The Catholic Lawyer

Volume 13 | Number 2 Article 7

December 2016

New York's "Minor" Obscenity Statute Held Constitutional

RECENT DECISION

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A seventeen year old youth, following a prearranged plan, purchased two "girlie" magazines from the defendant, a cigar store proprietor, who was then arrested for violating Section 484-i of the New York Penal Law which prohibits the sale or delivery of pornographic material to minors under the age of eighteen. In affirming his conviction, the Court of Appeals *held* that, although scienter as to age was not an element of the violation, the statute was neither a limitation on the first amendment freedoms of speech and press nor unconstitutionally vague. *People v. Tannenbaum,* 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966).

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." [1] This does not mean, however, that a citizen has an absolute right to speak or publish whatever he deems fit.[2] When the expression of a person is adversely prejudicial to the public welfare, federal and state governments have the power to prohibit such expression.[3]

In *Roth v. United States,*[4] the United States Supreme Court declared that "obscenity" is not within the area protected by the constitutional guarantees of free speech or press.[5] The Court stated that in determining obscenity the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." [6] The term "contemporary community standards" has been construed to mean not the standards of the particular local

[1] U.S. CONST. amend. I.

[2] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[3] *Id.* at 667. In *Gitlow,* writings which advocated, advised and taught the overthrowing and overturning of organized government by force, violence and unlawful means were found to be inimical to the public welfare. In Fox v. Washington, 236 U.S. 273 (1915), it was held that the wilful printing and circulation of material advocating or encouraging the commission of a crime or the breach of the peace to be adversely prejudicial to the public welfare. See also Patterson v. Colorado, 205 U.S. 454 (1907).

[4] 354 U.S. 476 (1957).

[5] *Id.* at 485.

[6] *Id.* at 489.

community from which the case arises, but those of the nation as a whole.[7] The *Roth* test has been qualified in that the material must also be "patently offensive." [8] This means that the material must be so offensive on its face, "as to affront community standards of decency." [9]

Aside from the material's "appeal to prurient interest," another element of the test—implied in *Roth* and specifically stated in *Memoirs v. Massachusetts* [10] — is that the material must also be "utterly without redeeming social importance," [11] *i.e.*, the material must be lewd for the sake of being lewd, offensive for the sake of being offensive.

A further refinement of the concept of prurient interest was made in *Mishkin v. New York*.[12] Mr. Justice Brennan, speaking for the Court, adopted the position that the prurient appeal requirement is satisfied if the dominant theme of the material appeals to the prurient interest of a clearly defined deviant sexual group where such material is designed for and primarily distributed to that group.[13] *Ginzburg v. United States*,[14] a companion case to *Mishkin*, added that, in close cases,

> where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.[15]

Thus the element of "pandering" was introduced, whereby consideration was given to the business of disseminating materials advertised to appeal to erotic interests.

It is important to note that, although a state cannot define obscenity in terms broader than those laid down by the United States Supreme Court, a state, of its own accord, may apply a definition of obscenity narrower than that expressed by the Court; it may voluntarily limit the ambit of its control. Thus, New York, in applying its statute controlling the dissemination of obscene material to adults, has defined obscenity as "hard-core pornography." [16]

When the federal or state government seeks to enact laws restricting freedom of expression, the power of said governments to do so is limited by the due process clauses of the fifth and fourteenth amendments, *i.e.*, the standards embodied in the legislation may not be unduly vague or difficult of ascertainment. Thus, in *Winters v. New York*,[17] the United States Supreme Court held a New York obscenity statute [18] unconstitutional on these grounds. This statute's prohibition was not limited to the indecent and obscene, but, in addition, prohibited the publication of detective stories, criminal treatises and stories of deeds of bloodshed when

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[7] Jacobellis v. Ohio, 378 U.S. 184 (1964).
[8] Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).
[9] *Id.* at 482.
[10] 383 U.S. 413 (1966).
[11] *Id.* at 418.
[12] 383 U.S. 502 (1966).
[13] *Id.* at 508.
[14] 383 U.S. 463 (1966).
[15] *Id.* at 475-76.
[16] Mishkin v. New York, *supra* note 12, at 506, 508.
[17] 333 U.S. 507 (1948).
[18] N.Y. Sess. Laws 1941, ch. 925, § 1(2).

so massed as to incite a person to violent and depraved crimes even though such a result was not intended by the publisher.[19]

Turning from the general constitutional limitations applicable to *any* statutory regulation, a limitation unique to obscenity regulations is the requirement of scienter of content. In *Smith v. California*,[20] the Supreme Court declared unconstitutional a California ordinance imposing criminal liability on any person who had in his possession any obscene or indecent publication in a place of business where books are kept or sold. The fundamental defect in the ordinance was the lack of any requirement as to knowledge on the part of the bookseller of the book's contents. This operated, in effect, to place strict liability upon the bookseller and would have forced him to restrict the books he sold to those he inspected, resulting in a restriction not only upon obscene matter, but also upon the distribution of material constitutionally protected.[21]

