TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

United States Constitution

Miscellaneous

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted with the written consent of the parties herein.

The American Civil Liberties Union is an organization whose membership is distributed throughout the United States. It is concerned with the protection of the civil liberties of all persons, whether or not it agrees with their views. Of especial concern to it is the protection of the freedoms guaranteed by the First Amendment.

The policy of the American Civil Liberties Union is that the constitutional guarantees of free speech and press apply to all expression, and there is no special category of obscenity or pornography to which different constitutional tests apply. To be constitutional, an obscenity statute at least must meet the requirement of definiteness; and also require that, before any material can be held to be obscene, it must be established beyond a reasonable doubt that the material represents a clear and present danger of normally inducing behavior which validly has been made criminal by statute.

This case involves a novel question dealing with freedom of the press, which requires resolution. This Court has not heretofore squarely decided the application of the First Amendment to prosecutions with relation to literature that is asserted to be obscene. In this case, at least two important questions are presented: (1) whether the law can be applied in such manner that a person may be apprised with definiteness of the wrong that may subject him to punishment; (2) may a person who publishes or distributes a book be convicted though evidence is lacking that such a book will probably cause anti-social conduct?

Statement of the Case

The defendant was charged with depositing for mailing certain obscene matter in violation of the Federal statute, Title 18 U. S. C. Sect. 2 and 1461 and for conspiracy under 62 Stat. 701, Section 371. He was convicted on four counts, and received a sentence of five years and a fine. His conviction was affirmed by the Court of Appeals for the Sec-

ond Circuit. On the defendant's challenge of constitutionality, that Court was reluctant to pass upon that claim, in the belief that this Court should do so. Judge Frank wrote a strong separate concurring opinion, which to all practical effect is a dissenting opinion and a suggestion that this Court hold the law unconstitutional.

Statute Involved

The statute involved is 18 U. S. C. Sect. 1461, 62 Stat. 768 and reads as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecedent character; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *
>
> 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 disposi-

tion thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination.''

POINT I

Absent evidence that the publications will probably and immediately cause anti-social conduct, the conviction violates the First Amendment.

The First Amendment occupies a preferred position in constitutional protection.

Therefore, a person may print what he chooses, and the burden—a most weighty burden is on the prosecution to show justification for suppression. The justification urged here is that the publications are ''obscene'' (when the expression ''obscene'' is used in this brief it refers also to the other characterizing adjectives grouped together in the statute).

The danger that is inherent in punishment for utterances is as applicable to this case as in any other. History has shown how publications that were deemed obscene by courts were subsequently accepted without question. See, Haight, Banned Books (2 Ed. 1955).

This Court has had no occasion previously to pass upon the validity of ''obscenity'' laws, whether Federal or State, except that in *Doubleday & Co., Inc.* v. *New York,* 335 U. S. 848, this Court, by an evenly divided court, affirmed the conviction of the publisher of ''Memoirs of Hecate County''. In affirming, this Court thus gave recog-

nition, that the Constitution affords protection to all writings or at least, raises constitutional issues for resolution. See also, *Butler* v. *Michigan,* 25 U. S. Law Week, 4165, where the decision did not treat or dispose of the obscenity question. See also Lockhart & McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minnesota Law Review, 352.

In *Dennis* v. *United States,* 341 U. S. 494, this Court reformulated the clear and present danger rule, which since *Schenck* v. *United States,* 249 U. S. 47, had governed permissible punishment for speech. The *Dennis* case revised the rule so that it only need be shown that the evil sought to be avoided or eliminated would "probably" flow from the speech. Said the Court:

> "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significance. More we cannot expect from words."

This Court, in any event, recognized however, that the evil had to be serious and grave

Justice Douglas said these words for the dissenters:

> "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.' The Constitution provides no exception.

> This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson 'that it is time enough for the rightful purpose of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.' The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action."

See also, *Herndon* v. *Lowry,* 301 U. S. 242, 258; *Craig* v. *Harney,* 331 U. S. 367, where it was also emphasized that free speech is the heart of a democracy (p. 383).

