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California v. LaRue: The Demise of the "Bottomless" Bar

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California v. LaRue: The Demise of the "Bottomless" Bar

The United States Supreme Court has sustained the right of California to regulate entertainment presented in bars and nightclubs licensed by its Department of Alcoholic Beverage Control. In *California v. LaRue*,[1] the Court held that rules which prohibit nude dancing on licensed premises are not on their face violative of the First and Fourteenth Amendments. This opinion will be examined here to determine its implications and effect.

The regulations[2] were issued as a result of the Department's growing concern over the "bottomless" entertainment offered in bars and nightclubs which it licensed and the illegal conduct occurring in and around such establishments. The depth of the problem was revealed in public hearing held by the Department in May of 1970.[3] Among the witnesses who appeared at these proceedings were law enforcement officers and investigators, owners of licensed premises and local city officials. They revealed numerous incidents of sexual conduct between customers and entertainers, a rise in criminal prosecutions for such activity, crime in the neighborhood of these bars and a decline of other businesses in the adjacent municipal areas.

Owners of bars and nightclubs affected by the regulations brought a declaratory judgment suit in the United States District Court

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1. 409 U.S. 109 (1972).

2. Only the regulations at 4 CAL. ADM. CODE § 143.3 and 4 CAL. ADM. CODE § 143.4 were challenged. These were summarized by Justice Rehnquist at 409 U.S. 111-12 as follows:

(a) The performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law";
(b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals";
(c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals";
(d) The permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus"; and
(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

3. Public Hearings of the State Department of Alcoholic Beverage Control held in Sacramento, California on May 12, 13 and 14 of 1970, pages 1-576.

challenging their constitutionality. Two of the three judges impaneled to hear the matter upheld the claim of the petitioners that the rules unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments.[4] The District Court majority reasoned that:

> . . . the state regulations had to be justified either as a prohibition of obscenity in accordance with the *Roth*[5] line of decisions . . . or else as a regulation of "conduct" having a communicative element under the standard laid down . . . in *United States v. O'Brien*.[6] Concluding that the regulations would bar some entertainment which could not be called obscene under the *Roth* line of cases, and that the governmental interest being furthered by the regulations did not meet the test laid down in *O'Brien*, the Court enjoined the enforcement of the regulations.[7]

On review by the Supreme Court, the regulations were upheld on a different basis. The majority did not believe that the State was confined to dealing with the problem either within the limits prescribed by the Court for obscenity or in accordance with the requirements for dealing with communicative conduct set forth in *United States v. O'Brien*.[8] The Court determined instead that the State power to enact the regulations stemmed from the Twenty-first Amendment[9] and the California Constitution.[10]

It is not easy to determine from Justice Rehnquist's language the view of the majority of the Court of either the scope or magnitude of the State's regulatory power under the Twenty-first Amendment. In defining this power, the Court employed its prior decisions involving conflicts between the Twenty-first Amendment and other constitutional provisions as authority. It claimed that the State was "totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders," according to *Hostetter v. Idlewild Bon Voyage Liquor Corporation*.[11]

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4. LaRue v. California, 326 F. Supp. 348 (1971).

5. The test is set forth in Roth v. United States, 354 U.S. 476 (1957) and A Book Named "John Cleland's Memoirs Of A Woman Of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1965).

6. 391 U.S. 367 (1968).

7. 409 U.S. 109, 113-14 (1972).

8. 391 U.S. 367 (1968).

9. U.S. CONST. amend. XXI, § 2. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

10. CAL. CONST. art. 20, § 22 (Alcoholic Beverages), amended Nov. 2, 1954 and Nov. 6, 1956: "The department shall have the power in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals . . ."

11. 377 U.S. 324, 330 (1964).

The Court also found that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," quoting from *State Board of Equalization v. Young's Market Company.*[12] On the other hand, the majority acknowledged that the Twenty-first Amendment does not supersede all other provisions of the Constitution. It noted a recent limitation recognized in *Wisconsin v. Constantineau*[13] of the fundamental notice and hearing requirements of the Due Process Clause of the Fourteenth Amendment. The Court overlooked a limitation which Justice Rehnquist had proclaimed six months earlier that a "State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause,"[14] as mentioned by Justice Marshall in his dissent in *LaRue.*

The important issue before the Court in *LaRue*, however, was the power of the State under the Twenty-first Amendment to regulate forms of expression which are traditionally protected by the First Amendment, for all of the Justices admitted that the regulations infringed on some free expression. Because there were no precedents for the Court to rely upon to resolve the conflict, the Court majority turned to other constitutionally permissible regulations of conduct with a communcative element. Justice Rehnquist found authority in two post-World War II cases: *Hughes v. Superior Court*[15] and *Giboney v. Empire Storage and Ice Company.*[16] In both, injunctions against picketing were approved by the Court because the activity was "directed to the accomplishment of an end which the State has declared to be illegal."[17] The *LaRue* Court implied that the California regulations were also permissible because the acts proscribed consisted in part at least of unlawful conduct. Moreover, by describing the movies and live entertainment offered as "partaking more of gross sexuality than of communication,"[18] the Court majority seemingly

