



Civil Regulation of Obscenity in Oregon

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LEGISLATIVE UPDATES

Civil Regulation of Obscenity in Oregon

Introduction

House Bill 2666 was introduced into the 1991 session of the Oregon Legislature on Feb. 15, 1991.¹ This bill would allow a purchaser, or the parent or guardian of a purchaser who is a minor, to return a video or audio recording if the purchaser certifies that: (1) in his or her opinion the recording is obscene; and, (2) the recording has not been copied. If the purchaser had an opportunity to preview the recording before purchase, or if the recording carried a warning label it is not returnable.² H.B. 2666 was first read on February 15, 1991 and assigned to the House Committee on Business and Consumer Affairs on February 21, 1991.³ No further action was taken in this legislative session. It is not known if the bill will be introduced in the next session.⁴

This update will discuss the proposed legislation, H.B. 2666, in the context of Oregon's obscenity law. It will also examine relevant case law and how H.B. 2666 could reintroduce obscenity into state statutes.

Background

Since 1960 the Oregon Supreme Court had held that the Oregon Constitution, art. I, § 8⁵ was congruent with the United States Constitution's First Amendment where obscenity was concerned. In *Oregon v. Jackson*,⁶ the Oregon Supreme Court specifically upheld this presumption and rejected an interpretation of the Oregon Constitution which would protect obscenity.⁷ Virtually the same decision resulted eight years later in *Oregon v. Childs*.⁸ The Oregon Supreme Court held that there was no legal basis for construing article I, § 8, of the Oregon Constitution more broadly than the First Amendment of the United States Constitution.⁹ As the U.S. Supreme Court obscenity standard evolved from national to state standards,¹⁰ the Oregon legislature kept pace¹¹ and the Oregon Supreme Court continued to uphold the legislative mandate,¹² including the 1973 obscenity statute, ORS 167.087, at issue in *Oregon v. Henry*.¹³

In 1982 the Oregon Supreme Court decided *Oregon v. Robertson*.¹⁴ In the *Robertson* decision the court

developed a test for deciding which types of speech, if any, could be restricted in accordance with the Oregon Constitution.¹⁵ Under the *Robertson* test, the Oregon Constitution's freedom of expression guarantee forecloses the enactment of legislation which prohibits free expression on any subject whatsoever unless "the prohibition falls within an original or modern version of an historically established exception to free expression."¹⁶ Examples of such historical exceptions include "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants."¹⁷

The Oregon Supreme Court used *Oregon v. Henry* to apply the *Robertson* freedom of expression test to "obscenity" under the Oregon Constitution.¹⁸ The Oregon Court of Appeals overturned Earl Henry's conviction for selling "obscene" material, but did so on the basis of "vagueness" of the statutory definition of obscenity.¹⁹ The Oregon Supreme Court upheld the appeals court, but on other grounds; specifically, it held that obscenity was protected speech under the Oregon Constitution and used *Henry* as a vehicle for striking down obscenity prosecutions in the state. Using "adequate and independent states grounds,"²⁰ and declaring in "a plain statement" as required by the United States Supreme Court,²¹ the Oregon Supreme Court struck down ORS 167.087 as contradictory to art. I, § 8. It pointed out that while the first amendment restrains "abridging the freedom of speech, or of the press,"²² the Oregon Constitution precludes laws "restraining free expression of opinion."²³ The Oregon Supreme Court read this language as covering any expression of opinion, including verbal and nonverbal expressions contained in "films, pictures, paintings, sculpture and the like."²⁴ This provision also covers "any subject whatever"²⁵ and does not contain any express exception for obscene communications.²⁶

In *Henry*, the Oregon Supreme Court undertook an extensive examination of the legal history of obscenity in England and the United States. It concluded that the U. S. Constitution's "First amendment was the product of a robust, not a prudish, age,"²⁷ and thus the proscription of obscenity was not well-established at the time the first amendment was ratified.²⁸ The court continued this history to 1859, specifically examining the laws of the

territorial legislature prior to statehood.²⁹ The territorial statute which the court analyzed did not define “obscene” and was directed primarily, in its view, to the protection of youth.³⁰ Thus the court was unable to find a well-established exception to free speech which would allow the legislature to proscribe obscenity. The court quoted with approval from Judge Tanzer in *Oregon v. Tidyman*:³¹