The freedom to publish is not only for the exposition of ideas. It also covers entertainment of any kind,—even literature of no special value. *Winters* v. *New York,* 333 U. S. 507.

In reaching these conclusions, the Court is not bound by legislative judgment of the evil, but must make an

independent examination to ascertain whether the publication has the probable effect of producing overt social harm. *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367; *Schneider* v. *State,* 308 U. S. 147, 161.

Along with the doctrine of the *Dennis* case must be considered the right of the public to read which was recently articulated in *Butler* v. *Michigan, supra.*

Once the burden is on the prosecution to show a right to punish for speech, it would follow that it has the burden of establishing that evil would probably flow from the books in question.

What are the evils that are usually asserted to be produced by books that are obscene? When we state this we do not minimize that they may produce shock, disgust or even offensiveness to tastes and high standards.

The asserted evils are:

1. The books would produce depraved sex attitudes or would arouse to lust.
2. The books would be productive of "juvenile delinquency".

Nowhere does it appear that the prosecution has carried its burden of bringing forth evidence that the books would, with any degree of probability cause these evils.

On the contrary, the available evidence is to the contrary. Recently a study was made to learn of the effects of reading on behavior. Distinction in such a study must be made, of course, between *harmful social effects and* normal behavior. For instance, assuming it can be shown

that the reading of a book will probably cause sex urges. That in itself could not be reasonably construed to be a social evil, for the sex impulse is a normal conduct.

In *Kingsley Books Inc.* v. *Brown,* No. 107, now before this Court for argument, Judge Fuld observed in footnote 3 that scientific studies are being made concerning the impact of writings, including the obscene, on the behavior of men, women and children, citing Jahoda and Staff of Research Center for Human Relations, New York University (1954), The Impact of Literature. A Pyschological Discussion of Some Assumptions in the Censorship Debate. Judge Frank took the occasion in this case to make further inquiry of the writer of that study. The summary of that study by the author, as given to Judge Frank is as follows:

> "Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to anti-social actions, particularly to juvenile delinquency. An examination of the pertinent psychological literature has led to the following conclusions:
>
> 1. There exists no research evidence either to prove or to disprove this assumption definitively.
>
> 2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.
>
> 3. In the vast research literature on the causes of juvenile delinquency there is no evidence to jus-

tify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter. Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose

> themselves to everything that is offered, but only to what agrees with their inclinations.
>
> Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in children those qualities which drove them to the comic book world to begin with: an ability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.
>
> It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

That summary emphasizes that the assumption that reading about sex or about violence leads to anti-social action and particularly to juvenile delinquency is without support of evidence.

Other studies are to the same effect. Alpert, Judicial Censorship of Obscene Literature, 52 Harvard Law Rev., 40, 72, shows that knowledge about matters sexual come

usually from sources other than books. Another study found that those who get involved in anti-social behavior are not the kind of persons who are inclined toward reading. Lockhart & McClure, *Obscenity In the Courts,* 20 Law & Contemporary Problems, 587, where it is said on page 596:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth —the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The

> many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

There are many variables that make for sex stimulation, not least of them being the sensual level of the reader himself. Judge Bok made this point in *Commonwealth* v. *Gordon,* 66 Pa. D & C, 101, where he made these observations (p. 137):

> "If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another? When, where, how, and why are questions that cannot be answered clearly in this field. The professional answer that is suggested is the one general compromise—that the appetite of sex is old, universal, and unpredictable, and that the best we can do to keep it within reasonable bounds is to be our brother's keeper and censor, because we never know when his sensuality may be high. This does not satisfy me, for in a field

> where even reasonable precision is utterly impossible, I trust people more than I do the law."

So, also, as Judge Frank and others have pointed out, that erotic stimulation may come from any symbol or sensation that may be associated with the observer, such as perfume, a handkerchief, and countless others. In this, the fault does not lie with the handkerchief or perfume, but with the person who accepts them as stimuli. The fault—if any there be—is with the low sensual threshhold of the person.

