

Constitutional Law - Ohio Supreme Court Upholds Conviction under Statute Prohibiting "Knowing Possession" of Obscene Literature - *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960), appeal docketed, 29 U.S. L. Week 3046 (U.S. July 14, 1960) (No. 236)

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DePaul College of Law, *Constitutional Law - Ohio Supreme Court Upholds Conviction under Statute Prohibiting "Knowing Possession" of Obscene Literature - State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960), appeal docketed, 29 U.S. L. Week 3046 (U.S. July 14, 1960) (No. 236), 10 DePaul L. Rev. 156 (1960)

Available at: <https://via.library.depaul.edu/law-review/vol10/iss1/14>

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conducted with dignity and decorum, and that it is entirely within the discretion of the judge to stop representatives of the press in any field of activity which creates distractions interfering with orderly court procedure. Evidence was also introduced, however, establishing the fact that the use of cameras, radio, and television would not invariably interfere with the proper administration of justice. In fact, evidence conclusively proved that photographs can now be taken by the press within the courtroom with little or no detection by others present.

It follows logically from the foregoing discussion that the photographing of spectators and other persons, not in the custody of the court, on streets and sidewalks surrounding the courthouse, is not violative of the *so near thereto* concept in either a causal or a geographical sense. Nor is it violative of the *clear and present danger rule*, because the photographing of spectators beyond the courtroom is an activity too remote to be considered a *clear and present danger* to the proper administration of justice. Finally, such photography is not violative of Canon 35, because this canon concerns activities exclusively *within* the courtroom.

In the case under consideration, certiorari was recently denied per curiam by the United States Supreme Court.<sup>31</sup> Such denial, however, does not act as a final determination of the subject, for the controversy will endure as long as judges continue to extend their powers beyond the courtroom to acts which do not interfere with the proper administration of justice.

<sup>31</sup> *Atlanta Newspapers, Inc. v. Grimes*, 29 U.S.L. WEEK 3101 (U.S. Oct. 11, 1960) (No. 237).

### CONSTITUTIONAL LAW—OHIO SUPREME COURT UPHOLDS CONVICTION UNDER STATUTE PROHIBITING "KNOWING POSSESSION" OF OBSCENE LITERATURE

In packing the belongings of a tenant for storage until his return, defendant discovered some lewd and lascivious books and pictures. Without any intent to exhibit, distribute or look at them again, she placed them in the storage box for her departed roomer's return. Armed with a search warrant to look for policy paraphernalia, three policemen discovered the obscene material in defendant's bedroom and thereupon arrested her;<sup>1</sup> she was subsequently convicted for violation of an Ohio

<sup>1</sup> The Supreme Court has held that in state prosecutions for violations of state statutes, evidence obtained by an illegal search and seizure is admissible. *Wolf v. Colorado*, 338 U.S. 25 (1949); *Stefanelli v. Minard*, 342 U.S. 117 (1951). *But see* *Elkins v. United States*, 364 U.S. 206 (1960). Ohio has ruled that such evidence is admissible in their courts. *State v. Lindway*, 131 Ohio St. 166, 2 N.E. 2d 490 (1936), *cert. denied*, 299 U.S. 506 (1936).

statute<sup>2</sup> which prohibits the *knowing* possession of obscene literature. On appeal, four of the six Ohio Supreme Court justices ruled that the statute was unconstitutional as interfering with freedom of speech and of the press, but since under an Ohio constitutional provision<sup>3</sup> no law can be held unconstitutional unless all but one of the judges concur, the conviction was upheld. *State v. Mapp*, 170 Ohio St. 427, 166 N.E. 2d 387 (1960), *appeal docketed*, 29 U.S.L. WEEK 3046 (U.S. July 14, 1960) (No. 236).

Noteworthy and of extreme importance in conjunction with the instant case is the recent *Smith v. California*<sup>4</sup> decision. In *Smith* a Los Angeles ordinance<sup>5</sup> prohibited the possession of obscene material in any place where books are sold or kept for sale. The Supreme Court held that the absence of *scienter* made the ordinance unconstitutional. The Court reasoned that the ordinance imposed a severe limitation on the public's access to constitutionally protected matter in that the bookseller would be criminally liable without knowledge of the contents of the book, and therefore he would tend to restrict the books he sold to those which he had read. By restricting him, the public's access to reading matter would be impeded. The Court's major argument was that an ordinance requiring *scienter* would be less likely to result in an undue restriction on the distribution of legitimate literature than one which did not.<sup>6</sup>

Although the California Supreme Court in interpreting the statute in the *Smith* case held that the ordinance did not prohibit possession with intent to sell, but possession in places where literature was *likely* to be sold or exhibited,<sup>7</sup> it would appear that the United States Supreme Court relied wholly on the restriction of *dissemination* of all literature, construing the statute to mean possession *with intent to disseminate*. The latter conclusion is based upon the fact that the Court did not discuss

<sup>2</sup> OHIO REV. CODE tit. 29, § 2905.34 (Supp. 1959). The statute provides: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book . . . print [or] picture . . ."

