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Obscenity - Liquor Regulations; California v. LaRue

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CONSTITUTIONAL LAW—OBSCENITY—LIQUOR REGULATIONS

California v. LaRue, 93 S. Ct. 390 (1972).

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, promulgated rules in 1970 regulating the type of entertainment which might be presented in bars and night clubs which it licensed.[1] The Commission is vested with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals.[2]

Concerned with a progression from "topless" to "bottomless" dancers and other forms of "live entertainment" which it licensed, the Commission held public hearings[3] and promulgated the following rules.

In summary, they provide:

(1) 143.2 prohibits topless waitresses
(2) 143.3
  (a) prohibits nude entertainers;
  (b) regulates the content of entertainment;
  (c) requires that certain entertainers perform on a stage
(3) 143.4 regulates the content of movies
(4) 143.5 prohibits any entertainment which violates a city or county ordinance.[4]

Various holders of California liquor licenses and dancers at licensed premises brought actions in the U.S. District Court[5] challenging the constitutionality of all four rules, regulating the content of live entertain-

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[1] California v. LaRue, 93 S. Ct. 390 (1972).

[2] *Cal. Const.* Art. 20 § 22. That section provides in part:
> The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.

[3] California v. LaRue, 93 S. Ct. 390 (1972).

[4] LaRue v. California, 326 F. Supp. 350 (C.D. Cal. 1971), rev'd 93 S. Ct. 390 (1972). For full text *see* LaRue v. California, 326 F. Supp. 358-60 (C.D. Cal. 1971).

[5] LaRue v. California, 326 F. Supp. 348 (C.D. Cal. 1971), rev'd 93 S. Ct. 390 (1972).

ment in violation of First, Fifth and Fourteenth Amendment rights. However, at oral argument, the plaintiffs withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3) require certain entertainers to be on a stage.[6]

The plaintiffs thus conceded that topless waitresses were not within the protection of the First Amendment; that local ordinances had to be independently challenged depending upon their content, and that the requirement that certain entertainers must dance on a stage was not valid.[7]

The District Court held that the "Rules of the Department as written; which prohibit the content of movies and live entertainment, are invalid under the First and Fourteenth Amendments,"[8] concluding that under standards laid down by the Supreme Court, some of the proscribed entertainment could not be classified as obscene[9] or lacking a communicative element.[10]

The Supreme Court reversed, stating that it did not view the challenged regulations in the context of censoring a dramatic performance. They viewed the regulations as to what the state may do in regard to the licensing of bars and nightclubs to sell liquor by the drink.[11]

The majority states as a basis for its holding that the "broad sweep of the 21st Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."[12] In *Hostetler v. Idlewild Liquor Corp.*,[13] the Court held that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[14]

The Supreme Court has upheld a Michigan statute prohibiting Michigan dealers from selling beer manufactured in a state which

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[6] LaRue v. California, 326 F. Supp. 350 (C.D. Cal. 1971), rev'd 93 S. Ct. 390 (1972).

[7] *Id.* at 350, 351.

[8] *Id.* at 348, 358.

[9] *See* Roth v. United States, 354 U.S. 476 (1957).

[10] *See* U.S. v. O'Brien, 391 U.S. 367 (1968).

[11] California v. LaRue, 93 S. Ct. 390, 395 (1972).

[12] *Id.*

[13] 377 U.S. 324 (1964).

[14] Hostetler v. Idlewild Liquor, 377 U.S. 324, 330 (1964). In Hostetler, an action was brought by a New York corporation to enjoin New York State Liquor Authority members from interfering with the corporation's business of selling tax-free bottled wines and liquors to departing international airline travelers at the airport for delivery to travelers upon their arrival at their foreign destinations. The court allowed the injunction since the Twenty-first Amendment only authorized state control of the importation of intoxicants and not the exportation of liquors.

discriminated against Michigan beer.[15] The view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.[16]

In *Seagram & Sons v. Hostetler*,[17] the Court felt that a New York Alcoholic Beverage Control Law[18] provision tying the New York price of brand liquor to the national price did not violate due process[19] by imposing an unreasonable, arbitrary, or capricious burden on brand owners.

