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Florida's Obscenity Statutes–Some Recommendations

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FLORIDA'S OBSCENITY STATUTES – SOME RECOMMENDATIONS

Prior to 1957, the power of a state to regulate what it considered to be obscene expression was virtually unquestioned. In that year, however, the United States Supreme Court decided *Butler v. Michigan*,[1] which was followed by a flurry of Supreme Court decisions on obscenity. In an effort to keep Florida's law in line with the developing procedures and standards established by *Butler* and subsequent decisions, the Florida Legislature has amended Florida's obscenity control statutes at three of the past five sessions. But these statutes still do not meet the due process requirements fixed by the Court. The purpose of this note is not to consider the delicate and controversial issues involved in the clash between first amendment rights and the state's right to control obscenity. Instead, the sole purpose is to analyze Florida's obscenity statutes in light of present constitutional requirements as a basis upon which to recommend needed legislative reform.

Florida's statutory law regarding obscenity control is found in two chapters of the Florida Statutes; chapter 521, entitled "Exhibition of Motion Pictures" and chapter 847, entitled "Obscene Literature; Profanity." Because these chapters are distinct in operation and effect, they will be discussed separately.

MOVIE CENSORSHIP

Chapter 521 directs the governor to appoint three Florida citizens to the National Board of Review of Motion Pictures, Inc., a nationwide movie censorship board. The act makes it unlawful[2] to exhibit any commercial film that has not been reviewed and approved by this board, the New York State Department of Education, or the Film Estimate Board of National Organizations, another movie censorship board. In any prosecution for violation of the statute the only question to be decided by the court or jury is whether the film was approved or disapproved by the censors. Moreover, the burden of proof is on the defendant to establish this approval.[3] Whether the film is obscene in fact is not an issue.

The statute also provides an injunctive procedure which permits the circuit court to issue a temporary restraining order against

1. 352 U.S. 380 (1957).

2. The penalty for violation of the act is imprisonment in the county jail not exceeding six months or a fine not exceeding $500, or both; a second violation is a felony punishable by imprisonment in the state prison for up to three years or a fine not exceeding $5,000, or both. FLA. STAT. §521.04 (1963).

3. FLA. STAT. §§521.02 (1), .021 (6) (1963).

the exhibition of any unlicensed film once a complaint is filed by the prosecuting officer. The exhibitor is entitled to an immediate trial, but here, as in a trial for violation of the act, the single issue is whether the film has the censor's stamp of approval. If the defendant is unable to carry the burden of establishing this approval, the film will be permanently enjoined.[4]

This injunctive jurisdiction was added by a 1961 amendment,[5] apparently in reliance upon *Times Film Corp. v. City of Chicago*.[6] In *Times Film* the United States Supreme Court considered a Chicago ordinance which required all films to be submitted to the police commissioner for censoring prior to their exhibition. The ordinance made it unlawful to exhibit any film not licensed by the commissioner. An appeal to the mayor was provided, but his decision was final. The Court held this procedure was not void on its face, thus recognizing that freedom of speech does not include the right to exhibit any motion picture at least once. Although the only clear holding of *Times Film* was that censorship of movies prior to their first public exhibition is not unconstitutional per se, some interpreted the decision as an approval of censorship statutes that were substantially similar to the Chicago ordinance.

In March of 1965, however, the Court made it clear in *Freedman v. State of Maryland*[7] that ordinances such as the one involved in *Times Film* can no longer survive.[8] In *Freedman*, the Court was called upon to review a Maryland statute which required all motion pictures to be reviewed and approved by the Maryland State Board of Censors prior to their exhibition, with a right of appeal to the Maryland courts. Freedman refused to submit the film "Revenge at Daybreak" to the board of censors and subsequently challenged the constitutionality of the statute as applied on the ground that it provided neither judicial participation in the procedure which bans a film, nor any assurance of prompt judicial review. The Maryland Court of Appeals upheld the statute, relying on *Times Film*. The United States Supreme Court reversed, holding that a movie censorship system can avoid constitutional infirmity only if: (1) the state is required to immediately initiate a judicial proceeding to determine if the film in question is legally obscene, (2) the state has the burden of proving this obscenity, and (3) the procedure in no way lends an effect of finality to the censor's judgment.[9] Thus *Times Film* was al-

