

10-1-1961

Constitutional Law—Statute Proscribing Sale of Obscene Materials Requires Scierter

Buffalo Law Review Board

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Recommended Citation

Buffalo Law Review Board, *Constitutional Law—Statute Proscribing Sale of Obscene Materials Requires Scierter*, 11 Buff. L. Rev. 109 (1961).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol11/iss1/33>

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shortage of scientific and sociological literature which can enable the courts to adequately treat this problem. What literature does exist, is mostly devoted to criticizing the rule. Scientific studies have suggested that literature is not a primary source of sexual stimulation. They also tend to prove that those people who are most prone to be stimulated by these books, are also those who are least likely to read them.⁵¹

Freedom of expression is one of our most cherished freedoms and the courts must be very careful not to allow infringement on this freedom in the name of suppression of obscenity. In the past several years, there have been attempts to censor books which are chiefly concerned with sex, *i.e.*, Henry Miller's *Tropic of Cancer*,⁵² James Joyce's *Ulysses*,⁵³ and D. H. Lawrence's *Lady Chatterley's Lover*,⁵⁴ all of which later became best sellers. If the "hard-core" pornography standard had been applicable in these cases, it seems doubtful that the propriety of these books would even have been questioned. It is apparent from their acceptance by the public, that their censorship would not have been in accord with the desires of the community as a whole. Whenever the law circumscribes or even threatens to circumscribe an author's freedom to express himself on a topic, and a large percentage of the community wants to read what he has to say, there exists a serious threat to our freedom of expression.

In general it would seem that a large segment of the community is in favor of less censorship. This has been indicated by the acceptance by the public of books which have been previously censored, by the liberal trend in the decisions of the courts, and by the decreasing number of statutes dealing with special areas of censorship.⁵⁵ Censorship is a restriction on our basic freedom and as such should be as severely limited as possible. The New York Court of Appeals, by adopting the "hard-core" pornography test, has taken the lead in this direction with a more liberal application of our censorship statutes.

J. D. R.

STATUTE PROSCRIBING SALE OF OBSCENE MATERIALS REQUIRES SCIENTER

The New York Penal Law Section 1141 provides that, "A person who sells . . . or has in his possession with intent to sell . . . any obscene . . . book . . . is guilty of a misdemeanor." In 1958, after exhaustive analysis, the Appellate Division, Second Department, concluded in *People v. Shapiro* that the language employed in and the history of the statute invoked, as well as the statutes from

51. *Ibid.*

52. *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953).

53. *Supra* note 33.

54. *Supra* note 18.

55. *Entertainment: Public Pressure and the Law*, 71 *Harv. L. Rev.* 326, 328 (1957), lists New York, Maryland, Virginia and Kansas as the only states which still censor movies. *Excelsior Pictures v. Board of Regents*, 3 N.Y.2d 237, 165 N.Y.S.2d 42 (1957), points out that the Supreme Court has effectively destroyed most of the grounds upon which New York can censor movies.

which it is derived, clearly indicates the legislative intent to dispense with *scienter* as an element of the crime defined, and to impose the risk of violation on those who fail to inspect that which they sell or distribute to others for public sale.⁵⁶

One year later, in *Smith v. California*,⁵⁷ the Supreme Court struck down a Los Angeles City Ordinance which proscribed,⁵⁸ and had been construed to impose strict liability for,⁵⁹ mere possession of obscene prints, regardless of the offender's awareness of the contents. The Court felt that if the ordinance fulfilled its purpose and imposed criminal liability upon the bookseller without knowledge of contents, he would tend to restrict sales to those books he had inspected. Thus, the State would have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature, a censorship by indirect means which would have been invalid if attempted directly.

The status of Section 1141 thereupon became uncertain. Three months after the *Smith* decision, the Court of Appeals, in a memorandum decision, dismissed an information and remitted a fine upon its authority.⁶⁰ Within months, the court which had decided *Shapiro*, without alluding to its earlier decision, dismissed an information for lack of proof of defendant's knowledge of the obscene character of the magazine holding that the statute required such proof.⁶¹

In *People v. Finklestein*,⁶² the Court of Appeals was required to decide if, as defendant contended, Section 1141 was unconstitutional because it did not expressly require *scienter*. The Court dismissed this argument concluding that the definition of the crime is instinct with the idea of *scienter*.⁶³ In reaching this conclusion the Court, guided by the strong presumption of constitutionality attending legislative enactments, found that the statute on its face required *scienter*. While conceding that the statute might be susceptible of either interpretation, the Court considered itself obliged to adopt the construction which would preserve its validity. This interpretation, furthermore, had the effect of putting this requirement in the statute "as definitely as if it had been so amended by the legislature."⁶⁴ The Court still reversed the conviction, however, believing that the *Shapiro* decision, which was the prevailing precedent at the time of the trial, may have misled defendants into believing that proof of their actual knowledge was irrelevant.