The Court felt that the California Commission's regulations were reasonable and within the scope of the powers delegated to the Commission, in light of the administrative hearings.[20] In *Assigned Car Cases*,[21] the opinion spoke of the powers of the Interstate Commerce Commission:

> In the case at bar, the functions exercised by the Commission are wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators may reason from the particular to the general.[22]

The majority gave full support to the Commission's utilization of the regulations as a "prophylactic solution" to rid licensed premises of the proscribed motion pictures and conduct.

> The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws; regulatory of

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15 Indianapolis Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939). "Since the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . ." *Id.* at 394. *See also*, Finch and Co. v. McKittrich, 305 U.S. 395 (1939).

16 *See* Seagram & Sons v. Hostetler, 384 U.S. 35 (1966); Hostetler v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964); Dept. of Revenue v. James Beam Co., 377 U.S. 341, 344, 346 (1964); California v. Washington, 358 U.S. 64 (1958); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Mahoney v. Joseph Triner, 304 U.S. 401 (1938); State Board of Equalization v. Young's Market, 299 U.S. 59 (1936).

17 384 U.S. 35, 48 (1966).

18 *Alcoholic Beverage Control Law, N.Y.*, § 101-b, subd. 3 (McKinney 1972).

19 *U.S. Const.* amend. XIV, § 1.

20 California v. LaRue, 93 S. Ct. 390, 395 (1972).

21 274 U.S. 564 (1927).

22 *Id.* at 583.

> business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.[23]

Mr. Justice Rehnquist, speaking for the majority, did not feel that the state regulatory authority is limited to either dealing with the problem it confronted within the limits of *Roth v. United States* and *Alberts v. California*,[24] or in accordance with the prescribed limits for dealing with some forms of communicative conduct in *United States v. O'Brien*.[25]

The "proper standard" which the court adopts in *Roth v. United States* and *Alberts v. California* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[26] In pronouncing this standard the court stated that "the early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons."[27] Some American courts adopted this standard, but later decisions have rejected it by substituting the *Roth* test.[28] *O'Brien* rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaging in the conduct intends thereby to express an idea"; and held that Government regulation of speech-related conduct is permissible

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[29]

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[23] Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955). *See* Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949); Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. People of State of New York, 291 U.S. 502 (1934).

[24] 354 U.S. 476 (1957).

[25] 391 U.S. 367 (1968).

[26] This test is drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6, § 207.10(2).

[27] Regina v. Hichlin, 3 Q.B. 360 (L.R. 1860).

[28] Winters v. New York, 333 U.S. 507 (1948); United States v. Limehouse, 285 U.S. 424 (1932); Rosen v. United States, 161 U.S. 29 (1896); Swearingen v. United States, 161 U.S. 446 (1896); Sunshine Book Co. v. Summerfield, 221 F.2d 42 (D.C. Cir. 1954) (Applicable Statute: 39 U.S.C.A. § 259a); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. One Book called "Ulysses," 72 F.2d 705 (2d Cir. 1934); United States v. One Obscene Book Entitled "Married Love," 48 F.2d 564 (D.C. Cir. 1931); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. Harmon, 45 Fed. 414 (D.C. Cir. 1891); Klaw v. Schaffer, 151 F. Supp. 534 (S.D. N.Y. 1957).

[29] U.S. v. O'Brien, 391 U.S. 376, 377 (1968).

The majority cites *Joseph Burstyn, Inc. v. Wilson*,[30] which held that motion pictures are "included within the free speech and press guarantees of the First and Fourteenth Amendments 'though not' necessarily subject to the precise rules governing any other particular method of expression."[31]

The present opinion noted that in *Schacht v. United States*,[32] actors were deemed to enjoy the constitutional right of free speech; including a right to openly criticize the government.

