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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,

Defendant-Appellant.

APPEAL FROM SUPREME COURT OF OHIO.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

PRELIMINARY STATEMENT.

This brief is submitted on the merits of the Appeal. Both Appellant and Appellee have consented to the filing of this brief *amici curiae* by the American Civil Liberties Union and the Ohio Civil Liberties Union.

The Ohio Civil Liberties Union is the Ohio Chapter of the American Civil Liberties Union, whose membership is distributed throughout the United States. They are concerned with the protection of the Civil Liberties of all persons, whether or not they agree with their views.

This case involves the constitutionality of Section 2905.34 Revised Code of Ohio particularly that portion of it which prohibits the mere possession of obscene literature. It is here contended that the section under which defendant-appellant was convicted violates the Equal Pro-

tection Clause and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. It is further contended that the statute constitutes an unwarranted invasion of the right to read and the right of privacy as well. These questions have never been determined by the United States Supreme Court.

By attacking the constitutionality of the statute, the Ohio Civil Liberties Union does not intend to suggest that it favors obscenity and pornography. To the contrary, its position coincides with that of Judge Frank in *U. S. v. Roth,* 237 F. 2nd 796, 804 (2d cir. 1956), when he said:

> "As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing; I happen not to be interested in so-called 'pornography' * * *."

Except as otherwise indicated, all emphasis has been supplied.

ARGUMENT.

A. THE STATUTE UNDER WHICH DEFENDANT APPELLANT WAS CONVICTED IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DUE PROCESS.

Defendant-Appellant was indicted and convicted under Section 2905.34, OHIO REVISED CODE, which reads in pertinent part as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd or lascivious book * * * print, picture * * *."

It is submitted that the portion of the statute under which defendant-appellant was convicted violates the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

1. General Constitutional Standards for Statutes Enacted Pursuant to the Police Power.

It is well established that in order to meet the test of due process, legislation enacted by the state pursuant to the police power must have a purpose which is in fact public and reasonably related to some legitimate subject of governmental action; it must be reasonably adapted to the accomplishment of that purpose, and must not be arbitrary or excessive. *Pierce v. Society of Sisters,* 268 U. S. 510, 535, *Treigle v. Acme Homestead Ass'n,* 279 U. S. 189, 197; *Louis K. Liggett Company v. Baldridge,* 278 U. S. 105, 111, 113 (1928); *Eubank v. City of Richmond,* 226 U. S. 137, 144.

It is abundantly clear that statutes enacted to advance the public health, safety, morals, prosperity, welfare or convenience have a valid and constitutional legislative purpose.

Eubank v. City of Richmond, 226 U. S. 137, 142. And it is not at this late date denied that the State may legislate in the area of morality. *L'Hote v. New Orleans,* 177 U. S. 587.

No one would argue that the improvement of general morality is not a desirable social result. But what, specifically, is the purpose of a statute which prohibits the *mere possession* of obscene literature, without more, by an adult not shown to be abnormal in any respect?

There would seem to be only three possible purposes:

(1) To prevent arousing in the possessor intense sexual appetites which will result in overt anti-social behavior.

(2) To prevent the production of abnormal, depraved and anti-social sexual attitudes in the possessor which will result in overt anti-social behavior.

(3) To discourage thoughts of sexual matters by the possessor.

It is conceded here that each of the first two possibilities provides a valid legislative purpose under the police power for the enactment of prohibitive legislation. It is denied, however, that the third possible purpose is in any way related to a proper legislative subject because legislation to control thoughts and attitudes alone is repugnant to democratic concepts. It will be assumed, therefore, throughout this discussion that the legislature's purpose in enacting Section 2905.34 OHIO REVISED CODE was to prevent abnormal or depraved sexual attitudes and overt anti-social behavior, was, consequently, valid and therefore meets the first of the constitutional requirements of due process.

2. The Legislative Means Adopted in Section 2905.34 Ohio Revised Code is Not Reasonably Adapted to the Accomplishment of the Legitimate Ends in View.

In addition to a legitimate purpose, due process requires that a statute enacted pursuant to the police power adopt a means of accomplishing such purpose which bears a real and substantial relation to the legislative goal. *Louis K. Liggett Company v. Baldridge,* 278 U. S. 105, 111; *Treigle v. Acme Homestead Ass'n.,* 297 U. S. 189, 197.

