

## NIMLO MODEL COMIC BOOK ORDINANCE

[EDITOR'S NOTE: See first: *Ginsburg v New York*, 20 L. ed. 2d 195 (1968). In 1948, when the problem of objectionable comic books first gained national attention, NIMLO released Report No. 124, "Comic Books—Municipal Control of Sale and Distribution—A Preliminary Study." The Report discussed the then recent case of *Winters v. New York*, 333 U. S. 507, 68 Sup. Ct. 665, 92 L. ed. 840 (1948), where a New York Statute which prohibited the distribution of magazines composed principally of criminal news or stories of bloodshed or lust was declared "vague" and indefinite and thus a denial of the rights of freedom of press and speech because the statute failed to give fair notice of what acts would be punished.

An *Opinion* by the County Counsel of Los Angeles County to the Board of County Supervisors was reproduced in full in the Report. The *Opinion* aptly pointed out that the *Winters* case did not close the door on control of this type of literature by the states and their subdivisions, and an accompanying proposed ordinance, designed to meet all constitutional objections, was submitted to the Board. See, however, the decisions by the Supreme Courts of California and Nebraska which held the Los Angeles County and Omaha comic book ordinances unconstitutional because of vague and indefinite standards. *Katzev v. County of Los Angeles*, 341 P (2d) 310 (1959) and *State v. Nelson*, 95 N. W. (2d) 678 (1959).

The Supreme Court of the United States in the recent case of *Smith v. The People of the State of California*, 28 U. S. L. Week 4033 (December 14, 1959), held that the City of Los Angeles ordinance imposing criminal liability upon a bookseller for possession of an obscene book in his store, without proof that he knew of its obscene character, violates the First and Fourteenth Amendments' free speech guarantee. However, the Court at 28 LW 4034-35, stated: "We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth v. United States*, 354 U. S. 476. The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if there in fact is to be found in his shop an obscene book. But our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. . . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

In the light of the *Smith* case, *supra*, the NIMLO Model Comic Book Ordinance which follows has been amended so as to require scienter in all pertinent provisions. See the *Roth* opinion, *supra*, which also decided *Alberts v. California* and upheld the general California obscenity statute, Penal Code § 311, requiring scienter.

NIMLO has continued its study of the problem and now submits a revised model ordinance which attempts to meet the requirements by the courts. See Cook, *Municipal Corporations and Obscene Literature* in NIMLO MUNICIPAL LAW REVIEW (1954) at page 444; and Workshop Session entitled "Obscene Literature and Crime Comic Books," which discusses all the most recent cases involving these two subjects, reproduced in NIMLO MUNICIPAL LAW REVIEW 1960 edition.

An Ordinance Prohibiting the Presence in the City of Illustrated "Comic" Books, Magazines, and Publications of an Obscene Nature; Prohibiting the Presence in the City of "Comic" Books, Magazines and Publications Giving Illustrated Accounts of Specified Crimes; Stating the Presumption Raised

Upon Display of Prohibited Publications; and Providing Penalties for Violations of Its Provisions.<sup>1</sup>

WHEREAS, The City Council of . . . . . finds and determines that there is a great increase in the number and variety of illustrated "comic" books, magazines and other publications of the type prohibited by this Ordinance being offered for sale in the City; and

WHEREAS, Many of such "comic" books, magazines and publications are designed and formed so as to resemble closely other publications devoted in substance to matters of humor and published primarily for sale to children, in many instances being placed for sale side by side with the humorous publications; and

WHEREAS, Certain of the "comic" books, magazines and publications specified in this ordinance deal in substantial part with subject matter of an obscene nature tending to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires; and

WHEREAS, Certain of the "comic" books, magazines and publications specified in this ordinance deal in substantial part with accounts of crime tending to incite children below the age of eighteen years, being of susceptible and impressionable character, to commit crimes similar to or identical with those prohibited by this ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF . . . . . :

SECTION 7-601. *Definitions.* For the purposes of this ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.

- ( ) "City" is the City of . . . . .
- ( ) "Council" is the Council of the City of . . . . .
- ( ) "Person" is any person, firm, partnership, association, corporation, company or organization of any kind.

SECTION 7-602. *Obscene Publications Prohibited.* It shall be unlawful and an offense for any person, with knowledge of the contents thereof, to sell, offer for sale, attempt to sell, exhibit, give away, keep in his possession with intent to sell or give away, or in any way furnish or attempt to furnish to any person any illustrated comic book, magazine or other publication which, read as a whole, is of an obscene nature.

