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Constitutional Law - Censorship of Obscence Literature

Donald M. Wilkinson, Jr. S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—CENSORSHIP OF OBSCENE LITERATURE—The right to a free expression of ideas, without interference from governmental authorities, is inherent in the very nature of a democracy.[1] On the other hand, it is also clear that the greater interests of the state at large will conflict with certain forms of expression, and in such circumstances obviously the former must prevail. It is the purpose of this comment to discuss the constitutional limitations on the governmental suppression of literature on grounds of obscenity.[2]

[1] ". . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . ." Justice Holmes, dissenting in Abrams v. United States, 250 U.S. 616 at 630, 40 S.Ct. 17 (1919).

[2] Although it is conceded that governmental powers to limit expression are not confined solely to obscene literature, this comment will consider only the latter.

I. *The Common Law Heritage*

The problem of requiring literary publications to conform to certain basic moral standards is not a modern one. Originally, the English common law courts imposed no criminal sanctions on the publication and distribution of obscene or lewd material.[3] Although disturbed by their inability to meet the situation, the early judges ruled against any criminal liability, on the ground that no adequate precedent could be found.[4] It was pointed out that this was not properly a problem for the temporal courts, but rather for the ecclesiastical courts, which in their great concern with spiritual matters must necessarily possess power to punish obscenity. However, it became increasingly evident that either the ecclesiastical courts had no jurisdiction over the matter, were not exercising it, or were doing so quite ineffectively. For it was not too long after the issue had first been presented to the English court[5] that it reversed itself. In *Rex v. Curl*,[6] the Court of the King's Bench ruled that the publication of obscene matter was an offense against the Crown and must necessarily be punishable in the common law courts. Thus was established the crime of obscene libel, which Blackstone in his *Commentaries*[7] later recognized as a part of the common law of England.[8] That this common law criminal liability was carried over to the United States and still exists today seems clear,[9] although for all practical purposes actions are now prosecuted in pursuance of appropriate statutes.[10] It has never been contended that the protections of the First[11] and Fourteenth[12] Amendments to the United States Constitution served to abolish these common law sanctions in this country.[13]

[3] Regina v. Read, Fort. 98, 92 Eng. Rep. 777 (1707).

[4] In Regina v. Read, Fort. 98, 92 Eng. Rep. 777 (1707), it was argued that Le Roy v. Sir Charles Sedley, 1 Sid. 168, 82 Eng. Rep. 1036 (1663), represented authority for punishment of overt obscenity, but the court concluded that this decision rested on criminal assault and battery.

[5] Regina v. Read, Fort. 98, 92 Eng. Rep. 777 (1707).

[6] 2 Strange 788, 93 Eng. Rep. 849 (1727).

[7] BLACKST., COMM., book IV, pp. 150-153.

[8] See generally 2 WHARTON, CRIMINAL LAW, 12th ed., §§1942-1946 (1932).

[9] Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 (1815); Commonwealth v. Holmes, 17 Mass. 336 (1821); State. v. Appling, 25 Mo. 315 (1857).

[10] See note 14 infra.

[11] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST., amend. I.

[12] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST., amend. XIV.

[13] See 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 883 (1927).

II. *Under Modern Statutes*

Any fruitful consideration of effective restraint on obscene literature today must take into account prevalent state statutes and municipal ordinances. These form the basis for all attempts at suppression of morally undesirable publications. Forty-seven of our states have statutes imposing criminal liability for the publication or distribution of obscene matter.[14] New Mexico, the one state having no provision for the punishment of obscene publications, expressly empowers the municipalities to impose criminal sanctions.[15] Even where state criminal provisions exist, it is common to find an overlapping enforcement, due to the presence of local ordinances.[16]

A. *Constitutionality of Provisions.* The initial inquiry must be whether these statutory provisions run afoul of First Amendment protections of free speech, guaranteed by the Fourteenth Amendment against infringement by the state.[17] The concern here is not with the question of the validity of prior restraints on expression.[18] This latter phase of the constitutional problem raised by these statutory