Assuming that the legislative object was to prevent overt anti-social behavior and abnormal or depraved sexual attitudes, what means did the legislature provide in Section 2905.34, Ohio Revised Code to accomplish this object? Among other provisions, it made mere possession of obscene matter by a normal, healthy adult a crime. Not "possession with intent to sell," nor "possession with intent to distribute to children"—but *mere possession, for whatever purpose,* constitutes the offense.

It is submitted that this provision of the statute is unreasonable and arbitrary, and that it is not related in any manner to the legitimate purposes of the statute, because it has never been demonstrated that there is any relationship, direct or remote, between the possession of obscene literature and depravity or overt anti-social conduct.

Some of the forward looking decisions have noted this lack of relationship.

Judge Frank, in a concurring opinion in *U. S. v. Roth,* 237 F. 2d 796, 804 (2d cir. 1956), after analyzing the sociological studies on this point, said, at page 812:

> "To date there exist * * * no thorough-going studies by competent persons which justify the conclusion that normal adults' reading or seeing of the 'obscene' probably induces anti-social conduct. Such competent studies as have been made do conclude that so

complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity' represents a ponderable causal factor in sexually deviant adult behavior * * * What little competent research has been done, points definitely in a direction precisely opposite to that assumption."

Judge Bok, in a landmark decision dealing with the relationship between sexually deviant behavior and obscene literature, *Commonwealth v. Gordon,* 66 Pa. D & C 101 (1949), in distinguishing the cause-and-effect relationship between the purposes and means employed in obscenity statutes from other, valid statutes enacted within the police power, said:

"There are various types of cases in which [the dangerous effect of the prohibited behavior] is clear because the need is clear. The police power operates in pure food cases because people can be injured or killed unless there is regulation; in weights and measures cases because of the ease with which the consumer can be cheated, and in conventional crimes because of the threat to persons and property." p. 154.

But, continued Judge Bok:

"A book, however sexually impure and pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place." p. 153.

"* * * the public does not read a book and simultaneously rush by the hundreds into the streets to engage in orgiastic riots." p. 154.

And again, at page 155:

"We might remember the words of Macauley:

> 'We find it difficult to believe that in a world so full of temptation as this, any gentleman whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.'

"Substitute the names of the books before me for "Aristophanes" and "Juvenal," and the analogy is exact."

Judge Bok considered the problem of different individual sensual levels of stimulation as a deterring factor in finding a cause-and-effect relationship between obscenity and depravity. He said, on this point:

> "If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field. The professional answer that is suggested is the one general compromise—that the appetite of sex is old, universal and unpredictable, and that the best we can do to keep it within reasonable bounds is to be our brother's keeper and censor, because we never know when his sensuality may be high. The does not satisfy me, for in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth v. Gordon,* 66 Pa. D & C 101, 137 (1949).

The sociological studies on the relationship between obscenity and depravity have been unanimous in denying that proof exists of any such relationship.

For example, see Lockhart and McClure: *Obscenity and the Courts,* 20 LAW AND CONTEMP. PROBS. 587, 595 (1955) in which the authors state

> "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study of effect of sex literature upon sexual behavior."

See also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954). The results of this study are reported in the appendix to Judge Frank's concurring opinion in *Roth v. U. S., supra.* A summary of the study by the author appears in full in Appendix A, *infra,* page 22.

Noteworthy also is the summary of scientific studies in Lockhart and McClure: *Obscenity and the Courts, supra,* page 596. It is quoted in full in Appendix B, *infra,* page 25.

For other studies and analyses of the problem of causation, see Alpert: *Judicial Censorship of Obscene Literature,* 52 HARV. L. REV. 40 (1942); Watson: *Some Effects of Censorship upon Society,* 5 SOCIAL MEANING OF LEGAL CONCEPTS 73 (1953).

The results of these sociological and psychological studies may be summarized as follows:

> (1) There has been no positive finding by anyone that possession and/or reading of obscene literature by adults leads to depravity and/or overt antisocial conduct. What evidence has been assembled suggests exactly the opposite.

(2) While children may be more susceptible to accidental influences from literature than adults, there is no research evidence available that there is even a causal relationship between obscenity and juvenile delinquency. The evidence which is available suggests the very contrary that juvenile delinquents seldom read anything and that children who read are not often juvenile delinquents.

In the face of these studies, it can scarcely be urged that there is a clear relation, as required for constitutionality, between the purpose of Section 2905.34, OHIO REVISED CODE (the prevention of depraved sexual attitudes and of overt anti-social behavior) and the means provided by the statute (the prosecution of normal, healthy adults for the mere possession of obscene literature).