12. 299 U.S. 59, 64 (1936).
13. 400 U.S. 433 (1971).
14. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).
15. Hughes v. Superior Court in and for the County of Contra Costa, 339 U.S. 460 (1950).
16. 336 U.S. 490 (1949).
17. 409 U.S. 109, 117 (1972).
18. *Id.* at 118.

excused its disregard of the special treatment traditionally accorded First Amendment free expression.[19]

Instead, the Court considered the regulations on the basis of whether the State could rationally conclude that certain sexual performances and the dispensation of liquor by the drink ought not to occur simultaneously at establishments which are licensed by the State. The majority felt that the Department should be able to prevent the Bacchanalian revelries which the record revealed were occurring frequently in licensed bars and nightclubs offering nude entertainment. It regarded the Twenty-first Amendment as conferring something more than the normal state authority over public health, welfare and morals. Having isolated the problem of recurring illegal conduct, the Department could "reason from the particular to the general."[20] As repository of the State's power under the Twenty-first Amendment, the Department was not confined to requiring self-regulation or self-discipline on the part of operators of licensed premises. Rather, it had a wide choice of means to accomplish a permissible end.[21] The Department could therefore employ a "prophylactic solution"[22] preventing the nude performances on penalty of removal of the licenses of the bar and nightclub owners, instead of choosing a "less restrictive alternative" of prescribing exactly how such entertainment could be presented as suggested by Justice Marshall in his dissent in *LaRue*.[23] The majority concluded that the regulations were not unconstitutional on their face, given the rational basis for their enactment and the added presumption in favor of their validity in the area of liquor control which the Twenty-first Amendment provides.

Justice Brennan disapproved of the conclusion reached by the majority. In no way could he find justification for the regulations' prohibition of protected expression on the basis of the language or history of the Twenty-first Amendment, no matter how distasteful the expression. He joined with Justice Marshall in finding the regulations overbroad. In addition, both Justices Brennan and Marshall agreed that the State has no right to condition a benefit, here the license to sell liquor by the drink, on the relinquishment of First Amendment rights.[24]

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19. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959), Charles L. Black, Jr., THE PEOPLE AND THE COURT, 217-21, The MacMillan Co. (1960).
20. Assigned Car Cases, 27 U.S. 564, 583 (1927).
21. 384 U.S. 35 (1966).
22. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).
23. California v. LaRue, 409 U.S. 109, 132.
24. Perry v. Sinderman, 408 U.S. 593 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

Justice Marshall in his dissenting remarks made two concesssions and implied a third. He conceded that state regulation of liquor is important and is deeply embedded in our history.[25] He also agreed that certain forms of expression are regulable, although he disagreed with the majority as to the standard to be applied to permit the control. He implied a balancing process which requires an overwhelming government interest to tip the scales against the expressive conduct because of the "preferred" position occupied by freedom of speech as well as freedom of religion and the press.[26] In Justice Marshall's estimation, the State failed to show a compelling governmental purpose, unrelated to mere hostility to the right being asserted, here the right of free expression, to permit the regulations abridging that right.[27]

In contrast to the views of Justices Marshall and Brennan, Justice Stewart found the regulations justifiable in the context of serving alcoholic beverages. He emphasized that a State has broad power under the Twenty-first Amendment to specify the times, places and circumstances where liquor may be dispensed within its borders. It is noteworthy that he cited the same authorities as the majority for his construction of the State's power under the Twenty-first Amendment.[28] Justice Stewart also found authority for his interpretation of Twenty-first Amendment power in *Ziffrin, Incorporated v. Reeves*.[29] In that case, the Court upheld the right of Kentucky to impose criminal penalties for violation of rigid regulations of the possession and distribution of liquor.

These regulations of expressive conduct may be justified on the same basis as those prescribing time, place and manner of political or religious speech, which have been upheld in prior Court decisions.[30] In *Hague v. C.I.O.*, the Court stated that the manner of exercising the right of free expression "may be regulated in the interest of all."[31] According to Kalven, no one has ever argued that expression "should be free of the restraints of reasonable

25. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
26. Murdoch v. Pennsylvania, 319 U.S. 105, 115 (1943).
27. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
28. State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Joseph E. Seagram and Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).
29. 318 U.S. 73 (1943).
30. Cox v. New Hampshire, 312 U.S. 569 (1941); Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39 (1966).
31. 307 U.S. 496, 516 (1939).

