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Criminal Law - Sufficiency of Statutory Definition Under State and Federal Constitutions

James A. George

wondered whether such a result would comply with the decisions of the Supreme Court relative to justiciability under the "case or controversy" concept. Were adjudication held to be appropriate under the circumstances of the instant case, there can be no doubt that the requirement of true adversity in proceedings before the Court would be greatly diminished. When the petitioner in the instant case satisfied the sentence imposed upon him by the State of Texas, the respondent, General Manager of the Texas Prison System, ceased to have any interest in his further detention. Thus, it appears that should the decision which the dissenters urged have obtained, it would not only have been an unwarranted expansion of the traditional limitations of the writ of habeas corpus, but also it would accord with neither the spirit nor the letter of the constitutional demand for adversity.

The instant case poses yet another problem, *viz.*, its possible impact on the rule derived from the *Fiswick* and *Morgan* cases. It is suggested that, considering the fact that the petitioner in the instant case did apprise the Court of the conviction's potentially adverse effects on his civil rights,[27] if his case had come before the Court on direct review, rather than as a collateral attack under the habeas corpus statute, the case would have received attention on its merits in spite of the petitioner's release. The fact that four Justices would have heard the case despite the limited scope of the writ of habeas corpus strengthens this conclusion. It is felt the allowance of such reviews would not do violence to the adversity requirement, because the state would be the adverse party and its interest in maintaining proper convictions would be opposed to that asserted by ex-convicts in seeking to have their convictions overturned.

George M. Snellings III

CRIMINAL LAW — SUFFICIENCY OF STATUTORY DEFINITION UNDER STATE AND FEDERAL CONSTITUTIONS

Defendant, a nightclub dancer, was charged with a violation of the Louisiana obscenity statute,[1] in having allegedly commit-

27. Brief for Petitioner, pp. 29-30, Parker v. Ellis, 80 Sup. Ct. 909 (U.S. 1960).

1. LA. R.S. 14:106(3) (1950).

ted "an act of lewd and indecent dancing."[2] She filed a motion to quash the indictment on the ground that the statute was unconstitutional in that the terms "Performance by any person . . . , in any public place or in any public manner, of any act of lewdness or indecency, grossly scandalous, and tending to debauch the morals and manners of the people"[3] were so vague and indefinite that defendant was not informed of the criminal charge against her.[4] The trial court sustained the motion. On appeal and rehearing, the Supreme Court *held*, affirmed. Statutory definition of a criminal offense must be sufficiently specific and accurate so any reader having ordinary intelligence will be clearly apprised as to whether or not his conduct will be denounced as an offense. The statute did not set forth the *particular* lewd or indecent conduct the legislature sought to punish as a crime. *State v. Christine*, 239 La. 259, 118 So.2d 403 (1960).

A general statement of the requirement of sufficiency of definition is declared in Article I, Section 10, of the Louisiana Constitution: "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him."[5] This requirement has proved difficult to meet in the area of obscenity. The word "obscenity," like "morality" or "decency," is difficult to define because such definition requires the application of individual moral standards. As Mr. Justice Cardozo has stated, "Morality is not merely different in different communities. Its level is not the same for all the component groups within the same community."[6] This difficulty manifests itself in

2. *Ibid.*

3. *Ibid.*

4. LA. CONST. art. I, § 10: "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him. . . ." Defendant also claimed that the statute was unconstitutional under Article I, § 2 ("No person shall be deprived of . . . liberty or property, except by due process of law") and Article I, § 9 (the accused "shall have the right to defend himself") of the Louisiana Constitution, and that the statute was also violative of the Sixth Amendment (the accused must be "informed of the nature and cause of the accusation") and the Fourteenth Amendment (in that the action of the state would deprive the accused of liberty and property without due process of law, and the accused would be denied the equal protection of the laws) of the United States Constitution.

5. LA. CONST. art. I, § 10.

6. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 37 (1928). Substantiating this idea is the fact that, in several instances, materials which have been found obscene in one jurisdiction have been held to be unobjectionable under the comparable laws of neighboring states. This is illustrated by the fact that while the novel *God's Little Acre* was declared obscene in Massachusetts (Attorney General v. Book named "God's Little Acre," 326 Mass. 281, 92 N.E.2d 819 (1950)), and *Memoirs of Hecate County* was found to be obscene in New York (Doubleday & Co. v. New York, 335 U.S. 848 (1949)), there was no finding that either of these books had been held to be obscene in any other state. See Note, 5 N.Y.L.F. 93, 96, n. 20 (1959).

two distinct areas: that of the proper jurisprudential test by which to determine the constitutionality of an obscenity statute *as applied*, and the determination of the constitutional limitations of the statute *on its face*.