4. FLA. STAT. §521.021 (1963).
5. Fla. Laws 1961, ch. 61-4.
6. 365 U.S. 43 (1961).
7. 85 Sup. Ct. 734 (1965).
8. This may be partially due to the fact that all four of the *Times Film* dissenters are still on the Court while two from the majority have retired.
9. 85 Sup. Ct. 734, 739 (1965).

lowed to stand, but only for the narrow proposition that prior restraints are not "necessarily unconstitutional *under all circumstances.*"[10]

The Court reasoned that although prior censorship was permissible under the procedural safeguards stated above, these safeguards were not present in the Maryland statute. The Court stated that an exhibitor's stake in any one film would often be insufficient to warrant a protracted and onerous course of litigation; and that a distributor might be equally unwilling to initiate a burdensome lawsuit in one area when the film could be freely shown in most other areas of the country.[11] Because of this, the Court believed that the practical effect of the statute in many cases was to make final the censor's original determination. This, the Court decided, could be cured only by requiring the censor either to promptly approve a film or to initiate court action to restrain its exhibition.

Under the requirements set out in *Freedman*, it is clear that Florida's movie censorship law is unconstitutional. Chapter 521 does not merely lend an air of finality to the censor's finding; it makes this finding controlling on the court. The only issue at trial is whether the film has been approved, and the burden is on the defendant to establish this approval. This clearly violates the basic requirement of *Freedman* that there be an adversary proceeding on the merits of obscenity, with the burden of proof on the state. Therefore, if Florida is to have an enforceable movie censorship law, the legislature must substantially amend chapter 521 to bring it within the guidelines established by *Freedman*.

With the following changes, chapter 521 should pass the present constitutional tests as established by the Court, and still provide Florida with an effective movie censorship statute. First, the conclusive presumption that any unlicensed film is obscene should be eliminated. In its stead should be placed the requirement that a film can be declared obscene only at a judicial proceeding initiated by the state. Thus the question whether a film had been approved as now required by chapter 521 would be relevant, but not controlling. It would simply be evidence going to the issue of whether the film is obscene in light of contemporary community standards. This requirement would be applicable to both a prosecution for exhibition of an obscene film and a suit seeking a permanent injunction against an obscene film. Second, as a guide for determining obscenity, the statute should include the standard set forth by the Supreme Court in *Roth v. United States*:[12] "Whether to the average person, applying

10. *Id.* at 736. (Emphasis by the Court.)
11. *Id.* at 739.
12. 354 U.S. 476 (1957).

contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."[13] The violation, therefore, would no longer be the exhibition of an unlicensed film; rather it would be the exhibition of a film judicially determined to be obscene according to the *Roth* standard. Third, the burden of proving that the film in question is obscene should be clearly placed on the state. The prosecutor would be responsible for proving each element of the *Roth* test, as well as meeting all other requirements established by the Supreme Court.

It should be recognized that convictions would be more difficult to obtain under the amended statute. Although the Court still accepts the *Roth* test, this obscenity standard has been restricted considerably by subsequent decisions. First, "average person" has been interpreted to mean average adult person, so that a film cannot be judged according to its effect on children or other highly susceptible persons.[14] Second, "dominant theme of the material taken as a whole" requires that a film be judged according to its over-all effect, not by isolated parts.[15] Thus the fact that a film contains one or two offensive scenes will not be sufficient to adjudge the film obscene. Third, whatever "prurient interest" might mean, it is something more than just material which stimulates lustful and lascivious thoughts. Instead the material in question must be "patently offensive,"[16] which apparently means that only "hard-core" pornography will be held obscene by the Court.[17]

As to the meaning of "contemporary community standards," even the Supreme Court has been unable to agree. In *Jacobellis v. Ohio*,[18] the Court held a French film entitled "The Lovers" not to be obscene, but no more than two justices could agree on a basis for the "community standard." Two justices believed the relevant community should be the entire nation.[19] Two others advocated the use of local community standards with review by the Supreme Court only on the question whether the lower court's finding was supported by

13. *Id.* at 489.

14. Butler v. Michigan, 352 U.S. 380 (1957).

15. Roth v. United States, 354 U.S. 476, 489 (1957).

16. Manual Enterprises v. Day, 370 U.S. 478, 486 (1962) in which the Court reviewed a magazine entitled *Manual*, a publication for homosexuals. The magazine consisted primarily of photographs of nude male models posed together suggestively so as to emphasize their genitals and buttocks. Names and addresses of the models were available upon request, as well as additional photographs. The Court held the magazine was not obscene under the amended standard.