<sup>3</sup> OHIO CONST. art. IV, § 2. This section reads in part: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmation of a judgment of the court of appeals declaring a law unconstitutional and void."

<sup>4</sup> 361 U.S. 147 (1959).

<sup>5</sup> LOS ANGELES, CAL., MUNICIPAL CODE § 41.01.1 (1955).

<sup>6</sup> Black J. concurring stated: "The fact is, of course, that prison sentences for possession of 'obscene' books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity." *Id.* at 156. He added that "the result of this case is that one particular bookseller gains his freedom, but the way is left open for state censorship and punishment of all other booksellers by merely adding a few new words to old censorship laws." *Ibid.*

<sup>7</sup> *People v. Smith*, 161 Cal. App. 2d 860, 327 P. 2d 636 (1958).

the matter of possession *per se*. Summarizing therefore, what seems to be the feeling of the Supreme Court in *Smith*: The possession of obscene literature is not to be interfered with unless one *knowingly* possesses *with intent to distribute*. However, the Ohio statute in the principal case prohibits knowing possession *per se*.

From the two cases these two serious questions arise concerning the future content of obscenity statutes: (1) If the Ohio statute is considered constitutional, what would be the possible indirect result that would flow from it? (2) Can states cope with the problem of obscene literature without Ohio-type statutes?

Modernly, both state legislative bodies and Congress can, as a general rule, constitutionally dispense with *scienter* or *mens rea* as pre-requisites to crimes *mala prohibita*.<sup>8</sup> Under present penal statutes mere possession of certain articles constitute a crime; narcotics and drugs are prime examples. The statutes prohibiting the illegal possession of a narcotic drug do not distinguish as to whether possession of the drug was for one's own use or for sale. The purpose of such statutes is to regulate the use of substances or preparations that are extremely injurious to both the moral qualities and physical structures of human beings:<sup>9</sup> All too often it has been found that such use leads directly to crime and other anti-social activities.

Strict liability is also imposed for the manufacture or sale of defective food.<sup>10</sup> The underlying principle of these statutes is that the public interest in the purity of its food is so great that it demands the ultimate in care from distributors; of no avail will be a plea of ignorance of the food's quality or a plea of great care in handling and/or in processing. Other "possession" crimes include: (1) possession of deadly weapons,<sup>11</sup> (2) dangerous drugs,<sup>12</sup> (3) counterfeit coins,<sup>13</sup> (4) machine guns,<sup>14</sup> and (5) "policy" paraphernalia.<sup>15</sup>

There is no question that the state, through the use of its police power, may enact either mere possession or possession-plus-*scienter* type criminal statutes. The police power of a state in its broadest sense includes all

<sup>8</sup> *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Greenbaum*, 138 F. 2d 437 (3rd Cir. 1943); *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919). *But see Lambert v. California*, 355 U.S. 225 (1957), *petition for rehearing denied*, 355 U.S. 937 (1957), where the Supreme Court held that this rule is not without limitations.

<sup>9</sup> *State v. Martin*, 193 La. 1036, 192 So. 694 (1939).

<sup>10</sup> *Culbertson v. Coca-Cola Bottling Co.*, 157 S. C. 352, 154 S.E. 424 (1930); *Meshbesher v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N.W. 428 (1909).

<sup>11</sup> *E.g.*, ILL. REV. STAT. ch. 38, § 152 (1959).

<sup>12</sup> *Id.* at § 186.43.

<sup>13</sup> *Id.* at § 284.

<sup>14</sup> *Id.* at § 414 (b).

