RECENT DEVELOPMENTS

OBSCENITY LAW IMPOSING STRICT LIABILITY DECLARED UNCONSTITUTIONAL

Smith v. California
361 U.S. 147 (1959)

Plaintiff, proprietor of a bookstore, was convicted under a Los Angeles City Ordinance[1] making it unlawful for a person to have in his possession any obscene or indecent book in a place where books are offered for sale. Plaintiff appealed to the United States Supreme Court[2] alleging that, *inter alia*,[3] construction of the ordinance as imposing a "strict" or "absolute" criminal liability without requiring any element of scienter[4] was in conflict with the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court reversed the conviction solely on the issue of lack of scienter, basing its decision on the effect "strict" liability would have on freedom of the press.[5] A bookseller, acting at his peril, would have to limit those books offered for sale to those about which he had knowledge. The coercive force of "strict" liability toward encouraging self-imposed restriction on free speech would be no less violative of the First and Fourteenth Amendments than a direct legislative restriction imposed on constitutionally protected matter.

Laws have existed in this country since 1712[6] attempting to regulate obscenity. The enforcement of these laws, however, has not been uniform,[7]

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1 Los Angeles, Cal., Code § 41.01.1.

2 28 U.S.C. § 1257(2) (1948).

3 Other Constitutional objections made by the Plaintiff were that evidence for the defense as to the obscene character of a book was not permitted, although of a nature constitutionally required to be admitted; that a constitutionally impermissible standard of obscenity was applied by the trier of facts; and that the book was not in fact obscene.

4 I.e., knowledge by the Plaintiff of the contents of the book.

5 Though the Ohio statute, Ohio Rev. Code § 2905.34, requires knowledge and thus escapes the infirmity, a random check of city ordinances reveals many subject to attack for lack of a requirement of scienter. Akron, Ohio, Code C. 25 § 47 (1952); Cincinnati, Ohio, Code § 901.i3 (1956); Cleveland, Ohio, Code § 13.1307 (1956); Columbus, Ohio, Code § 2343.02 (1952); Dayton, Ohio, Code § 947 (1954); Toledo, Ohio, Code § 17-10-5 (1956).

In a recent Ohio case, State *ex rel.* King v. Shannon, 170 Ohio St. 393 (1960), the suggestion was made that perhaps under the ruling of Cleveland v. Betts, 168 Ohio St. 386 (1958), municipalities do not have the power to enact ordinances in areas in which the state has made the crime a felony, on the basis of the conflict clause, Art. XVIII, Sec. 3, of the Ohio Constitution.

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

7 Leary, Noall, "Entertainment: Public Pressures and the Law," 71 Harv. L. Rev. 326, 347 (1957). "Despite the sincerity and good intentions which often underlie the actions of local officials, it must be recognized that their enforcement of the obscenity

and has often been completely arbitrary and unreasonable.[8] Although the Supreme Court had, by dicta, held obscenity to be outside the protection of the constitution,[9] it did not meet the issue squarely until 1957 in *Roth v. United States*.[10] The impact of the *Smith* case can most readily be seen by viewing it in light of the *Roth* decision.

The Court, in the *Roth* decision, laid to rest the already defunct *Hicklin* test[11] for obscenity and built anew from the "dominant" theme declared by Justice L. Hand in the *Ulysses* case.[12] The Court established a new test for obscenity that is "bounded only by the definition of the term itself."[13] This new test is "whether to the average person, applying contemporary community standards, the dominant theme of the matter taken as a whole appeals to prurient interests."[14]

The Court has, by the scienter requirement, reduced the uncertainty accompanying the broad test in the *Roth* decision. This is not the first time the Court has seized upon the requirement of knowledge to more narrowly define a rule of law.[15] By coupling the requirement of knowledge with the *Roth* test, the Court had rendered the test less susceptible to future attacks for vagueness.[16]

It was argued in the *Smith* case that the scienter requirement would hinder enforcement of obscenity laws because of the difficulty of proof.[17] A more apparent effect would seem to be that enforcement efforts will be

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laws is essentially extra-legal. These officials, largely unrestrained by the courts, exert a far-reaching influence over the reading matter and entertainment available to the community, and their determinations are in many respects even more secretive and subjective than those of formal censorship boards."

[8] Wiggins, "Freedom of Secrecy" (1956) at 194. "One local prosecutor used the test of excluding everything he did not want his thirteen year old daughter to see. Such highly subjective standards are commonly employed."

[9] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[10] 354 U.S. 476 (1956).

[11] Queen v. Hicklin, L.R., 3 Q.B. 360 (1868) at 371. "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

[12] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) at 708. "(W)e believe that the proper test of whether a given book is obscene is its dominant effect. In applying the test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content."

[13] *Supra* note 7, at 348.

[14] Roth v. United States, *supra* note 10, at 489.

[15] Screws v. United States, 325 U.S. 91 (1945) at 103. ". . . [A] requirement of a specific intent . . . made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness."

[16] *Ibid.*

[17] 361 U.S. 147, at 154.

directed towards those against whom evidence is most readily available, i.e., the "smut" dealer. He is the prime offender and should be the prime target.[18] Little is to be gained by punishing the legitimate bookseller who unknowingly offers an obscene publication for sale to the public. The end result of such misquided prosecution can only be a breeding of disrespect for the law and supression of the free exchange of ideas.

The present enforcement of obscenity laws is pervaded by extralegal procedures of public officials[19] and private organizations[20] which are encouraged by increasing public concern and uncertainty over the law. The Court, by proclaiming a definite legal standard in the *Roth* and *Smith* decisions, has taken a big step toward channeling enforcement back into the hands of governmental enforcement agencies. This approach is necessary to insure judicial review and its subsequent protection of individual rights.

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[18] "The vast bulk of the prosecutions under the obscenity laws are aimed at dealers in so-called 'under-the-counter' pornography and 'stag' movies." Quoted from the United States' brief in Roth v. United States, *supra* note 10, at 38.

[19] *Supra* note 7, at 344-7.

[20] *Id.* at 356-67.