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IN THE

Supreme Court of the United States

October Term, 1956

No. 258

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc. is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

We respectfully submit that the statute involved (18 U. S. C. 1461, 1462)—prohibiting the mailing of "obscene" literature—is unconstitutional for the reasons urged by Judge Frank in his concurring opinion. Such prohibitions cannot be reconciled with "opinions of the Supreme Court uttered within the past twenty-five years relative to the First Amendment as applied to other kinds of legislation" (237 Fed. 2d 796, 802). The statute troubled Judge Frank in two respects: first, there is no reasonable probability that obscene publications tend to have any effect on the behavior of normal, average adults; and second, that punishment is inflicted for provoking in such adults undesirable thoughts rather than dangerous or anti-social acts.

We respectfully urge that, for the reasons hereinafter discussed, present judicial interpretations of "obscene" are unconstitutional because unduly restrictive of freedom of expression in their operation; and that it is possible to deal with the problem of "obscene" literature and preserve this freedom.

I.

Present judicial definitions of "obscenity" unreasonably restrict freedom of the press.

> "(For) the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (*Bridges* v. *United States,* 314 U. S. 252, 263)

Realization of the ideal embodied in the First Amendment has until now been frustrated by the necessity of denying protection to certain "well defined and narrowly limited classes of speech," one of which is the "lewd and obscene" (*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571). Unfortunately, the "lewd and obscene" has not proven, in operation, to be a "well defined" class of speech.

In theory, everyone might agree that a particular book is so unspeakably filthy, so socially useless, that it should be prohibited. In practice, such a consensus is never reached on any given work; it has proven impossible to reach agreement on the definition and concept of "obscenity" or the purpose of prohibiting it.

Judicial approach to the problem has come, generally, from two directions: the first, represented by the decision in *Besig* v. *United States,* 208 Fed. 2d 142; the second, reflected in Judge Hand's opinion in *United States* v. *One Book Entitled Ulysses,* 72 Fed. 2d 705.

The Restrictive Besig Test

In *Besig,* the Court reiterated a venerable definition of "obscene":

> "* * * the word symbol for indecent, smutty, lewd or salacious references to parts of the human or animal body or to their functions * * *" (208 Fed. 2d at p. 145)

The prohibition is drawn in terms of forbidden themes, indelicate language or treatment, and offensiveness:

> "Yet we risk the assertion that there is an under-

> lying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposely flaunt such delicacy in language generally regarded as indecent come under the ban of the statute." (Id. p. 147)

There is no such "accord," nor would one be consistent with the First Amendment; on the contrary, it would contradict "the very basis of a free society, that of the right of expression beyond the conventions of the day." (*Hannegan* v. *Esquire,* 327 U. S. 146, 160.) This view that speech may be restricted for transgressing standards of delicacy offers a sharp contrast with the concept that the First Amendment "does not speak unequivocally" and is a "command of the broadest scope"; it also stands in utter contradiction of the view expressed by Mr. Justice Jackson in *Board of Education* v. *Barnette,* 319 U. S. 624

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." (pp. 641-2)

As Judge Hand had demonstrated earlier in *Ulysses,* a test drawn in the broad terms of the *Besig* definition indiscriminately outlaws classics and scientific texts, as well as innumerable books, plays and motion pictures of varying degrees of inoffensiveness and literary value—in complete defiance of common sense and the First Amendment. (Cf. *Winters* v. *New York,* 333 U. S. 507, 509.)

The effect of any definition of "obscenity" extends beyond the courtroom to a degree unparalleled in most other areas of the law; particularly when rights of free speech and press are subjected to strong pressures from law enforcement agencies, or from private organizations devoted to making unavailable to an entire community books, plays and motion pictures which offend their respective political, social or religious views.*

In such instances, the very broadness of definition becomes a coercive force, employed by officials to compel booksellers and distributors to discontinue the sale of books which the officials or private groups may find "offensive". The pressures are irresistible because the bookseller has no personal stake in a particular work which would warrant the cost of defending an action or the risk of conviction and possible loss of business; and because the scope of the statute is so wide that no one can predict its application to a particular book, and lastly, because it is applied without the mediating influence of a court.