Furthermore, this sensual receptiveness, among other factors, can be attributed to the society we live in. There is a great preoccupation with sex. Lippman, *A Preface to Morals,* 285, 300; Kinsey, et al.,—*Sexual Behavior in the Male;* Kinsey, et al., *Sexual Behavior in the Human Female;* G. R. Scott, *Into Whose Hands,* p. 5; T. Schroeder, *Obscene Literature and Constitutional Law,* p. 275.

This atmosphere of sex is pervasive particularly where large commercial organizations hawk their wares through advertisements supposedly alluring. Clothing merchants, bathing suit and brassiere manufacturers as examples among many do all they can to emphasize the role of sex.

This pervasiveness results in mores, whose genesis cannot be attributed to any single person or to any isolated factor. It is there.

The prevalence of these mores makes for "readiness", as psychologists call it,—makes for the capacity of a person to react to a stimulus. It doesn't follow therefore, that the book, the supposed stimulus,—is the necessarily competent producing cause.

POINT II

The statute violates due process under the Fifth Amendment because it is vague.

In examining the scope of the First Amendment it should not be overlooked that the First Amendment did not adopt the British ideas of restraints on speech. On the contrary, it was adopted to do away with the British practices. *Robertson* v. *Baldwin,* 165 U. S. 275, 28; *Leach* v. *Carlisle,* 258 U. S. 138, 141; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 248; *Bridges* v. *California,* 314 U. S. 252, 264. Therefore, common law cases are not controlling.

It has been said that "obscenity" is a well understood word through long usage. Yet when one studies and examines the constructions put on the word by the courts, one enters a vast hall of confusion. For the sake of brevity, reference is made to independent studies: Alpert, *supra;* Lockhart and McClure, Literature, The Law of Obscenity and the Constitution, pp. 324-350.

Even if one were to take the definition, charged by the trial court in this case, from *United States* v. *Levine,* 83 Fed. 2d 156, the arousal of sexual thoughts and desires on an average adult person, one is not free from obscurity.

To test what this means, we must enter the practical world where laws are in action.

First, take the case of the lawyer who is asked whether a book may be published and distributed. How would he know? His personal subjective views may be a concatenation of all factors that make for his personality. He cannot jump out of his skin to be objective. His next resort

would be the decisions of the courts. They would merely repeat the rubric found in the *Levine* case. But how to apply it is his task. There is no standard to guide him. He can advise his client what larceny is or what arson is. But so far as "obscenity" is concerned, he must tell his client to either forego publishing (which is a deterrent to publication) or else to take his risk that he might be convicted by the predilections of a judge, or be acquitted on another's predilections.

This results in *ad hoc* legislation of an *ex post facto* nature and which the Constitution forbids. This Court in *Lanzetta* v. *New Jersey,* 306 U. S. 451, held that a person cannot be convicted under an obscure statute that is sought to be construed for the first time in that case. In other words, a person is not obliged to be a guinea pig to afford clarification of a law. The penal law must be so clear in the first instance, that a person may know what is the permissible area of his conduct, without having to take risks. In *Winters* v. *New York,* 333 U. S. 507, that same problem arose as to whether due process permits a statute to operate in such way that a person must become a guinea pig as a sacrifice for the legislature's omissions. This Court set that case down for reargument of that very question. That point was decided however on what was said in *Lanzetta.*

A second illustration that occurs, is a practical and serious one prevalent today because of nation-wide "drives" against publications claimed to be obscene (Lockhart & McClure, *supra,* 302). Let us take the case of the small candy and cigar store that also sells newspapers and books. Here is a class of self-employer who works from early

morning to midnight for the purpose of ekeing out a moderate livelihood.

