CRIMINAL OBSCENITY STATUTE HELD UNCONSTITUTIONAL FOR LACK OF SCIENTER

City of Cincinnati v. Marshall
172 Ohio St. 280, 175 N.E.2d 178 (1961)

Defendant, a wholesale distributor of periodicals, was convicted for violating a Cincinnati ordinance making the possession or sale of obscene writings or pictures a misdemeanor.[1] Defendant had been out of town during the ten days preceding the confiscation of the fourteen magazines upon which the prosecution based its indictment. The city prevailed in the Cincinnati Municipal Court and the decision was subsequently affirmed by both the court of common pleas and the Court of Appeals[2] for Hamilton County. The Supreme Court of Ohio reversed, declaring the ordinance "fatally defective due to its omission of the element of *scienter* or knowledge in defining the offense."[3] The Ohio Supreme Court applied the rule enunciated by the United States Supreme Court in *Smith v. California*[4] where a Los Angeles ordinance, similar to the Cincinnati ordinance in that the requirement of knowledge was lacking, was held to violate the freedom of the press provision of the United States Constitution.

Attempts to control obscenity by legislation in this country date back to

---

[1] Section 901-i3 of the Code of Ordinances of the City of Cincinnati reads:

> Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose, or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, picture, image, cast statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than $500.00 or imprisoned not more than six months or both for the first offense and shall be fined not more than $1000.00 or imprisoned not more than six months or both for the second and subsequent offenses.

[2] Lower courts had recognized the lack of *scienter* requirement under the ordinance. The judge in the trial court (Cincinnati Municipal Court) had charged the jury in part: "The intent of the defendant, if you find in fact he did have the materials under his control, is of no matter in this case. Whether the defendant had a good or an evil or an unlawful intent is of no concern to you. . . . The indecent publications ordinance makes the mere possession of having under his control obscene, lewd, or indecent materials unlawful, and the intent with which they are possessed or held is of no consequence. The ordinance provides no exception by reason of the existence of any good, bad, indifferent, or special intent in the possession of the materials."

See also, City of Cincinnati v. Marshall, 15 Ohio Op. 2d 163, 164, 175 N.E.2d 181, 182 (Ct. App. 1960). "It will be noticed that under this ordinance the very possession of the type of literature described therein is sufficient for such conviction and that no guilty knowledge is necessary for conviction."

[3] City of Cincinnati v. Marshall, 172 Ohio St. 280, 281-2, 175 N.E.2d 178, 179 (1961).

[4] 361 U.S. 147 (1959).

the pre-revolutionary period.[5] In 1868, British courts devised the *Hicklin* rule as the test of obscenity; its standard turned on the "tendency of the matter charged . . . to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[6] This test was adopted in the United States in 1879,[7] but was sharply criticized as reflecting "mid-Victorian morals" and because its standard would "forbid all which might corrupt the most corruptible."[8] The *Hicklin* rule was finally rejected in 1934, and the emphasis was placed on the challenged work's "dominant effect."[9] The standard which is applied today is the test set out in *Roth v. United States*:[10]

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[11]

The Ohio Supreme Court in the principal case acknowledged that states have the power to prevent the distribution of obscene matter,[12] but held that the *Smith* case was controlling in that "the mental element may not be eliminated from the crime of possession or dissemination of obscene matter."[13] The *Marshall* decision also adheres to the principle that strict liability penal laws may be a valid exercise of the police power of a state or municipal corporation. Although *mens rea* is accepted as the rule rather than the exception in criminal law,[14] conduct without either criminal knowledge or intent is often a sufficient basis for criminal liability. There is broad power vested in the legislature to exclude knowledge,[15] and the development in Ohio of legislation to regulate a limited class of *mala prohibitum* statutory offenses in areas such as illegal sales of liquor, pure food and drugs, misbranded merchandise, child labor, narcotics regulation, and motor vehicle laws without any criminal knowledge or intent has been upheld as a valid

---

5 Acts & Laws of the Prov. of Mass., Bay, c. CV § 8 (1712).

6 Queen v. Hicklin (1868) L.R. 3 Q.B. 360, 371.

7 United States v. Bennett, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D.N.Y. 1879).

8 Learned Hand, J., in United States v. Kennerley, 209 Fed. 119, 120-121 (S.D.N.Y. 1913).

9 United States v. One Book Called "Ulysses," 72 F.2d 705, 708 (2d Cir. 1934).

10 354 U.S. 476 (1957).

