

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 4: The Early National Era – Individual Rights/Free Speech/Free Speech in the States/Obscenity

Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (PA 1816)

On March 1, 1815, Jesse Sharpless displayed a painting of a man and a woman in an “indecent posture.” He was subsequently indicated, tried, and convicted for exhibiting an obscene picture. Sharpless appealed to the Supreme Court of Pennsylvania. He claimed that, because the exhibition was private, he had not published an obscenity, and that the appeals court should examine the painting when determining whether the painting was obscene.

The Supreme Court of Pennsylvania unanimously rejected this appeal. Chief Justice Tilghman ruled that the picture was obscene, that the court could determine obscenity from the description, and that the private showing of an obscene painting supported an indictment under common law. How did the justices define obscenity? Why did they believe obscenity must be punished? Suppose we included in this text a copy of the painting Sharpless exhibited. Could we be punished under Commonwealth v. Sharpless?

CHIEF JUSTICE TILGHMAN

That actions of *public indecency* were always indictable, as tending to corrupt the public morals, I can have no doubt; because, even in the profligate reign of Charles II, Sir Charles Sedley was punished by imprisonment and a heavy fine for standing naked in a balcony, in a public part of the city of London. . . . The courts are guardians of the public morals, and therefore, have jurisdiction in such cases. Hence, it follows, that an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals; although it be not committed in public. . . .

. . . The defendants are charged with *exhibiting and showing to sundry persons, for money, a lewd, scandalous and obscene painting*. A picture tends to excite lust, as strongly as a writing; and the *showing* of a picture is as much a *publication*, as the *selling* of a book. . . . [I]f the privacy of the room was a protection, all the youth of the city might be corrupted, by taking them, one by one, into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eye of the law, this would be a *publication*, and a most pernicious one. . . .

The second reason in arrest of judgment is, that the picture is not sufficiently described in the indictment. It is described as *a lewd and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman*. We do not know that the picture had any name, and therefore, it might be impossible to designate it by name. What then is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records; these are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the *evidence*, or, if necessary, from *inspection*. . . .

JUSTICE YEATES

. . . The destruction of morality renders the power of the government invalid, for government is no more than public order; it weakens the bands by which society is kept together. The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in

such instances, courts of justice are, or ought to be, the schools of morals. . . . The wicked intention of the defendants; the exhibition of the obscene painting for money, to persons unknown; and the effects of such scandalous conduct, are facts found by the jury, and I cannot bring my mind to doubt for a single moment, that the offence charged falls within cognisance of a court of criminal jurisdiction.

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As to the nature and manner in which the painting is represented to have been made, I hold it to be sufficient to state, that it represented a man in an obscene impudent, and indecent posture with a woman, either clothed or unclothed, without wounding our eyes or ears, with a particular description of their attitude or posture. Why should it be so described? If the jurors are satisfied, on the proof, that the persons represented were painted in an impudent and indecent posture, will not this give the court all the information they can require? Some immodest paintings, it is true, may carry grosser features of indecency than others, and in fact, may produce disgust in the minds even of the most debauched; yet, if the painting, here, tended to the manifest corruption of youth and other citizens, and was of public evil example to others, I think it sufficiently described. . . .

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