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* The Report of the Select Committee on Current Pornographic Material (H. R. 2510, 82nd Congress, 2nd Session) contains testimony of a Detroit police officer who reported the complete success of efforts by the Police Department and the District Attorney to induce book distributors in Detroit to discontinue selling all pocket size editions which these agencies believed violated the Michigan Obscenity Statutes. The Police Inspector testified that his department operated "under the State law, insofar as the literature is concerned" (50), that up to the time of his testimony they had not been required to prosecute any pocket sized books in court because "they have always been withdrawn voluntarily" (53), and that the "result has been very gratifying to us because we feel that voluntary censorship on his part is the ideal method of suppression." (54-55).

The Liberal Ulysses Test

The Court of Appeals for the Second Circuit, was in *Ulysses,* sorely troubled by the consequences of prohibiting any work which contained "obscenity" in the dictionary sense; too many great books would fall under such an axe. As Judge Hand noted, many of the classics contained much that would be condemned as "obscene" under any definition (72 Fed. 2d 705, 707).

In an effort to escape these restrictive and unreasonable consequences, Judge Hand held that a work must be considered as an entity and could not be condemned as obscene unless "taken as a whole (it) has a libidinous effect" (72 Fed. 2d 707).

If libidinous effect is to be the test, it would seem irrelevant whether the result were achieved by a book in its entirety or only by portions of it.

Under Judge Hand's test, literary merit becomes significant; "relevancy of the objectionable parts to the theme, (and) the established reputation of the work in the estimation of approved critics, are critical criteria" (72 Fed. 2d 705, 708). But such considerations do not jibe with the holding in *Winters* v. *New York,* 333 U. S. 507, 510, that even "works of no possible value to society . . . are as much entitled to the protection of free speech as the best of literature."

Because the *Ulysses* test represents a far less restrictive approach to the problem than did the concept typified by *Besig,* the Authors League, in *Butler* v. *Michigan,* 352 U. S. , 77 Sup. Ct. 524 urged that the Court accept this definition.

However, *Butler* v. *Michigan,* permitting consideration of the problem uninhibited by concern that a solution would limit the right to protect minors and Judge Frank's opinion, embolden us to suggest that there are other factors which may be considered in determining the boundaries of "obscene" as a "well defined and narrowly limited class(es) of speech."

II.

The clear and present danger test would not provide a constitutionally valid definition of "obscene".

In *Commonwealth* v. *Gordon,* 66 Pa. Dist. & Co. R. 101, it was suggested that a book could be proscribed only upon demonstration "beyond reasonable doubt" of a causal connection between the book and criminal behavior. Judge Frank believed that the test should be modified by stressing "the element of probability in speaking of a 'clear danger,'" in accordance with *Dennis* v. *United States,* 341 U. S. 494.

However, we submit that this test is not an appropriate one for coping with the problem of "obscene" literature any more than it would be relevant in defining libel or slander. In *Dennis* v. *United States,* the defendants were convicted for uttering or conspiring to utter speech prohibited by the Smith Act. The clear and present (or probable) danger test was not employed to define or describe the prohibited speech; rather it was employed to determine

whether the defendants should be punished for having uttered the speech:

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case." (341 U. S. 494, p. 513)

Here the first question is not whether there is a danger that a specific class of speech will cause a particular punishable result. Rather, it is: what is that class of speech? What is meant by "obscene"?

Even if the probable danger standard were used, it would not provide a definition of the class of speech banned by the statute (or by any state enactment prohibiting "obscene" literature).

If a book is to be banned as obscene whenever there is a probable danger that it would cause "criminal" behavior, then the definition becomes broad (and ambiguous) enough to include anything which is found, as a matter of fact, to provoke the undesirable conduct. There are many stimuli which could produce such conduct, and of these, most do not fall within any current definition of obscenity. (237 F. 2d 812)

Application of the probable danger test would leave the critical issue to be determined by the court: whether the First Amendment protects the "(speech) which constitutes the violation of the statute" (341 U. S. 494, 513). Indeed, all issues would be taken from the jury because "probability of danger" becomes the means of defining "obscenity" and the existence of probable danger "must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case" (341 U. S. at 513).