11 *Id.* at 489. This test was adopted in Ohio in City of Cincinnati v. King, 107 Ohio App. 453, 159 N.E.2d 767 (1958). The test is an adaptation of the definition formulated in the American Law Institute's Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

12 Roth v. United States, *supra* note 10, at 481-485.

13 City of Cincinnati v. Marshall, *supra* note 3, at 284, 175 N.E.2d at 181.

14 Morissette v. United States, 342 U.S. 246 (1952); State v. Weisberg, 74 Ohio App. 91, 55 N.E.2d 870 (1944); Holmes, The Common Law, p. 3 (1881); Pound, Introduction to Sayre, Cases on Criminal Law (1927); Hall, General Principles of Criminal Law (1947).

15 Chicago, B. & Q. R.R. v. United States, 220 U.S. 559 (1911); United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922); People v. Johnson, 288 Ill. 442, 123 N.E. 543 (1919); 14 Am. Jur. Criminal Law § 16.

exercise of the police power to promote the safety, health, and well-being of the community.[16] These statutes emphasize social betterment and higher standards of conduct rather than the actual punishment or deterrence of crime;[17] they are a matter of policy designed as controls for the social order.[18]

However, in defining crimes or declaring their punishment, the legislature cannot take away or impair any inalienable right secured to citizens by the Constitution.[19] The First Amendment liberties lie "at the foundation of free government by free men" and courts must in all cases "weigh the circumstances and appraise the reasons in support of the regulation of the rights."[20] Moreover, a legal doctrine which in most instances would be held valid may be unconstitutional if its collateral effect is to inhibit these guaranteed freedoms.[21] The effect of the ordinance in the principal case is to make the individual retail bookseller absolutely responsible for every publication or periodical which he may sell. He cannot be expected to read every book which may be available on his shelves;[22] yet the regulation imposes an extremely high standard of care, and in furtherance of that standard, subjects him to absolute criminal liability. This is not only an onerous burden and an unusually rigid requirement of vigilance, but an unconstitutional infringement on the freedoms of speech and press.[23] The attempt to meet this responsibility would physically restrict the amount of material which could be offered by these outlets of communication. The effect is to choke the free flow of ideas so vital to democratic thought and government. While strict liability criminal regulation may be justified in the distribution of food due to the obvious need to protect the public health and the patently harmful effects on the public interest which adulterated food will produce, the consequences or impact on public morality and conduct which is the direct result of the distribution of obscene literature is subject to great conjecture.[24]

---

16 State v. Kelly, 54 Ohio St. 166, 43 N.E. 163 (1896); City of Columbus v. Webster, 170 Ohio St. 327, 164 N.E.2d 734 (1960); State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959); State v. Healy, 156 Ohio St. 229, 102 N.E.2d 233 (1951); State v. Huffman, 131 Ohio St. 27, 1 N.E.2d 313 (1936); Kendall v. State, 113 Ohio St. 111, 148 N.E. 367 (1925); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924); State v. Rippeth, 71 Ohio St. 85, 72 N.E. 298 (1904).

17 United States v. Balint, *supra* note 15.

18 Morissette v. United States, *supra* note 14.

19 Smith v. California, *supra* note 4; Lambert v. California, 355 U.S. 225 (1957); Ex parte Dickey, 144 Cal. 234, 77 Pac. 924 (1904); 14 Am. Jur. Criminal Law § 16.

