Louisiana Law Review

Volume 35 | Number 3
Highlights of the 1974 Regular Session: Legislative Symposium
Spring 1975

Obscenity Regulation

Mark A. Fullmer

error discoverable on the face of the pleadings, without reference to the evidence, the supreme court remains limited in its appellate review to errors "designated in the assignment of errors." Louisiana has no procedure analogous to the doctrine of "plain error" such as is found in the federal rules.[28]

To some critics, the effect of Act 207 of 1974 is insignificant. They argue that it does little more than to replace the bill of exceptions with an assignment of error, since both must be filed at the trial level and both serve to restrict the appellate jurisdiction of the supreme court. They contend that the assignment should be made to the supreme court and that the whole process should not preclude review of a point properly objected to either orally or by written motion.[29]

Possibly such changes should be considered in the future. Nevertheless, the writer submits that Act 207 of 1974 has given some significant flexibility to the appellate review of criminal cases. It is hoped that the supreme court will treat the new procedure as a relaxation of the technicalities associated with the bill of exceptions.

OBSCENITY REGULATION

The landmark decision of the United States Supreme Court in *Miller v. California*[1] prompted the Louisiana supreme court to invali-

28. FED. R. CRIM. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Perhaps as a consequence of the absence of the plain error doctrine, Louisiana courts have often been called upon to determine the scope of the exception as to errors "patent on the face of the record." *See* City of Baton Rouge v. Norman, 290 So. 2d 865 (La. 1974); State v. Chighizola, 281 So. 2d 702 (La. 1973); State v. Davis, 278 So. 2d 130 (La. 1973); State v. Comeaux, 277 So. 2d 647 (La. 1973); State v. Raby, 259 La. 909, 253 So. 2d 370 (1971); State v. Austin, 255 La. 108, 229 So. 2d 717 (1969), *appeal after remand,* 258 La. 273, 246 So. 2d 12 (1971); State v. Palmer, 251 La. 759, 206 So. 2d 485 (1968).

29. When a federal constitutional right is involved, the refusal of the supreme court to review the complaint on appeal spawns problems of collateral review. *See* Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974); Lawrence v. Henderson, 478 F.2d 705 (5th Cir. 1973); State v. Woodfox, 291 So. 2d 388 (La. 1974); State v. Flanagan, 250 La. 100, 222 So. 2d 872 (1969). The writer submits that the supreme court should be able, under the new procedure, to receive late filings of assignment of errors to avoid collateral litigation of constitutional issues. Art. 844 simply requires the filing of the assignment "within the time specified by the trial judge." The return date is not mentioned. The supreme court, in the exercise of its supervisory jurisdiction (LA. CONST. art. V, § 5(A)), should be able to authorize or order late filing of assignment of error. This is a logical and necessary approach when constitutional questions are properly raised at the trial level. *See* State v. Moseley, 284 So. 2d 749 (La. 1973).

1. 413 U.S. 15 (1973). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973);

date our state statutory regulation of obscenity. In *State v. Shreveport News Agency, Inc.*[2] and *State v. McNutt*,[3] the court declared that Louisiana's definition of obscenity was unconstitutional. Similarly, in *Gulf States Theatres v. Richardson*[4] and *State v. Gulf States Theatres*,[5] the court held the state nuisance statute unconstitutional when used to regulate obscenity. During the 1974 regular session, the legislature passed three important acts[6] designed to fill the void created by these recent decisions.

Act 274 — Definition of Obscenity

Although first amendment protection does not extend to obscenity, the danger of restricting protected expression requires that statutes regulating obscenity be narrowly drawn.[7] Beginning with *Roth v. United States*,[8] which formulated the requirement that the work as a whole appeal to prurient interest,[9] the United States Supreme Court has attempted to enunciate a permissible standard for judging obscenity. Later cases applied the tests of "patent offensiveness"[10] and utter lack of "redeeming social importance,"[11] and in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*,[12] the Court combined these three standards and required that each be independently satisfied before the work could be judged obscene. In *Miller*, the Court re-stated the three part test[13] and declared that the states may regulate only descriptions or depic-

United States v. Orito, 413 U.S. 139 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. Twelve Two Hundred Foot Reels of Super Eight Film, 413 U.S. 123 (1973).