It is submitted that the prohibition of mere possession of obscene literature by an adult is in no way related to the control of depravity and that Section 2905.34, OHIO REVISED CODE is constitutionally defective for this reason.

3. The Legislative Means Adopted to Accomplish the Purposes of Section 2905.34, Ohio Revised Code, Interfere with Private Rights to a Greater Degree than the Necessities of the Situation Require.

The third test of constitutional validity is that the means employed in the statute must not be excessive. What private rights are affected by the operation of Section 2905.34, Ohio Revised Code?

a. Section 2905.34, Ohio Revised Code interferes unnecessarily with the constitutional right to read.

This Court in *Butler v. Michigan*, 352 U. S. 380 has recently made explicit the fact that the public is guaranteed the Right to Read by the Fourteenth Amendment.

In that case, this Court struck down a Michigan statute which made it a crime to make available to the general public books having a potentially deleterious influence upon youth. Justice Frankfurter, speaking for a unanimous Court, said:

> "The State insists that, by this quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. * * *
>
> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." 352 U. S. 380, 383.

It is here contended that the public's *Right to Read* is violated by a statute which makes possession by adult, without more, of obscene literature a crime, and that such infringement of this right is greater than is reasonably necessary to accomplish the legitimate purposes of the state in the valid exercise of its police power. It is submitted further that the *Right to Read,* if it is to have any meaning at all, must include the *Right to Possess* literature as well.

It is not argued here that there is a right to sell, disseminate or distribute obscene literature or to pass such material out to children; if the state had confined its regulation of obscene literature to sale, dissemination or distribution to children, it could not be argued that the

right to read was involved or violated. But the state did not so limit its statute and it is for that reason unconstitutional.

B. SECTION 2905.34 REVISED CODE INTERFERES UNNECESSARILY WITH THE CONSTITUTIONAL RIGHT OF PRIVACY.

It is urged that Section 2905.34 REVISED CODE be struck down by this Court as an unconstitutional attempt to use the police power to invade the privacy of the individual.

The right of privacy of the defendant, guaranteed by the Fourth and Fourteenth Amendments of the Federal Constitution, was invaded by her arrest and conviction under the Ohio Obscenity Statute for mere possession of obscene books and photographs.

The general rule relating to this right of privacy is stated in 16 *C. J. S.*, Constitutional Law, Section 574 at p. 606:

> "Right of privacy is guaranteed by state and federal constitutional provisions declaring that no person shall be deprived of liberty except by due process of law. * * * The security of one's privacy against arbitrary intrusion by the police is basic to a free society, and is, therefore, implicitly in the concept of ordered liberty and as such enforceable against the states through the due process clause and were a state affirmatively to sanction such police intrusion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Perhaps the best enunciation of this constitutional guarantee is by United States Supreme Court Justice Frankfurter in *Frank v. Maryland,* 359 U. S. 360, p. 362:

> "We have said that the security of one's privacy against arbitrary intrusion by the police is fundamental to a

free society and as such protected by the Fourteenth Amendment. *Wolf v. Colorado,* 338 U. S. 25, 27, Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests."

And on page 365:

"Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds."

Thus it appears that the right of privacy is given protection under the Fourth Amendment of the Constitution from Federal officials, and under the Fourteenth Amendment of the Constitution from arbitrary interference of State officials.

What is this right of privacy?

It has been defined by Lee Nizer in 39 MICHIGAN LAW REVIEW, at 528 as follows:

"It is the right of an individual to live a life of seclusion and anonymity free from the prying curiosity which accompanies both fame and notoriety. It presupposes a desire to withdraw from the public gaze, to be free from the insatiable interest of the great mass of men

in one who has risen above or fallen below the mean. *It is the recognition of the dignity of solitude of the majesty of man's free will and the power to mold his own destiny, of the sacred and inviolate nature of one's innermost self.*"

The common law has long recognized that certain rights exist and that certain relationships are permitted free from invasion from governmental interference. The personal rights include freedom of speech, press, assembly and religion. Additionally there is the constitutional privilege of a person accused of a crime not to be compelled to testify against himself. The relationships accorded protection are those involving attorney and client, physician and patient, priest and confesser.

As the above rights were one by one being given protection, and the relationships were gaining acceptance, it is only natural that courts should give similar recognition to the sanctity of the individual's right of privacy.