. . . rules, and any concessions on this front should not be taken as relevant to the questions most central to speech theory—questions of control of content."[32] In recent cases, the Court has spoken more and more of the acceptability of regulation of the context of expression.[33] Justice Marshall for the Court upheld such regulation on the ground that past Court decisions make clear "that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted."[34] The regulation has been held constitutionally permissible "when the individual's interest in expression, judged in the light of all relevant factors, is 'miniscule' compared to a particular public interest in preventing that expression or conduct at that time and place."[35] Although free expression is guaranteed by the First Amendment, ". . . expressive conduct may be constitutionally protected at other places or other times," but prohibited at certain times or places.[36]

Always the focal point of discussion by the Court in the regulation is the balancing of the reasons for the control against the diminution of the exercise of the rights:

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[37]

In *LaRue*, the reason for the regulation was to curb the illegal conduct occurring in and around bars and nightclubs offering "bottomless" entertainment and to prevent the offensive presentations. Reliable studies demonstrate the increased likelihood of sexual arousal where liquor is being consumed.[38] Evidence of the

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32. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SU. CT. REV. 1, 23.

33. Grayned v. Rockford, 408 U.S. 104 (1972); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Colten v. Kentucky, 407 U.S. 104 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971).

34. Grayned v. Rockford, 408 U.S. 104, 115 (1972).

35. Colten v. Kentucky, 407 U.S. 104, 111 (1972).

36. Grayned v. Rockford, 408 U.S. 104, 120 (1972).

37. Schneider v. State, 308 U.S. 147, 161 (1943).

38. Kinsey, Pomeroy and Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, Sept., 1970 (Bantam Books, 1970); TASK FORCE REPORT ON DRUNKEN-

difficulty of curtailing the unlawful activity by police enforcement was documented in the public hearings.[39] On balance, the governmental interest seems of sufficient importance to permit the narrow regulations necessary to eliminate the provocative element of the entertainment.

Every one of the *LaRue* Justices considered balancing except Justice Douglas, who felt that he could not decide the constitutionality of the regulations, absent an application to the challengers. Justices Brennan and Marshall found that the State's Twenty-first Amendment power could not balance the scales against First Amendment rights. The Court majority postponed its balancing by adopting in its final footnote to the opinion the reservation set forth in *Joseph E. Seagram and Sons, Inc. v. Hostetter* that "specific future applications . . . may engender concrete problems of constitutional dimension" and that "it will be time enough to consider any such problems when they arise."[40] Only Justice Stewart concluded that the scales were weighted in favor of the regulations, based on the State power to control the time, place and circumstances under which alcoholic beverages may be dispensed within California.

In addition to an actual application of the regulations, the *LaRue* opinion leaves other questions unanswered. There is the problem of complying with Due Process requirements as tailored to guarantee First Amendment protection[41] when the rules are applied. The issue of whether the Department exceeded the authority granted to it in the California Constitution by promulgating the regulations may yet be resolved by the State courts.

However, the approval by the Court of the regulations and the indicated intention of the Department to enforce them may effectively prevent the orgiastic activities which "bottomless" dancing in bars and nightclubs serving liquor seems to encourage. The approach taken by the Department in prohibiting nude dancing on licensed premises may after all be less harsh than the injunctive relief against lewd dancing ordered by the California Court of

NESS, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE.

39. LaRue v. California, 326 F. Supp. 348, 360-62 (1971). *See also* note 3, *supra.*

40. 384 U.S. 35, 52 (1966).

41. Freedman v. Maryland, 380 U.S. 51 (1965).

Appeal in *People ex rel. Hicks v. Sarong Gals*[42] and the consequent abatement proceedings.

The "bottomless" entertainment may still be presented sans the serving of alcoholic beverages, for as Justice Rehnquist observed in *LaRue* "the State has not forbidden these performances across the board."[43] The California Supreme Court decided subsequently that cities and counties may proscribe nudity in specified public places,[44] justifying its approval of ordinances of this type as reasonable regulation of "the form or manner of the communication."[45] Nude dancing in the state has thus been relegated to presentation in "theaters or similar establishments primarily devoted to theatrical performances."[46] The entertainment will now have to be judged solely on its merits against the new standards laid down by the United States Supreme Court on June 21, 1973[47] and finally accorded the First Amendment considerations which it truly requires.

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42. 27 Cal. App. 3d 46, 103 Cal. Rptr. 414 (1972).
43. 409 U.S. 109, 118 (1972).
44. Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).
45. *Id.* at 426, 509 P.2d at 511, 107 Cal. Rptr. at 695.
46. *Id.* at 409-10, 509 P.2d at 499, 107 Cal. Rptr. at 684.
47. Miller v. California, 41 U.S.L.W. 4925.