The difficulty [with the United States Supreme Court’s approach] arises from the anomaly that the very purpose of the first amendment is to protect expression which fails to conform to community standards.³²

The Oregon Supreme Court concluded that characterizing speech as obscene, no matter what test was used, did not deprive it of protection under art. 1, § 8 of the Oregon Constitution.

In dicta, the *Henry* court went on to say that it “*had not held* that this form of expression could not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors.”³³ H.B. 2666 will be examined in light of these exceptions.

Analysis of H.B. 2666

Unwilling viewers

In dicta, the *Henry* court explicitly provided that the decision did not preclude the regulation of free expression in the interests of “*unwilling viewers, captive audiences, minors [or] beleaguered neighbors*.”³⁴ If a purchaser, aside from a parent or guardian of a minor purchaser, buys a recording without realizing that the contents might, in his or her opinion, be “obscene,” is that purchaser an “unwilling viewer or a captive audience?” The Oregon Supreme Court has not answered this question. It did say in dicta in *Henry* that it had not foreclosed the legislative ability to protect these groups.³⁵ Yet, the court has not provided any judicial support for this statement. On the contrary, since the *Henry* decision, the Oregon Supreme Court had two opportunities to protect “unwilling viewers, captive audiences and beleaguered neighbors.” In both decisions the court struck down the regulations. In *Oregon v. Ray*,³⁶ it overturned the Oregon statute criminalizing telephonic threats, and in *City of Portland v. Tidyman*³⁷ it overturned the Portland ordinance restricting the locations of “adult” bookstores.

While the Oregon Supreme Court consistently has struck down statutes which criminalize utterances and behavior which could be characterized as “obscene,” it has also given judicial support, at least in

dicta, to legislative attempts to deal with offensive utterances and material by allowing the “unwilling viewers and captive audiences” to remedy their complaints in civil actions. In *Ray* the concurrence stated:

There is no obvious reason why the state cannot assist persons so injured to specified compensatory damages remedy rather than leaving them to pursue a tort remedy entirely on their own.³⁸

Furthermore, the court does not object to attempts to curb this type of behavior and utterances, merely to the criminalization of them. Justice Linde, concurring, stated that:

The almost invariable legislative impulse when seeking to make harmful behavior ‘unlawful’ is to turn to the criminal law. I mean no more than to suggest that when the state’s object is to help victims of abusive behavior, criminal law is not the only choice.³⁹

This viewpoint is the approach taken in H.B. 2666. A consumer who is unaware at the time of the purchase of the contents of a recording may return the recording within seven days, and, by certifying that he or she considers the recording to be obscene and that it has not been copied, receive a full refund of the purchase price.⁴⁰ The state becomes involved only if the seller refuses to refund the money.⁴¹

If, as the dicta in *Ray* suggests, the Oregon Supreme Court will look with favor at self-help remedies, a precedent exists at the federal level for this type of remedy. The United States Supreme Court in *Rowan v. U.S. Post Office Dept.*⁴² found 39 U.S.C. 3008 to be constitutional.⁴³ This statute allowed anyone receiving by mail “a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative,” to ask that the Postmaster General remove his or her name from the mailing list of that sender, and that the sender remove the recipient’s name from all mailing lists within the sender’s actual or constructive control.⁴⁴ The Court upheld the statute because the householder determined whether or not the material was objectionable, no government decision on the contents was required, or even allowed, and householders should not have to be exposed in their homes to material they find objectionable.⁴⁵

H.B. 2666 allows the purchaser and not the government to decide if the material is ‘obscene,’ and therefore involves no direct government action. It further provides for civil as opposed to criminal

penalties, and even provides for a private right of action. It is the purchaser who will regulate the sale or distribution of free expression based on content, not the state. An unresolved issue is whether or not a householder deserves the same level of protection in the home from a purchase as from unsolicited mail.