<sup>1</sup> The titles of the ordinances studied in preparing this model ordinance varied in accordance with the requirements of constitutional, charter or legislative provisions covering each particular city. Attorneys for each city must therefore rewrite the title of the model ordinance so as to satisfy any local, constitutional, charter or statutory directive requiring that every

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SECTION 7-603. *Certain Crime Publications Prohibited.* It shall be unlawful and an offense for any person, with knowledge of the contents thereof, to sell, offer for sale, attempt to sell, exhibit, give away, keep in his possession with intent to sell or give away, or in any way furnish or attempt to furnish to any child under the age of eighteen (18) years any "comic" book, magazine or other publication which, read as a whole, is concerned with an account of crime and which depicts, by the use of drawings, the following crimes as defined in the several chapters and articles of the Penal Code of the State of . . . . .

- (a) administering poisonous and injurious potions
- (b) aggravated assault
- (c) arson and other willful burning
- (d) assault in attempting burglary
- (e) assault to maim or disfigure
- (f) assault with intent to commit rape
- (g) assault with intent to commit robbery
- (h) assault with intent to murder
- (i) burglary
- (j) false imprisonment
- (k) kidnapping and abduction
- (l) maiming and disfiguring
- (m) malicious mischief
- (n) murder
- (o) rape
- (p) robbery
- (q) theft
- (r) conspiracy to commit any of the foregoing offenses.

(1) *Intent Where Text Is Not Prominently Featured.* It is the intent of this Ordinance to include publications where the text is not prominently featured, but rather is incidental to the picture, being usually in the balloons that indicate the words spoken by the characters.

(2) *News Accounts Not Included.* This Ordinance shall not be construed to apply to those accounts of crime which are part of the ordinary and general dissemination of news, nor to such drawings and photographs as are used to illustrate such accounts.

(3) *Historical or Literary Publications Not Included.* This ordinance shall not be construed to apply to legitimate, illustrated, historical accounts of crime or crimes.

SECTION 7-604. *Presumption from Displaying.* If any publication prohibited hereunder shall be displayed in any newsstand, book store, drug store, market, or other mercantile establishment, where the said prohibited publication may be seen by any child under the age of eighteen (18) years visiting such establishment, such display shall be prima facie evidence that the person in charge of such establishment was then exhibiting the crime "comic" book or other prohibited publication, with knowledge of the contents thereof, and intended to sell, offer

for sale, furnish or attempt to furnish such prohibited publication to a child or children under the age of eighteen (18) years in violation of this Ordinance, but it shall be competent for the defendant in any such case to show that no such intention existed.

SECTION 7-605. *Penalties.* Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in an amount not exceeding . . . . . dollars or be imprisoned in the . . . . . jail for a period not exceeding . . . . . or be both so fined and imprisoned. Each day that such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such hereunder. If more than one publication prohibited hereunder shall be offered, exhibited, kept or displayed in violation of this ordinance, at the same location by the same person, the offer, exhibiting, keeping or display of each separate publication prohibited hereunder shall constitute a separate offense and shall be punished as such hereunder. If two or more publications prohibited hereunder are furnished or sold at the same time by the same person, the sale or furnishing of each shall constitute a separate offense and shall be punishable as such hereunder.

SECTION 7-606. *Separability.* See Section 8-1603, NIMLO Model Ordinance Service.

SECTION 7-607. *Ordinances Repealed.* See Section 11-316, NIMLO Model Ordinance Service.

#### ANNOTATIONS TO NIMLO MODEL COMIC BOOK ORDINANCE

SECTION 7-602. *Obscene Publications Prohibited.* As pointed out in Report No. 124, numerous states have statutes which prohibit the sale of obscene literature. This section is included to remind draftsmen of the distinction between the several kinds of objectionable matter and to offer a model provision where the state has not acted. "Obscene" has been the subject of judicial definition by both state and federal courts. It is to be noted that "obscenity" statutes and ordinances traditionally have reference to persons generally and are not directed solely at children.

SECTION 7-603. *Certain Crime Publications Prohibited.* This section attempts to meet the requirements of the cases by:

- (1) Specifically designating the persons within its scope.
- (2) Concerning itself only with children under eighteen.
- (3) Requiring that illustration be essential to the offense.
- (4) Specifically designating the prohibited matter.
- (5) Specifically covering (sub-section (1)) a popular type of publication which the preamble purports to condemn and thus harmonizing purpose and effect. See *Dickey Case, supra.*
- (6) Excluding (sub-section (2)) accounts of crime part of the ordinary and general dissemination of news.
- (7) Excluding (sub-section (3)) legitimate historical ac-