17. See Lockhard & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 58-68 (1960).

18. 378 U.S. 184 (1964).

19. *Id.* at 195.

sufficient evidence.[20] As a practical matter, of course, the standard applied will be that of the local area, because the jury will be chosen from that area. This may well make a difference in Florida, where there are notable differences among the various areas of the state.

Regardless of the standard applied, however, it is likely that judges and juries in Florida will find films to be obscene which would not be considered obscene by the Supreme Court. Terms such as "purient interest" and "community standards" are simply not susceptible to specific legal definition; and judging by the preponderance of cases reversing lower state and federal findings of obscenity, it appears that the *Roth* standard means something entirely different to the Supreme Court than to most other courts.[21] In *Grove Press, Inc. v. State*[22] and *Tralins v. Gerstein*,[23] the Court reversed two Florida decisions which had determined that certain materials, including the *Tropic of Cancer*, were obscene according to the *Roth* standard as applied to literature. There is every reason to believe that this same gap in standards will exist if the *Roth* test is applied to motion pictures. But the application of the *Roth* standard to movies is still the only feasible guide to incorporate into chapter 521, because it is the only test that has the Supreme Court's approval.

Chapter 521 should also be amended to provide a procedure by which a final judicial determination of obscenity can be obtained prior to the date of the first exhibition of the film in question. This could be done by requiring exhibitors to submit to the state attorney a schedule of all films at least one month in advance of their exhibition date. This requirement would not be burdensome on the exhibitors, because all films are generally scheduled more than a month in advance.[24] It would, however, provide a procedure under which the prosecutor could go to court for a permanent injunction prior to the exhibition of any film he believed to be obscene. Under this amendment, the question whether a film had been approved as now required would serve a practical, but not a legal, purpose. It would serve as a guide to prosecutors in reviewing lists of scheduled films, since a prosecutor might want to investigate for possible injunctive action only those films which were disapproved. Likewise, it would serve as a guide to many theater owners, since they might consider exhibiting only those films which had been approved. Because of this practical advantage, the present system of appointing three Florida citizens to the National Board of Review of Motion Pictures should be main-

20. *Id.* at 202.

21. See, *e.g.*, One, Inc. v. Olesen, 355 U.S. 371 (1958); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1958).

22. 378 U.S. 577 (1964), *reversing* 156 So. 2d 537 (3d D.C.A. Fla. 1963).

23. 378 U.S. 576 (1964), *reversing* 151 So. 2d 19 (3d D.C.A. Fla. 1963).

24. See Freedman v. State of Maryland, 85 Sup. Ct. 734, 740 (1965).

tained. But under no circumstances should this censorship board's approval or disapproval be permitted to have a binding effect on the courts.

Chapter 521 now provides that any person sought to be enjoined from exhibiting an allegedly obscene film shall be entitled to trial within one day after joinder of issue and to a decision within two days of the conclusion of the trial.[25] This provision was added by the 1961 session of the legislature[26] in reliance upon *Kingsley Books, Inc. v. Brown*,[27] which upheld a New York injunctive statute containing identical time limits. In *Freedman*, the Court restated its approval of the New York procedure;[28] therefore, the Florida adaptation of the New York statute should be maintained. Under the amended procedure, there could be a final judicial determination of whether a film was obscene prior to the date it was originally scheduled for exhibition, which clearly satisfies the requirements set forth in *Freedman*.[29]

It would be unrealistic, however, to expect all prosecutors to move against objectionable films prior to their actual exhibition. Many, if not most, prosecutors will take no action against a film until the electorate protest following the first public exhibition. It is necessary, therefore, that a provision for temporary restraining orders be provided and that the power to issue such orders be given to the circuit judge according to the procedure now provided by section 521.021 (1)-(2). This would provide a means whereby the exhibition of an allegedly obscene film could be temporarily stopped until there could be a judicial determination of obscenity. Here it is vital that the exhibitor be assured a trial on the merits within one day after joinder of issue and a decision within two days after the trial is concluded. As the Court stated in *Bantam Books, Inc. v. Sullivan*,[30] "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[31] It is unlikely, therefore, that the Court will accept any longer delay for an adversary proceeding than that upheld in *Kingsley Books*.