Purchasers who are minors

H.B. 2666 provides for refunds to the parents or guardians of purchasers who are minors if they certify that in their opinion the recording is obscene, that it has not been copied, and if it is returned within seven days of purchase.⁴⁶ This provision could be found to be constitutional. The Supreme Court of Oregon found that the only obscenity statute in the Oregon territorial code was a statute which "included prohibitions against the sale, distribution and possession of obscene writings or pictures which manifestly tended to corrupt the morals of youths."⁴⁷ Under the *Robertson* test, protection of minors from exposure to obscenity is a "well-established exception to freedom of expression"⁴⁸ embodied in the Oregon Constitution. *Henry* further suggests the possibility of regulating obscenity when minors are involved; independent of this well established historical exception.⁴⁹ The dicta in *Oregon v. Ray*⁵⁰ might allow the type of civil regulation proposed here, even if the court did not find the "well-established historical exception." Likewise, the arguments for a *Rowan* type of control are stronger for parents regulating what their child brings into the house than they are for protecting adults from their own purchases. *Rowan* allows a parent or guardian to remove a minor's name from an objectionable mailing list.⁵¹ Similarly, H.B. 2666 provides for parental supervision of a minor's purchases brought into the home and does not involve any governmental intervention in the parental decision. The bill also provides for civil rather than criminal penalties.

However, the Oregon Supreme Court allows greater latitude to personal freedom of expression than does the United States Supreme Court, even when minors are involved. For example, the Supreme Court has approved "variable obscenity" in *Ginsberg v. New York*.⁵² While the Oregon Supreme Court has not yet decided this specific issue, the Oregon courts of appeals have struck down sections of the Oregon statutes criminalizing the distribution of obscene material to minors prior to the Oregon Supreme Court decision in *Henry*.⁵³ The Oregon Supreme Court refused review in *Woodcock* and review was not sought in *Frick*, even though the statutory language of *Frick* was nearly identical to the language in the statute upheld by the United

States Supreme Court in *Ginsberg*.⁵⁴ Both of the Oregon cases involved statutes which criminalized the activity.

The hostility of the Oregon Supreme Court to any legislation criminalizing obscenity makes civil regulation preferable through private rights of action. H.B. 2666 provides for this and the Oregon Supreme Court in dicta has given support to this type of legislation.⁵⁵

Labeling

Section 2 of H.B. 2666 provides that the retailer does not have to refund the purchase price if:

- (a) The recording is labeled or otherwise identified by the manufacturer, distributor or retail seller as potentially obscene or offensive; or
- (b) The purchaser is given the opportunity by the retail seller to preview the recording by listening to all or a portion of the recording or by reading a transcription of the words contained within the recording.⁵⁶

This provision allows the retailer to place a warning label on every audio and video cassette, record, and compact disk in the store, and thus short circuit the bill; especially as it is applied to minors who often buy a recording just because it has a label. If the purpose of the bill is to allow parents to control their children's purchases, then a better approach may be to apply the labelling provision only to adults. Parents or guardians could then return items which, in their opinion, are obscene.

Conclusion

H.B. 2666, if it becomes law, would probably withstand a constitutional challenge under the Oregon Constitution; especially the provisions for minor purchasers. The bill is an improvement over the labeling bills currently being introduced in legislatures across the country. It puts the burden of restricting a minor's access to potentially objectionable material where it belongs; on the parent, and not on the retailer. A parent who is concerned with his or her child's music can preview what the child is buying. Since H.B. 2666 provides for a private right of action rather than criminal sanctions, a retailer would not risk a criminal prosecution for selling a recording which the parent, or a jury, later finds to be obscene. In this author's opinion, the bill would provide more protection for children without restricting the free expression of adults. Ω

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1. H.B. 2666, 66th Leg., 1991 Oregon.

2. *Id.*

3. Search of LEXIS States library, Ortrck file (Oct. 7, 1991).