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Manual Enterprises Inc. v. Day, 82 Supp. Ct. 1432 (1962)

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ciable as intangible assets.[38] Only when the courts adopt this rationale will they reach results which will conform to the Internal Revenue Code and to economic reality.

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SCIENTER REQUIRED IN POST OFFICE CENSORSHIP PROCEEDING UNDER 18 U.S.C. § 1461.—Three publishing corporations, having a common president, brought suit in the United States District Court for the District of Columbia to enjoin a nonmailability order of the Postmaster General of the United States against certain of their magazines. The magazines, entitled *MANual, Trim,* and *Grecian Guild Pictorial,* consist of photographs of nude or semi-nude males, and advertisements by independent photographers offering photographs of male nudes for sale. The District Court denied injunctive relief and sustained nonmailability on the grounds that the magazines are obscene in themselves and that they contain information of where obscenity may be obtained. The Circuit Court of Appeals affirmed.[1] On certiorari to the Supreme Court of the United States, *held,* reversed. Mr. Justice Harlan, in announcing the judgment of the court, was of the view that the magazines do not affront the current community standards of decency and, hence, are not obsene in themselves. Secondly, without a showing of scienter on the part of the publisher the magazines cannot be removed from the mails on the grounds that they contain information of where obscenity may be obtained. Mr. Justice Stewart concurred. Mr. Chief Justice Warren, Mr. Justice Brennan, and Mr. Justice Douglas concurred in the reversal, but based their opinion on the ground that the Postmaster General has no legal authority to make nonmailability determinations under 18 U.S.C. § 1461 (1955). (Mr. Justice Black concurred in the result writing no opinion, and Mr. Justice Frankfurter and Mr. Justice White took no part in the decision. Mr. Justice Clark dissented against both of the separate majority opinions on the ground that the Postmaster General has authority to make nonmailability determinations under 18 U.S.C. § 1461 (1955), and further, that scienter is an immaterial element. *Manual Enterprises, Inc. v. Day,* 82 Sup. Ct. 1432 (1962).

The divergence of opinion among the justices makes it difficult to interpret the impact of the decision. Although the concept of a prior restraint seems crucial, it is not explicity considered in any of the opinions. What can the Court be expected to do regarding future Post Office De-

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[38]Although all leases theoretically constitute depreciable assets, only the favorable lease could be depreciated because the rents received from it are greater than could currently be obtained on the same property. This excess value would exhaust itself whereas in the unfavorable and ordinary lease situations there would be no excess value to depreciate. Treas. Reg. § 1.167(a)-3 (1960): "Intangibles. If an intangible asset is known from experience or other facts to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance." Compare Comm'r v. Moore, 207 F.2d 265, 274, 276 (9th Cir. 1953).

[1]Manual Enterprises, Inc. v. Day, 289 F.2d 455 (D.C. Cir. 1961).

partment conduct? With the support of Mr. Justice Clark, the Post Office Department may have a reasonable chance to succeed by conducting its proceedings in accordance with the opinion of Justices Harlan and Stewart. The failure of this opinion to analyze the issues in terms of a prior restraint will trouble the Court in future decisions.

Obscenity is not protected by the First Amendment to the Constitution of the United States, which guarantees freedom of speech and press.[2] However, the courts have been plagued by two problems in obscenity cases: what is obscenity, and how may it be regulated.

The various forms of regulation of obscenity may be loosely classified as prior restraint and subsequent punishment. The former involves censorship *before* the obscene material has been disseminated; the latter usually involves criminal punishment *after* the obscene material has been disseminated.

The legal authority claimed for the nonmailability order of the Post Office Department in the instant case is 18 U.S.C. § 1461 (1955).[3] This section is a general criminal statute prescribing criminal responsibility for the sending of obscenity or information of where it may be obtained through the mails. But, as used by the Post Office Department,[4] it is an effective prior restraint[5] utilized to remove from the mails material that is deemed

[2]Roth v. United States, 354 U.S. 476 (1957).

[3]This statute provides that: "Every obscene . . . article, matter, thing, device, or substance; and . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . .

"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 uses the mails for the mailing . . . of anything declared by this section to be nonmailable, . . . shall be fined not more than $5,000.00 or imprisoned not more than five years, ..."

[4]The concurring opinion of Mr. Justice Warren, Mr. Justice Brennan, and Mr. Justice Douglas discusses the general issue of the authority of the Post Office Department to act under § 1461. Four questions are involved in this general issue: (1) whether Congress can close the mails to obscenity by any means other than prosecution of its sender; (2) if Congress can authorize exclusion of mail, can it provide that obscenity be determined in the first instance in any forum except a court; (3) if Congress can authorize such censorship, has it conferred such power on the postal officials; and (4) assuming affirmative answers to the first three questions, are the procedures employed by the Post Office Department valid? The concurring justices confine their opinion to question (3), and conclude that Congress has not conferred on the Post Office Department the power to censor under § 1461. They review discussions in the Senate and House of Representatives in connection with the passage of § 1461 and amendments thereto. The chief argument is that it is questionable whether the authority has been extended to the Post Office Department, especially in view of the fact that other statutes authorizing the Post Office Department to withhold matter from the mails expressly so provide and make unambiguous reference to postal laws. An example is 18 U.S.C. § 1463 (1955), which provides that the listed items, ". . . shall be withdrawn from the mails *under such regulations as the Postmaster General shall prescribe.*" (Emphasis added.)

[5]Although the restraint involved here is exercised after the magazine is published it is a prior restraint. Some years ago a prior restraint only petained to suppession of publication and not to circumvention of its dissemination. Today, however, denial of transportation of material through the mails is considered an effective prior restraint. Comment, 27 U. CHI. L. REV. 354 (1960).

to be obscene or that gives information of where obscenity may be obtained.[6]

Because of the repugnance of preventing communication, the Supreme Court in *Near v. Minnesota*[7] held that prior restraints are void[8] with certain exceptions. Obscenity was one such exception, and is, therefore, a proper subject for prior restraint.

The contention of the Post Office Department that the magazines in the instant case were obscene in themselves was not sustained by Justices Harlan and Stewart because the magazines ". . . cannot be deemed so offensive on their face as to affront current community standards of decency. . . ."[9] Their position on this aspect of the case is more understandable[10] than their position on the claim that the magazines give information of where obscenity may be obtained.

[6]The Post Office Department also exercises censorship under the "mail-block" statute. 39 U.S.C. §§ 4006, 4007 (1962). This statute authorizes the Postmaster General to stop all mail addressed to a sender of obscenity and mark it "Unlawful" and return it. The Postmaster General may apply to a federal district court for an injunction. Pursuant to FED. R. CIV. P. 56, on a showing of probable cause he may obtain a temporary restraining order and preliminary injunction directing an impounding of mail addressed to a sender of obscenity pending statutory proceedings.

The Post Office Department may also proceed to revoke a sender's second-class mail rate pursuant to 39 U.S.C.A. § 4354 (1962).

[7]283 U.S. 697 (1931). Prior restraint has been declared void in Montana under MONT. CONST. art. III, § 10. See, Lindsay & Co. v. Montana Fed'n of Labor, 37 Mont. 264, 96 Pac. 127 (1908).

[8]"Prior restraint is a method of censorship which should be closely guarded against, because it is insiduous in its nature, and complete in its operation. A communication that is censored never reaches the public at all, or it may be withheld so long that its value is lost. A system of prior restraint leaves no opportunity for public appraisal or criticism, and this increases the chances of official discrimination and abuse. The decision to prohibit is made administratively and the opportunity for judicial review is slight." Note, *Prior Restraint—The Constitutional Question*, 42 B.U.L. REV. 357, 364 (1962).

[9]Instant case at 1434. The test for obscenity is: "Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." United States v. Roth, 354 U.S. 476, 489 (1957). In the instant case Justices Harlan and Stewart state: "Obscenity under the federal statute . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) 'prurient interest appeal.' Both must conjoin before challenged material can be found 'obscene' under § 1461." Instant case at 1436.

The two justices agree that the magazines are, ". . . dismally unpleasant, uncouth, and tawdry." But they conclude that the magazines do not affront the current community standards of decency and are not, therefore, "patently offensive."

