The Catholic Lawyer

Volume 8
Number 2 *Volume 8, Spring 1962, Number 2*

Article 11

July 2016

Obscenity in the Mails; Privileged Communications; The Law Against Contraceptives; The Rights of Prisoners

POSTSCRIPTS

Obscenity in the Mails

In *Roth v. United States*[1] the Supreme Court laid down what has become a basic guide for dealing with problems of obscenity and first amendment freedoms. It defined the general test of obscenity to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[2] The principle just quoted is very often cited by courts in dealing with obscenity questions, yet the particular context in which the problem arose and which produced this valuable constitutional guide rarely accompanies the rule.

The *Roth* case involved the mailing of circulars, advertising and a book, deemed by Post Office officials to be obscene. Title 18, U.S.C., section 1461 provides that:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Thus, it was within this frame of reference that the now famous rule was produced.

Recently, in *Ackerman v. United States*[3] the question arose whether section 1461 applied to private letters, and, if so, whether the *Roth* test could be applied to them or only to commercial exploitation of psychosexual tensions.

The predecessor of section 1461 had specifically included "letters" within its prohibition,[4] but a 1955 amendment, which produced the present section, substituted the general language "article, thing, device or substance." The Court, however, had little difficulty in construing the intent of the amendment to be "to enlarge the scope of the statute to include *all matter* of obscene nature. . . ."[5]

The more interesting question was whether the *Roth* test applied to private letters – in this case, "an exchange of noncommercial private letters between a serious writer and another adult person, dealing with abnormal sex. . . ."[6] It should be noted that the lower court experienced no difficulty in finding the material obscene under the *Roth* test and the instant Court agreed, hence the only issue was the applicability of the test to private correspondence.

The defendants were apparently seeking at least in cases of private letters a narrower test, namely, a test whereby obscenity would be judged by the effect of the matter on the particular addressees. Noting that such a test was rejected by the *Roth* court,[7] the instant Court also rejected it in the following language:

> To qualify the *Roth* standard, as defendant suggests, in cases involving non-commercial

[1] 354 U.S. 476 (1957).
[2] *Id.* at 489.
[3] 293 F.2d 449 (9th Cir. 1961).
[4] 25 Stat. 496 (1888).
[5] Ackerman v. United States, 293 F.2d 449, 453 (9th Cir. 1961).
[6] *Id.* at 451.
[7] *Id.* at 453.

> private correspondence, would facilitate one of the mischievous and reprehensible practices, which the statute was designed to prevent – the indiscriminate mailing of filthy and obscene, although purportedly private letters by crackpots or perverts whose convictions would be made to depend, not upon any general standard of obscenity, but upon the reactions and views of particular addressees.[8]

The Court also pointed out that "well-intentioned writers of letters which might be susceptible to misconstruction by their recipients, would be endangered by prosecutions, according to the reaction of the addressee."[9]

Privileged Communications

In the last issue of *The Catholic Lawyer,* Rev. Anthony F. LoGatto argued most compellingly for an extension of the rule of privileged communications to the social worker.[1] Of interest in this connection is what appears to be some indication of a liberalization of the statutory privilege of a clergyman in New York.[2]

In *Kruglikov v. Kruglikov,*[3] an order was made for an examination before trial of a rabbi as a witness. The parties to a separation action had conferred with him in his study with a view to a reconciliation. The rabbi asserted his statutory privilege when the defendant's attorney asked the following question: "Rabbi, will you now please tell me the substance of the conversation you had with Mr. and Mrs. Kruglikov, giving me the date, what each person said in the presence of Mr. and Mrs. Kruglikov to the best of your recollection?"[4] In a letter to the court the New York Board of Rabbis stated:

> The New York Board of Rabbis deem it essential for the proper work of the rabbi in the community, that any confidences reposed in him by husband or wife, individually or jointly, or anyone else who has come to him for counseling not be divulged, and we hope that the Court will sustain this action. Otherwise the confidential role of the rabbi in counseling would be completely vitiated, to the detriment of those who seek his guidance.[5]

The defendant's attorney contended that neither party had sought guidance, nor was either a member of his congregation. The consultation had been initiated by a rabbi from another community at the request of the plaintiff's father, and a letter by the rabbi involved in the action to the defendant had brought about the meeting. The parties had formerly resided in the community of the rabbi-witness.