<sup>15</sup> *Id.* at § 414.

legislation and almost every function of civil government, and specifically embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or public health.<sup>16</sup>

Almost all states have passed laws controlling the selling, possession, and circulation of lewd books and pictures.<sup>17</sup> Typical of such laws, with few exceptions,<sup>18</sup> is the Delaware statute:

Whoever sells, lends, distributes, exhibits, gives away or shows, . . . or has in his possession with intent to sell, lend, distribute, exhibit, give away or show, . . . any obscene . . . book, magazine, pamphlet, newspaper, . . . writing, drawing, photograph, film, figure or image, or any written or printed matter of an indecent, obscene, . . . nature . . . shall be fined . . . or imprisoned. . . .<sup>19</sup>

Such legislation, therefore, seeks, in the main, not to punish the possession or reading of obscene literature, but to prohibit the *traffic* in such materials. This right of prohibition was upheld in *Roth v. United States*.<sup>20</sup> Considered with the *Roth* case was the companion case of *Alberts v. California*.<sup>21</sup> *Roth* was convicted of sending obscene materials through the mails, and *Alberts* of keeping for sale obscene material. The Court held that sex and obscenity are not synonymous, and that obscenity is not within the area of constitutionally protected speech.

Whereas many convictions<sup>22</sup> have been obtained under statutes similar to that of the Delaware statute stated above, few cases have been decided directly concerning possession *per se*,<sup>23</sup> and no case has been found where

<sup>16</sup> *Sligh v. Kirkwood*, 237 U.S. 52 (1915).

<sup>17</sup> E.g., CAL. PENAL CODE § 311; CONN. GEN. STAT. ch. 945, § 53-243 (Supp. 1959); DEL. CODE ANN. ch. 3, tit. 11, § 711 (Supp. 1958); GA. CODE ANN. § 26-6301 (Supp. 1959); IOWA CODE ANN. ch. 725, §§ 725.4-5 (Supp. 1959); KAN. GEN. STAT. ch. 21, art II, § 21-1102 (Supp. 1951); MASS. ANN. LAWS ch. 272, §§ 28 (A)-(B) (Supp. 1959); MINN. STAT. ANN. ch. 617, § 617.24 (Supp. 1959); MO. REV. STAT. ANN. ch. 563, § 563.270 (Supp. 1960); NEV. REV. STAT. ch. 201, tit. 16, § 201.250 (1955); N.Y. PENAL CODE § 1141; PA. STAT. ANN. tit. 18, § 4524 (Supp. 1959); TEX. PENAL CODE ch. 7, tit. 10, arts. 526-7 (Supp. 1960); W. VA. CODE ch. 61, art. 8, § 6066 (Supp. 1960).

<sup>18</sup> IND. STAT. ANN. ch. 28, § 10-2803 (Supp. 1960); ILL. REV. STAT. ch. 38, § 468 (1959); ME. REV. STAT. ch. 134, § 24 (Supp. 1959); FLA. STAT. ANN. ch. 847, § 847.01 (Supp. 1959); WYO. COMP. STAT. ANN. ch. 9, art. 5, § 9-513 (Supp. 1953); WIS. STAT. ANN. ch. 944, tit. 45, § 944.22 (Supp. 1959); OHIO REV. CODE tit. 29, § 2905.34 (Supp. 1959). These statutes are different in that possession, with or without any intent, constitutes a crime.

<sup>19</sup> DEL. CODE ANN. ch. 3, tit. 11, § 711 (Supp. 1958). (Emphasis added.)

<sup>20</sup> 354 U.S. 476 (1957).

<sup>21</sup> *Ibid.*

<sup>22</sup> *State v. Hochman*, 2 Wis. 2d 410, 86 N.W. 2d 446 (1957); *Commonwealth v. Blumenstein*, 184 Pa. Super 83, 133 A. 2d 865 (1957); *State v. Kohler*, 40 N.J. Super. 600, 123 A. 2d 881 (1956); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840 (1945).

<sup>23</sup> *City of Cincinnati v. King*, 107 Ohio App. 453, 159 N.E. 2d 767 (1958); *People v. Edelman*, 320 Ill. App. 361, 51 N.E. 2d 76 (1943).

a court of *last* resort has rendered a decision concerning the point of the principal case—i.e., mere knowing possession of obscene literature. However, in *State v. Kowan*,<sup>24</sup> a recent Ohio *appellate* case, the knowing possession of obscene literature was *one* of the issues. The court stated in the *Kowan* decision that “society has a right and the necessity of protecting itself from the prurient interests of any individual aroused by obscene literature.”<sup>25</sup> The court added: “The danger to the community as a whole is just as great whether the possessor holds the obscene literature solely for his own purposes as it is when he exhibits or sells it to others.”<sup>26</sup>