The element of "prurient interest" is considered in the opinion announcing the judgment of the Court as an issue that need not be decided in the instant case. The opinion indicates that the problem lies in the fact that homosexuals are not average persons and that material which would stimulate them may have no effect at all upon the average member of the community; hence, the material is not within the test for obscenity as set forth in the Roth case, *supra*.

[10]The magazines display nude or semi-nude male models in highly suggestive poses. The entire publication is designed to stimulate homosexual tendencies. The genitals were covered in all instances so that technically there is simply a portrayal of semi-nude men. Mr. Justice Harlan states: ". . . (T)hese portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene." Instant case at 1438. *Accord*, Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); Mounce v. United States, 355 U.S. 180 (1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

Until psychological studies become a part of the test for obscenity, the Court has little opportunity to look at the challenged material subjectively. For this reason the decision of Justices Harlan and Stewart as regards obscenity per se is at least understandable.

This is the first time that the Supreme Court has considered a nonmailability order based on the advertising proscription of § 1461. Removal of material from the mails has been attempted in situations where the advertiser was not offering obscenity and the advertisements were more in the nature of fraud as giving the "leer" that obscenity would be sent in response to the advertisements. The nonmailability determinations have not been sustained in such cases.[11]

In the instant case, the advertisers were admittedly sources of obscenity.[12] The Post Office Department was proceeding against many of them, and some had been convicted for possession and distribution of obscenity. However, Justices Harlan and Stewart denied proscription of the magazines because it was not shown that the publisher *knew* his advertisers were offering obscene matter.

In requiring scienter the two Justices relied solely on *Smith v. California.*[13] In the *Smith* case, scienter was made a necessary element in order to sustain the constitutionality of an ordinance making a bookseller criminally responsible for the possession of obscene books. The lower courts had sustained the statute as imposing absolute criminal liability for the offense. The Supreme Court required the element of scienter, not to provide a *mens rea* as a prerequisite to criminal liability, but to protect the First Amendment rights of the public. Unless it was made necessary to show that the bookseller knew of the presence of the obscene book the Court felt that he would resort to selective stocking of books and thereby possibly eliminate constitutionally protected material from the access of the reading public.[14] Without scienter the ordinance was considered unconstitutional as an encroachment upon the First Amendment beyond permissable limits.[15]

Justices Harlan and Stewart applied the reasoning of the *Smith* decision to the instant case. They felt that the fear of loss of an issue of a periodical by removal without a showing of knowledge on the part of the publisher will give rise to self-censorship. The publishers may resort to selective publication of advertisements in order to be certain that the Post Office Department will not remove their magazines from the mail. This ". . . would deprive such material, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public."[16] Hence, the prior restraint is limited to situations where scienter can be attached to the publisher.

Scienter is an immaterial element to the mechanism of a prior restraint.

[11]Poss v. Christenberry, 179 F. Supp. 411 (S.D.N.Y. 1959). See, PAUL & SCHWARTZ, FEDERAL CENSORSHIP—OBSCENITY IN THE MAILS, 303 (1962).
[12]On a number of occasions the police had seized hard-core photographs in the possession of the third-party advertisers.
[13]361 U.S. 147 (1959).
[14]". . . (I)f the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Id.* at 153.
[15]"Doubtless any form of criminal obscenity statute . . . will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene. . . ." Smith v. California, 361 U.S. 147, 154 (1959). And Mr. Justice Frankfurther concurring in that case notes: "Such difficulties or hazards are inherent in many domains of the law. . . ." Smith v. California, *supra* at 164.
[16]Instant case at 1440.

In the dissent in the instant case, Mr. Justice Clark wrote: "The sender's knowledge of the matter sought to be mailed is immaterial to the harm caused to the public by its dissemination.'"[17] Knowledge and other mental elements are not relevant in determining whether the magazines should be removed from the mails. The nature of a prior restraint does not contemplate relief from suppression on the grounds that the publisher (or communicator) does not know that his publication contains the particular thing which is sought to be suppressed. The important inquiry is whether the particular evil is so grave or detrimental that restraint on its presentation to the public is necessary. This is demonstrated by Chaffee's classic example of the publication of the sailing dates of American troops into a war sector.[18] The fact that the publisher had no knowledge that the publication contained such information would hardly justify its dissemination.