[14] Ala. Code (1940) tit. 14, §373; Ariz. Code Ann. (1939) c. 43, §3002; Ark. Stat. Ann. (1947) §41-2704; Cal. Penal Code (1949) §311; Colo. Stat. Ann. (1935) c. 48, §217; Conn. Gen. Stat. (1949) §8567; Del. Code Ann. (1953) tit. 11, §711; Fla. Stat. Ann. (1944) §847.01; Ga. Code Ann. (1935) tit. 26, §6301; Idaho Code (1948) §18-4101; Ill. Rev. Stat. (1935) c. 38, §468; Ind. Stat. Ann. (Burns, 1933) c. 28, §§10-2804, 10-2805; Iowa Code Ann. (1950) tit. 35, §725.4; Kan. Gen. Stat. Ann. (1949) c. 21, §§1101, 1102; Ky. Rev. Stat. (1953) §436.100; La. Rev. Stat. (1950) tit. 14, §106; Me. Rev. Stat. (1944) c. 121, §24; Md. Code Ann. (1951) art. 27, §515; Mass. Laws Ann. (1952 Supp.) c. 272, §28 (§28C provides for proceedings against the book itself in order to determine obscenity); Mich. Stat. Ann. (1938) §28.575; Minn. Stat. Ann. (1947) §617.24; Miss. Code Ann. (1942) tit. 11, §2288; Mo. Stat. Ann. (1953) §563.280; Mont. Rev. Code (1947) tit. 94, §3603; Neb. Rev. Stat. (1943) c. 28, §921; Nev. Comp. Laws (1929) §10144; N.H. Rev. Laws (1942) c. 441, §§14, 17; N.J. Rev. Stat. (1937) §2:140-2; 39 N.Y. Consol. Laws (McKinney, 1944) §1141; N.C. Gen. Stat. (1953) c. 14, §189; N.D. Rev. Code (1943) tit. 12, §2109; Ohio Rev. Code (Baldwin, 1953) §2905.34; Okla. Stat. Ann. (1937) tit. 21, §1021; Ore. Comp. Laws Ann. (1940) §23-924; Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4524; R.I. Gen. Laws (1938) c. 610, §13; S.C. Code (1952) tit. 16, §414; S.D. Code (1939) tit. 13, §1722; Tenn. Code Ann. (Williams, 1934) §11190; Tex. Penal Code Ann. (Vernon, 1952) art. 526; Utah Code Ann. (1953) tit. 76, c. 39, §1; Vt. Stat. (1947) tit. 41, c. 370, §8490; Va. Code (1950) tit. 18, §113; Wash. Rev. Stat. Ann. (Remington, 1932) tit. 14, c. 6, §2459; W.Va. Code (1949) §6066; Wis. Stat. (1951) §351.38; Wyo. Comp. Stat. (1945) §9-513.

[15] N.M. Stat. Ann. (1941) c. 14, §1812.

[16] See, e.g., Municipal Code of Chicago (1929) §192-9; Municipal Code, City of Detroit (1945) c. 185, §1; The Pittsburgh Municipal Digest (1938) §733.

[17] In ensuing portions of this comment, references will be made to First Amendment protections. It should be noted that where state or local action is considered, these protections are referred to as they are mirrored by the due process clause of the Fourteenth Amendment.

[18] Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931). But see 49 COL. L. REV. 1001 (1949).

provisions will be considered later.[19] Yet it must be recognized that the protection accorded by the First Amendment is more than a mere limitation on prior restraint. From a practical standpoint, in fact, the more significant safeguard is the establishment of limits beyond which the states may not even impose subsequent punishment for expression. However, it seems to be conceded that obscene utterances are not within this area of privileged expression.[20] If the matter truly qualifies as obscenity, the First Amendment will not preclude state or local punishment.