The broad standards which the Supreme Court has laid down as regards obscenity have caused state governments much concern in the area of regulation of dissemination of material not obscene as to adults, but unfit for minors. It has been recognized that the authority of the state over the activity of children is broader than that over similar adult conduct.[22] In an attempt to exercise its authority over the activity of children, New York enacted *former* Section 484-h of the New York Penal Law.[23] In *People v. Bookcase, Inc.*,[24] appellants had been convicted of violating *former* section 484-h. In reversing the conviction, the Court of Appeals held that that *part* of the statute which read "any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality . . ." [25] was so broad and obscure as to violate the First Amendment to the United States Constitution, and the due process clause of the New York constitution.[26] The fact that the statute was applicable only to minors had no bearing on the constitutional issue. The Court maintained that, if the statute were to be given effect, great works of literature would be deemed illicit reading for the young, since anything dealing with sex would come under the prohibition of this statute regardless of whether the material was fictional, sociological or morally instructive in nature.

Similarly, in *People v. Kahan*,[27] the Court found the *entire* statute unconstitutional due to the vagueness of its substantive definitions. In addition, the Court believed the statute defective in that it lacked a provision making scienter of the content and of the age of the purchaser essential for conviction. Judge

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[19] Winters v. New York, 333 U.S. 507, 519 (1948).

[20] 361 U.S. 147 (1959).

[21] *Id.* at 153-54.

[22] Prince v. Massachusetts, 321 U.S. 158 (1944).

[23] N.Y. Sess. Laws 1955, ch. 836, § 542.

[24] 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

[25] N.Y. Sess. Laws 1955, ch. 836, § 542.

[26] N.Y. CONST. art. 1, § 6: "No person shall be deprived of life, liberty or property without due process of law."

[27] 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam).

Fuld, concurring, felt this type of regulation to be a constitutional exercise of the state's authority. He reasoned that, although parental supervision of a child's reading may be best, such parental control or guidance cannot always be provided, and society's transcendent interest in protecting the welfare of children permits that such authority be exercised.[28] Judge Fuld added, however, that the definition of obscenity in such a statute should be "reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." [29]

As a result of *former* Section 484-h of the New York Penal Law being held unconstitutional, the New York legislature enacted two new sections—*present* section 484-h, applicable to minors under seventeen, and section 484-i, applicable to minors under eighteen.

In *Bookcase, Inc. v. Broderick,*[30] the New York Court of Appeals, in reviewing *present section* 484-h, held that a state may constitutionally enact legislation which differentiates the standards of obscenity as to adults and minors.

The Court pointed out that when the law is applied, a three-element definition of what is "harmful to minors" is to be used. First, the material must predominantly appeal to the prurient, shameful or morbid interest of minors; second, it must be patently offensive to prevailing standards of what is suitable for minors; third, it must be utterly without redeeming social importance.

In the principal case, the defendant sold a seventeen year old a magazine entitled "Candid." The cover of the magazine exhibited a picture of a seductively posed girl clad only in skimpy undergarments. In addition to the pictorial representation, the cover described the contents, each article having a provocative title. The lower left hand corner stated: "Sale to Minors Forbidden." The magazine was devoted purely to sex, featuring tales of sex orgies and pictures of nudes. The advertisements contained therein promoted mail-order photographs and motion pictures of nudes, sexual devices and handbooks. In a prosecution under 484-i, 484-h not being in issue under the particular facts of the case, the Court of Appeals concluded that the magazine came within the restrictions imposed by the new section of the penal law, which prohibits the sale of such material to a person under the age of eighteen, the vendor having knowledge of its contents.[31] Having so decided, the Court turned its attention to the defendant's constitutional attacks upon the statute.

Initially, it was contended that section 484-i is so vague that conviction under the statute would deprive defendant of due process of law. In rejecting this contention, the Court found that the material subject to restriction is clearly defined.

Judge Keating, speaking for the majority, indicated that the obscenity stan-

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[28] *Id.* at 312, 206 N.E.2d at 334, 258 N.Y.S.2d at 392 (concurring opinion).

[29] *Id.* at 313, 206 N.E.2d at 335, 258 N.Y.S.2d at 393.

[30] 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1966).

