
The Requirement of *Scienter* in Obscenity Statutes

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a member of the family of the parent on whom the obligation is sought to be imposed.²⁹ These qualifications are not a precedent to statutory liabilities and are not required in the greatest number of cases decided on general principles.

CONCLUSION

In view of the many well settled decisions on the subject and the various statutes in effect in many states, it is clear that in the vast majority of jurisdictions the tendency is to impose upon the parent the duty to support an adult incapacitated child who cannot maintain himself. Such an expansion of liability is based either upon a construction of statutory law or a judicial expansion of common law.

²⁹ *Breuer v. Dowden*, 207 Ky. 12, 268 S.W. 541 (1925); *Blachley v. Laba*, 63 Iowa 22, 18 N.W. 658 (1884).

THE REQUIREMENT OF SCIENTER IN OBSCENITY STATUTES

INTRODUCTION

To the practitioner and law student, the state of mind of the accused at the time the activity in question occurred is a vital factor in determining criminal liability. In most instances determining the necessity, nature and existence of the *mens rea* is a perplexing problem in research, investigation and mental gymnastics. It is the purpose of this paper to investigate the mental element in statutes and ordinances pertaining to First Amendment rights; specifically, statutes and ordinances dealing with the control of distribution of obscene material.

Blackstone spoke of "vicious will" and a consequent unlawful act as constituting a crime.¹ The United States Supreme Court has said: "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence."² Black's Law Dictionary succinctly defines *mens rea* as a guilty mind; a guilty or wrongful purpose; a criminal intent.³ Judge Learned Hand defined *mens rea* in *United States v. Crimmins*.⁴

Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the *mens rea*, the 'criminal intent,' necessary to guilt, as distinct from the additional specific intent required in certain instances . . . and even this general intent is not always necessary.⁵

¹ Blackstone's Commentaries, Bk. 4, p. 294 (1889).

² *Dennis v. United States*, 341 U.S. 494, 500 (1951).

³ Black's Law Dictionary 1178 (3rd ed., 1933).

⁴ 123 F.2d 271 (C.C.A. 2d, 1941).

⁵ *Ibid.*, at 272.

Judge Hand's definition is excellent because it is descriptive and workable. It clearly states what the law requires in most cases and then states that this requirement need not always be present.

CRIMES MALA PROHIBITA

A mental element is not required for conviction for crimes *mala prohibita*. In *Morissette v. United States*,⁶ Justice Jackson, expressing the unanimous opinion of the Court, gives an excellent explanation of crimes where no mental element is involved. He traces the history and development of such crimes both here and in England.⁷ Justice Jackson attributes this tendency to call into existence new duties and crimes which disregard any mental element to the industrial revolution, mass transportation, and urbanization. Mechanization plus crowded highways and congested living conditions created new duties which lawmakers imposed on the populace by means of regulations invoking criminal sanction.

Morissette also points out that penalties for violation of such laws are relatively small and there is no great damage to one's reputation caused by a conviction for such an offense. Therefore, since damage to a violator is not of an extremely serious nature, courts have been inclined to dispense with the need for intent where statutes and regulations make no mention of it and have held that the guilty act alone constitutes the crime.⁸ The rationale of such statutes and regulations is found in *United States v. Dotterweich*,⁹ where in referring to legislation dispensing with need of awareness of some wrongdoing the Court said: "In the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."¹⁰

MALA PROHIBITA AND OBSCENITY

In recent years governmental bodies within the United States have become concerned with the widespread distribution of obscene materials. In attempts to check this distribution, so as to prevent the undermining of public morals, lawmakers have found it convenient to dispense with the mental element in statutes and regulations dealing with obscenity. Although this is a logical step in the development of public welfare offenses, it presents the problem of being a substantial restriction on freedom of speech.

⁶ 342 U.S. 246 (1952).

⁷ For a detailed analysis, consult: Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).

⁸ For an excellent discussion of crimes *mala prohibita* consult: Clark and Marshall on Crimes, c.5, §5.10 (6th ed., Wingersky, 1958).

⁹ 320 U.S. 277 (1943).

¹⁰ *Ibid.*, at 281.

The City of Los Angeles passed an ordinance dispensing with the element of *scienter*, knowledge by booksellers of contents of books, and imposing a strict criminal liability on booksellers for possessing obscene materials.¹¹ The Supreme Court reversed the conviction of a bookseller, Eleazar Smith, under this ordinance.¹² In reversing, the Court said that such an ordinance was unconstitutional in that: "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."¹³ The limitation on free speech was present because, to avoid liability under the ordinance, booksellers would tend to sell only what they have read, and as a result, the distribution of constitutionally protected matter, as well as obscene matter, would be impeded. Therefore, constitutionally protected material that the bookseller had not read, would also not be sold. Such a result, of course, is repugnant to American constitutional law. The Court could not allow an infringement of a citizen's constitutionally guaranteed rights where that citizen had an innocent mind, especially when to infringe that right might tend to inhibit the dissemination of information and ideas.