The first major jurisprudential definition of a standard to apply to obscenity legislation came in 1868 in the English case of *Regina v. Hicklin*,[7] in which the defendant was convicted of distributing literature which levelled grave charges of moral depravity at members of the Jesuit priesthood. The court stated that the test of obscenity was: "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."[8] This rule was generally followed by American courts,[9] although its operation was vigorously criticized by Judge Learned Hand in *United States v. Kennerley*.[10] Although applying the rule because he felt bound by precedent, he reasoned that the test was faulty in that it required the isolation of passages which might otherwise be termed "honestly relevant to the adequate expression of innocent ideas,"[11] and judged the material by its effect on the weakest members of society. Judge Hand's admonition was recognized in *United States v. One Book Entitled Ulysses*,[12] in which the Court of Appeals for the Second Circuit espoused the "dominant effect" theory, which takes into consideration the relevancy of allegedly obscene passages to the central theme of the work and its established reputation in the estimation of approved critics. This test, therefore, requires the entire work to be examined instead of selected passages taken out of context. In *Roth v. United States*[13] the United States Supreme Court approved charges of the lower court which defined material as obscene if it tended to arouse "lustful thoughts" as judged by "contemporary community standards."[14] However, while approving these instructions, the court accepted the new rule as promulgated in the American Law Institute's Model Penal Code, which states that, "a thing is ob-

7. L.R. 3 Q.B. 360 (1868).
8. *Id.* at 371.
9. United States v. Smith, 45 Fed. 476 (E.D. Wis. 1891); United States v. Harmon, 45 Fed. 414 (D. Kan. 1891); United States v. Clarke, 38 Fed. 500 (E.D. Mo. 1889); United States v. Bennett, 24 Fed. Cas. 1093 (No. 14,571) (C.C.S.D. N.Y. 1879).
10. 209 Fed. 119 (S.D. N.Y. 1913).
11. *Id.* at 120-21.
12. 72 F.2d 705 (2d Cir. 1934), *affirming* 5 F. Supp. 182 (S.D.N.Y. 1933).
13. 354 U.S. 476 (1957).
14. *Id.* at 489.

scene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . . . Obscenity shall be judged with reference to ordinary adults."[15] Confusion is engendered by the fact that the Model Code expressly rejects the "lustful thoughts" theory on the grounds that it is unrealistically broad and that governmental regulation of thoughts and desires as opposed to overt commissions raises both serious constitutional and practical difficulties.[16] The definition of obscenity in terms of a *tendency* to arouse lustful thoughts, according to the Institute, "makes the criminal law a battleground for conflicting moralities, ethics and aesthetics, contrary to the principle that criminal law must be reserved for that which the whole community condemns."[17] Despite this apparent conflict inherent in the *Roth* opinion, it may be concluded that the United States Supreme Court has fully adopted the "dominant appeal to prurient interest" standard of obscenity, and that it stands as the current federal test.[18]

In addition the Court in *Roth* made the following statement

15. MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957). The omitted portion is as follows: "A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience. In any prosecution for an offense under this section evidence shall be admissible to show:

"(a) the character of the audience for which the material was designed or to which it was directed;

"(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people;

"(c) artistic, literary, scientific, educational or other merits of the material;

"(d) the degree of public acceptance of the material in this country;

"(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

"(f) [purpose and reputation of the author, publisher, or disseminator.]"

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible.

16. *Id.* Comments at 10. See also Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 593 (1955).

17. MODEL PENAL CODE § 207.10(2), at 22 (Tent. Draft No. 6, 1957).

18. Smith v. People, 80 Sup. Ct. 215 (1959); Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960); Flying Eagle Productions, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960); Alexander v. United States, 271 F.2d 140 (8th Cir. 1959); Eastman Kodak Co. v. Hendricks, 262 F.2d 392 (9th Cir. 1958); United States v. Keller, 259 F.2d 54 (3d Cir. 1958); Sunshine Book Co. v. Summerfield, 249 F.2d 114 (D.C. Cir. 1957); Excelsior Pictures Corp. v. City of Chicago, 182 F. Supp. 400 (N.D. Ill. 1960); Poss v. Christenberry, 179 F. Supp. 411 (S.D.N.Y. 1959); Werner v. City of Knoxville, 161 F. Supp. 9 (E.D. Tenn. 1958); United States v. 31 Photographs, Etc., 156 F. Supp. 350 (S.D.N.Y. 1957).

