BOALT HALL STUDENTS ASSOCIATION
INFORMATION ON CURRENT CAMPUS LEGAL QUESTIONS

The appended material is published as a public service by the Boalt Hall Students Association (a student government body within the law school similar to the A.S.U.C. on the campus). The current campus concern with the law in the area of obscenity, the regulation of the content of speech and the legal status of a compulsory membership body (such as the A.S.U.C.) has highlighted the need for information in the community at large as to what the law in these areas may be. The primary purpose for publication of this material is to provide information on California Supreme Court and U.S. Supreme Court opinions and the legal issues involved. The facts and excerpts from four opinions considered relevant to these questions are presented herein. No stand is taken or contemplated by the Boalt Hall Students Association on these questions, and it is to be noted that the law is fast changing and uncertain in these areas. Material is presented on the substantive issue of "fighting words," as it is felt that recent speeches made on campus resulting in arrests are governed by the law in the area of "fighting words" more than obscenity.

If public acceptance of this service is enthusiastic, future material may be prepared on other current legal issues.

OBSCENITY:

ZEITLIN v. ARNEBERGH
Supreme Court of California, 1963
59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P.2d 152

. . .

Action by a bookseller and a prospective reader of a certain book against a city attorney to secure a declaratory judgment that the book is not matter defined as obscene by Pen. Code, §311 and that its sale would not violate Pen. Code, §311.2.

(Ed. - After disposing of the procedural questions, the court addressed itself to the validity of the statute as follows:)

. . .

As Justice Harlan eloquently states in Roth v. United States (1957) 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498]: "Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards. . . .

. . .

We turn, then, to our task of determining whether "Tropic of Cancer" constitutes obscene matter within the meaning of the statute and the constitutional limitations. To understand the statute we must first examine the constitutional

setting in which the California Legislature in 1961 completely recast Penal Code sections 311 and 312 (Stats. 1961, ch. 2147). The Legislature patterned its definition of obscenity upon that set forth in the American Law Institute's Model Penal Code (§ 207.10), portions of which had been approved as constitutionally permissible standards by the United States Supreme Court in Roth v. United States (1957), supra, 354 U.S. 476. This decision and others of the United States Supreme Court, we think, impliedly drew a line of constitutional protection around all material except that which has been described as hard-core pornography. In this analysis which we shall develop, we follow the interpretations of the distinguished New York Court of Appeals and Supreme Judicial Court of Massachusetts.

. . .

(Ed. -
The court then discussed two appeals to the U.S. Supreme Court, concerning federal and California obscenity statutes. The Court affirmed the convictions in each case.)

. . .

Mr. Justice Brennan, writing the majority opinion, held that "obscenity is not within the area of constitutionally protected speech or press" (p. 485) because, in the words that were later incorporated in the California statute, obscenity is "utterly without redeeming social importance." (P. 484.) He points out that "sex and obscenity are not synonymous . . . [and the] portrayal of sex, e.g., in art, literature and scientific works . . . [is entitled to] the constitutional protection of freedom of speech and press" (p. 487) provided that it does not become the designated kind of obscenity. The majority opinion sought to separate the protected from the unprotected material by the use of the term "obscenity." It approved the statutory standards under which the defendants were convicted.

. . .

(Ed. - the Zeitlin opinion then discussed the positions of four justices of the U.S. Supreme Court who differed from the majority opinion above by Mr. Justice Brennan. Particular notice was taken of Mr. Justice Harlan's opinions as follows:)

. . .

The most revealing opinion is that of Justice Harlan, who concurred in Alberts but dissented in Roth. We have pointed out that Justice Harlan held that a reviewing court should determine for itself, by scrutiny of the attacked material, whether it "is suppressable within constitutional standards." (P. 497.) Justice Harlan's opinion, which applies this test to the material itself, constitutes the sole such approach of any of the opinions. Accordingly, in Roth Justice Harlan found the material did not constitute hard-core pornography and voted to reverse the conviction. He stated: ". . . The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as 'hard-core' pornography. . . ." (P. 507.) In Alberts he concluded that the

suppression of the material would not so "interfere with the communication of 'ideas' in any proper sense of that term" (p. 503) as to offend due process, and therefore affirmed the conviction.