In light of First and Fourteenth amendment rights allocated to these areas, the Court reasons that the "states may sometimes proscribe expression which is directed to the accomplishment of an end which the state has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.' "[33] In *Hughes v. Superior Court of California*[34] the decision included the following: "We cannot construe the Due Process Clause as precluding California from securing respect for its policy against

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[30] 343 U.S. 495, 503 (1952).

[31] *Id.* pp. 502-503.

Burstyn involved a New York Statute, *N.Y. Education Law*, § 101 (McKinney 1947); *N.Y. Const.*, Art. V, § 4, authorizing the appointment by the Board of Regents of a head of the motion picture division of the education department to examine motion picture films and to issue licenses therefor unless the film is "Sacrilegious," etc. The Court held this to be an unconstitutional abridgement of free speech and of free press. *U.S. Const.* amend. I, XIV. *See also* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Jacobellis v. Ohio, 378 U.S. 184 (1964); Pincus v. Pilchess, 429 F.2d 416 (CA 9 1970) *aff'd by equally divided court sub nom.* California v. Pinkus, 400 U.S. 922 (1970).

[32] 398 U.S. 58, 64 (1970).

In *Schacht*, the petitioner had been indicted in a United States District Court for violating *United States Code* (U.S.C.) § 702, which made it a crime for any person, "without authority [to wear] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States. . . ."

The Supreme Court reversed a conviction stating "the general prohibition of" 18 *United States Code* (U.S.C.) § 702 cannot always stand alone in view of 10 *United States Code* (U.S.C.) § 772(f), which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstance of an actor portraying a member of the armed services in a "theatrical production," 10 *United States Code* (U.S.C.) § 772(f). *See, e.g.*, P.B.I.C. Inc. v. Byrne, 313 F. Supp. 757 (Mass. 1970), *vacated to consider mootness*, 401 U.S. 987 (1971); *In re* Giannini, 69 Ca.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), *cert. denied sub nom.* California v. Giannini, 395 U.S. 910 (1969).

[33] California v. LaRue, 93 S. Ct. 390, 396 (1972).

[34] 339 U.S. 460, 466 (1950).

involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy."[35]

The majority concludes that while at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink.

Mr. Justice Marshall, in a vigorous dissent, states that the regulations are unconstitutional on their face as violative of the First Amendment. He contends that this is true even if the conduct of the party challenging such statutes could be prohibited under a more narrowly drawn scheme.[36]

The state has the power to regulate the distribution of liquor and enforce health and safety regulations, but the state may not broadly stifle First Amendment freedoms when doing so.[37] "The breath of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[38] The Court has consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms.[39]

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[35] *Id.* Thus, California was not barred by the Fourteenth Amendment from use of an injunction to prohibit the picketing of a store solely in order to secure compliance with a demand that the store's employees be in proportion to the racial origin of its then customers.

See, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941). *See, e.g.,* Cameron v. Johnson, 390 U.S. 611 (1968), and Cox v. Louisiana, 379 U.S. 559 (1965).

[36] California v. LaRue 93 S. Ct. 390, 400 (1972). Mr. Justice Marshall citing Thornhill v. Alabama, 310 U.S. 88 (1940). *See, e.g.,* Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); Baggett v. Bullitt, 377 U.S. 360, 366 (1964); NAACP v. Button, 371 U.S. 415, 432-433 (1963). *See also* Schneider v. State, 308 U.S. 147, 161 (1939); Hague v. C.I.O., 307 U.S. 496, 515, 516 (1939).