2. 287 So. 2d 464 (La. 1973).

3. 287 So. 2d 478 (La. 1973).

4. 287 So. 2d 480 (La. 1973).

5. 287 So. 2d 496 (La. 1973).

6. La. Acts 1974, Nos. 274, 275, 277. Enactments of lesser importance passed during the session were Acts 279 and 496 (prohibiting lewd, immoral or improper conduct or practices at premises holding on-sale permits for beverages of low and high alcoholic content) and Act 180 (regulating motion picture ratings).

7. Miller v. California, 413 U.S. 15, 23-24 (1973).

8. 354 U.S. 476 (1957).

9. *Id.* at 489.

10. Manual Enterprises v. Day, 370 U.S. 478, 482 (1962).

11. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

12. 383 U.S. 413 (1966).

13. (1) The average person applying contemporary community standards must find that the work appeals to prurient interest, (2) the work must depict or describe patently offensive hard-core sexual conduct specifically defined by state law, and (3) the work must lack serious literary, artistic, political or social value. 413 U.S. at 24.

tions of hard-core sexual conduct.[14] *Miller* listed a few "plain examples" of material constituting hard-core obscenity: patently offensive representations or descriptions of ultimate sex acts, masturbation, excretory functions and lewd exhibition of the genitals.[15] In the recent case of *Jenkins v. Georgia*,[16] the Court repeated the examples given in *Miller* and stated that the states may also proscribe "anything sufficiently similar to such materials to justify similar treatment."[17]

Section one of Act 274 adopts the three part *Miller* test of obscenity and defines by means of an extensive list what the legislature considers to be "patently offensive hard-core sexual conduct."[18] Some of the activities included in the definition, such as ultimate sex acts,[19] are almost identical to the "plain examples" of hard-core sexual conduct given in *Miller*, and thus prohibition of materials depicting such conduct is constitutional. However, other sections of the definition of hard-cord obscenity in Act 274 may exceed the constitutional limitations of *Miller* and *Jenkins*. Nudity is arguably included;[20] yet the Court has declared that "nudity alone is not enough to make material legally obscene under the *Miller* standards."[21] Finally, the definition lists such things as sadomasochistic abuse,[22] acts of apparent sexual

14. *Id.* at 27.

15. *Id.* at 25-26.

16. 418 U.S. 153 (1974).

17. *Id.* at 161.

18. Since the second part of the *Miller* test is the most troublesome, the following analysis is limited to a discussion of Act 274's attempt to fulfill the requirement that the state statute must prohibit specifically defined hard-core sexual conduct.

19. LA. R.S. 14:106A(2)(a) (Supp. 1974): "Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals or an animal and a human being. . . ." LA. R.S. 14:106A(2)(b) (Supp. 1974): "Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals . . . anus [or] vulva. . . ."

20. *See* LA. R.S. 14:106A(2)(b) (Supp. 1974): "lewd exhibition, actual, simulated or animated, of the . . . pubic hair [or] female breast nipples. . . ." Although the above section of the Act does not proscribe nudity per se, a strong argument can be made that the prohibited depictions, (*e.g.*, lewd exhibition of female breast nipples) are in fact attempts to include conduct that can be more properly classified as "mere nudity" than "patently offensive hard-core sexual conduct." *See also* LA. R.S. 14:106A(2)(d) (Supp. 1974): "[a]ctual, simulated, or animated, touching, carressing or fondling of, or other physical contact with, a . . . female breast nipple, covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an apparent act of sexual stimulation or gratification. . . ."

21. Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (declaring the movie "Carnal Knowledge" could not be found obscene under the *Miller* standards).