The court in *Kowan*, as well as the framers of the ordinance which was struck down in *Smith*, focused attention solely toward the elimination of smut, but indirect results cannot be overlooked, as was pointed out in the *Smith* decision and others. For example, in *Near v. Minnesota*,<sup>27</sup> defendant was found guilty under a statute which provided that anyone engaged in publishing a malicious and scandalous newspaper would be guilty of a nuisance; furthermore, a permanent injunction could be obtained restricting those committing the nuisance from further committing or maintaining it. The *Near* Court recognized the state’s authority to protect its citizens by appropriate legislation; however, the Court declared the particular statute unconstitutional in that it not only suppressed the offending newspaper, but in application put the publisher under effective censorship. Thus the Court found the statute unconstitutional in application. In the *Mapp* case, it would seem that the same criterion should be followed, i.e., “Is the Ohio statute unconstitutional *in application*?” But looking at the other side of the coin for a moment, if the Ohio statute were declared *constitutional*, what would be some possible results thereof? The following hypothetical situations are offered as examples:

(1) A bookseller receives in his shop a book which because of its price, sex blurbs on its back, and its few pages is suspected of being obscene.<sup>28</sup> He removes it immediately from stock, reads it at home and finds it utterly obscene. Under the Ohio-type statute, he is guilty.

(2) X decides to purchase some additions to his home library. Under the statute, it is incumbent upon X to determine through a preliminary

<sup>24</sup> 156 N.E. 2d 170 (Ohio C.P. 1958).

<sup>25</sup> *Id.* at 172.

<sup>26</sup> *Ibid.*

<sup>27</sup> 283 U.S. 697 (1931); *Speiser v. Randall*, 357 U.S. 513 (1958).

<sup>28</sup> Though the Supreme Court in *Smith* laid down no tests for scienter, a recent New York case, *People v. Schenkman*, 195 N.Y.S. 2d 570 (Spec. Sess. 1960), held that where the bookseller received a book with few pages, yet with a high price and with sex blurbs on the back, the requirement of scienter was met.

examination at the bookstore whether or not the book is obscene. If through his quick scanning of the book, he determines that it is not obscene, but when he reads it at home discovers that it is obscene, he is guilty of violating the statute.

On the other hand, the states obviously believe that there is a causal relationship between obscene material and antisocial behavior.<sup>29</sup> But the question then is: "Should the reader be subject to prosecution if he unknowingly purchases obscene literature?" States must have obscenity statutes, but the watch word must be reasonableness. Reasonableness here should be the coupling of knowing possession with *some intent*, and in the appeal of *State v. Mapp*<sup>30</sup> presently pending before the United States Supreme Court, it is believed that the Court will recognize the latter fact and declare the Ohio statute unconstitutional.

<sup>29</sup> For an excellent criticism of the view that there is no causal relationship between obscene literature and anti-social activities, see Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 *FORDHAM L. REV.* 70 (1957).

<sup>30</sup> 29 U.S.L. WEEK 3046 (U.S. July 14, 1960) (No. 236).

### CONSTITUTIONAL LAW—STATE STATUTE PROHIBITING COLLECTION OF DUES IF UNION OFFICER CONVICTED OF FELONY, HELD CONSTITUTIONAL

A New York statute, the New York Waterfront Commission Act of 1953, section 8,<sup>1</sup> prohibited the collection of dues on behalf of any waterfront labor organization if any officer or agent of such organization had been convicted of a felony and had not been pardoned or given a certificate of good conduct from a board of parole. Defendant, District Attorney of Richmond County, threatened to prosecute anyone collecting dues for Local 1346 of the International Longshoremen's Association, because its Secretary-Treasurer, the plaintiff, had pleaded guilty to a charge of grand larceny in 1920 and had received a suspended sentence. By reason of this threat, plaintiff was suspended as an officer of Local 1346. An action for a declaratory judgment was thereupon instituted, plaintiff claiming section 8 to be in conflict with the supremacy clause of the United States Constitution, and the due process clause of the fourteenth amendment. It was further alleged that section 8 constituted a bill of attainder and was an *ex post facto* law. The Supreme Court of the United States, by a five to three decision (Mr. Justice Harlan took no part in the consideration or decision of the case), affirmed the lower courts and upheld the validity of the Waterfront Commission Act, stating

<sup>1</sup> N.Y. UNCONSOL. LAWS § 6700 (McKinney Supp. 1960).