Like all criminal statutory provisions, obscenity statutes and ordinances must conform to the constitutional requirement of lucidity. If the provision is too vague to apprise potential violators of the nature of the prohibited action, the Fourteenth Amendment will invalidate it as a denial of due process. Although it might be thought that statutes or ordinances imposing criminal sanctions on obscenity are peculiarly subject to such attack, the Supreme Court has never ruled that such provisions are not sufficiently clear.[21] It would probably be concluded that the common law crime of obscene libel[22] has laid a sufficiently clear foundation for the validity of the statutory crime.[23]

B. *Application of Provisions.* The application of the obscenity laws to specific cases has, by and large, resulted in no clear line of authority as to what will qualify as "obscene."[24] Although the uncertain application of these statutory provisions bears a theoretical relationship to the constitutional question of whether the provisions are void

[19] See part II-C of this comment, infra.

[20] ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568 at 571, 62 S.Ct. 766 (1942). See also New York v. Doubleday, 297 N.Y. 687, 77 N.E. (2d) 6 (1947), affd. per curiam, 335 U.S. 848, 69 S.Ct. 79 (1948).

[21] Dunlop v. United States, 165 U.S. 486, 17 S.Ct. 375 (1897); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948); New York v. Doubleday, 297 N.Y. 687, 77 N.E. (2d) 6 (1947), affd. per curiam, 335 U.S. 848, 69 S.Ct. 79 (1948).

[22] See treatment of common law liability in part I of this comment.

[23] "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. . . ." Winters v. New York, 333 U.S. 507 at 518, 68 S. Ct. 665 (1947).

[24] See Alpert, "Judicial Censorship of Obscene Literature," 52 HARV. L. REV. 40 (1938). See also the opinion in Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949).

for vagueness,[25] the courts in resolving the latter question in favor of the validity of the provisions would not likely be bothered by the inconsistencies in the varying tests utilized in the application of the penal sanctions.

The earliest test of obscenity was enunciated in the celebrated opinion in *Regina v. Hicklin*.[26] There, Chief Justice Cockburn stated that the test of obscenity is ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[27] Although lip service has apparently been paid to this standard in the United States,[28] other decisions have indicated a preference for a narrower definition.[29] It has been pointed out that a test of obscenity as broad as that formulated by Justice Cockburn would include many of the classics, since certain passages might serve to corrupt the mind of the pervert, which is seemingly the standard that the test imposes.[30] As a further departure from the early English doctrine, there has developed a line of cases concluding that books or pamphlets the purpose of which is to further sex education are not "obscene."[31] This latter development perhaps paved the way for the famous "Ulysses" decision.[32] In the federal district court opinion in that case, Judge Woolsey concluded that in order to qualify as "obscene" a publication must be "dirt for dirt's sake."[33] This doctrine would leave outside the sphere of punishable matter any work representing a laudable purpose on the part of the author, regardless of

[25] This is treated in part II-A of this comment.

[26] L.R. 3 Q.B. 360 (1868).

[27] Regina v. Hicklin, L.R. 3 Q.B. 360 at 371 (1868).

[28] United States v. Bennett, (2d Cir. 1879) 16 Blatchf. 338; Rosen v. United States, 161 U.S. 29, 16 S.Ct. 434 (1896). See also 81 A.L.R. 801 (1932).

[29] St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N.Y.S. 582 (1909); Halsey v. The New York Society for the Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922); United States v. Dennett, (2d Cir. 1930) 39 F. (2d) 564; United States v. One Book Entitled "Contraception," (D.C. N.Y. 1931) 51 F. (2d) 525.

[30] See generally, ERNST AND SEAGLE, TO THE PURE . . . (1929); ERNST AND LINDEY, THE CENSOR MARCHES ON (1940).

