OBSCENITY IN PRIVATE COMMUNICATIONS

Ackerman v. United States
293 F.2d 449 (9th Cir. 1961)

United States v. Holt
12 U.S.C.M.A. 471, 31 C.M.R. 57 (1961)

Two recent cases have applied a federal statute prohibiting obscenity in the mails, 18 United States Code section 1461,[1] to letters of private communication. The pertinent parts of that section are:

> 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. . . .
>
> Whoever knowingly deposits for mailing or delivery anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5000 or imprisoned not more than five years, or both for the first offense. . . .[2]

In *Ackerman v. United States*[3] the defendant was a writer and literary agent who claimed to be engaged in research on lesbianism and homosexuality. In the course of his research, Ackerman sent correspondence to one R. W. Hearn, a married father of two children, whom he believed to be a homosexual. The defendant was convicted on several counts of having mailed letters which were "obscene, lewd, indecent, lascivious and filthy in violation of Title 18 section 1461 of the United States Code."[4] The court found that the contents of the letters were "obscene matter" within the meaning of the statute and that it was improbable that such letters had any connection with a serious research project. Defendant claimed that the social evil at which the statute was aimed was not involved in this case and that the evidence was insufficient to establish the requirement of scienter.[5]

In the case of *United States v. Holt*[6] the Court of Military Appeals

---

1 Federal Mail Obscenity Statute, 69 Stat. 183, 18 U.S.C. § 1461 (1955).

2 *Ibid.*

3 293 F.2d 449 (9th Cir. 1961).

4 *Id.* at 450.

5 Ackerman v. United States, *supra* note 3, at 450, 451. Many crimes require that the element of scienter be present in order for the conviction of a crime. Scienter means that the accused knowingly did the action for which he is charged. In the *Ackerman* case where the element of scienter was claimed by defendant to be lacking, the court felt without too much explanation, that the evidence supported the notion that the requirement of scienter had been fulfilled. It has been held in past cases that if in fact the letters are obscene and if the sender knew of the contents at the time of sending it, his own belief that the material is not obscene is immaterial. See Burton v. United States, 142 Fed. 57, 62 (1906).

6 12 U.S.C.M.A. 471, 31 C.M.R. 57 (1961).

reviewed the Board of Review's decision to set aside defendant's plea of guilty to the charge of mailing obscene and lewd letters to a thirteen-year-old girl. The accused was a thirty-one-year-old married man who had been separated from his wife and who claimed to be in love with the addressee of the letters. It was conceded that by any applicable standards the letters were obscene, but to escape conviction under the statute the accused's counsel claimed that a private personal love letter is not "matter" within the meaning of the federal obscenity statute. Defendant's counsel also claimed that "private communications between two people who have a close and personal relationship is not matter within the meaning of the statute."[7] The court reversed the Board of Review and found that the defendant should be convicted.

In *Holt* the court held that a personal relationship between the parties is not sufficient to take a letter out of the operation of the statute.[8] The court based its holding on several decisions which do not say this directly, but which the court felt could be implied from their silence on that point.[9] Perhaps the court is going too far in making generalizations on the basis of what the courts do not say in these decisions. The courts have often been criticized for implying rules or doctrines from the silence of the legislature.[10] The same might be said about obtaining implications from another court's silence on a particular matter. Since the legislature does not legislate by remaining silent, so also is it doubtful that courts decide issues by what they do not say. One can readily see the danger involved should such means be used to interpret criminal statutes.

The most important problem raised by the two cases is whether or not personal letters are to be included within the meaning of the statute. Both courts referred to the legislative history of the statute, which in its original form in 1876 did not include letters and was construed as not to include them; but an 1888 amendment included the word "letters."[11] In 1955 the statute was again amended by substituting more general terms such as article, matter, thing, device or substance for the specific items such as book, pamphlet, picture, paper, and letter. It was stated in the Senate report that:

> the purpose of the proposed legislation is to enlarge section 1461

---

[7] *Id.* at 473.

[8] United States v. Holt, *supra* note 6, at 474.