Thus the amended statute would provide a system in which: (1) the censor has the burden of instituting all judicial proceedings; (2) any restraint prior to judicial review is imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity is assured. With these procedural safeguards, Florida's

25. FLA. STAT. §521.021 (3) (1963).
26. Fla. Laws 1961, ch. 61-4.
27. 354 U.S. 436 (1957).
28. Freedman v. State of Maryland, 85 Sup. Ct. 734, 740 (1965).
29. *Ibid.*
30. 372 U.S. 58 (1963).
31. *Id.* at 70.

movie censorship statute would meet all current constitutional requirements.[32]

OBSCENE LITERATURE

Chapter 847 of the Florida Statutes prohibits the sale or distribution of obscene materials. In an effort to conform this chapter to the New York obscenity statute, which had previously been upheld by the United States Supreme Court,[33] the 1961 session of the legislature substantially amended chapter 847.[34] This amendment added procedural time limits identical with those found in the New York statutes[35] and incorporated the *Roth* standard into the chapter as a guide in determining whether material is obscene.[36]

Unfortunately, however, chapter 847 as amended does not conform to the New York statute in respect to the confiscation of obscene materials. The New York statute allows an injunction pendente lite against the owner of allegedly obscene material to prevent distribution of the specific materials described in the injunction until the outcome of the trial. Although it is not required by statute, the New York practice is for the prosecuting attorney to attach copies of the specific material to the complaint requesting the injunction. If the judge is satisfied that the material is in fact obscene, the owner can be temporarily enjoined, but only from distributing those materials specified in the injunction. No confiscation is allowed under any circumstances until the materials have been declared obscene at an adversary judicial proceeding.

In contrast, however, chapter 847 allows any authorized law enforcement officer to seize "any of the materials, matters, articles, or things possessed or otherwise dealt with in violation"[37] of the statute prior to an adversary judicial proceeding. Under this provision, a law enforcement officer is authorized to confiscate all materials that, in his opinion, are obscene. This confiscation is normally made pursuant to either section 847.03, allowing confiscation incident to arrest, or section 933.02 (2) (c), authorizing search warrants for obscene literature. Moreover, there is no requirement that the search warrant specify the material to be seized, other than that it be "obscene" or "in violation of" chapter 847.

Furthermore, section 933.14 provides that obscene materials and other "contraband" such as narcotics and gambling paraphernalia are

32. See Freedman v. State of Maryland, 85 Sup. Ct. 734, 740 (1965) (Black, Douglas, JJ. concurring).
33. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).
34. Fla. Laws 1961, ch. 61-7.
35. FLA. STAT. §847.011 (7) (c) (1963).
36. FLA. STAT. §847.011 (10) (1963).
37. FLA. STAT. §847.011 (6) (1963).

exceptions to the general statutory provision which permits a judge or magistrate to order the return of property secured by an "unreasonable" search. The section declares that there shall be "no property right" in obscene material and that the property shall be destroyed if it is found to be obscene by the court. If the materials are not found obscene, they can be returned by order of the court. This order, however, can be issued only after a proceeding initiated by the claimant at which he has the burden of proving the materials were used in a "lawful manner."[38]

Two recent decisions of the United States Supreme Court conclusively demonstrate that Florida's statutes relating to the confiscation of obscene materials cannot withstand a constitutional attack. In *Marcus v. Search Warrant of Property*,[39] the Court reviewed a Missouri statute which provided for a search warrant to be issued on a verified complaint that obscene material was being kept at a particular place. There was no requirement that the warrant specifically identify the materials for which the search was to be made. This procedure, therefore, was similar to Florida's in that the officers were permitted to make on-the-spot decisions whether the material found was obscene. The Court held this statute unconstitutional, reasoning that the officers were given too much discretion in choosing which materials were obscene.

In *Quantity of Books v. Kansas*,[40] the Court assured the demise of Florida's procedure. In that case, the Kansas Attorney General filed an information identifying by title and description fifty-nine paperback books to be seized. Attached to the information were seven samples of the books, all of which were substantially identical and published by the same publisher. The district judge conducted a forty-five minute ex parte inquiry during which he "scrutinized" the seven books. He found there was probable cause for believing the materials were obscene, and issued a warrant authorizing the seizure of only the fifty-nine books identified by title. The Court held this procedure unconstitutional even though a trial on obscenity was required within ten days after joinder of issue. Moreover, the Court specifically rejected the contention that obscene material was contraband along with narcotics and gambling paraphernalia.[41]

Apparently, therefore, the Court is willing to uphold a temporary injunction against the *person* prior to a judicial determination of

38. FLA. STAT. §847.011 (6) (1963) has the same requirement. Apparently there is a distinction between "obscene" and "lawful" so that in order to recover confiscated materials a claimant must prove they were used in a "lawful manner," even after the materials have been judicially determined not to be "obscene."

