it can never be subordinated to other interests.[9] The doctrine that obscenity is outside the free speech protection of the First Amendment is first discernible in *Near* v. *Minnesota*.[10] This dictum was expanded further in *Chaplinsky* v. *New Hampshire*[11] and *Beauharnais* v. *Illinois*.[12] The most recent restatement took place in *Roth* v. *United States*[13] where the majority after a historical approach concluded; " . . . it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance . . . At the time of the adoption of the First Amendment obscenity law was not as fully developed as libel law but there is sufficiently contemporaneous evidence to show that obscenity too, was outside the protection intended for free

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[7] Smith v. California, supra note 1.

[8] The basis of jurisdiction for the federal court ruling on the local ordinance here is the principle, assumed as correct by the majority of the court, that the Fourteenth Amendment applies the restrictions of the First with equal force against the states. See Gitlow v. New York, 268 U.S. 652 (1924), and Whitney v. California, 274 U.S. 357 (1927).

[9] Richardson, "Freedom of Expression and the Function of the Courts." 65 Harv. L. Rev. 1 (1951).

[10] 283 U. S. 697 (1930). At page 714 the court said, "No one would question but that a government might prevent actual obstruction to its recruiting or the publication of the sailing dates of transports or the number and location of troops. On similar grounds the primary requirements of decency may be enforced against obscene publications."

[11] 315 U.S. 568 (1941).

[12] 343 U.S. 250 (1951).

[13] 354 U.S. 476 (1957).

speech and press."[14] This series of decisions would seem to have settled the principle that obscenity, as such, is outside the protection of the First Amendment. The problem lies in dealing with what is not obviously obscene and even with the definition of the word itself.[15] It is in this twilight zone that the conflict arises as to whether the court will balance the interests involved or treat the words of the First Amendment as imparting absolute protection to free speech. The test used in determining whether freedom of expression must be weighed in relation to more important interests has been that of "clear and present danger."[16] The Court in *Dennis* v. *United States* adopted Judge Learned Hand's interpretation of the Test: "In each case [courts] must ask whether the gravity of the evil discounted by its improbability justifies the invasion of free speech as is necesary to avoid the danger."[17] In a separate concurring opinion Mr. Justice Frankfurter said, "The demands of a free speech in a democratic society . . . are better served by a candid and informed weighing of the competing interests, within the confines of the judicial process . . ."[18] However the "clear and present danger" formula is difficult to apply to freedom of speech cases outside of the overthrow of government situations as presented in the *Dennis case.* Some dangers less grave than overthrow of the government by force and violence are concededly of a sufficient seriousness to warrant the restriction of free speech.[19] In this light the balancing of interests advocated by Mr. Justice Frankfurter makes good sense. Indeed, the court has moved in that direction and away from "clear and present danger" in recent cases. In *Beauharnais* v. *Illinois* the court found "clear and present danger" not applicable to libelous utterances. In addition there was dictum to the effect that obscenity was a class of

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[14] *Id.*, at 483.

[15] See Lockhart and McClure, "Literature, The Law of Obscenity and the Constitution." 38 Minn. L. Rev. 295 (1954). At 323 the authors state: "The law of obscenity undertakes to protect a common standard in an area where there is no such thing for each community is divided into groups that have different standards of decency."

[16] Mendelson, "Clear and Present Danger—From Schenck To Dennis." 52 Col. L. Rev. 313 (1952).

[17] 341 U.S. 494, at 510 (1951).

[18] *Id.*, 524-525.

[19] 51 Col. L. Rev. 98, at 105 (1951).

speech to which the test did not apply.[20] The dictum in *Beauharnais* was picked up in the majority opinion in *Roth* v. *United States*.[21] On the basis of these cases it is probably safe to assume as a settled principle that the "clear and present danger" test will no longer be used in deciding obscenity cases.

In Roth the court recognized in obscenity a social problem on one hand and the necessity for safeguarding the protection of freedom of speech and press on the other. The majority felt that constitutional protection should not extend beyond the point where the average person applying contemporary community standards feels the dominant theme of the material, taken as a whole, appeals to a prurient interest.[22] The *Smith* case under discussion here balances the interest of the community in having an ordinance controlling obscenity, against the harm done to the First Amendment freedoms through the lack of a scienter element. In this light the case is a logical step by the court toward continued use of the balancing of competing interests formula in construing obscenity statutes. When the obscenity of the material involved is also an issue the "prurient interest" test is applied to it.[23]

The decisions in freedom of expression cases in which the court attempts to balance the interests are not without strong dissents. This is especially true in the obscenity cases. Justices Black and Douglas concurred in a strong rejection of the courts balancing of the interests in *Roth*. The opinion, written by Black, said, "I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression . . . The First Amendment, its prohibition in terms absolute was designed to preclude courts as well as legislatures from weighing the values of free

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[20] 343 U.S. 250, at 266 (1951).

