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Obscenity - Protection of Speech - Necessity of Hearing to Determine Obscenity prior to Seizure of Property

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fertilized ovum within her, ". . . drastically interferes with a woman's right to control the use of her own body."[73] "If the bedroom [in *Griswold*] is a sanctuary of marital privacy, the law cannot regard a married woman's reproductive organs differently."[74]

The *Belous* decision not only invalidated the "necessary to preserve" type statute, but also placed the validity of any abortion statute in question. The State does not have an interest in protecting the fetus before viability, and the woman's right to privacy allows abortion as she may desire. The fetus has lost the Battle. While the shot fired at Lexington was the shot heard round the world, the decision in *Belous* may well be the shot heard round the nation.

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OBSCENITY—PROTECTION OF SPEECH—NECESSITY OF HEARING TO DETERMINE OBSCENITY PRIOR TO SEIZURE OF PROPERTY—The attorney of the Commonwealth and Chief of Police seized a motion picture being shown by the lessee of a motion picture theatre. The lessee brought an action to enjoin the seizure. The United States District Court for the Eastern District of Virginia granted an injunction requiring return of the film and prohibiting the seizure of any other film until its obscenity had been determined in an adversary hearing.

The Commonwealth's attorney and Chief of Police appealed. The Court of Appeals *held* that an adversary hearing was required to determine obscenity before seizure of the motion picture and *reversed* that portion of the injunction prohibiting seizure of the film, and ruled that the lessee must make a copy of the film reasonably available to the Commonwealth's attorney. *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639 (4th Cir. 1969).

In rendering its decision in this case, the court was quick to point out that its decision would not determine the obscenity of the seized movie,[1] nor the constitutionality of the statute under which the movie was seized.[2] Thus, the only issue for decision was whether a hearing on the obscenity of a movie is necessary before its seizure for use in a prosecution under an obscenity statute.

The defendants sought the injunction against seizure on the grounds of an alleged violation of First, Fourth and Fourteenth Amendment rights.[3]

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73. Med. Deans Brief at 20-21.
74. Ziff 23.
1. Tyrone, Inc. v. Wilkinson, 410 F.2d 639, 640 (4th Cir. 1969).
2. The statute under which the movie was seized was VA. CODE ANN. §§ 18.1-227 to 18.1-236.4 (1960).
3. The action was brought under 42 U.S.C. § 1983 (1964

In 1964 the Supreme Court held in *A Quantity of Books v. Kansas*[4] that the seizure of all copies of specified titles of books without a hearing on the question of the obscenity of the books prior to seizure was constitutionally deficient.[5]

In passing upon a similar question relating to the seizure of a movie without a prior hearing to determine its obscenity, the United States Court of Appeals held in *Metzger v. Pearcy*[6]:

> The lesson of *Books* is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment to the Constitution of the United States, and is a prior restraint condemned by the Supreme Court.[7]

In the two aforementioned cases the courts seem to have ruled that while obscene publications may be seized and used in a prosecution under an obscenity statute, they must be adjudged obscene before they may be so seized and used.

The case which set the standard for obscenity prosecutions and constitutional safeguards was *Roth v. United States*.[8] The United States Supreme Court held in that case, *inter alia*, that the test to be applied in determining whether a publication was obscene or not was whether the material appeals to the prurient interests of the beholder.[9] The decision did much to expand the field of constitutionally protected publications, but it did not extend protection to obscene publications. The Court said: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[10]

In *Smith v. California*[11] the Supreme Court said, "But our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; . . ."[12] But the problem had become not how to determine obscenity, but when it must be determined in order to guarantee all requisite constitutional rights afforded by the First Amendment. It therefore became necessary to determine whether a publication was obscene or not *before* it was submitted to seizure by state officials, because if it were an obscene publication, it would not be entitled to Constitutional safe-

4. 378 U.S. 205 (1964).
5. *Id.* at 210.
6. 393 F.2d 202 (7th Cir. 1968).
7. *Id.* at 204; *cf.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Int. Pictures Corp. v. Regents, 360 U.S. 684 (1959); Jacobellis v. Ohio, 378 U.S. 184 (1964).
8. 354 U.S. 476 (1957).
9. *Id.* at 487.
10. *Id.* at 484.
11. 361 U.S. 147 (1959).
12. *Id.* at 152.

guards. However, if it were a non-obscene publication, it must be afforded the protection of the First Amendment rights.