22. LA. R.S. 14:106A(2)(c) (Supp. 1974): "Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude

gratification[23] and artificial stimulation of human genital organs.[24] This expansion upon the "plain examples" given in *Miller* was undertaken by the legislature without intelligible guidelines, apart from the elusive concepts that the activity must be "patently offensive hard-core sexual conduct"[25] and of "sufficient similarity"[26] to clearly hard-core conduct to justify similar treatment. It is in this area that "one can not say with certainty that material is obscene until at least five members of [the] Court, applying inevitably obscure standards, have pronounced it so."[27]

Act 274 purports to proscribe violent material,[28] even though the United States Supreme Court has never declared such material to be outside of the limits of constitutional protection.[29] Indeed, many great works of literature would appear to fall within the ambit of this statutory prohibition.[30] It is not clear under what circumstances prohibition of violent material may be permissible or whether the Court would apply the talismanic approach of *Roth*, the traditional clear and present danger test or would adopt a new balancing test in this uncharted first amendment area.[31] However, other states which had previously enacted regulations dealing with violent materials have since repealed them,[32] and recent attempts to prohibit such materials

---

or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or the condition of being fettered, bound or otherwise physically restrained, on the part of one so clothed. . . ."

23. LA. R.S. 14:106A(2)(d) (Supp. 1974): "Actual, simulated or animated, touching, caressing or fondling of or other similar physical contact with, a pubic area [or] anus . . . covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification. . . ."

24. LA. R.S. 14:106A(2)(e) (Supp. 1974): "Actual, simulated or animated stimulation of a human organ by any device whether or not the device is designed, manufactured or marketed for such purpose."

25. Miller v. California, 413 U.S. 15, 27 (1973).

26. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

27. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

28. LA. R.S. 14:106A(6) (Supp. 1974): " 'Violent material' is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture and mutilation of the human body."

29. The only time this issue was before the Court was in *Winters v. New York*, 333 U.S. 507 (1948), which was decided on the void-for-vagueness doctrine.

30. A plausible interpretation of the statute would prohibit the teaching of such classics as the *Iliad* in high school English classes.

31. *See* Comment, 67 COLUM. L. REV. 1149 (1967).

32. *See, e.g.*, Law of March 26, 1885, ch. 47, § 2, [1885] Conn. Laws ch. 329, § 6245 (repealed 1935); Mass. Ann. Laws ch. 272, § 30 (1933), *as amended by* Mass. Acts

have evoked criticism, indicating that regulation of violent material is of questionable constitutionality.[33]

The Act also proscribes indecent exposure.[34] Because the danger of impinging upon protected first amendment expression is much less when the state regulates indecent exposure than when it attempts to prohibit obscenity, more flexibility is given the state in defining the crime of indecent exposure.[35] The requirement that "intent of arousing sexual desire" be proven as an essential element of the crime of indecent exposure dispels any doubt as to the constitutionality of this section of the Act. The statutory language does not allow punishment for activity arguably protected by the first amendment, such as public nudity in the nature of symbolic protest.

An adversary hearing prior to arrest is provided by the Act, although there is an exception for arrest without a hearing when the offense charged is depiction of ultimate sex acts.[36] Since a pre-arrest hearing is not constitutionally compelled in any instance,[37] the exception is permissible. If the alleged violation involves the questionable sections of the Act, the hearing procedures might provide the easiest method of successfully contesting the validity of those sections. Even if portions of the Act are declared unconstitutional, the severability provision insures that other portions will not be affected.[38]

Act 275 — Regulation of Material Harmful to Minors

Obscenity is a concept which varies in its coverage, depending on the group that will be exposed to the materials.[39] The United

1974, ch. 430; Laws of April 4, 1917, ch. 242, § 1 [1917] Minn. Stat. § 617.72 (repealed 1963); Mont. Rev. Code § 11134 (1935), *as amended by* Mont. Acts 1967, ch. 276; Laws of March 31, 1887, ch. 113, § 4 [1887] Neb. Rev. Stat. § 28-924 (repealed 1961).