[21] 354 U.S. 476, at 486-487 (1957).

[22] *Id., at* 514.

[23] Some writers believe the value of any test used to ban obscene material is of little value especially when incorporated into legislation. It is argued that the recognition of the constitutional issue and review by the courts of each work on its merits, taking into account all of the broader policy issues will insure a more intelligent and carefully weighed determination than can be made by police officers or other equally unqualified censors. See Lockhart and McClure, *supra* note 14 at 388.

speech against silence. The first Amendment puts free speech in a preferred position."[24] Mr. Justice Douglas, while concurring with the majority in the *Smith* decision, indicated that he differed with their philosophy as to the extent one can be punished under the Bill of Rights for publishing or distributing obscenity. The grounds for suppression of free expression are very narrow, Douglas feels. He rejects the fluid tests of obscenity which prevail, "For the test that suppresses a cheap tract today can suppress a literary gem tomorrow."[25] Dissents such as these have their value in keeping the court appraised of its role as guardian of Constitutional rights when it is tempted go too far in balancing the interests.

A further conflict in the court arises as to the extent to which the Federal Constitution prohibits state regulation of freedom of expression. This is important in the *Smith case* because of prior holdings by the Supreme Court that the Fourteenth Amendment applies all of the force of the First against the states.[26] Certain of the Justices feel that the First Amendment should not apply as strictly to the states. Mr. Justice Jackson in *Beauharnais* v. *Illinois* pointed out the weakness of a single standard to both federal and state action in this field.[27] The Federal government has very limited authority to weigh the maintenance of free speech against social interests favoring suppression. The First amendment strongly inhibits any federal action along this line. States, on the other hand, have different functions and duties in relation to the freedoms of speech and press. Consequently states should be permitted greater latitude in controlling free speech when they consider other social interests more important. Mr. Justice Harlan in the *Roth case* adopted this view and also pointed out that, ". . . the dangers of federal censorship in this field are far greater than anything the states may do."[28] In the instant case Harlan again brought out this principle in his partial dissent. He contended that the court needed more information than it had before striking

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[24] Roth v. United States, *supra* note 4 at 514.

[25] Smith v. United States, *supra* note 1 at 226-227.

[26] Stromberg v. California, 283 U. S. 359 (1931); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[27] 343 U.S. 250, at 294-295 (1951).

[28] Roth v. United States, *supra* note 4 at 505.

down the ordinance as unconstitutional. Different considerations are involved depending on whether a state or federal statute is before the court. If states have greater scope than the federal government in barring material as obscene then the court should remand the case for a further showing by the city of necessity for such an ordinance. Harlan implies that he would consider an adequate showing of sufficient public need justification for upholding the constitutionality of the ordinance. Even though its effect might be to induce booksellers to restrict their offerings of non-obscene literary merchandise for fear of unwittingly having on their shelves an obscene publication, Harlan feels a state may constitutionally do this to protect its citizens against the dissemination of obscene material.

The entire field of obscenity regulation involves the drawing of fine lines, the setting of delicate balances, and the laying of flexible boundaries. A legal line must be drawn between decency and indeceny.[29] A balance must be struck between the community's need for regulation of obscenity and the continuance of freedom of expression. And finally the difference in scope between state and federal power to legislate against it must be determined. All of these factors must be considered by legislators in devising statutes and the courts in interpreting them. The role of the Supreme Court is to indicate to these bodies the boundary points of the territory covered by the First Amendment freedoms, beyond which they must not trespass in pursuing their respective social needs. One of those points is defined clearly by the decision in the instant case.

D. A. B.

[29] Chafee, Free Speech in the United States, 531-535 (1941).

DOMESTIC RELATIONS, DIVORCE, RETROACTIVE MODIFICATION OF ACCRUED ALIMONY

A recent Nebraska decision, *Rhuehle* v. *Rhuehle*, serves as a competent guide in examining the question of the ability of the courts to retroactively modify accrued installments of alimony.[1] This was an action by a wife to recover the amount

[1] Rhuehle v. Rhuehle, 169 Neb. 23, 97 N.W. 2d 868 (1959); See Rhuehle v. Rhuehle, 161 Neb. 691, 74 N.W. 2d 690, (1956).