56. 6 A.D.2d 271, 275, 177 N.Y.S.2d 670, 674 (2d Dep't 1958).

57. 361 U.S. 147 (1959).

58. Los Angeles Municipal Code § 41.01.1.

59. 161 Cal. App. 2d Supp. 860, 327 P.2d 636 (1958).

60. *People v. Engel*, 7 N.Y.2d 1002, 200 N.Y.S.2d 48 (1960).

61. *People v. Richmond County News, Inc.*, 11 A.D.2d 799, 205 N.Y.S.2d 94 (2d Dep't 1960). See also *People v. Douglas*, 12 A.D.2d 194, 209 N.Y.S.2d 734 (3d Dep't 1961) construing Section 1141 to require *scienter* and dismissing the indictment for failure to allege knowledge on the part of defendant.

62. 9 N.Y.2d 342, 214 N.Y.S.2d 363 (1961).

63. *Id.* at 344, 214 N.Y.S.2d at 364.

64. *Id.* at 345, 214 N.Y.S.2d at 365.

Judge Van Voorhis, dissenting, argued that *Smith v. California* served to render Section 1141 unconstitutional. In view of the clear demonstration in *Shapiro* of the legislature's intent to dispense with *scienter*, a construction reading into the statute a requirement of *scienter* exceeded judicial power.

Despite the dissent, the decision does not shock. If there is a possible construction which will uphold the statute, the Court should adopt it. The earlier decisions in the Appellate Division afford good evidence that the construction is not strained. Further, if the statute is clear on its face, the court need not attempt to determine the intent of the legislature. Absent the *Shapiro* decision, it is extremely unlikely that a legislative intent contrary to the holding of the Supreme Court would have been considered. Certainly, if the statute were stricken, it would have been reenacted as now interpreted. The only objection open is the impact of the decision upon the defendants. The disposition of the case does not, however, deny them their day in court on the question of *scienter*. If they have objection, it is only upon the grounds that they have been deprived of the benefit of a fortuitous gap in the law.

Bd.

DUE PROCESS AND POLICE POWER— CRIMINAL STATUTES

The enactment of a criminal statute must be a reasonable exercise of the police power under the Fourteenth Amendment of the United States Constitution.⁶⁵ For a court to uphold a statute making certain conduct criminal, it must find some clear and reasonable connection between the statute and the promotion of health, comfort, safety and welfare of society.⁶⁶

In *People v. Bunis*,⁶⁷ the defendant was the owner of a bookstore in which coverless magazines were sold. An information filed against the defendant in the City Court of Buffalo charged him with a violation of Section 436-d of the New York Penal Law.⁶⁸ The City Court dismissed the information on the grounds of *stare decisis*, noting that the supreme court,⁶⁹ sitting in another county, had held the same statute unconstitutional as an arbitrary and unreasonable exercise of the police power. An appeal from the dismissal was taken to the Supreme Court, Appellate Term,⁷⁰ the State contending that this statute was a lawful use of the police power in that its purpose was to prevent bookdealers, such as the defendant, from tearing off the covers of magazines, returning the

65. While there is some indication that the scope of the police power under art. 1, § 6 of the New York Constitution is narrower than under the Fourteenth Amendment, it is not now relevant to make a distinction; See Opinions of the Attorney General (1959) at 96.

66. Cf. *Trio Distr. Corp. v. City of Albany*, 2 N.Y.2d 690, 163 N.Y.S.2d 589 (1957); *Defiance Milk Products v. DuMond*, 309 N.Y. 537, 132 N.E.2d 829 (1956); *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888).

67. 9 N.Y.2d 1, 210 N.Y.S.2d 505 (1961).

68. N.Y. Penal Law § 436-d:

Any person who knowingly sells . . . any magazine . . . from which the cover or title page has been removed . . . is guilty of a misdemeanor.

69. *People ex rel Bunis v. Simmers*, 13 Misc. 2d 1097, 181 N.Y.S.2d 388 (Sup. Ct. 1958).

70. 24 Misc. 2d 561, 205 N.Y.S.2d 517 (Sup. Ct. 1960).