[9] Sinclair v. United States, 338 U.S. 908 (1950), husband-wife; Thomas v. United States, 262 F.2d 844 (6th Cir. 1959), lovers; United States v. Wroblenski, 118 Fed. 495 (1902), mother-son. In these cases there existed a close relationship between the sender and recipient of the letters involved. No mention is made by the court in these cases as to the existing relationships having a bearing on the outcome. From this silence, some courts have concluded that closeness of relationship has no affect in taking parties out of the control of the statute.

[10] Girouard v. United States, 328 U.S. 61, 70 (1946); United States v. Southeastern Underwriters Association, 322 U.S. 533, 560-61 (1944); Cleveland v. United States, 329 U.S. 14, 22 (1946). These cases reject the notion that Congress legislates by remaining silent.

[11] Ackerman v. United States, *supra* note 3, at 452, 453.

> of Title 18 of the United States Code so as to include within the prohibition of said section all matter of obscene nature, whether or not said matter had fallen within the more restricted definition contained in the statute.[12]

This purpose has since been reaffirmed in *Thomas v. United States* where the court said:

> In analyzing the foregoing legislative history . . . , it is readily apparent that Congress intended to amend section 1461 so as to include within the prohibition of the statute any and all matter of an obscene . . . nature, and it is further apparent that Congress, by the amendment, had no intention of withdrawing from the operation of the statute a filthy letter sent through the United States Mails.[13]

As to any possible constitutional question, the issue has been decided since *Roth v. United States*. In deciding whether or not obscenity came within the protection of the first amendment, the court said:

> All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties. . . . But implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.[14]

Even though legislative history and subsequent interpretation of the Federal Mail Obscenity Act indicate that all types of obscene material are subject to punishment, it is questionable whether there is a need to extend the law to include private communications. It should be noted that while *Roth* made a general pronouncement against all obscene matter, the case actually dealt with a commercial publication. While the legislative history indicates a desire to expand the statute, it would seem the real aim of the statute has been exceeded. Section 1461 of the criminal code was enacted to prevent people from using the mails to corrupt public morals. It has been felt that the increase in juvenile delinquency is due in great part to the wide use of obscene matter within the mails. The purpose of broadening the statute by the amendment is to combat the general corruption of the public morals.[15] While this seems an admirable purpose, it has not been fully proven that obscenity in fact tends to increase juvenile delinquency. Experts' opinions conflict on this point. In an article reviewing and discussing the latest decisions on obscenity, it was said "it is not unlikely that none of the justices takes the evils of obscenity very seriously. Yet, as responsibly placed men, they cannot . . . say so."[16]

---

[12] S. Rep. No. 113, 84th Cong., 1st Sess. (1955).

[13] Thomas v. United States, 262 F.2d 844, 847 (6th Cir. 1959).

[14] Roth v. United States, 354 U.S. 476, 484 (1956).

[15] S. Rep. No. 113, 84th Cong., 1st Sess. (1955).

[16] Kalven, "Metaphysics of the Law of Obscenity," in The Supreme Court Review 45 (1960).

However, assuming for the present that the purpose of suppressing obscenity is a valid one, the language of the legislative history seems to indicate a desire to protect the public but not any one individual, who because of a close or private relationship may be the recipient of an obscene letter. Even though the word "letter" was included in prior statutes, one wonders whether it was meant to include private letters as opposed to letters sent to unknown recipients through a general mailing. Neither the statute nor the legislative history indicates specifically that the statute was to include private letters. If the statute had been written expressly to apply to private letters, it is questionable whether in balancing the government's interest in protecting the morals and welfare of the people as opposed to an individual's freedom of speech and right of privacy, such an act would be constitutional. Yet the courts have been willing to extend the present statute to include such a meaning.

The government under the Constitution may not dictate what we may say to our friends in private conversations, but the government may stop us from speaking to the general public where our words may present a clear and present danger.[17] It would seem on the same basis that a prohibition may be well founded if obscenity will affect the morals of a group, but that a line should be drawn where people are corresponding privately. Limits must be set if we hope to preserve the basic freedoms we so faithfully advocate.

[17] Feiner v. People of State of New York, 340 U.S. 315 (1951). In this case the Supreme Court held that where a speaker in a public place urged the people present into conflicting groups so that there was a possibility of a riot, interfered with traffic, and disobeyed police requests to stop speaking, there was no violation of freedom of speech as guaranteed by the Federal Constitution when such speaker was convicted of disorderly conduct.