33. *See* comments to New York Penal Law § 235.00 (Supp. 1974); Zellick, *Violence as Pornography*, 1970 CRIM. L. REV. (ENGLISH) 188; Comment, 67 COLUM L. REV. 1149 (1967).

34. LA. R.S. 14:106A(1) (Supp. 1974).

35. "[T]he States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." Miller v. California, 413 U.S. 15, 26 n.8 (1973).

36. LA. R.S. 14:106F(1) (Supp. 1974).

37. Milky Way Prod., Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), *aff'd per curiam sub nom.*, New York Feed Co. v. Leary, 397 U.S. 98 (1970).

38. La. Acts 1974, No. 274 § 2.

39. "[T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75, 218 N.E.2d 668, 671 (1966), *appeal dismissed sub nom.*, Bookcase, Inc. v. Leary, 385 U.S. 12 (1966). Conversely,

States Supreme Court in *Ginsberg v. New York*[40] affirmed a conviction based upon the sale to a minor of material that would not have been considered obscene for adults. The variable obscenity concept has been incorporated into Act 275 by defining obscenity in terms of material which is harmful to minors.

Section one of Act 275 defines material harmful to minors as any tangible work or thing which:

> exploits, is devoted to or principally consists of, descriptions or depictions of illicit sex or sexual immorality for commercial gain, and when the trier of facts determines that the average person applying contemporary community standards would find that the work or thing is presented in a manner to provoke or arouse lust, passion or perversion or exploits sex.[41]

This language, when read in conjunction with the Act's definition of "descriptions of depictions of illicit sex or sexual immorality,"[42] basically incorporates the first two *Miller* guidelines.[43] Even mere nudity may be labelled obscene for minors[44] and, therefore, Act 275's prohibition of nudity or sexual activity involving nudity is valid.

On the other hand, the Act has failed to include the third requirement of *Miller*—that "the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[45] However, in *Jacobellis v. Ohio*,[46] where this requirement was first stated, the Court recognized that an appropriately drafted variable obscenity statute could survive constitutional scrutiny even though it lacked the third requirement.[47] Furthermore, the Court has stated that the states may "accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[48] In view of these pronouncements,

---

a statute which restricts adults to reading what is fit for children is unconstitutional. *See* Butler v. Michigan, 352 U.S. 380 (1957).

40. 390 U.S. 629 (1968).

41. LA. R.S. 14:91.11(A) (Supp. 1974).

42. LA. R.S. 14:91.11A(1-5) (Supp. 1974).

43. *See* note 13 *supra*.

44. Ginsberg v. New York, 390 U.S. 629, 631-33 (1968).

45. 413 U.S. 15, 24 (1973).

46. 378 U.S. 184 (1964).

47. *See State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959), cited in *Jacobellis* as containing an example of an appropriately drafted variable obscenity statute, despite its lack of the third requirement.

48. Ginsberg v. New York, 390 U.S. 629, 637 (1968).

the lack of the third *Miller* guideline should not render the Act unconstitutional.[49]

Variable obscenity statutes upheld as constitutional in other states provide that the trier of fact is to determine whether the material appeals to the prurient interest of minors.[50] Act 275 includes the prurient appeal requirement,[51] but fails to indicate whether the material can be judged obscene because it appeals to the prurient interest of minors or whether it must appeal to the prurient interest of adults. Since the apparent legislative intent was to enact one statute defining obscenity for the general public and another more strictly defining material harmful to minors,[52] it seems that the material should be judged on the basis of its appeal to the prurient interest of minors.

Obscenity statutes cannot impose absolute criminal liability, but must contain an element of scienter.[53] Both Act 274 and Act 275, by providing that the activities they proscribe must involve specific intent, contain the requisite element of scienter.[54]

Act 277 — Regulation of Obscenity Through Nuisance Statutes

Regulation of obscenity by a properly drawn nuisance statute is constitutionally permissible.[55] Since Act 277, which declares obscene materials to constitute a nuisance, is keyed to the criminal statutes defining obscene materials,[56] any infirmities in the latter will infect the former. In regulation of obscenity under the nuisance statute,

49. Regarding the state's authority to restrict material directed towards minors, *see generally* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963); 30 ALBANY L. REV. 133, 138 (1966); Note, 54 GEO. L.J. 1379 (1966).