39. 367 U.S. 717 (1961).

40. 378 U.S. 205 (1964).

41. *Id.* at 211-12.

obscenity, such as that upheld in *Kingsley Books,* but is unwilling to allow any confiscation of allegedly obscene materials, even though a prompt trial on the merits is assured. This is evidenced by the Court's statement in *A Quantity of Books* that "if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books."[42] This distinction may be based upon the belief that the fourth amendment's protection against unreasonable search and seizure justifies the added protection.[43] Or the Court may reason that the actual physical seizure of allegedly obscene material may unduly influence the issue of obscenity at trial.[44] Whatever the reason, it is clear that the Court has drawn this distinction, and that Florida's procedure cannot survive under it.

It is submitted, therefore, that the following changes should be made.

Section 847.011 (6). This subsection now provides for the pre-trial seizure and post-trial destruction of obscene material. It should be totally deleted and replaced by a procedure requiring: (1) that the prosecuting officer shall specify the allegedly obscene materials in his complaint asking for an injunction or temporary restraining order, (2) that any order restraining a person from distributing obscene material before trial shall specify the restricted material, and (3) that any final injunction ordering the confiscation and destruction of materials adjudged to be obscene shall specify the materials to be destroyed. Although it may well be the current practice of most prosecutors and judges, chapter 847 does not require any such specification in the complaint, restraining order, or final injunction. This amendment, therefore, would not only eliminate the invalid pre-trial confiscation, but would also lessen the chance that the act might be held unconstitutional as applied. In other words, there would be less likelihood that a judge might issue a restraining order to prevent a person from distributing any "obscene" materials without limiting the order to specific materials, or that he might enter a final order for the sheriff to seize and destroy all "obscene" materials belonging to the defendant, thereby allowing the possible destruction of materials other than those adjudged to be obscene. Neither of these practices is compatible with current case law and should be disallowed by statute.

Section 847.02. This section provides for the pre-trial confiscation of obscene materials in conjunction with an arrest for violation of

42. *Id.* at 213.
43. See Marcus v. Search Warrant of Property, 367 U.S. 717, 724-25 (1961).
44. See A Quantity of Books v. Kansas, 378 U.S. 205, 211 (1964).

the act and should be deleted in its entirety. It can only serve to lead law enforcement officers to believe they have such confiscatory powers when, in fact, they do not.

Section 933.02 (2) (c). This subsection provides that the use of obscene materials in violation of chapter 847 shall be a ground for the issuance of a search warrant. It should be deleted.

Section 933.03. This provides that any obscene materials confiscated by an officer in executing a search warrant shall be held until after the trial to be disposed of by court order. Because search warrants for obscene materials are invalid, this section should also be deleted.

Section 933.14. This section provides for the return of property taken incident to an "unreasonable" search; but obscene materials and other enumerated items of "contraband" are excepted. As the Supreme Court held in *A Quantity of Books,* obscene material cannot be classed as contraband;[45] therefore, obscene materials should be deleted from the items specified as contraband under this section.

CONCLUSION

The recommendations in this note are made in light of the current case law. This is not to say, of course, that the law will not change, or that new requirements will not be added. Obscenity regulation is an area in which few precise standards have been fixed. And the standards which can be deciphered are qualified and redefined with each new case, and the cases are frequent. The recommended amendments, therefore, can promise no more than to conform Florida's obscenity statutes to the law as of this date. To keep the necessarily detailed statutes in line with developing standards will require a continuing study of the cases and periodic revisions.

This note should not be read as an approval of the United States Supreme Court's strict requirements concerning obscenity control. Nor should it be read as criticism of the Florida Legislature. In fact, Florida has done far better than most states in amending its obscenity statutes to conform to Supreme Court requirements. This is further evidence that the legislature sees great potential harm in the uncontrolled distribution of obscene materials. But if the state is to have a valid, enforceable means of regulating obscenity, some amendments must be made. It is hoped that this note might be beneficial in drafting the needed changes.

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45. *Id.* at 211-12.