. . .

(Ed. - The California Court continued as follows:)

Kingsley Intl. Pictures Corp. v. Regents (1959) 360 U.S. 684 [79 S.Ct. 1362, 3 L.Ed.2d 1512], although interpreted by the majority of the court as a case which involved an attempt to suppress matter dealing with sex for reasons other than the "obscenity" of the material, also serves to illustrate the great breadth of protection accorded materials dealing with sex. There the New York Court of Appeals indicated that although the motion picture involved was not obscene, it might nonetheless be censored because it pictured adultery as proper behavior. The Supreme Court reversed, holding that this interfered with the freedom to advocate, which necessarily includes the freedom to advocate unpopular, even hateful, ideas. The breadth of the constitutional protection is also illustrated by the several cases involving various procedures used to suppress alleged obscenity.

. . .

In substance these courts, applying the rulings of the United States Supreme Court, hold that if material is commercial obscenity or saleable pornography it is obscenity in the sense that it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If the material, however, has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guarantees.

Cognizant of these constitutional guarantees, the Legislature wrote a statute which, in substance, prohibited hard-core pornography; the draftsmen recognized that a wider proscription would trespass upon an area which is constitutionally protected. The legislative history itself shows a deliberate narrowing of the definition of "obscene" material; indeed, no words in the language could more totally express constriction of the concept of obscenity than those which the Legislature adopted. As we shall explain, the Legislature intentionally incorporated as part of the definition itself the important provision that obscene matter "is matter which is utterly without redeeming social importance," changing the function of these words from a description of a matter of defense to an element of the offense.

. . .

The meanings conveyed by the words "reasonably" or "preponderantly" are well known; had such been intended, the appropriate terms would have been used. By employing the term "utterly" the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was totally devoid of social importance. The only material that falls into the latter category is hard-core pornography. This language, indeed, is the language of Roth; as we have shown, subsequent Supreme Court decisions, state courts and commentators have interpreted it to describe hard-core pornography.

(Ed. note - the court then concluded that Tropic of Cancer was not obscene, as it was not utterly without redeeming social importance. The opinion was written by Mr. Justice Tobriner for a unanimous court.)

THE "FIGHTING WORDS" DOCTRINE:

CHAPLINSKY v. NEW HAMPSHIRE
Supreme Court of the United States, 1941
315 U.S. 568

(Ed. note - this is a unanimous decision by the 9 members of the Supreme Court.)

Mr. Justice Murphy delivered the opinion of the Court:

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chap. 378, § 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names."

. . .

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action" [citations omitted].

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts commited in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." [citations omitted.]

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker--including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. [citations omitted.] This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. [citations omitted.]

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

. . .

Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment.

Affirmed.

"PRIOR RESTRAINT" IN THE AREA OF MOVIE CENSORSHIP:

FREEDMAN v. STATE OF MARYLAND
Supreme Court of the United States, 1965 (March 1)
85 S.Ct. 734

(Ed. note - the facts of the case are summarized in the reporter as follows:)

Summary

Defendant was convicted, in the Criminal Court of Baltimore of publicly exhibiting a film not submitted to board of censors. The Court of Appeals affirmed, 197 A.2d 232, 233 Md. 498, and defendant appealed. The Supreme Court, Mr. Justice Brennan, held that procedural scheme of Maryland motion picture censorship statute failed to provide adequate safeguards against undue inhibition of protected expression since (1) if censor disapproved film, exhibitor was required to assume burden of instituting judicial proceedings and persuading court that film was protected expression, (2) once board had acted against film, exhibition thereof was prohibited pending judicial review, however protracted, and (3) statute provided no assurance of prompt judicial determination.

. . . Reversed.