In 39 MICHIGAN LAW REVIEW, at 528, it is further said:

"Progress in this direction indicated that in the natural course of events the common law would expand its scope to include the right of privacy. It is but a short step, for example, from an injunction against the publication of a man's private letters to an injunction against the publication of his picture. One's thoughts, emotions and sensations are as much a part of him as his arms and legs. Not all the pain, pleasure and profit of life come from physical things; man's spiritual nature, too requires legal recognition."

"Five hundred years of legal history reveal the progressive growth of the 'right to inviolate personality.' What were originally deemed the minimum rights of man ordained by nature itself have been expanded to include newer concepts of man's right to enjoy un-

molested a fuller and richer life more consonant with the dignity of human existence."

Since the time of the Warren-Brandeis article on the Right to Privacy in 4 HARVARD LAW REVIEW 192, our Courts have recognized the civil remedy which an individual has against another for an unreasonable invasion of his privacy. Surely, an individual is no less entitled to the enjoyment of this right of privacy safe from abitrary interference from governmental agencies.

The right of a citizen to possess and control books and photographs, even if they be obscene, is a right such citizen is entitled to enjoy without interference by police officers.

Admittedly, there may be certain instances where the private possession of obscene literature and photographs would lead to unlawful and socially undesirable practices, and it is possible that the exercise of police power in seizing such materials might in some few instances eliminate the occasion of such illegal or undesirable practices. However, the danger to society arising out of sanctioning police interference in the private lives of our citizens far outweighs any good that might be derived from uncovering and destroying allegedly obscene material.

No doubt the state which George Orwell so eloquently described in his book *Nineteen Eighty Four* was a state in which human defection was kept to the absolute minimum —a state in which the supervision over the individual by Big Brother and colleagues was so comprehensive that the citizens within the community found it impossible to do other than that which was socially good. But this state in intruding itself into the private lives of the members of Orwell's mythical society had, by its regimentation, all but destroyed that divine spark which separates the human being from the animal kingdom. Under the watchful eye

of Big Brother the citizen may have become more efficient, but the price of such efficiency was the loss of all human dignity.

The danger to individual freedom which would come about were the police authorities able to arrest and detain persons for private possession of obscene material far outweighs any benefit that would accrue to society if all such materials were seized and destroyed.

There appears to be a dearth of cases dealing with violation of due process or violation of the right of privacy in situations similar to the one at bar. The only utterance on the subject by an Appellate Tribunal of any State as well as the Federal Government has been that of the Ohio Supreme Court in the within case. *State of Ohio v. Mapp,* 170 O. S. 427 (1960).

The absence of these cases may be attributed to the unusual and far reaching character of the Ohio Statute on this subject. Most state statutes punish only the exhibition or sale of obscene matter but not the mere possession thereof.

Perhaps the closest case in point is *DiMello v. Gabrielson,* 34 Hawaii 459 (1938), where it was held that it is a violation of the due process clause of the Federal Constitution for a police officer to compel a person who is not under arrest on a criminal charge to submit to the taking of his finger prints and photograph.

The Court said on page 465:

> "Human freedom is too precious a heritage and has been achieved at too great a cost of blood and suffering to be jeopardized by the acts of police authorities done without the sanction of law and in disregard of constitutional mandate."

We believe that the Ohio Statute should be declared unconstitutional. Perhaps the best expression of this feel-

ing is to be found in the dissenting opinion of Justice Brandeis in *Olmsted v. United States,* 277 U. S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

C. SECTION 2905.34 READ TOGETHER WITH SECTIONS 2905.37 AND 3767.01, REVISED CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment to the United States Constitution requires that laws apply equally to all persons similarly situated. Legislatures have the inherent right and power to make classifications, but such classifications must be based upon real and substantial distinctions in the nature of the class or classes upon which the law operates.

Missouri ex rel. Gaines v. Canada, 305 U. S. 337:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins,* 118 U. S. 356; *Missouri ex rel. Gaines v. Canada,* 305

U. S. 337 (cited in quotation) *Skinner v. Oklahoma,* 316 U. S. 535."

It is submitted that Section 2905.37 REVISED CODE, and the last sentence in Section 3767.01 C, REVISED CODE, do create unreasonable and arbitrary classifications in exempting from the operation of Section 2905.34, REVISED CODE, the following persons similarly situated with other persons whose conduct is deemed criminal thereby:

1. Druggists.
2. Persons belonging to "bonafide associations for the advancement of art," or whose work is made, published and distributed by such association.
3. Art associations not organized for profit.
4. Newspapers, magazines, or other publications entered as second class matter by the Post Office Department.