[37] California v. LaRue, 93 S. Ct. 390, 401 (1972). Mr. Justice Marshall citing Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[38] Shelton v. Tucker, 364 U.S. 487 (1960). *See* P. A. Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 539-40 (1951); Note, *Inseparability in Application of Statutes Impairing Civil Liberties,* 61 HAR. L. REV. 1208, 1210 (1948). *Cf.* Stromberg v. California, 283 U.S. 359, 368, 370 (1931); Yuh Wo v. Hopkins, 118 U.S. 356, 369 (1886).

See, e.g., Jones v. Opeliha, 316 U.S. 584, 611 (1942); Thornhill v. Alabama, 310 U.S. 88, 105 (1940); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

Where different constitutional issues have been involved, more administrative leeway has been thought allowable to accomplish a clearly constitutional purpose. *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Schlesinger v. Wisconsin, 270 U.S. 230 (1926) dissenting opinion; Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912). *But cf.* Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[39] N.A.A.C.P. v. Button, 371 U.S. 438 (1963).

The dissent argues that if we recognize movies and plays as enjoying First Amendment protection, we must observe the stringent standards set up by the court to prohibit the speech.[40] The regulations are viewed as a condition to the licensing of California bars. The State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his freedom of speech."[41]

Although a State may, in proper circumstances, enact a broad regulatory scheme which, incidentally, restricts First Amendment Rights, classifications which discriminate against the exercise of constitutional rights *per se* must be shown necessary to promote a compelling governmental interest.[42]

It seems that one cannot help but to view the majority with a critical eye. The California rules would legitimately seem to be able to rest under the constitutional veil either by satisfying the *O'Brien* requirements, the *Roth* test, or the compelling interest that is requisite to the state's incidental restriction of First Amendment rights.

Mr. Justice Rehnquist states in his opinion that the "states may sometimes proscribe expression which is directed to the accomplishment of an end which the state has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.' "[43] Such a statement would seem to require the government to meet the requirements laid out by the Supreme Court in view of California's regulation of this entertainment.[44]

Instead of any of these pronounced standards, the California regulations are sustained on the grounds that the state may regulate the forms of entertainment in bars via the Twenty-first Amendment. A rather

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[40] California v. LaRue, 93 S. Ct. 390, 403 (1972). Mr. Justice Marshall citing Schenk v. United States 249 U.S. 47, 52 (1918). *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951). *See also,* Schneider v. State, 308 U.S. 147, 161 (1939); Lovell v. City of Griffen, 303 U.S. 444 (1938); Herdon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931).

[41] California v. LaRue, 93 S. Ct. 390, 406 (1972). *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 397 (1963).

See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). *But cf.* Wyman v. James, 400 U.S. 309 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971); Konigsberg v. State Bar, 366 U.S. 36 (1961).

[42] California v. LaRue, 93 S. Ct. 390, 407 (1972). *See,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); Korematsu v. United States, 323 U.S. 214 (1944); Shinner v. Oklahoma, 316 U.S. 535 (1942).

[43] California v. LaRue, 93 S. Ct. 390, 396 (1972).

[44] U.S. v. O'Brien, 391 U.S. 376-77 (1968).

rash and improbable extension of such reasoning can lead one to believe that the state may forbid blacks from entering a licensed bar in a predominantly white neighborhood because of the existence of racial tensions. "Freedom of press; freedom of speech, freedom of religion are in a preferred position."[45]

The California Commission concerned itself with events that occurred near bars that presented the proscribed entertainment. At the administrative hearings, it was revealed that rape, prostitution, and indecent exposure manifested themselves in and around bars.

Mr. Justice Marshall relates that the cause-effect relationship arrived at by the Commission when tested by empirical data is open to question.[46]

The court seems to be on insecure ground in basing its decision on such a tenuous basis as the Twenty-first Amendment and the raw conclusions of an administrative body.

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[45] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[46] California v. LaRue, 93 S. Ct. 390, 404 (1972). *See, e.g., Report of the Commission on Obscenity and Pornography* 27 (1972); Carrns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence,* 46 MINN. L. REV. 10009 (1962).