In sustaining the right to invoke the privilege, the court stated:

> [I]t matters not how and by whom the meeting was initiated. . . . The fact is that . . . the parties consulted a representative of their faith in the privacy of his study . . . with a view to reconciliation and restoring their marriage. It cannot be supposed that either husband or wife, or both, would have been willing to disclose their marital problems to the rabbi if they thought that what they said would ever be divulged, even in a judicial proceeding. . . . [W]hat was said by the parties here . . .

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[8] *Ibid.*

[9] *Ibid.*

[1] LoGatto, *Privileged Communication and the Social Worker,* 8 CATHOLIC LAWYER 5 (Winter 1962).

[2] N.Y. CIV. PRAC. ACT § 351 states: "A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs."

[3] 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961).

[4] *Id.* at 17, 217 N.Y.S.2d at 846.

[5] *Ibid.*

was stamped "with that seal of confidence which the parties in such a situation would feel no occasion to exact."[6]

The court concluded that if Section 351 of the Civil Practice Act is not to be stultified, "confidential communications to a clergyman under the circumstances here involved must be deemed to fall within the spirit of this statute."[7]

*The Law Against Contraceptives**

In 1873 the federal Comstock Act[1] made it unlawful for anyone to deposit in the mails any information concerning birth control or to put into carriage in interstate commerce any article or thing designed, adapted or intended to prevent conception. Since that time many states have passed laws restricting the use, sale or advertisement of contraceptives.[2] Although often subjected to constitutional attack, these laws have generally been sustained as valid exercises of state police power.

The New Jersey Disorderly Persons Act is a typical state statute dealing with contraceptives. It provides:

> Any person who, *without just cause,* utters or exposes to the view of another, or possesses with intent to utter or expose to the view of another, or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion, or who in any way advertises or aids in advertising the same, or in any manner, whether by recommendation for or against its use or otherwise, gives or causes to be given, or aids in giving any information how or where any such instrument, medicine or other thing may be had, seen, bought or sold, is a disorderly person.[3]

Recently, this statute was the subject of a constitutional attack.[4] The plaintiff, Sanitary Vendors, Inc., had installed automatic vending machines in locations about the state which delivered packages of prophylactics or condoms. At various times, New Jersey law enforcement authorities had confiscated plaintiff's machines. In addition, plaintiff's agents and the owners of various establishments had been threatened with arrest if they resisted removal of the machines. Plaintiff sought a declaratory judgment that the statute was unconstitutional, as well as injunctive relief against its enforcement.

The attack on the statute focused on the words "without just cause," the contention being that they rendered the section vague and unenforceable. In *State v. Kohn,*[5] a lower New Jersey court had sustained the statute against a similar objection, indicating that the words "just cause" meant proper medical care and the like, and that a defendant might prove "just cause" by all the circumstances. On the other hand, a second court, at the same level, had concluded that the phrase "without just cause" is vague and indefinite and incapable of judicial or lay construction.[6]

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[6] *Id.* at 18, 217 N.Y.S.2d at 846-47.

[7] *Id.* at 18, 217 N.Y.S.2d at 847.

* See generally, Regan, *The Connecticut Birth Control Ban and Public Morals,* 7 CATHOLIC LAWYER 5 (Winter 1961); see 6 CATHOLIC LAWYER 317 (Autumn 1960).

[1] 17 Stat. 598 (1873), 18 U.S.C. §§ 1461-62 (1958).

[2] For a recent survey in this connection, see 6 CATHOLIC LAWYER 317, 318-19 nn. 9 & 10 (Autumn 1960).

[3] N.J. REV. STAT. § 2A: 170-76 (1951) (emphasis added).

[4] Sanitary Vendors, Inc. v. Byrne, — N.J. Super. —, 178 A.2d 259 (1962).

[5] 42 N.J. Super, 578, 127 A.2d 451 (County Ct. 1956).

[6] State v. Kinney Bldg. Drug Stores, Inc., 56 N.J. Super. 37, 151 A.2d 430 (County Ct. 1959).

It held that the statute "says all things to all men . . . without granting to the prospective defendant his constitutional right to be fairly apprised of the elements constituting a *quasi*-criminal infraction."[7]

The present court indicated that the statute as originally enacted lacked the phrase "without just cause," and that when these words were included the purpose was to qualify the prohibitions of the statute. Thus, there were some instances when possession or sale of these instruments, medicines or other objects might well be justified medically. But the court had earlier noted:

> [T]he factual problem here involved is the indiscriminate sale of contraceptives to anyone who puts a coin in the machine, whether it be a teenager, a procurer or a married person. The factual problem does not include any question between husband and wife; about religious belief; nor planned parenthood; nor prevention of disease."[8]

Stating that the legislature was not required to list every situation which it deemed to be with or without just cause, and that the statute properly protected persons who may use the prohibited articles for medical reasons, the court declared that the statute was constitutional. It further found that the plaintiff was in violation of the statute.