20 Marsh v. Alabama, 326 U.S. 501, 509 (1946).

21 Smith v. California, *supra* note 4, at 150-151.

22 *Ibid.* But see City of Cincinnati v. King, 11 Ohio Op. 2d 433, 168 N.E.2d 633 (1960).

23 *Id.* at 152-3: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

24 Douglas, J., dissenting in Roth v. United States, supra note 10, at 510-11: "It is by no means clear that obscene literature, as here defined, is a significant factor in in-

Whether obscene materials are really a cause of juvenile delinquency, an incitement to anti-social conduct,[25] or even a stimulant to undesirable thoughts and various evils[26] attributed to them by the defenders of community censorship laws is a most debatable inference on which there is an appalling dearth of reliable data.[27] Sociologists, statisticians, law professors, and reformers all can give forceful and often contradictory arguments[28] on whether obscene literature is any real stimulant to overt anti-social acts which the law seeks to discourage, prevent or punish.[29] In view of this divided though highly vocal opinion from authorities with antagonistic views, the courts have agreed that obscene literature is without redeeming social value

---

fluencing substantial deviation from the community standards. . . . If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. . . . The absence of dependable information on the effect of obscene literature on human conduct should make us wary. . . ."

Lockhart & McClure, Obscenity in the Courts, 20 Law & Contemp. Prob. 587, 595 (1955). "Although the whole structure of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior."

Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957) "We . . . reject the common definition of obscene as that which 'tends to corrupt or debase'. . . . [I]t suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking. . . ." See also Manfred v. State, 226 Md. 312, 173 A.2d 173 (1961); People v. Richmond News Co. Inc., 9 N.Y.2d 579, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961).

[25] Roth v. United States, *supra* note 10, at 501-2. "It is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society."

[26] See, e.g., Roth v. United States, *supra* note 10, at 502. "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards."

[27] See authorities cited *supra* note 24.

[28] Lockhart & McClure, Literature, "The Law of Obscenity, and the Constitution," 38 Minn. L. Rev. 295 (1954); Lockhart & McClure *op. cit. supra* note 24; Lockhart & McClure, The Developing Constitutional Standard, 45 Minn. L. Rev. 5 (1960); McKeon, Merton, & Gellhorn, The Freedom to Read (1957); Kalven, The Metaphysics of the Law of Obscenity in The Supreme Court Review—1960, p. 1; St. John-Stevas, Obscenity and the Law, *op. cit. supra* note 24.

[29] Douglas, J., dissenting in Roth v. United States, *supra* note 10, at 509-514: "Speech to be punishable must have some relation to action which could be penalized by government. . . . Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."

People v. Richmond News Co. Inc., *supra* note 24 at 586, 175 N.E.2d at 685: "The mere undemonstrated possibility of harm to the community from realistic accounts of normal sexuality is not of sufficient moment to warrant the exercise of the public force in their suppression."

and therefore is not protected by the Constitution.[30] However, censorship regulations are often treated in a narrow manner[31] in an effort to prevent encroachment of First Amendment liberties. Since the psychological bases of such legislation is heatedly disputed and the currently available data on the subject is meager and often unsubstantiated,[32] our highest court has warned that "the door barring federal and state intrusion" into the fundamental freedoms of speech and press "must be . . . opened only the slightest crack necessary. . . ."[33] This restrictive attitude of the United States Supreme Court has been evident since *Butler v. Michigan*[34] in which a broad, overreaching regulation was set aside with the warning that such an attempt was "to burn the house to roast the pig."[35] The departure from ordinary *mens rea* standards is not justified when the harm to society which the ordinance seeks to remedy is at best a dubious and indirect result of the cause which is attacked.