[31] People v. Tannenbaum, 18 N.Y.2d 268, 271, 220 N.E.2d 783, 785, 274 N.Y.S.2d 131, 134 (1966).

dard under the various subdivisions proscribed material which was

> 'posed or presented in such a manner as to exploit lust for commercial gain *and* . . . which would appeal to the lust of persons under the age of eighteen years *or* to their curiosity as to sex *or* to the anatomical differences between the sexes. . . .' [32]

In analyzing this standard it was pointed out that a conviction under the statute would not be based merely on the dissemination of material which appeals to the minor's curiosity as to sex or to the anatomical differences between the sexes. In interpreting the language of the statute, the provision was found to be primarily aimed at pandering. Hence, in addition to arousing the minor's curiosity, prohibited material must be posed or presented in such a manner as to exploit lust for commercial gain. On the basis of this construction of 484-i, it was felt that the statute did not "spill over into the area of constitutionally protected matter." [33]

In further support of its construction, the Court noted that the statute expressly provided that obscenity is to be distinguished from "flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks." [34] The purpose of such material not being the exploitation of lust for commercial gain, the Court felt confident that legitimate works of art, educational texts and literature with redeeming social value were not within the ban of section 484-i. Countering appellant's contention that the term "obscene" was indefinite and vague, the Court held that the statute provided a workable standard insofar as it gave clear and unequivocal warning of the conduct to be avoided, *i.e.,* pandering.[35]

A second constitutional objection raised by the defendant was based upon an extension of the first amendment protection of free speech and press. Relying on the reasoning of *Smith v. California,* it was contended that the failure to require proof of scienter on behalf of the bookseller as to the age of the purchaser would tend to restrict the bookseller in the material he would sell to persons whose membership in the eighteen and over age bracket was questionable, and would, in effect, be a state imposed restraint on the sale of constitutionally protected literature. While recognizing that scienter of content is a constitutional requirement of any obscenity statute, the Court refused to accede to the defendant's argument that the rationale underlying the scienter of *content* requirement in *Smith v. California* mandated a constitutional requirement of scienter as to *age.*[36]

In so deciding, the Court distinguished the situation presented in *Smith* from the present case, finding a major difference between

> requiring the bookseller to read every piece of material which he chooses to sell and requiring him to inquire after and

[32] *Id.* at 271, 220 N.E.2d at 786, 274 N.Y.S.2d at 135. (Emphasis added.)
[33] *Ibid.*
[34] *Ibid.*
[35] *Id.* at 272-73, 220 N.E.2d at 787, 274 N.Y.S. 2d at 135-36.
[36] *Id.* at 273, 220 N.E.2d at 787, 274 N.Y.S.2d at 137.

> establish the age of those persons who will fall within the doubtful age bracket.[37]

The number of situations in which inquiry would be necessary were considered to be few in comparison to the total number of purchasers.

The Court noted that the protections granted by the first amendment are not absolute, and, therefore, Section 484-i of the Penal Law was to be viewed in light of its "reasonableness in relation to the legitimate end to be obtained." [38] Adopting such an approach, the Court found that the imposition of strict liability as to age did not cause the statute to *unduly* inhibit the free dissemination of literature.

Judge Fuld, dissenting, believed that the legislature could constitutionally restrict the distribution of certain materials to minors, the distribution of which could not be restricted as to adults, but thought that a conviction could not be sustained under Section 484-i of the Penal Law.[39] Judge Fuld considered the statute unconstitutional in that it was defective with regard to its "substantive definition" and its failure to require scienter as to age.

Inasmuch as section 484-i proscribes the sale of material which appeals to the curiosity of minors "as to sex or to the anatomical differences between the sexes," minors being those "actually or apparently under the age of eighteen years," it was thought that such standards in and of themselves were patently insufficient and impermissible predicates for penal liability. Apart from the fact that such standards would cover both married teenagers and children of tender years, the statute was considered as indiscriminately punishing the dissemination of material which evoked a healthy curiosity about sex. Taken literally, and without the pandering provision, Judge Fuld believed that the statute would outlaw instructive courses, such as sex and hygiene education, and would bar a minor from access to the paintings of the great masters.

With regard to the pandering "limitation" of the statute, the dissent considered the added requirement that the material be "presented in such a manner as to exploit lust for commercial gain," to be of no saving value. Even if this was a limitation, the statute was still too broad. Relying upon the recent decision of the Supreme Court in *Ginzburg,* the dissent pointed out that the intent of the seller, or his presentation, "does not deprive publications or other works which are not questionable of their constitutional protection." [40] It was further noted that the

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[37] *Id.* at 274, 220 N.E.2d at 788, 274 N.Y.S.2d at 137.