Section 2905.37 provides in part:

"Sections 2905.33 to 2905.36 inclusively of the Revised Code do not affect * * * *druggists in their legitimate business,* nor do they affect the publication and distribution of bonafide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is *made, published, and distributed by a bonafide association of artists or an association for the advancement of art* whose demonstrated purposes does not contravene Sections 2905.06 and 2905.04 inclusive, of the Revised Code, and which is *not organized for profit.*"

Section 3767.01 C provides in part:

"* * * this section and Sections 2905.34 * * * 2905.37 * * * of the Revised Code shall not affect * * * *any newspapers, magazine, or other publication entered as second class matter by the Post Office Department.*"

When a statute grants a privilege or immunity to one and denies it to another in the same class it denies equal protection of the laws.

That the classifications listed above make an act penal if done by one or not so if done by another, can be illustrated by the following examples:

(1) It is common knowledge that druggists in their legitimate business handle newspapers, magazines, paperback books and the like. A druggist handling material deemed obscene is not affected while anybody else handling the same material is guilty of a crime. In fact the druggist would be immune from prosecution but his customer would not be.

(2) A person may create an article which if "made, published, and distributed by a bonafide association of artists or an association for the advancement of art * * *" would not be affected by Section 2905.34 R. C. However, if he created the same article *independently,* he would be affected.

(3) The Association would be affected if the same person cited above, even if he belonged to an association was *for profit* instead of being *non-profit.* The U. S. Supreme Court in *Durstyn, Inc., v. Wilson,* 343 U. S. 495 at pp. 501-2 indicated that the fact that motion pictures were produced for profit had no bearing on whether they were entitled to the protection of the First Amendment. Similarly, with the present statute, it is difficult to find any reason why the same conduct done for profit should constitute a crime when, if not done for profit, it would not.

(4) A newspaper, magazine, or other documents containing obscene matter, if entered as 2nd class mail would be free from the penalties imposed by Section 2905.34, REVISED CODE. Yet, if the same matter were printed elsewhere or sent by any other class of mail it would fall under Section 2905.34. The California Supreme Court declared unconstitutional a Los An-

geles County ordinance which attempted to prohibit the sale and distribution of crime comic books on the ground that the ordinance unreasonably exempted certain types of comic books and strips. *Katzev v. Los Angeles,* 341 P. 2nd 310. Included within the exemptions in the ordinance was one which exempted those accounts of crime which appeared in newspapers of general circulation.

The Court stated on page 316:

"Because these exemptions are not related to the purported purposes of the legislation they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws.

"Where the legislative classification is unreasonable, the courts will invalidate the law. In *Franchise v. Motor Freight Association v. Seavey,* 196 Cal. 77, 81, 235. P. 2d 1,000, 1,002, we said that 'a Statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger class of persons all of whom stand in the same relation to the privileges granted and between whom, and the persons not so favored, no reasonable distinction or substantial developments can be found to justify the inclusion of the one and the exclusion of the other.' "

In *Skinner v. Oklahoma,* 316 U. S. 535 the Court struck down a state sterilization statute because it applied to habitual criminals having committed grand larceny but not those having committed embezzlement although the statutes made both crimes felonies and provided the same punishment for both. The Court stated that the "* * * Nature of the crimes is basically the same * * *" 539.

Similarly, under Section 2905.34, REVISED CODE, the conduct, i.e. possession of obscene material, is intrinsically the same. Thus, it should be criminal whether possessed by a druggist, non-profit art association, or sent in a newspaper or other pub-

lication entered as second class mail. There seems to be no social good to be derived from granting immunity to these classes as there is from granting it to those teaching in medical colleges, printing it in medical books or doctors using it in the regular practice of medicine. Since the classifications are without real substance or distinction, the statute must fall as being a denial of equal protection of the laws.

D. USE OF EVIDENCE OBTAINED IN AN ILLEGAL SEARCH AND SEIZURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf v. Colorado*, 338 U. S. 25. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings.

CONCLUSION.

This Court has before it a statute which gives to the state excessive police powers. This statute, which prohibits mere possession of obscene literature or photographs, permits the state unfairly and arbitrarily to intrude itself into the private lives of its citizens. Because of the exemptions granted, it denies persons the equal protection of the laws. This Court should reverse the conviction because the statute under which defendant-appellant was convicted is constitutionally defective and because it would be an unconstitutional deprivation of the liberty of defendant to apply such statute to the facts of her case.

Respectfully submitted,

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