This consequence is underscored by Mr. Justice Douglas in his dissent in *Dennis* v. *United States*:

> "I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce* v. *United States,* 252 U. S. 239, 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said, 'Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial" (341 U. S. 494, p. 587).

If the theory of statutes punishing the obscene is that such speech must be suppressed because it constitutes an incitement to illegal conduct, then the statute here falls for failure to define any such proscribed conduct. Moreover, the ordinary statute punishing incitement would require, for conviction, proof beyond a reasonable doubt that the words used might produce the conduct. It is in connection with such a prosecution, but not in connection

with a prosecution under the instant statute, that the clear and present danger test may have application.

The principal weakness of the probable danger test is that:

> "No one can now show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults" (237 Fed. 2d 802).

The Appendix to Judge Frank's opinion is most convincing in its demonstration (pp. 806-827) that there is no factual basis for assuming a causal connection between reading "obscene" literature and the behavior of normal average adults. In the absence of conclusive evidence, books should not be condemned, no less defined as obscene, because of a "probability" that they would cause anti-social conduct.

> "So long as this Court excercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress." (Mr. Justice Black dissenting in *Dennis* v. *United States,* 341 U. S. 494, 580)

It is almost self-evident that an average, normal adult could not be activated by a book to commit a sexual crime or similar act (by definition, any person so stimulated would not be normal). And a statute aimed at proscribing literature or other means of expression to all adults because

of a possible effect upon abnormal or unbalanced members of the community, would be guilty of the same infirmity which was condemned in *Butler* v. *State of Michigan, supra.*

Certainly, neither the trial judge nor the jurors below were so affected by the material mailed by petitioner. Offended, they may have been; compelled to criminal acts, they were not. Indeed, if a jury is representative of the normal adult community, and probable danger were a fact, it would be impossible for them to hear evidence in any case involving obscene literature punishable under Judge Frank's rule.

III.

Freedom of expression should be unequivocally secured so long as it does not destroy the right of privacy.

If there is no reasonable basis for assuming causal connection between "obscene" works and adult behavior, then there is no purpose in considering that relationship in any definition of a class of proscribed speech or press. In fact, most judicial approaches to the problem did not seem to be based upon any real concern for the prevention of possible resulting "conduct."

Rather, efforts by the community against the "obscene" —through statutory action and judicial definition—seem to strive for three objectives.

The first is to prevent impure thoughts—either to compel "respectable delicacy" in accordance with *Besig,* or to prohibit inspiring "libidinous effect", as suggested in

Ulysses. As Judge Frank has stated, restrictions on thought *per se* cannot be reconciled with the First Amendment. A majority of the community may find a particular book, picture or play repulsive because of its "obscene" content and may be shocked by the fact that other adults derive pleasure from such objects, but under the First Amendment these reactions do not furnish a basis for preventing anyone from reading the book, seeing the play, or contemplating the picture.*

The second objective is the protection of minors against corruption by obscene literature. As *Butler* v. *Michigan* indicates, this is a problem which can and should be treated separately and an appropriate definition of "obscene" need not be affected by fear of opening the door to matter dangerous to the morals of children.

Lastly, society strives in its campaign against the "obscene" to allay an underlying fear that without protection, sights and sounds will be forced upon people who do not wish to see or hear them, under circumstances in which there is no opportunity for rejection. In other words, a fear that society, unprotected, would be subjected to literary and artistic "indecent exposure."