[31] United States v. Dennett, (2d Cir. 1930) 39 F. (2d) 564; United States v. One Obscene Book Entitled "Married Love," (D.C. N.Y. 1931) 48 F. (2d) 821; United States v. One Book Entitled "Contraception," (D.C. N.Y. 1931) 51 F. (2d) 525. See also 76 A.L.R. 1099 (1932).

[32] United States v. One Book Called "Ulysses," (D.C. N.Y. 1933) 5 F. Supp. 182, affd. (2d Cir. 1934) 72 F. (2d) 705.

[33] ". . . In many places it seems to me to be disgusting, but although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake. . . ." United States v. One Book Called "Ulysses," (D.C. N.Y. 1933) 5 F. Supp. 182 at 184, affd. (2d Cir. 1934) 72 F. (2d) 705.

his medium of expression. Such a test of obscenity certainly represents a significant departure from the test first formulated by Justice Cockburn. In any event, it has received support in recent years.[34]

C. *Constitutionality of Enforcement Methods.* Probably the most significant constitutional question raised by statutory provisions imposing criminal sanctions on the publication or distribution of obscene literature relates to the methods utilized in the enforcement of these provisions. Certainly the proper state or local authorities are empowered to initiate prosecutions for alleged violations of these obscenity laws, and no meritorious question can be raised as to the constitutionality of such action. Common law civil actions of course remain as a limitation on the abuse of such processes.[35] However, serious questions arise from a consideration of action taken by officers before prosecution, with restraint of embryonic violation as its purpose.

In a recent federal district court case, *New American Library of World Literature v. Allen,*[36] the enforcement officer[37] sent to the local distributors of a large publishing house lists of those books which he considered violative of a municipal ordinance imposing criminal sanctions on the distribution and sale of obscene literature. This action amounted to a threat of prosecution, the purpose of which was to remove the questionable books from the publisher's outlet in that

[34] United States v. Levine, (2d Cir. 1936) 83 F. (2d) 156; Walker v. Popenoe, (D.C. Cir. 1945) 149 F. (2d) 511. Although only a few courts will go so far as to sustain a publication on the sole ground that it is written with a sincere purpose, others have been influenced by the "Ulysses" decision in decreeing a standard more liberal than that of the earlier cases. See Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. (2d) 840 (1945); People v. Wepplo, 78 Cal. App. (2d) 959, 178 P. (2d) 853 (1947); Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949) (extensive discussion of the history of the application of obscenity provisions), affd. 166 Pa. Super. 120, 70 A. (2d) 389 (1950). See also ERNST AND LINDEY, THE CENSOR MARCHES ON 20-24 (1940); Alpert, "Judicial Censorship of Obscene Literature," 52 HARV. L. REV. 40 (1938), where the author suggests that the difficulties which application of the obscenity laws engender might best be obviated by the elimination of all criminal sanctions against "obscene literature."

[35] Halsey v. The New York Society for the Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922).

[36] (D.C. Ohio 1953) 114 F. Supp. 823.

[37] In American Mercury v. Chase, (D.C. Mass. 1926) 13 F. (2d) 224, the court enjoined the Boston Watch and Ward Society from threatening the plaintiff magazine with prosecution if they did not suppress certain publications which that organization deemed morally undesirable. In reaching its decision, the court treated the Society as an unofficial organization, and the decision has been noted on that basis. 75 UNIV. PA. L. REV. 258 (1926); 25 MICH. L. REV. 74 (1926). But the question under consideration here might have been reached if it had been impressed upon the court that a closer scrutiny of that Society's function would show it to be, in effect, an agent of municipal authorities. See CHAFEE, THE INQUIRING MIND 136-140 (1928).

municipality. After deciding that the ordinance in question was constitutional, the court concluded that the circulation of the lists was outside the statutory authority of the officer in question.[38] As a result, the publishing house was granted an injunction restraining the local officer from pursuing this means of intimidation. It would seem that this interpretation is quite narrow— especially in light of the common practices of governmental authorities in the enforcement of criminal provisions in general. Certainly it is a rare, and perhaps inefficient, penal officer who is not well-informed on potential criminal violations, and who at the same time does not seek to restrain their commission through personal contact with the potential violator. Yet such a narrow determination of the powers of the officer enforcing obscenity laws can probably be explained by the courts' justifiable reluctance to give sanction to anything that might appear to be, or even form the basis for, a prior restraint on expression. Here is reached the crux of the problem of censorship of obscene literature.