The Ohio Supreme Court has now narrowed the scope of the criminal law by making knowledge of the nature and contents of obscene materials a requirement for conviction. The statutes which created criminal sanctions for possession or sale of obscene materials without *scienter* were obviously designed to eliminate the problem of proof of such knowledge which the prosecutor must now undertake.[36] This "practical" method of law enforce-

30 Roth v. United States, *supra* note 10, at 485. "Obscenity is not within the area of constitutionally-protected speech or press." See also Chaplinsky v. N.H., 315 U.S. 568, 571-572 (1942).

31 People v. Richmond County News Inc., *supra* note 24, at 584, 175 N.E.2d at 684. "The broader the prohibitions we read into our statute, the more unlikely it is that these prohibitions are reasonably related to the legitimate ends which the legislation seeks to serve. Thus, the constitutional background of the legislation, the inherent nature of the subject of regulation, and the available knowledge concerning the possible effects of such regulation all point to and necessitate a very limited definition of the statutory prohibition of obscenity."

32 McKeon, Merton, & Gellhorn, *op. cit. supra* note 28, at 67. "Those who would ban books argue that particular books make for juvenile delinquency or crime, induce violence and sadism, corrupt taste, promote sexual perversion, distort human values, subvert political loyalties, provoke disrespect for the law, produce demeaning stereotypes of groups, and, in general, make sin even more attractive than it ordinarily is. When evidence is put forward in support of these claims, it is at best thin and questionable; more characteristically, it is entirely absent. This naturally leads one to ask, is all this really so?"

33 Roth v. United States, *supra* note 10, at 488.

34 352 U.S. 380 (1957).

35 Section 343 of the Michigan Penal Code made the test of obscenity any publication "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . . ." Thus, in the words of Mr. Justice Frankfurter speaking for the Court, the act "made it an offense . . . to make available for the general reading public . . . a book that the trial judge found to have a potentially deleterious influence upon youth. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal."

36 Van Voorhis, J., dissenting in People v. Finkelstein, 9 N.Y.2d 342, 346-348; 214 N.Y.S.2d 363, 366-367, 174 N.E.2d 470, 472-473 (1961).

ment has been called to a halt with the decision in the instant case. Several other states have dealt with the lack of *scienter* in their state statutes in the two years since *Smith*, and have "read into" the challenged legislation a requirement of knowledge in order to give the acts a construction which would uphold their constitutionality.[37] The more forthright solution used in the instant case seems to be a better solution and more cognizant of the need for clear language and definitive criminal laws.

The principal case leaves unanswered the question of the degree of *scienter* which is required for valid anti-obscenity enactments. Elimination of the knowledge factor entirely is rejected, but the standard of necessary *mens rea* remains vague and indefinite. A major reason for such regulation in the first place was to alleviate the state's burden of proof when defendants consistently profess innocent ignorance of the contents of objectionable material confiscated from their shops. Whether proof of actual knowledge of specific material, negligence for failure to inspect, constructive notice from questionable titles or cover designs, or even reckless disregard of content will constitute sufficient *scienter* under the word "knowingly" which now saves these ordinances from unconstitutionality is left open by both the *Marshall* and *Smith* decisions. A possible expediency to insure knowledge is warning by enforcement officers that specific titles must be removed from the shelves with subsequent arrests and prosecutions only following such notice. This method transfers enormous power to local officers, however, with only limited protection through recourse to the courts. It is censorship in its most threatening and uncontrolled manifestation and seems clearly undesirable. Many problems remain unsolved in this turbulent and emotional field, but the developing standard of obscenity and the requirement of *scienter* as a part of the offense in these criminal codes are steps forward in the administration of justice in this very subjective area of the law.

[37] Cohen v. State, 125 So. 2d 560 (Fla. 1960); Demetropolis v. Commonwealth, 175 N.E.2d 259 (Mass. 1961); State v. Hudson County News, 35 N.J. 284, 173 A.2d 20 (1961); People v. Finkelstein, *supra* note 36; State v. Jackson, 356 P.2d 495 (Ore. 1960); but cf. Van Voorhis, J., dissent in People v. Finkelstein, *supra* note 36.