Louisiana Law Review

Volume 23 | Number 3
April 1963

Criminal Law - The Louisiana Obscenity Statute And Freedom of Speech and Press

Anthony J. Graphia

for divorce under R.S. 9:301 one of the parties must have lived continuously separate and apart for at least two years *in Louisiana* before jurisdiction to hear the proceeding will vest in a court of this state.

The jurisdictional requirement of domicile and the venue requirement for separation and divorce are mandatory and unequivocal;[18] only the conditions of locale with which the grounds must comply may be otherwise provided for in the statute authorizing such grounds.[19] Thus, grounds prescribed by any law which does not itself "otherwise provide" must comply with the general conditions of locale of Article 10(7). This interpretation prevents divorce-minded spouses in other states from taking advantage of what would be an otherwise liberal jurisdiction provision, and abrogates the need for further amendment to R.S. 9:301 to require expressly that the ground for divorce created thereby occur in Louisiana. In summary, a party desiring a divorce or separation in Louisiana must: (1) have grounds prescribed by a general divorce or separation statute that either satisfy the conditions for existence of jurisdiction found in Article 10(7), or conform to other conditions expressly prescribed in the statute establishing the grounds; (2) be either a Louisiana domiciliary or bring suit against one; and (3) institute suit in the proper forum provided by Article 3941 of the Code of Civil Procedure.

David S. Bell

CRIMINAL LAW — THE LOUISIANA OBSCENITY STATUTE AND FREEDOM OF SPEECH AND PRESS

Respectable authorities agree serious dangers lurk in the apparent widespread dissemination of obscene and pornographic materials throughout the United States.[1] Obscenity statutes exist

18. Constitutionally and jurisprudentially, see note 8 *supra*, and accompanying text; statutorily, see note 1 *supra*, and accompanying text; as to venue, see note 7 *supra*.

19. LA. CODE OF CIVIL PROCEDURE art. 10(7) (1960). See note 7 *supra*.

1. An increased sex-crime rate among juveniles in the United States which parallels the increased exposure to American produced pornography has been cited as a primary danger. Moreover, communist subversion has also been blamed for the attempted demoralization of youth through dissemination of such materials. Joint Committee on Continuing Legal Education of ALI and ABA, *The Problems of Drafting an Obscenity Statute*, No. 9, 67, 68 (1961), and authorities cited therein.

in most jurisdictions in an effort to suppress these dangers.[2] Following in their wake are serious constitutional problems of freedom of speech and press. This Comment will examine these problems in connection with the test for constitutionality of obscenity legislation. Louisiana's obscenity statute will be evaluated in light of federal jurisprudence with a view to possible redrafting of the clause defining obscene and pornographic material.[3]

The first amendment to the Federal Constitution guarantees freedom of speech and press.[4] The framers of this amendment apparently intended an assurance of free interchange of ideas which would advance the cause of truth, justice, and liberty. Inevitably, the delicate question arose whether this freedom of speech and press was absolute; the answer was in the negative.[5] The specific issue whether obscenity was utterance within the ambit of protected speech and press was eventually presented to the United States Supreme Court in *Roth v. United States*.[6]

2. People v. Richmond County News, Inc., 9 N.Y.2d 578, 590, 175 N.E.2d 681, 688 (1961): "The common judgment that obscenity should be restrained is also reflected in the international Agreement for the Suppression of the Circulation of Obscene Publications entered into by more than fifty countries . . . , in the obscenity laws of our forty-eight states . . . , and in the scope of obscenity laws enacted by Congress since 1842." (Dissenting opinion by Froessel, J.)

3. LA. R.S. 14:106A(2) (1950), as amended, La. Acts 1958, No. 388, § 1, La. Acts 1960, No. 199, § 1, provides: "A. Obscenity is the intentional: . . . (2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, or of any lewd, lascivious, filthy, or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed, or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory visual or sensory representations of such sexually indecent character."

4. U.S. CONST. amend. 1; see Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959).

5. Schaefer v. United States, 251 U.S. 466 (1919); Gitlow v. New York, 268 U.S. 652 (1924).

A recent New York case involving the circulation of magazines illustrates the principle that freedom of speech and press is not absolute. People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681 (1961), held a statute which prohibited the publishing and selling of materials "incontestably found to be obscene" did not offend first amendment guarantees. *Id.* at 581, 175 N.E.2d at 682. The court cited Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957), which had held valid a New York statute under which booksellers could be enjoined from selling obscene books as regulating obscenity without prior restraint.

6. 354 U.S. 476 (1957). Roth was charged by indictment in New York with the mailing of circulars and advertisements which were allegedly obscene and in violation of 18 U.S.C. § 1461 (1948). Alberts v. United States, 354 U.S. 476 (1957) was considered by the Supreme Court with *Roth*. Alberts, conducting a mail order business in Los Angeles, was charged with possession for sale of obscene books in violation of CAL. PENAL CODE ANN. § 311 (1955).