50. *See* N.Y. PENAL LAW § 484-h (McKinney 1965), held constitutional in *Ginsberg v. New York*, 390 U.S. 629 (1968); FLA. STAT. ANN. § 847.013(1) (1969), held constitutional in *Davison v. State*, 288 So. 2d 483 (Fla. 1973); WASH. REV. CODE 9.68.050 (1969) held constitutional in *City of Tacoma v. Naubert*, 491 P.2d 652 (Wash. 1971).

51. In *Roth*, the Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts." 354 U.S. 476, 487 n.20 (1957). Act 275 requires that the objectionable material "provoke or arouse lust, passion or perversion or exploits sex."

52. *Compare* the preamble of La. Acts 1974, No. 274 *with* that of No. 275.

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

54. Use of the word "intentional" and the phrase "with the intent" in prior Louisiana statutes regulating obscenity and material harmful to minors has been held to fulfill the scienter requirements of the *Smith* case. Delta Book Distrib., Inc. v. Cronvich, 304 F. Supp. 662, 669 (E.D. La. 1969); State v. Roufa, 241 La. 474, 483-84, 129 So. 2d 743, 747 (1961). Therefore, Act 274's use of the "intentional" and Act 275's use of "intentional" and "with the intent" satisfy scienter requirements.

55. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

56. LA. R.S. 13:4711 (Supp. 1974).

abatement is not an authorized remedy,[57] and the statute thereby avoids prior restraint "in the context of its historical origin."[58]

Strict procedural safeguards insure that the public's right to the unobstructed circulation of constitutionally protected material[59] will not be infringed. Act 277 provides that after a petition for injunction has been filed, a preliminary hearing must be held within twenty-four hours of service upon the adverse party.[60] At the preliminary hearing an independent judicial determination of obscenity must be made in order to warrant injunctive relief.[61] A similar procedure received approval by the United States Supreme Court in *Kingsley Books, Inc. v. Brown*.[62]

The new nuisance statute insures the speedy judicial determination[63] required in this area.[64] A suspensive appeal to the appropriate appellate court is provided, and the court is required to hear the appeal with the "greatest possible expedition."[65] The suspensive appeal protects the public's right of access to material arguably within the protection of the first amendment and avoids restraint of material which might be found unobjectionable upon final judicial determination.

Mark A. Fullmer

---

57. *Id.*

58. Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So. 2d 480, 489-92 (La. 1973); *See* Near v. Minnesota, 283 U.S. 697 (1931).

59. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So. 2d 480 (La. 1973).

60. LA. R.S. 13:4713 (Supp. 1974).

61. LA. CODE CIV. P. art. 3601 provides in pertinent part: "An injunction shall issue in cases where irreparable injury, loss or damage may otherwise result to the applicant, or in other cases specifically provided by law. . . ." Since the regulation of obscenity is specifically provided by law and the criminal law guidelines in Acts 274 and 275 are the basis for determining whether or not an injunction shall issue, it is not necessary to allege or prove irreparable injury, loss or damage. *See* Whalen v. Brinkmann, 258 So. 2d 145, 147 (La. App. 1st Cir. 1972) (petition for injunction to prohibit creditor and sheriff from selling debtor's property to satisfy creditor's judgment).

62. 354 U.S. 436 (1957).

63. LA. R.S. 13:4713 (Supp. 1974) provides that an adversary hearing shall be had not less than five nor more than ten days after the preliminary hearing, regardless of whether a preliminary injunction issues, and that judgment shall be rendered within forty-eight hours of the conclusion of the adversary hearing.

64. *See* Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

65. LA. R.S. 13:4713 (Supp. 1974).