in reference to the other major problem encountered in this area, the interpretation of the terms of obscenity laws with a view toward determining whether or not the statute fulfills the constitutional requirements of statutory definition:

> "Many decisions have recognized that the terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. . . . '[T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' "[19]

The problem of statutory definition is heightened by the fact that most obscenity statutes utilize many adjectives such as "lewd, lascivious, filthy, indecent . . . or disgusting,"[20] which are equally imprecise, and which depend on each other for definition. Louisiana jurisprudence has experienced much the same difficulty with such words as lewd, immoral, indecent, and obscene as has been experienced in other jurisdictions. In 1883, the Louisiana Supreme Court sustained the use of the words "disorderly and indecent manner" in a bawdy-house ordinance.[21] In 1919, the court in *City of Shreveport v. Wilson*,[22] stated that the term "or other lewd or indecent act" was too vague and indefinite to meet the test of constitutionality when used in an anti-prostitution ordinance, although the court did not determine the question of constitutionality in disposing of the case. One year later the court held that the term "lewd dancing" was not too vague to inform the defendant of the charge against him.[23] Conceding that the term "lewd" had no statutory or technical definition, the court said that "it has, particularly when applied to dancing, the very well and generally understood and unmistakable meaning, indecent, lascivious, lecherous, tending to excite lustful thoughts. If all of these qualifying terms were contained in the statute, they would amount to nothing but tautology."[24] In *State v. Truby*,[25] the court declared that the word "immoral" as used in the disorderly houses statute[26] had

19. Roth v. United States, 354 U.S. 476, 491 (1957).
20. N.Y. Penal Law § 1141.
21. City of Shreveport v. Fanny Roos, 35 La. Ann. 1011 (1883).
22. 145 La. 906, 83 So. 186 (1919) (dictum).
23. State v. Rose, 147 La. 243, 84 So. 643 (1920).
24. *Id.* at 251, 84 So. at 646.
25. 211 La. 178, 29 So.2d 758 (1947).
26. La. R.S. 14:104 (1950).

no definite meaning and was unconstitutionally vague. The obscenity statute met its first test of validity in *State v. Kraft.*[27] The court held that the use of the word indecent in the phrase "indecent print, picture" rendered the statute unconstitutionally vague. The 1950 legislature revised the statute to read "*sexually* indecent print"[28] (emphasis added), which wording the court upheld in 1954 in *State v. Roth.*[29]

Concomitant with the requisite that criminal statutes are *stricti juris* and must be strictly construed in favor of the defendant[30] is the generally accepted canon of construction that penal statutes are not to be given the narrowest possible meaning but that the "language of the statute should be given a reasonable or common sense construction, consonant with the objects of the legislation."[31] This canon is expressed in Article 3 of the Louisiana Criminal Code of 1942 which requires that all criminal provisions "shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."[32] This rule of construction reflects the technique used in the Criminal Code of 1942, i.e., generalization of terms as opposed to the technique of minutely detailed specification. Such a drafting style makes possible a greater coverage of prohibited conduct and eliminates the defense that the conduct involved is not included in the specific enumeration.[33] The technique of generalization was approved in such cases in *State v. Pete,*[34] which upheld the theft article[35] of the Criminal Code against an attack of unconstitutional vagueness. This article, which consolidated the many early common law stealing crimes into one clear provision, is probably the most general statement in the Criminal Code. This method has also been accepted, without any serious challenge, in the definition of such basic crimes as burglary[36] and gambling.[37] In several

27. 214 La. 351, 37 So.2d 815 (1948).
28. La. Acts 1950, No. 314, § 1.
29. 226 La. 1, 74 So.2d 392 (1954).
30. State v. Vanicor, 239 La. 357, 118 So.2d 438 (1960); State v. Penniman, 224 La. 95, 68 So.2d 770 (1953); State v. Truby, 211 La. 178, 29 So.2d 758 (1947); State v. Gelbach, 205 La. 340, 17 So.2d 349 (1944); State v. Laborde, 202 La. 59, 11 So.2d 404, 144 A.L.R. 1376 (1943).
31. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5606 (3d ed. 1943).
32. LA. R.S. 14:3 (1950).
33. See Bennett, *The Louisiana Criminal Code, A Comparison with Prior Louisiana Criminal Law*, 5 LOUISIANA LAW REVIEW 6, 7, n. 2 (1942). See also 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5607 (3d ed. 1943).
34. 206 La. 1078, 20 So.2d 368 (1944).
35. LA. R.S. 14:67 (1950).
36. State v. Route, 221 La. 50, 58 So.2d 556 (1952).

