GINSBERG v. NEW YORK, 390 U.S. 629 (1968)

Argued January 16, 1968.
Decided April 22, 1968.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question of the constitutionality on its face 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 prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two "girlie" magazines on each of two dates in October 1965, in violation of 484-h of the New York Penal Law. The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court.

I.

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 stated in the plurality opinion in Memoirs v. Massachusetts.[1] Appellant's primary attack upon 484-h is leveled at the power of the State to adapt this Memoirs formulation 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's attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly 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.

---

[1] (f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
(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.

Appellant argues that there is an invasion of protected rights under 484-h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in Meyer v. Nebraska; the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in Pierce v. Society of Sisters; and the statute compelling children against their religious scruples to give the flag salute, which was struck down in West Virginia State Board of Education v. Barnette, 319 U.S. 624. We reject that argument. 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. Rather 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 . . . ." Prince v. Massachusetts.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 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.

The State also has an independent interest in the well-being of its youth.

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. In Meyer v. Nebraska we were able to say that children's knowledge of the German language "cannot reasonably be regarded as harmful." That cannot be said by us of minors' reading and seeing sex material. To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state." But the growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." We do not demand of legislatures "scientifically certain criteria of legislation." We therefore cannot say that 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

Affirmed.

MR. JUSTICE STEWART, concurring in the result.

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute. But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees.

I think a State may permissibly determine that, at least in 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.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

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 state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature.

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.