He receives his books usually from the same distributor of newspapers or even perhaps of his cigars and candies. One day he is suddenly confronted by the police who find a book, on display for sale, and which is claimed to be obscene. He is arrested, handcuffed and marched off with indignity before his astonished neighbors. He is held in bail, put to the expense of retaining counsel, placed in jeopardy and subjected to the torments of a trial. Had he even read the book he would not know whether it is condemned by statute. Nor could anyone tell him in advance, not even by a declaratory judgment. *Dreiser* v. *Lane Co.*, 183 App. Div. 773.

The shifting applications of the term "obscenity" have many lessons in the past. They reveal how uncertain the law is and how unreliable it is as a guide to a citizen who must obey or go to jail.

Southey's "Wat Tyler" or Byron's "Cain" or Byron's "Don Juan" or Shelley's "Queen Mab", were condemned respectively in *Southey* v. *Sherwood,* 2 Mer. 435; *Murray* v. *Benbow,* Jac. 474 n; *Lord Byron* v. *Dugdale,* 1 L. J. Ch. 239, Moxon's Case, 2 Townsend's Mod. St. Tr. 356. These were the incidents that brought forth these words from Judge Augustus N. Hand in *United States* v. *One Book Entitled Ulysses,* 72 F. (2d) 705:

> "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the work of Byron and Southey, and the findings by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense

> are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

This language was subsequently approved in *Parmelee* v. *United States,* 113 F. (2d) 729, 737, 738; *Hannegan* v. *Esquire,* 327 U. S. 146, 157, 158.

These "foolish judgments" may be repeated over and over again unless some standard of practical application be adopted. If one cannot be found, then it might be better as Judge Bok observed, to trust people rather than the law. At least, the small candy storekeeper or bookseller will find safety in the law rather than peril.

These "foolish judgments" result from the inability of the judges to apply any objective tests. One judge will find a book free from legal condemnation. Another will convict on the same book. Why? Judges themselves are the victims, so to speak, of a law that is so vague and flexible that it means all things to all men. If a judge of the stature of Lord Eldon could be "foolish", then others can meet the same misfortune.

A reply to this might be a resort to the observation that "disorderly conduct" is an elastic term. But conduct is not as amorphous as thought or speech. That is the difference between the speech with a probable breach of the peace,—"fighting words,—face to face" as in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, and ordinary speech as *De Jonge* v. *Oregon,* 299 U. S. 353.

In *Holmby Productions* v. *Vaughan,* 350 U. S. 870, this Court had before it a Kansas statute that permitted censorship of motion pictures that were "cruel, obscene, inde-

cent, or immoral, or such as tend to debase or corrupt morals". The Supreme Court of Kansas rested its decision on the ground the motion picture in question was obscene. That court sustained the disapproval of a license. This Court reversed in a *per curiam* decision, upon a challenge to the vagueness of the word, "obscene". Whether this Court held there, that the word "obscene" is unconstitutionally vague is not clear. The decision may have rested on the *Stromberg* v. *California,* 283 U. S. 359 rule, that when there are several charges set forth and the defective one cannot be separated from the others, then the entire judgment will be reversed.

See also, *Musser* v. *Utah,* 333 U. S. 95, holding vague "injurious to public morals"; *Gelling* v. *Texas,* 343 U. S. 960, holding vague "sexually immoral"; *Joseph Burstyn Inc.* v. *Wilson,* 343 U. S. 495, holding "sacrilegious" to be vague; *Commercial Pictures Corp.* v. *Board of Regents,* 346 U. S. 587, holding "immoral" as vague.

CONCLUSION

This Court has for decision a case dealing with the limitations of expression in relation to obscenity. It is in a field of utmost confusion and its consequential abuses. It is not the fate of the books in this case or of the petitioner that alone are at stake. The principles to be announced will set a pattern for prosecutions even under State laws.

We have tried to show, that prosecutions under obscenity laws—Federal or State, are rampant. The censors are on the loose, each one armed with his version of what the

law means. It is submitted that this Court clarify the law so that the constitutional safeguards of a citizen may be realized and his civil liberties may be protected.

Respectfully submitted,

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