[38] *Id.* at 275, 220 N.E.2d at 788, 274 N.Y.S.2d at 138. See Fagan, *Obscenity Control and Minors—The Case for a Separate Standard,* 10 CATHOLIC LAW. 270, 278 (1964), wherein the author states:

> The evidence of causal relationship between constant exposure of children to obscene materials and moral degeneracy and juvenile delinquency, even though conflicting, can certainly justify a legislative decision to act in this area despite the fact that it results in some curtailment of adult freedom of press.

[39] It must be noted that while Judge Fuld dissented, he voted for the reversal of conviction "with some reluctance." 18 N.Y.2d at 275, 220 N.E.2d at 788, 274 N.Y.S.2d at 138 (dissenting opinion).

[40] *Id.* at 276, 220 N.E.2d at 789, 274 N.Y.S.2d at 139 (dissenting opinion).

phrase "presented in such manner as to exploit lust for commercial gain" was the exact phrase which the Court held unconstitutionally vague in *People v. Kahan*.[41] Judge Fuld could not discover any gain in precision by re-enactment. Comparing Section 484-h and Section 484-i of the Penal Law, Judge Fuld noted that section 484-h (1) (F) incorporated a number of provisions designed to prevent unconstitutional application of the law, which are not found in section 484-i. Concluding that 484-i does not enable vendors to know with any reasonable degree of certainty exactly what material is condemned, Judge Fuld found the statute to be unconstitutionally vague.

Among the safeguards of section 484-h absent from section 484-i is the requirement of scienter of the bookseller as to the age of the purchaser.[42] By this provision, one who makes an honest mistake as to the purchaser's age has a complete defense to a prosecution under section 484-h; under scction 484-i he is strictly liable.

Taking the point of view opposite to the majority's viewpoint on the issue, the dissent thought the reason for requiring scienter of content was equally valid for holding scienter as to age a constitutional requirement of any criminal obscenity statute. Unlike the majority, the dissent intimated that it believed that instances of sale to persons questionably over eighteen would be large enough to severely restrict distribution of material to adults, particularly in the case of young women. Judge Fuld concluded that in its efforts to protect children, the state has infringed upon the first amendment by hindering the free flow of information and ideas. In answer to the argument that, if scienter as to age is a constitutional requirement it should be read into the statute, Judge Fuld noted that the language of section 484-i is manifestly too explicit and specific to permit such a construction.

Judge Bergan, also dissenting, concurred in the views expressed by Judge Fuld. In addition, he attacked the statute on pragmatic grounds. It was thought that where the prosecution had a choice between a constitutionally sound statute (section 484-h) and a defective statute (section 484-i) the prosecution should rest on the sound statute.[43] To do otherwise would, it was thought, create unnecessary litigation in the federal courts, and leave the ultimate decision on constitutionality in doubt.

In considering this statute in terms of its constitutionality and the protection afforded the minor, one must take cognizance of the conditions extant in society today. Many communities have experienced a growing concern over the moral degeneration of the minor. It has been suggested that an apparent connection exists between this degeneration and the minor's reading of obscene material.[44] In order to allay the fears of their citizens many states have enacted legislation restricting the distribution of obscene ma-

[41] 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S. 2d 391 (1965) (per curiam). It is to be noted that the opinion of the Court in *Kahan*, regardless of Judge Fuld's supposition, criticized no specific language, but only found "definitional defects" in the statute.

[42] N.Y. PEN. LAW § 484-h(1)(g)(ii).

[43] *Supra* note 31, at 281, 220 N.E.2d at 792, 274 N.Y.S.2d at 143 (dissenting opinion).

[44] Fagan, *supra* note 38, at 274-78.

terials to minors.[45] Section 484-h and Section 484-i of the Penal Law are the most recent efforts by New York to restrict the dissemination of pornographic materials to minors. It is to be noted that section 484-h, which is applicable to minors under the age of seventeen, as opposed to section 484-i, which applies to minors under eighteen, requires scienter of age before criminal prosecution. Section 484-i fails to include such a requirement. The legislature, in specifically omitting a requirement of scienter as to age in section 484-i, enacted a statute which, while apparently satisfying constitutional standards, permeates the area with maximum regulation. In this regard, the legislature has implicitly recognized the necessity for effectively protecting the youth of New York from obscene material.

This is an area of great controversy. In the instant case, it appears that defendant Tannenbaum's violation of section 484-i resulted from a campaign conducted by Operation Yorkville, purposively to test the statute's constitutionality. The New York Court of Appeals has sustained the constitutionality of section 484-i. Nevertheless, the sharp dissent voiced by Judge Fuld indicates the divergence of opinion on this subject. It is probable that the decision of the Court of Appeals will not be allowed to stand unchallenged. It is quite likely that the issue will find its way to the Supreme Court for final determination of its constitutionality.

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[45] *Cf.* Fagan, *supra* note 38.