GINSBERG v. NEW YORK

SUPREME COURT OF THE UNITED STATES
390 U.S. 629
April 22, 1968
[6 - 3]

OPINION: Justice Brennan...This case presents the question of the constitutionality..of a New York criminal obscenity statute which **prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults**.

Appellant and his wife operate "Sam's Stationery and Luncheonette" in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called "girlie" magazines. Appellant was...[charged with selling] a 16-year-old boy two "girlie" magazines ...in violation of...the New York Penal Law. He was...found guilty...The judge found (1) that the magazines contained pictures which depicted female "nudity" in a manner defined in subsection 1(b), that is "the showing of...female...buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple...," and (2) that the pictures were "harmful to minors" in that they had, within the meaning of subsection 1(f) "that quality of...representation...of nudity...[which]...(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." He held that both sales to the 16-year-old boy therefore constituted the violation under §484-h of "knowingly to sell...to a minor" under 17 of "(a) any picture...which depicts nudity...and which is harmful to minors," and "(b)

any...magazine...which contains...[such pictures]...and which, taken as a whole, is harmful to minors." The conviction was affirmed...We affirm.

The "girlie" picture magazines involved in the sales here are not obscene for adults...The three-pronged test of subsection 1(f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth*[1]...Appellant's primary attack upon §484-h is leveled at the power of the State to...define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression...

[Appellant]...insists that the denial to minors under 17 of access to material condemned by §484-h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty...We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors...We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms...§484-h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests..." of such minors. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts.* **The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility**. Indeed, subsection 1(f)(ii) of §484-h expressly recognizes the parental role in assessing sex-related material harmful to minors according "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

The State also has an **independent interest** in the well-being of its youth...In *Prince v. Massachusetts*, this Court...recognized that the State has an interest...to see that [children] are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." The only question remaining...is whether the New York Legislature might rationally conclude...that exposure to the materials proscribed by §484-h constitutes..."abuse."

...To sustain state power to exclude material defined as obscenity by §484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors...We...cannot say that §484-h...has no rational relation to the objective of safeguarding such minors from harm...*Affirmed*.

CONCURRENCE: Justice Stewart...I think a State may permissibly determine that, at least in

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[1]Case 1A-S-10 on this website.

some precisely delineated areas, a child... is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights -- the right to marry, for example, or the right to vote -- deprivations that would be constitutionally intolerable for adults...

DISSENT: Justice Douglas/Black...If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called "obscene" book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of "sin."

That, however, was the view of our preceptor in this field, Anthony Comstock, who waged his war against "obscenity" from the year 1872 until his death in 1915. Some of his views are set forth in his book *Traps for the Young*, first published in 1883...The title...refers to "traps" created by Satan "for boys and girls especially." Comstock, of course, operated on the theory that every human has an "inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment." In his view any book which tended to remove that fear is a part of the "trap" which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do. It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873...[and] the New York Act which soon followed...I would conclude from Comstock and his *Traps for the Young* and from other authorities that a legislature could not be said to be wholly irrational...if it decided that sale of "obscene" material to the young should be banned.

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate...is directed to **any** law "abridging the freedom of speech, or of the press." I appreciate that there are those who think that "obscenity" is impliedly excluded; but I have indicated on prior occasions why I have been unable to reach that conclusion. And the corollary of that view...is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of "obscenity" is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. **The "juvenile delinquents" I have known are mostly over 50 years of age.** If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for "protecting" many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should be done to stop the flow. **It is one thing for parents and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor**. As I read the First Amendment, it was designed to keep...the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business. **I think it would require a constitutional amendment to achieve that result**. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. **Censors are, of course, propelled by their own neuroses. That is why a universally accepted definition of obscenity is impossible...**Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it. That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old. I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.

DISSENT: Justice Fortas...[Not Provided.]