Mr. Justice Brennan delivered the opinion of the Court:

(Ed. note - after stating the facts, the court considered the validity of the statute involved.)

. . .

[1] In Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403, we considered and upheld a requirement of submission of motion pictures in advance of exhibition. The Court of Appeals held, on the authority of that decision, that "the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments." . . . This reliance on Times Film was misplaced. The only question tendered for decision in that case was "whether a prior restraint was necessarily unconstitutional under all circumstances." The exhibitor's argument that the requirement of submission without more amounted to a constitutionally prohibited prior restraint was interpreted by the Court in Times Film as a contention that the "constitutional protection included complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. * * * even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government . . . The Court held that on this "narrow" question . . . the argument stated the principle against prior restraints too broadly; citing a number of our decisions, the Court quoted the statement from [citations omitted] that "[t]he protection even as to previous restraint is not absolutely unlimited." In rejecting the proffered proposition in Times Film the Court emphasized, however, that "[i]t is that question alone which we decide, . . . and it would therefore be inaccurate to say that Times Film upheld the specific features of the Chicago censorship ordinance.

(Ed. note - the appellant challenged the statute on the grounds that he was forced to undergo a time consuming and ill-defined censorship procedure, during which he could not show the film. The court then considered the validity of the statute as follows:)

[6] Although the Court has said that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," [citations omitted] it is as true here as of other forms of expression that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." [citations omitted.] * * * [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech." [citations omitted.] The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court -- part of an independent branch of government -- to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

[7-13] Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered

in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. [citations omitted.] To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.

[15] How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected. . .

Reversed.

COMPULSORY MEMBERSHIP ORGANIZATIONS:

INTERNATIONAL MACHINISTS v. STREET
Supreme Court of the United States, 1961
367 U.S. 740

(Ed. note - the facts of the case are summarized in the case reporter as follows:)

Summary

Labor unions which had negotiated union-shop agreements pursuant to the union-shop authorization stated in § 2, Eleventh of the Railway Labor Act (45 USC § 152, Eleventh), expended, over the objection of plaintiff employees, union funds in support of political causes to which plaintiffs were opposed. Plaintiffs brought suit in the Superior Court of Bibb County, Georgia, to enjoin enforcement of the union-shop agreement on constitutional grounds, and that court granted the injunction, viewing § 2, Eleventh as unconstitutional to the extent that it permitted such union use of funds exacted from employees. The Supreme Court of Georgia affirmed [citation omitted].

On appeal, the United States Supreme Court reversed the judgment below.

(Ed. note - Mr. Justice Brennan delivered the opinion of the court, speaking for four members of the court. Mr. Justice Douglas concurred with the opinion of the court but doubted that the opinion concerning remedies was correct. Mr. Justice Whittaker also concurred with the opinion of the court but dissented as to the part of the decision concerning remedies. Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Harlan dissented from the majority opinion of the court.

The majority opinion by Mr. Justice Brennan addressed itself to the question of the use of the funds of a compulsory membership union for political purposes as follows:)

. . .

The record in this case is adequate squarely to present the constitutional question reserved in Hanson. These are questions of the utmost gravity. However, the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union ship under § 2, Eleventh, also meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes. Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." [citation omitted.] Each named appellee in this action has made known to the union representing his craft or class his dissent from the use of his money for political causes which he opposes. We have therefore examined the legislative history of § 2, Eleventh in the context of the development of unionism in the railroad industry under the regulatory scheme created by the Railway Labor Act to determine whether a construction is "fairly possible" which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. We conclude that such a construction is not only "fairly possible" but entirely reasonable, and we therefore find it unnecessary to decide the correctness of the constitutional determinations made by the Georgia courts.

. . .

We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.

. . .

We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.

We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes.

. . .

Under our view of the statute, however, the decision of the court below was erroneous and cannot stand. The appellees who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes.

(Ed. note - the court proceeded to reverse the decision of the Supreme Court of Georgia which was on constitutional grounds and based its decision solely on the construction of the Railway Labor Act.)