The restriction on freedom of self-expression has been limited to instances where treason, sedition, or obscenity is involved.[19] In these situations the evil to the public overrides the First Amendment guarantees of freedom of speech and press. If material which contains information of where obscenity may be obtained is sufficiently evil to warrant a prior restraint then the execution of the restraint ought not to be crippled by the requirement of proof of scienter.

Another objection to requiring scienter is that it is foreign to the procedure employed[20] in exercising a prior restraint. Prior to the instant case, the only concern of the Post Office Department was whether the magazines appeared to be obscene or whether they contained information of where obscenity could be obtained. This was a "yes" or "no" situation and the controversy concerned only the issue of obscenity. The presentation of the evidence went to support or deny the charge that the materials were obscene in themselves[21] or, in the alternative, whether they contained information of where obscenity may be obtained.

[17]Instant case at 1457.
[18]CHAFFEE, FREE SPEECH IN THE UNITED STATES 11 (1941).
[19]Near v. Minnesota, 283 U.S. 697, 716 (1931).
[20]The procedure in substance is as follows: when a postmaster is in doubt as to whether matter entered for mailing is mailable or not because of possible obscenity, he withholds it and delivers a sample or statement of the facts to the Mailability Division, Office of the General Counsel for the Post Office Department, Washington, D.C. The General Counsel either files a complaint or returns the matter for admission to the mails. Within ten days of the filing of the complaint notice is given and there is a hearing. The mailer may file an answer. At the hearing, the Hearing Examiner makes a decision at the close of the evidence and argument. After this initial decision, there may be an appeal to the Judicial Officer, which is to be held within five days. The Judicial Officer renders a Departmental decision or refers the matter directly to the Postmaster General. This is the end of the administrative proceedings, but usually by this time the mailer has brought an action in a federal district court for an injunction to enjoin the barring of the matter. 39 C.F.R., Part 203 (1959).
[21]The Post Office Department claims a special expertise on the issue of obscenity, and on this basis judicial review of obscenity determinations is resisted. It is felt that the Post Office Department has a competence in the field of their specialty that the judiciary cannot claim. Currently, however, this has been challenged. "In the area of obscenity, however, this [expertise] is not true. The administrators, to begin with, are not specialties. They are lawyers or party managers or, occasionally, old postal hands whose work had probably had nothing whatever to do with literature, history, psychology, and the other disciplines that may bear upon intelligent consorship. Nor does their main work after appointment provide them with pertinent experience or information. In this respect they differ from many

Now, in addition, scienter must be shown. Removal is certain to continue and abuse will result from the procedure as it now exists. The local postmaster will not know whether the publisher has knowledge of the fact that the magazines sought to be admitted contain information of where obscenity may be obtained. Neither is there any way to assure that the postal officials will affirm the restraint on an adequate finding of knowledge at the administrative hearing. There is no jury,[22] and the first opportunity for judicial review is when the publisher files suit for injunction or exhausts the administrative channels and appeals the final administrative order.

In a criminal proceeding, such as the *Smith* case,[23] a jury is mandatory for the determination of knowledge and the other mental elements. But this is altogether different than leaving the determination to the local postmaster in the first instance and then to a hearing procedure where no jury is provided and the proof of scienter must live or die on the finding of the administrative official. This goes to the fundamental notions of fair and full hearing. The analogy to the *Smith* case was poorly drawn on this account.

When a monthly periodical is involved, the effect of the prior restraint will be felt even if the publisher is found to be ignorant of the character of his advertiser's products. The hearing is to be commenced within ten days,[24] but there is no provision for a speedy determination. The clumsiness of attempting to determine whether the publisher had knowledge may prolong the hearing for several days, and a prior restraint on communication with the public will have been exercise.