The decision in the *Smith* case is based on the Court's prior decision in *Wieman v. Updegraff*.¹⁴ There, the Court held an oath pertaining to freedom from past membership in subversive groups as prerequisite to state employment unconstitutional, because the oath made no distinction between members who, at the time of membership, had no knowledge of the groups' character and those members who knew the nature of the group. The Court said that *scienter* was of vital necessity in such cases. To dispense with it violates a basic right of citizens of a democracy. Though the Court admitted that state employment was not a matter of right, they would not allow an individual to be barred from such employment for an innocent association with a subversive group. The Court also believed that the city and state courts would not construe, nor had they in the past construed, the oath as adversely affecting those persons who, during their membership in the proscribed organizations, were

¹¹ §41.01.1 of the Municipal Code of the City of Los Angeles states: "Indecent Writing, . . . Possession Prohibited: It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places: . . ." (various types of stores, and stores located in certain places are thereafter listed).

¹² *Smith v. California*, 161 Cal. App.2d 860, 327 P.2d 636 (1958), rev'd *Smith v. California*, 361 U.S. 147 (1959).

¹³ *Ibid.*, at 153.

¹⁴ 344 U.S. 183 (1952).

unaware of its purpose. Great confidence was expressed by the Court as to its belief that the ordinance would continue to be so read in order to avoid raising difficult constitutional problems which any other application would create.

Other cases dealing with oaths unquestionably show the Supreme Court's demand for *scienter* in statutes and ordinances affecting basic rights. An oath similar to the one in the *Wieman* case was held valid in *Garner v. Los Angeles Board*.¹⁵ However, the Court specified that it upheld the oath and the ordinance providing for it, only because the Justices assumed that *scienter* was implicit in each clause of the oath. A similar oath required for schoolteachers in New York was upheld by the Court because the New York courts had construed the statute to require knowledge of organizational purpose before the regulation could apply.¹⁶

In a case involving a Maryland statute requiring a like oath of persons who sought places on the ballot, the Court held the statute constitutional.¹⁷ The decision was based on a promise made by the Maryland Attorney General during oral argument that he would inform the proper state officials that the element of *scienter* would be required and on a Maryland Court of Appeals decision interpreting the statute as requiring knowledge.

Another case along the same lines was *Shelton v. McKinley*.¹⁸ There, a state statute barring from state employment members of the National Association for Advancement of Colored People was held invalid because the statute made no requirement of knowledge of the organization's nature.

It is easily discernible that any sort of legislation affecting freedoms guaranteed by the First Amendment will require the inclusion of a mental element. The Supreme Court has demanded such an element in cases pertaining to a citizen's right to become a member of an organization and in at least one case affecting a citizen's right to possess and distribute books. In light of the *Smith* case it seems that legislation directed at obscene materials will not be able to take advantage of the trend toward eliminating the mental element from statutes aimed at promoting the public good.¹⁹ This inability flows from the rationale of crimes *mala*

¹⁵ 341 U.S. 716 (1951).

¹⁶ *Adler v. Board of Education*, 342 U.S. 485 (1952).

¹⁷ *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951) per curiam.

¹⁸ 174 F. Supp. 351 (E.D. Ark., 1959).

¹⁹ *Chicago v. Capitol News Agency*, 59 S 21907 (Mar., 1960). The City of Chicago sought a temporary injunction to restrain distribution of alleged obscene material as provided in a Chicago ordinance. The Superior Court of Cook County denied the injunction, struck the complaint and declared the Chicago ordinance unconstitutional because it made no provision for *scienter* on the part of the distributor.

prohibita as recited in *Dotterweich*. It states that such legislation places the burden of acting at hazard upon persons otherwise innocent but in a responsible relation to public danger *in the interest of the larger good*. The larger good in cases involving freedom of speech and press are these very freedoms which are the life-blood of a democratic form of government. To endanger them, in order to protect ourselves from materials which should be recognized as valueless would indeed be a bad bargain. The Supreme Court did not allow our nation to make such a compromise with itself.

CONCLUSION

What is the solution to the perplexing problem of controlling the distribution of obscene material and at the same time preventing infringement of basic constitutional rights? The courts cannot ordinarily allow slight infringements to be made on freedom of speech and press by legislation because slight infringements make major ones a bit more acceptable. The members of the Supreme Court recognized this danger in *Roth v. United States*²⁰ when speaking of freedom of speech and press it said: "Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."²¹ Mr. Justice Black, concurring in *Smith*, deals with these slight infringements far more harshly when he says: "Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the judiciary giving it a foothold here."²² Therefore, if the courts will not allow our lawmakers to protect us in this area who will protect us? The answer is simple. We must protect ourselves. Freedom creates responsibility. Liberty imposes duties. For, if we want freedom, we must prove we are capable of being free.

²⁰ 354 U.S. 476 (1957).

²¹ *Ibid.*, at 488.

²² *Smith v. California*, 361 U.S. 147, 160 (1959).