The Supreme Court had apparently decided that all publications were entitled to First Amendment protections until a hearing took place to determine their obscenity, but the same day that *Roth* was decided, the court also decided *Kingsley Books Inc. v. Brown.*[13] In that case the defendant was enjoined from disseminating material allegedly obscene. The action was taken under authority of a New York statute giving the state supreme court jurisdiction to enjoin the sale or distribution of obscene articles. Any local official had the authority to maintain an action,[14] and a hearing as to obscenity was to be held within one day following joinder of issue.[15] If, after the hearing, the defendant was found to be in violation of the statute, he was required to surrender the materials to the sheriff of the county.[16]

The case came to the Supreme Court on a claim that the statute in question violated the Fourteenth Amendment to the Constitution. The Supreme Court upheld the statute saying that:

> The method devised by New York in § 22-a for determining whether a publication is obscene does not differ in essential procedural safeguards from that provided under many state statutes making the distribution of obscene publications a misdemeanor. . . . [17]

The court in *Kingsley* answered the claim that the injunction constituted a prior restraint on constitutionally protected publications, by saying that protection from previous restraint is not absolutely unlimited.[18]

Thus, the real rule after *Roth* and *Kingsley* appears to have been that obscene publications weren't constitutionally protected, and non-obscene publications were. However, dissemination of questionable materials could be enjoined pending adjudication of their obscenity, provided that the statute enjoining dissemination did not operate oppressively.[19]

The question then becomes what constitutes a proceeding which operates so as to be oppressive. In *Marcus v. Search Warrant*[20] the court supplied a partial answer to the question. There the state had

13. 354 U.S. 436 (1957).
14. N.Y. CODE CRIM. PROC. § 22a(1) (McKinney 1958).
15. *Id.* at § 22a(2).
16. *Id.* at § 22a(3).
17. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 443 (1957).
18. *Id.* at 441, *citing* Near v. Minnesota, 283 U.S. 697 (1931).
19. *See generally* Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951). The Supreme Court cited Freund, with approval in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).
20. 367 U.S. 717 (1961).

seized large quantities of allegedly obscene publications under the strength of a search warrant issued after a short *ex parte* hearing on the issue of obscenity. The Supreme Court condemned this method of seizure:

> [u]nder the Fourteenth Amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.[21]

The court distinguished *Marcus* from *Kingsley* in a number of procedural and substantive instances.[22]

In *A Quantity of Books v. Kansas*,[23] the sheriff was authorized by judicial authority to seize copies of certain books which, in the opinion of the issuing magistrate, were obscene. Such opinion was reached after a forty-five minute *ex parte* hearing by the judge on the probable obscenity of the books. The Supreme Court reversed the decision and stated as follows:

> It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since (the owner) was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.[24]

In *Books* the Court again found that the constitutional safeguards necessary in such seizures were not met. The sheriff was authorized to seize all copies of specified titles, the statute afforded the state *ex parte* relief rather than a hearing before seizure, and a hearing was not required for ten days in the Kansas statute.[25]

These two cases draw significant distinctions between the procedures under the New York statute and procedures under the Missouri and Kansas statutes. It is important to note, however, that no real statement of what actions may or may not be taken in a seizure of allegedly obscene materials was made.

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21. *Id.* at 731.
22. *Id.* at 735-738. Briefly stated, the differences between the two cases were: (1) The New York proceeding was begun by a complaint naming specific publications; the proceeding in *Marcus* was against diverse publications without specifying titles. (2) The injunction in *Kingsley* operated only against the named publications. In *Marcus* a mass seizure took place. (3) In *Kingsley* the distributor still had the opportunity to distribute the publications and in a prosecution under an obscenity statute raise the claim of non-obscenity as a defense. In *Marcus* this was impossible because the publications had been actually seized, not merely kept from circulation by injunction. (4) A hearing as to the issue of obscenity was provided for in the New York statute "within one day" after joinder of issue. No similar provision existed in the Missouri statute in operation in this case.
23. 378 U.S. 205 (1964).
24. *Id.* at 210.
25. KAN. GEN. STAT. ANN. § 21-1102(c) (1964).

The problem becomes even more acute in the case of seizure of films where, unlike books, perhaps only one or two copies are available. *Kingsley* seems to stand for the proposition that only a proceeding which still allows the distributor the option of disseminating the materials at the risk of prosecution is valid. *Marcus* and *Books* seem to stand for the proposition that elimination of this option by seizure is constitutionally deficient. Then in the case of movies, if only one copy is available, it would appear that seizure, prior to determination of obscenity is indeed also constitutionally deficient because the same elimination of the distributor's option to disseminate the publications then exists as existed in *Marcus* and *Books*. For this reason, almost all state censorship laws which have been challenged have been found to be unconstitutional prior restraints on First Amendment rights.[26] The state must, when seeking to exercise its power to prevent dissemination of allegedly obscene material, establish precise objective standards for judging the work, and procedural safeguards that will insure protection of constitutional publications.[27] In addition, these standards must be statutory and not based upon a common law notion of nuisance.[28]

The purpose for these strict limitations is readily apparent. The courts here are seeking to provide the maximum protection to the freedoms of speech and expression and their method of doing so is to closely limit the manner in which a state or municipality may proceed against suspect publications. This is no new trend or relaxing of the standards of decency. As early as the *Roth* decision the Supreme Court stated:

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensible to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[29]

The instant case appears to have opened the door wider than the Court recommended in *Roth*. By holding that the hearing need not be a fully matured action at law,[30] the court seems to have retreated from the traditional position of strict procedural and ob-

26. *See* Interstate Cir. v. Dallas, 390 U.S. 676, 682-83 (1967), and cases cited therein.
27. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1964).
28. Grove Press, Inc. v. Philadelphia, 300 F. Supp. 281, 287-88 (E.D. Pa. 1969).
29. Roth v. United States, 354 U.S. 476, 488 (1956).
30. Tyron, Inc. v. Wilkinson, 410 F.2d 639, 641 (4th Cir. 1969).

jective standards to a position allowing considerable discretion to the authority seeking to prosecute a person dealing in allegedly obscene materials.