It is submitted that Justices Harlan and Stewart should have recognized in their decision the fact that § 1461 is a prior restraint. The subject matter is proper for regulation, and the only question is on the procedural aspect. No cases indicate that material which advertises sources of obscenity is of such urgency that a prior restraint of it is valid—with or without scienter. The opinion announcing the judgment of the Court reflects a disfavor of the advertising proscription as a prior restraint inasmuch as if is deemed necessary to require that knowledge be shown. The question of whether the proscription ought to be sustained as a valid prior restraint should have been decided. By attempting to reduce the

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other administrators who, though not especially trained at the outset of their careers, become educated through being immersed in their agency's practical affairs. Moreover, the 'fact' of obscenity is so illusory that bureaucratic methods are not peculiarly fitted to ascertain its existence. Especially when that 'fact' may limit freedom of expression and may subject the press to a degree of governmental dictation, its existence should be verified by an independent examination." GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 95-96 (1958).

[22]There is a movement to relocate the determination of obscenity to a court in the first instance. Comment, 27 U. CHI. L. REV. 354 (1960). See, Mr. Justice Brennan's dissenting opinion in Kingsley Book Co. v. Brown, 354 U.S. 436 (1957).

[23]Smith v. California, 361 U.S. 147 (1959).

[24]*Supra* note 21.

practice of self-censorship,[25] the possibility of depriving a publisher and the public of the right to communicate without prior restraint has not been eliminated.

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PUNATIVE DAMAGES FOR THE FRAUDULENT PROCUREMENT OF A RELEASE ARE PROHIBITED BY STATUTE.—Plaintiff purchased a used automobile for $495. As a downpayment he was allowed $200 for a 1937 truck and a 1949 automobile. The balance was financed by a conditional sales contract, which was assigned to a finance company. As part of the same transaction the conditional sales vendor purchased a dual-interest insurance policy from the defendant company. This policy provided that in the event of a collision or upset, the plaintiff and the finance company, as their interests might appear, would receive the actual cash value of the automobile at the time of the loss, less $50. Ten days after the purchase plaintiff was involved in an accident. At that time $330 was owing to the finance company. Upon notification of the accident, the defendant's adjuster conducted an investigation and submitted a report to the defendant company ascertaining the total loss to the insured to be $330. Subsequently a release was submitted to the plaintiff for his signature. By the provisions of the release the plaintiff, in consideration of payment of $330 to the finance company, discharged the defendant from further liability. Although the plaintiff read this instrument, the jury found that he executed it in reliance on the representation made to him by the defendant's adjuster that there would be "something" left over for him, either the interest in the policy or another car. The finance company received $330, and the plaintiff $9.81 representing hte unearned premiums of the policy. Plaintiff, contending that he did not receive the "something" promised him by the adjuster, brought this action proceeding on a tort theory based on fraud. The jury awarded him $115 compensatory damages and $750 punative

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[25]The end result of the proceeding will possibly be a greater threat of self-censorship practice than before. The fear that causes self-censorship is still a delay with consequential financial loss, but it is magnified by subjecting the publisher to a hearing where suspicious circumstances will be paraded before the Hearing Examiner in an effort to show that he had knowledge. This is not considered by the majority in the instant case.

It is reasonable to suppose that this publisher or any similar publisher does not really fear economic loss with ultimate deprivation of constitutionally protected advertising. The magazines are designed for homosexuals and are sold to them to the extent of the precise limits tolerated by our obscenity law. This should provide a basis for finding scienter from the circumstances. In the Smith case the Court recognized that personal knowledge is not necessary and that circumstantial knowledge would satisfy the requirement. Smith v. California, 361 U.S. 147, 154 (1959).

Here, however, Justices Harlan and Stewart would not find scienter satisfied by the circumstances. This is not in keeping with the modern trend advocated by Paul and Schwartz. They would root the test for obscenity in a study of commercial exploitation and conduct of the individuals. Looking to the circumstances would force the conduct of the individual into the foreground, and a new, more effective basis for determining obscenity would be provided. PAUL & SCHWARTZ, FEDERAL CENSORSHIP—OBSCENITY IN THE MAILS 214 (1962). See dissenting opinions of Mr. Chief Justice Warren in Roth v. United States, 354 U.S. 476 (1957) and Kingsley Book Co. v. Brown, 354 U.S. 436 (1957).