The determination that it is not within the enforcement powers of governmental officers to threaten prosecution of distributors who continue to handle stipulated literary works of course obviates consideration of any constitutional question relating to freedom of expression. But if it were determined that such action on the part of these officers is authorized, the question immediately becomes paramount, is this a prior restraint on expression? And if so, is it a denial of due process, forbidden by the Fourteenth Amendment?

At the outset, it would seem that the circulation of such lists by penal officers does not constitute on its face a restraint on expression. The publishers or distributors may or may not conform to these lists. A failure to do so will bring about no results other than those which would follow were no lists distributed, viz., prosecution under the appropriate obscenity provision. Yet it seems reasonably clear that a distribution of such lists has an effect independent of that provided by a later prosecution. Relatively small distributors might suppress certain literary works for fear of prosecution, and this fear would be all the more aggravated when the authorities have indicated the certainty of a criminal proceeding in the event of non-compliance with the distributed lists.[39] To say that such a power, were it to fall into the

[38] For a like determination on an identical issue, see Bantam Books v. Melko, 25 N.J. Super. 292, 96 A. (2d) 47 (1953). The court there went on to point out that the action by the officer also constituted an unconstitutional form of censorship.

[39] See CHAFEE, FREE SPEECH IN THE UNITED STATES 536-540 (1941).

hands of those who might abuse it, would be a dangerous one is to voice the obvious. It is therefore submitted that the power to circulate such lists, as a mode of enforcement of the obscenity laws, does in effect constitute a prior restraint.[40]

The final question which must be considered is whether or not a previous restraint on obscene publications is rendered invalid by the Fourteenth Amendment, as it incorporates the First Amendment.[41] The doctrine that although the First Amendment does not preclude punishment for some forms of expression it does operate to limit the power of the states and municipalities to impose prior restraints on expression finds its most famous pronouncement in the case of *Near v. Minnesota*.[42] In that case, however, the Supreme Court did suggest two possible situations where a valid prior restraint might exist. These the Court referred to when it said: "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited . . . . On similar grounds, the primary requirements of decency may be enforced against obscene publications . . . ."[43] The Court seems to have meant that a prior restraint is permissible when the expression would constitute a "clear and present danger." The Court has never since been called upon to determine if a prior restraint on obscenity is valid.[44] That it might follow this casual remark in *Near v. Minnesota* is possible. But it would seem that before the Court would sanction prior censorship of obscene literature, it would demand extremely definite standards for determining what would constitute obscenity—a requirement which appears quite difficult to meet.[45]

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[40] Ibid.

[41] See Bantam Books v. Melko, 25 N.J. Super. 292, 96 A. (2d) 47 (1953).

[42] 283 U.S. 697, 51 S.Ct. 625 (1931).

[43] Near v. Minnesota, 283 U.S. 697 at 715, 51 S.Ct. 625 (1931). The first possibility the Court recognized was that expression which would have an adverse effect on the security of the nation could be restrained by the government during time of war.

[44] In striking down a municipal ordinance which made a license a prerequisite to the distribution of literature, the Court noted: ". . . The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. . . ." Lovell v. City of Griffin, 303 U.S. 444 at 451, 58 S.Ct. 666 (1937). But see Bantam Books v. Melko, 25 N.J. Super. 292, 96 A. (2d) 47 (1953); CHAFEE, FREE SPEECH IN THE UNITED STATES 536-540 (1941).

[45] See CHAFEE, FREE SPEECH IN THE UNITED STATES 536-540 (1941).