It may be true that in the instant case no prior restraint exists, because only one of the four copies of the film which were available was seized, i.e., given over to the Commonwealth's attorney. However, in a situation where only one copy of a film was available, a prior restraint might well exist if the defendant were required to surrender that copy prior to the hearing on the issue of obscenity.

In addition, the court in making its decision in the instant case cited *Kingsley* as support for the lack of necessity of a judicially perfect hearing. However, *Kingsley* is distinguishable from the instant case in a number of important ways. First, the statute involved in *Kingsley* was a civil sanction in the form of an injunction; in the instant case, violation of the statute is a criminal offense.[31] Second, in *Kingsley* the hearing was statutorily provided for within one day of joinder of issue;[32] the Virginia statute makes no such provision. Finally, in *Kingsley*, nothing was seized. The disseminator of the allegedly obscene materials was merely enjoined from further dissemination. He could still continue to distribute the publications, in violation of the injunction in the hope that the publications would not be obscene and he would not be punished for violation of the injunction.[33] In the instant case the possibility has been raised that the state could take into possession the only available copy of a publication, especially a movie, and thereby accomplish the prior restraint looked upon with so much disfavor by the Supreme Court in *Marcus*.[34]

If the states are allowed to take into their possession publications which have not yet been found to be violative of an obscenity standard, one of the most fundamental of our Constitutional freedoms will be seriously threatened. If allegedly obscene publications can be reached without being found obscene, it is not a very long step to more stringent controls upon publications critical of the government and its officials prior to a determination of their violation of any existing law. Nor would controlled news seem to be an impossibility. A television film critical of a city political machine might be seized as a "protective measure," without any hearing as to the propriety of such action or the illegality of the film.

Perhaps legislative relief from the evils of obscenity could be sought in the form of more severe punishment for conviction under

31. VA. CODE ANN. § 18.1-228 (1960).
32. N.Y. CODE CRIM. PROC. § 22a(2) (McKinney 1958).
33. *See* Marcus v. Search Warrant, 367 U.S. 717, 735-36 (1961).
34. *Id.*

obscenity statutes, but any attempt at curtailing or limiting obscenity must take effect only after a true judicial determination of that issue. To require an adversary hearing prior to seizure of an allegedly obscene movie, and then compel the holder of that movie to supply his prosecutor with a copy of it on the grounds that the hearing need not be a fully matured action at law, is merely to substitute the concept of "supplying" for the act of seizing; in the opinion of this writer, this constitutes a prior restraint on publications condemned by the First Amendment to the Constitution.

DWIGHT F. KALASH

RELIGION — CONSTITUTIONAL LAW — FREEDOM OF RELIGION— The defendants are members of the Founding Church of Scientology, a group which professes the ability to rid one of mental and emotional disturbances, primarily by a process termed "auditing", using a device known as an E-meter. The Government seized the defendant's E-meters and attempted to link their use with certain statements found in Scientology literature, which were alleged to be false or misleading.[1] The Government attempted to establish that these statements were "labeling" of the type prohibited under the Food, Drug and Cosmetics Act "False or misleading label" clause,[2] in that they were "written, printed or graphic matter . . . accompanying such article."[3] The defendants appealed from a judgment and decree of condemnation and destruction of the E-meters and certain large quantities of literature.

The United States Court of Appeals for the District of Columbia found that much of the literature the Government used to show false or misleading "labeling" was not such within the meaning of the statute, in view of First Amendment protections, and reversed the judgment. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969).

The United States Court of Appeals, District of Columbia Circuit, found that the Founding Church of Scientology was incorporated in the District of Columbia as a religious organization, and that the defendants had presented a prima facie case that the church was a religion. The court further found that most of the literature relied

1. Founding Church of Scientology v. United States, 409 F.2d 1146, 1159 (D.C. Cir. 1969), the court mentions the following as an example: "Cancer has been eradicated by auditing out conception and mitosis". L. HUBBARD, SCIENTOLOGY: A HISTORY OF MAN 21 (4th ed. 1961).

2. Federal Food, Drug, and Cosmetics Act, 52 Stat. 1040 (1938), 21 U.S.C. § 321(m) (1964).

3. *Id.*; United States v. Urbuteit, 335 U.S. 355 (1948); V.E. Irons, Inc. v. United States, 244 F.2d 34 (1st Cir. 1957).