In *Roth*, the court noted that, although on numerous occasions it had indi-

The Court squarely held that "obscenity is not within the area of constitutionally protected free speech or press."[7]

To be contrasted with obscenity cases are those involving an advocacy of ideas not in themselves obscene albeit unconventional. The United States Supreme Court has held unconstitutional a state statute prohibiting the showing of a motion picture portraying sexual immorality "as desirable, acceptable, or proper patterns of behavior."[8] In so holding the Court emphasized the distinction between obscenity and unconventional ideas immoral by current standards — promulgation of the latter is protected by the first amendment.[9]

A dilemma is faced by legislators endeavoring to formulate a statute regulating moral conduct, *i.e.*, construction of a test specific enough to inform one of the prohibited crime, yet not so restrictive as to encroach upon freedom of speech and press.[10] The decision of the United States Supreme Court in *Roth* lends guidance in travelling this narrow path. *Roth* rejected defendant's contention that material was not obscene unless it presented a "clear and present danger" of inciting antisocial behavior.[11] Instead the Court formulated as the constitutional test for obscenity the following: "Obscene material is material which deals with sex in a manner appealing to the prurient interest."[12]

---

cated an assumption that freedom of speech and press did not include obscenity, this was the first case in which the issue was squarely presented. *Id.* at 481.

7. 354 U.S. at 483. Reviewing constitutional history from 1712 to 1792, the Court noted that not every utterance was protected by the first amendment. The Court concluded: "[A]t the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for free speech and press."

8. Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959).

9. The Court stated that censorship of the motion picture *Lady Chatterly's Lover*, not for obscenity, but for alluring portrayal of adultery as proper behavior "struck at the very heart of constitutionally protected liberty." *Id.* at 688.

10. See Adams Newark Theatre Co. v. City of Newark, 22 N.J. 472, 126 A. 2d 310 (1956); see *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Criminal Law and Procedure*, 18 LA. L. REV. 119, 120 (1957).

11. The Court quoted Beauharnais v. Illinois, 343 U.S. 250 (1952): "[L]ibellous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts to consider the issues behind the phrase 'clear and present danger'." Roth v. United States, 354 U.S. 476, 486 (1957). See also Dennis v. United States, 341 U.S. 494 (1951).

12. 354 U.S. at 487. Going further, the Court quoted the test adopted by later decisions of American courts: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489, See MANual Enterprises Inc. v. Day, 370 U.S. 478 (1962), 16 VAND. L. REV. 257.

"Prurient interest" is defined by MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957) as "a shameful or morbid interest in nudity, sex, or excretion," going substantially "beyond customary limits of candor in description or representation of such matters."

The Court indicated that a statute is not void for vagueness if the wording is such that one would understand what conduct is proscribed, for neither precision nor impossible standards are required. Consequently, statutes employing the terms "obscene, lewd, lascivious, or filthy . . . or indecent character," and "obscene or indecent," were found to "give adequate warning of the conduct proscribed" when applied according to the test for obscenity outlined by the Court.[13]

An obscenity statute which does not require the element of *scienter* — a term signifying defendant's guilty knowledge[14] — imposes strict criminal liability for mere performance of the prohibited acts. The United States Supreme Court has held freedom of speech and press are too severely restricted by elimination of the *scienter* requirement; therefore, to be constitutional, an obscenity statute must contain that element,[15] even though other criminal statutes have been found adequate without the *scienter* element.[16]

Section 2 of Louisiana's present obscenity statute[17] has never been constitutionally challenged. However, an analysis of it in terms of the *Roth* test should shed light on the probable outcome of such a challenge.

The statute characterizes as obscene material that is "lewd, lascivious, filthy, or sexually indecent" or "of sexually indecent character."[18] *Roth* approved, as constitutionally adequate specifications of the crime charged, statutes employing the words "obscene, lewd, lascivious, or filthy . . . or indecent character" to describe the prohibited material.[19] Because of the obvious similarity of wording,[20] it seems reasonable to conclude that

13. 354 U.S. at 491. Applying the stated test, the Court said: "These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . .'." *Id.* at 491.

14. People v. Gould, 23 Mich. 156, 211 N.W. 346 (1926); Horton v. Tyree, 104 W. Va. 238, 139 S.E. 737 (1927).

15. Smith v. California, 361 U.S. 147 (1959).

16. "There is no specific constitutional inhibition against making the distributors of foods the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.* at 152.

17. LA. R.S. 14:106A(2) (1950), as amended, La. Acts 1958, No. 388, § 1; and La. Acts 1960, No. 199, § 1, quoted note 3 *supra*.