cases in which the Louisiana Supreme Court has upheld these general provisions, it has been clearly expressed that the rule of *stricti juris* would not be applied with such "unreasonable technicality" as to defeat the very meaning and intent of the statutes.[38]

It is submitted that the majority opinion in the instant case, while giving full effect to the rule of *stricti juris*, failed to utilize the rules of genuine construction which have been embodied in both the Criminal Code and jurisprudence. As the United States Supreme Court said in *Roth*, the requirement of statutory definition is only that the "language conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices*." (Emphasis added.)[39] It would appear that an application of this rule in conjunction with a more genuine construction of the Louisiana obscenity statute would have led the court to a different result in the instant case. Furthermore, as Mr. Justice Hamiter points out in his dissenting opinion,[40] the only case of those cited by the majority that dealt squarely with lewd and indecent *acts* was that of *City of Shreveport v. Wilson*,[41] in which the question of constitutionality was not reached by the court.[42]

A sequel to the *Christine* case is the 1960 amendment of Louisiana Revised Statutes 14:106,[43] which utilizes the very specification technique that the draftsmen of the Criminal Code sought to avoid. In an effort to comply with the *Christine* ruling, the legislature was forced to define an obscene performance in these tautologous terms:

> "Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement."[44]

37. State v. Varnado, 208 La. 319, 23 So.2d 106 (1945); State v. Davis, 208 La. 954, 23 So.2d 801 (1945).

38. State v. Broussard, 213 La. 338, 34 So.2d 883 (1948); State v. Davis, 208 La. 954, 23 So.2d 801 (1946); State v. Bonner, 193 La. 402, 190 So. 626 (1939).

39. Roth v. United States, 354 U.S. 476, 491 (1957).

40. 239 La. 259, 298, 118 So.2d 403, 417 (1960).

41. 145 La. 906, 83 So. 186 (1919).

42. In reversing the convictions, the court there stated: "The only question thus presented is whether the municipal ordinance has application to the facts stated." 145 La. 906, 908, 83 So. 186, 187 (1919).

43. La. Acts 1960, No. 199, § 1.

44. La. R.S. 14:106(4) (1950), as amended.

The instant case seems to impose "impossible standards"[45] on the drafting of valid obscenity legislation, and denies the operation of the "genuine construction" rule of the Criminal Code. Such a construction seemingly runs contrary to the obvious intent and purpose of the legislation, and it is submitted that a more reasonable construction of such statutes will better serve to accord them their appropriate scope, and to fulfill the objectives of legislative design.

James A. George

MINERAL RIGHTS — ALIENATION OF MINERALS BY STATE POLITICAL SUBDIVISIONS AND AGENCIES

Plaintiff instituted a concursus proceeding to determine the ownership of proceeds from the production of oil and gas on the land in question. A dispute over the ownership of the minerals existed between the claimant school board and the claimant Harrison. The school board acquired the property by purchase, and by mesne conveyances the title ultimately descended to Harrison. In the deeds the minerals were neither excepted nor mentioned. Harrison executed an oil, gas, and mineral lease to plaintiff, and about one year later, claimant school board executed a similar lease to plaintiff. The trial court determined that the school board was included within the ambit of Article IV, Section 2, of the State Constitution of 1921, which provides that mineral rights sold by the state shall be reserved and thus by virtue of the constitutional provision could not alienate the minerals on any land it sold. Therefore, the State of Louisiana, through its agent the school board, was found to be the owner of the minerals. The court of appeal reversed and on review by the Louisiana Supreme Court, *held,* judgment of the court of appeal affirmed. The constitutional provision of Article IV, Section 2, applies to the "state" only and not to a political subdivision or state agency. Thus the sale of the land included the mineral rights since the latter were not expressly reserved by the school board. *Stokes v. Harrison,* 238 La. 343, 115 So.2d 373 (1959).

The Louisiana Constitution of 1921 in Article IV, Section 2, provides: "In all cases the mineral rights on any and all property

45. Roth v. United States, 354 U.S. 476, 491 (1957).