Recognizing that there would be close cases, which would make the statute difficult to apply, the court quoted[9] with approval from *State v. Monteleone:*[10]

> That there may be marginal cases in which it is difficult to determine the side on which a particular fact situation may fall, furnishes insufficient reason to hold the language of a penal statute too vague and uncertain. . . . If a statute is reasonably appropriate in its overall approach, it should be upheld notwithstanding that it may be invalid in its application in special circumstances or fringe areas.

[7] *Ibid.*

[8] Sanitary Vendors, Inc. v. Byrne, — N.J. Super —, —, 178 A.2d 259, 263 (1962).

[9] *Id.* at —, 178 A.2d at 265-66.

[10] 36 N.J. 93, 99, 175 A.2d 207, 210 (1961).

*The Rights of Prisoners**

"A citizen is still a citizen, though guilty of crime and visited with punishment."[1] A man convicted of a crime and sentenced to prison retains all rights except those taken away expressly or by necessary implication.[2] These basic principles, though easily stated, create the difficult problem of determining just what rights a prisoner possesses, or has relinquished.

A recent decision of the New York Court of Appeals is a good illustration.[3] The petitioner, a prison inmate, instituted a proceeding in the nature of mandamus to compel the Commissioner of Correction of the State of New York to permit petitioner the free exercise of his religion. Special Term dismissed the petition without a hearing, and the Appellate Division unanimously affirmed.

Petitioner had alleged that he was a member of the Islamic faith, and had been denied spiritual advice, ministration and religious services from the local temple in contravention of Section 610 of the New York Correction Law. That section provides:

* See 6 CATHOLIC LAWYER 249 (Summer 1960).

[1] White v. Hart, 80 U.S. (13 Wall.) 646, 651 (1871).

[2] See Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert denied,* 325 U.S. 887 (1945).

[3] Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

> All persons who may have been or may hereafter be committed to or taken charge of by any of the institutions mentioned in this section [penitentiaries and other correctional institutions], are hereby declared to be and entitled to the free exercise and enjoyment of religious profession and worship, without discrimination or preference. . . . The rules and regulations established . . . shall recognize the right of the inmates to the free exercise of their religious belief . . . and shall allow religious services . . . and for private ministrations to the inmates in such manner as may best carry into effect the spirit and intent of this section *and be consistent with the proper discipline and management of the institution*. . . .[4]

The answer filed by the respondent consisted of a general denial, and, as an affirmative defense, incorporated affidavits of the Commissioner of Correction and the Acting Warden of Green Haven Prison denying the alleged deprivation of petitioner's rights. The Commissioner's affidavit also indicated that the local temple from which petitioner sought spiritual advice was headed by one Malcolm X. Little who had a previous criminal record. The Commissioner concluded:

> [I]n the interests of safety and security of the institution concerned and a matter of long standing policy, the allowing of inmates to communicate with or to be ministered to by a person with a criminal background would not be consistent with the good administration of this institution.[5]

The New York Court of Appeals recognized that the proper discipline and management of a correctional institution authorized the *reasonable* curtailment of an inmate's rights:

> [F]reedom of exercise of religious worship is not an absolute but rather a preferred right; it "cannot interfere with the laws which the State enacts for its preservation, safety or welfare. . . ." While freedom to believe is absolute, freedom to act is not. . . . "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[6]

However, the court indicated that petitioner's brief stated that he did not seek to communicate with any specific individual. Hence, the Commissioner's objection to Malcolm X. Little was no bar to the designation of any "recognized clergyman." Accordingly, the court reversed the lower court's dismissal and remitted the matter for a hearing to determine the relief to which petitioner was entitled, subject to the *reasonable* rules and regulations of the Commissioner for the proper management of the institution.

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[4] N.Y. CORREC. LAW § 610 (emphasis added).

[5] Brown v. McGinnis, 10 N.Y.2d 531, 534, 180 N.E.2d 791, 792, 225 N.Y.S.2d 497, 498 (1962).

[6] *Id.* at 536, 180 N.E.2d at 793, 225 N.Y.S.2d at 500.