18. *Ibid.*

19. See note 13 *supra*, and accompanying text.

20. See note 13 *supra*, and accompanying text. The Louisiana statute does not employ the word "obscene" in characterizing the material. However, this should make no difference since the words used by the Louisiana statute are

the Louisiana statute is not void for vagueness or uncertainty in the description of the proscribed materials.

The test in *Roth* — appealing to prurient interest — is applied to the statutory description of obscene materials, while the Louisiana statute utilizes the test only in defining defendant's intent;[21] defendant must have the specific intent to primarily appeal to the prurient interest. Although the variance in the subject of the test might raise doubt as to its adequacy, it could be argued the test is indirectly applied to the material itself by way of proof of the defendant's intent.

This variance of the subject of the obscenity tests leads to another difficulty; on its face the Louisiana statute's requirement that there be a primary appeal to the prurient interest may seem to satisfy *Roth's* requirement that the material be considered as a whole to determine its dominant theme.[22] However, since this primary appeal refers to the intent of the defendant, not to the materials, it could be argued the dominant theme of the materials is ignored. It is equally arguable, however, that the word "character"[23] as used in the Louisiana statute when referring to the materials, means quality or trait of the materials that can be judged only by a review of the entire work.

In *State v. Roufa*[24] the Louisiana Supreme Court held the constitutional requirement of *scienter*[25] was fulfilled by the Louisiana statute.[26]

The Louisiana obscenity statute, as it now stands, may meet the present constitutional tests as developed by the federal courts.[27] However, a redrafting may be helpful in order more nearly to track the test of federal constitutional jurisprudence, thus removing the problems previously discussed. This could be

synonymous with "obscene." See BLACK, LAW DICTIONARY 1227 (4th ed. 1951).

21. One must produce the sexually indecent materials with a specific intent to appeal primarily to the prurient interest of the average person. Thus, evidence must be submitted which establishes that the actor actively desired the criminal consequences to follow.

22. See note 13 *supra*.

23. See note 18 *supra*, and accompanying text.

24. 241 La. 474, 486, 129 So. 2d 743, 747 (1961): "It leaps to the mind that knowledge is necessary to intention and that one cannot have intention without knowledge."

25. See Smith v. California, 361 U.S. 147 (1959).

26. See notes 18-20 *supra*, and accompanying text.

27. Note, 21 LA. L. REV. 264, 267 (1960) states: "[I]t 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."

accomplished by incorporation of the principles of the Model Penal Code concerning obscenity statutes[28] with those of the *Roth* case.

A revision[29] of the Louisiana obscenity statute might read as follows:

> R.S. 14:106 Obscenity
>
> A. Obscenity is the intentional:
>
> (2) Production, sale, exhibition, gift, advertisement, exchange, or the possession with the intent to sell, exhibit, give, advertise, or exchange, any lewd, obscene, or sexually indecent material,[30] the dominant theme of which, considered as a whole, applying contemporary community standards of the average person, appeals primarily to the prurient interest. Prurient interest, as used in this sub-section, means a shameful or morbid interest in nudity, sex, or excretion, going substantially beyond the customary limits of candor in description or representation of such matters.[31]

Anthony J. Graphia

SALES — REFUSAL OF PURCHASER TO ACCEPT TITLE SUGGESTIVE OF SERIOUS LITIGATION

Plaintiff sued for specific performance of an agreement to purchase immovable property. Defendant school board contended

28. See note 13 *supra*.

29. The present statute possibly violates principles of good draftsmanship because of its verbosity; but considering the nature of the conduct intended to be precluded, the many variations of obscene matter, and the difficulties that have arisen in construing obscenity (see generally Note, 21 LA. L. REV. 264 (1960)), conciseness and brevity must be sacrificed for the cause of enforcement. See *The Work of the Louisiana Legislature for the 1960 Term — Criminal Law and Procedure*, 21 LA. L. REV. 66, 68 (1960).

30. It is submitted that as an alternative, keeping in mind the difficulties encountered in enforcement, the materials may be specified as in the present statute. See note 3 *supra*. See also *The Work of the Louisiana Legislature for the 1960 Term — Criminal Law and Procedure*, 21 LA. L. REV. 66, 68 (1960).

31. In People v. Richmond County News, 9 N.Y. 2d 578, 175 N.E. 2d 681 (1961) the court was split 4-3 in favor of setting the constitutional limits at "hard-core" pornography, despite the minority view that *Roth v. United States* did not require such restriction, but merely set forth the minimum test of constitutionality and outlined its limits. There is no Louisiana jurisprudence dealing with this problem. Therefore, an adoption of the proposed redrafting will still result in speculation where the Louisiana Supreme Court will draw its limits. In Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 398 n. 26 (1963), however, it is suggested that MANual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), 18 VAND. L. REV. 251 so limits the *Roth* test.