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Constitutional Law--Freedom of Speech and Press--Determination of Obscenity

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CASE COMMENTS

Constitutional Law—Freedom of Speech and Press—Determination of Obscenity.—Action by the publisher of the unpurged edition of Lady Chatterly's Lover to restrain the enforcement of the Postmaster General's decision that the novel was obscene and, as such, was nonmailable under the statute barring obscene matters from the mails. 18 U.S.C. § 1461 (Supp. 1959). Held, reversing the Postmaster General's decision that the novel was obscene, that the tests relating to obscenity are objective and not subjective, and in determining what is obscene, the court considers whether the dominant effect of the book is an appeal to prurient interests, whether it exceeds the tolerance imposed by current standards, and whether the references to sex are an integral part of the overall theme sought to be conveyed to the reader. Grove Press Inc. v. Christenberry, 175 F. Supp. 488, (S.D. New York 1959).

The court in determining what is obscene and what is not is faced with a difficult problem. It is torn between two duties, first, the protection of free speech and press as prescribed by the first amendment of the United States Constitution and secondly, the demands of a society striving to prohibit traffic in obscene materials. If it be too rigid in protecting the first, the door is opened for profit in one of the most vile of enterprizes, while a too strict adherence to the second principle would infringe upon one of the most fundamental of constitutional guarantees. The real difficulty is not whether obscene material is under the protection of the first amendment, but rather in determining what is obscene. For though the phrasing of the amendment is unconditional, the court, when the question was squarely presented, held that obscenity is not within the area protected by the federal constitution. Roth v. United States 354 U.S. 476 (1957); Beauharnais v. Ill. 343 U.S. 250, (1952).

The earliest standard for judging obscenity was the so-called Hicklin test, which judged the effect of isolated passages in the work upon particularly susceptible persons. Regina v. Hicklin 3 Q.B. 360 (1868). This method brings to mind the oft-quoted statement of Samuel Johnson to a lady who complained of the inclusion of certain words in his dictionary: "Madam," Dr. Johnson said, "you must have been looking for them." The absurdity of this view was evident. Then in 1933 Judge Woolsey, in the famous case involving James Joyce's novel Ulysses, repudiated the Hicklin test, holding that the test to be applied is objective in that the work
must be read as a whole and judged as to its effect upon a person with average sex instincts. United States v. One Book Called Ulysses, 5 F. Supp. 182, (S.D. New York 1933).

The right to advocate ideas—any idea—has been jealously protected by the courts. The mere fact that the advocate holds views contrary to general public sentiment is not sufficient for its suppression. This concept has never been more forcefully stated than by Justice Potter Stewart, speaking for the majority of the United States Supreme Court, in holding unconstitutional a New York ban on the showing of a movie based on Lady Chatterley’s Lover. The picture was banned on the grounds that it attractively portrayed adultery in a manner which was contrary to the moral and religious views of the time. Justice Stewart, in referring to the first amendment said, “it protects advocacy of the opinion that adultery may sometimes be proper; no less than advocacy of socialism or the single tax.” Kingsley v. Regents, 79 S.Ct. 1362, (1959).

Roth v. U.S., supra, is probably a landmark decision in the field of censorship. It represents a concrete attempt by the Supreme Court to establish some standard by which obscenity may be judged. The case stands for the proposition that material is obscene if to an average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interests. This does not mean that whatever arouses lustful thoughts and desires is obscene, for such a definition would be much too broad for a society which today tolerates an erotic interest in art and literature. A prurient interest is an unusual fascination with sex, an interest which goes almost to the point of perversion. But even so, the general area for application of these tests has of necessity remained quite broad. The Roth case made no attempt to establish a specific set of circumstances to which these rules could be applied. The court recognized that although the material in that case could be classified as so-called “hard core” pornography, the rules laid down could also be made apply to works of art, science, and literature. Consequently in decisions after the Roth case the court, in reversing two lower court decisions on the basis of these tests, limited its application solely to the circumstances involved in each situation. A.L.I., Model Penal Code § 207.10 (2) (Tenative Draft No. 6, 1957); One, Inc. v. Olesen, 355 U.S. 371, (1958), Sunshine Book Co. v. Summerfield, 355 U.S. 372, (1958).
CASE COMMENTS

The instant case is the first time the Roth standards have been applied to a major literary work. Lawrence’s novel represents his rebellion against the staid and proper victorian society in which he lived. It has generally been considered by critics as one of the better English novels, and is usually read by most serious students in the field of literature. In writing it the author was faced with a problem in linguistic expression. Unlike French or similar romance languages, English has no socially acceptable word or words to describe procreation. Use, by the author, of scientific terminology would have been completely out of character for the persons involved, so the author chose the words which would commonly be used by the type person he sought to depict. It is these words which aroused the furor concerning the book. This type situation is precisely what the court sought to provide for in the Roth decision. It looked to the dominant theme of the novel and found the inclusion of such words not “dirt for dirt’s sake” but vital to the author’s expression and purpose.

There are many to who the novel is most distasteful, indeed even shocking. To others it is the high point of D. H. Lawrence’s career and one of the bright spots in the field of English expression. Because the views are varied and subjective, it appears that the court is correct in attempting to establish objective standards. By choosing a middle ground from which to attack each individual situation as it occurs and by discarding a hard and narrow rule such as the Hicklin view for one with a broader and more flexible base, the Supreme Court is now in the position to place substantial restraint upon the smut industry, all the while protecting the reading public from the over zealous censor.

J. G. V. M.

CONSTITUTIONAL LAW—DUE PROCESS—WHAT CONSTITUTES “DOING BUSINESS.”—Three recent cases have considered the question of what constitutes “doing business” within a state by a foreign corporation so as to subject such corporation to personal service and the jurisdiction of state courts. In the first case, P, a Louisiana resident, brought a libel action against D, a New York magazine publisher and a foreign corporation with no offices or employees in Louisiana, which merely had contacts with representatives in the state handling subscriptions, sales, and circulation of D’s magazines. D contended that such activities did not amount to presence or “doing business”