We respectfully submit that there are limits within which this purpose can be legitimately secured without restrict-

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* Undue concern for the moral welfare of less fortunately situated members of the community seems to constitute a strong incentive for efforts at suppression. Prosecutions and enforcement campaigns are often directed at cheap paper-backed editions of a novel but not at the more expensive hard cover or "trade" editions which sell at many times the price (Cf. H.R. 2510, 82nd Congress, 2nd Session). Similarly, efforts were made over the years to suppress "burlesque" in large cities, although higher priced entertainment in the theatre and night clubs offered precisely the same "attractions" as did lower priced burlesque.

ing freedom of speech and press; that the purpose can be accomplished by placing the emphasis upon securing the right of privacy rather than on suppression of any form of expression because of its content.

In *Public Utilities Commission* v. *Pollak,* 343 U. S. 451, Mr. Justice Douglas, dissenting, said (at pp. 468-469):

> "The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on street cars travelling to and from home. * * * in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command.
>
> "* * * One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.
>
> "* * *
>
> "One who tunes in an offensive program at home can turn it off or tune in another station as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the street car has no choice but to sit and listen, or perhaps to sit and try *not* to listen."

We submit that these considerations are applicable to the problem of restricting "obscene" speech and press.

Ordinarily, a book is a private matter; its contents are concealed between covers and are available only to those who choose to open and read it. Unless they are forced

upon members of the community, without any choice on their part to hear or reject, there should be no suppression. If, for example, passages from an obscene book were read over a loud speaker, there would be ample basis for punishing that act without suppressing the sale of the book in book stores (Cf. *Kovacs* v. *Cooper,* 336 U. S. at pp. 104-105).

Similarly, the community may be entitled to ban the display in public places, e.g., newsstands and stores, of magazine covers containing pornographic illustrations or pictures; or the posting in public places of billboards containing obscene photographs advertising motion pictures or plays. In either circumstance, the State would have a legitimate interest in protecting the right of its citizens not to be exposed to obscene sights (or sounds) on public places. However, no purpose would be served in suppressing the sale of the magazine because of its contents, or the motion picture thus advertised because of its dialogue or subject.

The same considerations applicable to literature should apply to motion pictures, the stage, and other media of communication and entertainment. No adult is compelled to see a motion picture or a play; and in that sense these media do not involve invasion of privacy any more than books do.

However, the chief distinction between these media is that books only involve speech, whereas motion pictures and plays employ both speech and action. Concern has been expressed that theatre audiences might be exposed to acts (as distinguished from words) which were obscene. This should not present any problem, since acts could be pro-

scribed if they constituted indecent behavior or exposure, without impairing freedom of expression.

In *Public Utilities Commission* v. *Pollak,* 343 U. S. 451, Mr. Justice Douglas (dissenting) said at page 469:

> "The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds."

We are respectfully suggesting here that people should be "let alone in those choices" for as Mr. Justice Douglas has declared:

> "The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy." (dissenting in *Dennis* v. *United States,* 341 U. S. 494, 590)

That maturity of judgment is not a myth; its soundness has already proven effective in several areas of speech and press. Books published in regular or "trade editions" compete for public approval solely on the basis of merit. Success results from critical acclaim; and seldom is an effort made to exploit in suggestive or sensational manner the contents of books. Almost invariably, advertisements

contain only the title, the names of the author and publisher, and occasionally excerpts from reviews.

Similarly, the legitimate theatre makes its appeal to the public on the basis of merit. Theatrical advertising is limited in the same manner; and the public makes its choices as a consequence of the nature and content of plays, the reactions of the critics and the general public.

We respectfully submit that the problems of prohibiting the "obscene" have been overly complicated by a reluctance to trust the judgment of individual members of the community and to recognize the essential fact that taste (and sensual reactions) cannot be determined by legislation.

> "For indecency and vulgarity the fundamental remedy is the culture of audiences and readers, and the protests of critics. Jeremy Collier cured the profaneness and immorality of Restoration drama without any official authority. But the censorship, established not to clean up the stage, but to muzzle Henry Fielding, one of the greatest of British authors, made the theatre the most stagnant cultural institution in the country." (G. B. Shaw, "*Everybody's Political What's What?*", pp. 198, 199).

CONCLUSION

It is respectfully submitted that the conviction should be reversed.

Respectfully submitted,

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