

NEW YORK STATUTE PROHIBITING SALE OF COVERLESS BOOKS HELD UNCONSTITUTIONAL

People of the State of New York v. Bunis
9 N.Y.2d 1, 172 N.E.2d 273 (1961)

The defendant, a New York bookstore owner, was prosecuted for knowingly selling magazines from which the cover had been removed. A New York statute, enacted in 1956, made it a misdemeanor for any person to sell such a book or magazine.¹ The information was dismissed by the City Court of Buffalo, and an appeal was taken to the Supreme Court of Erie County which reversed the City Court. A permissive appeal was then taken to the New York Court of Appeals which reversed the New York Supreme Court and found that the statute was unreasonable and deprived the bookstore owner of his property without due process of law.

The purpose of the statute, as stated by the New York Court of Appeals,² is to prevent the resale of periodicals which have been recalled by the publisher. Upon recall by the publisher, the wholesalers return only the covers of the magazines; therefore, they are in a position to resell the body of the issue to second-hand bookdealers who then sell them to the public. Such illicit sales are harmful both to publishers, who refund the purchase price, and to retailers, whose customers buy from second-hand dealers at reduced prices.

The New York Court of Appeals did not state whether this statute violated the due process clause of the New York Constitution³ or the United States Constitution. The standard of due process under state constitutions often varies from the due process standard of the fourteenth amendment.⁴ A statute may be held unconstitutional as a violation of state due process even though it is constitutional under the standard imposed by the fourteenth amendment.⁵ The court of appeals relied upon decisions applying the New York due process clause; it is safe to assume that the court intended to apply the New York due process clause.⁶

The position of the New York Court of Appeals is that this statute

¹ N.Y. Consol. Laws § 436-d (McKinney 1949), "Any person who knowingly sells, offers or exposes for sale, (except in bulk as waste paper) any newspaper, magazine, periodical or other publication, except a rare book, manuscript or educational text, from which the title, trade name, trade mark or other identification mark has been removed or obliterated, is guilty of a misdemeanor."

² *People v. Bunis*, 9 N.Y.2d 1, 172 N.E.2d 273 (1961).

³ N.Y. Const. Art 1, § 6.

⁴ *Nebbia v. New York*, 291 U.S. 502 (1934), typifies the prevailing federal test.

⁵ See *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Boomer v. Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1941); See also Paulsen, "The Persistence of Substantive Due Process in the States," 3 Minn. L. Rev. 91 (1950); Comment, 53 Col. L. Rev. 827 (1953); Comment, 18 Ohio St. L.J. 384 (1957).

⁶ *People v. Bunis*, *supra* note 2.

is unconstitutional because it prohibits all sales of coverless books merely to prevent those which are illicit.⁷ The court places great emphasis upon the fact that the statute punishes behavior which is proper and unobjectionable.⁸ The due process clause of the New York Constitution has been interpreted to require that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil.⁹ Can it be said that a statute which punishes proper behavior is necessarily unreasonable or arbitrary? The court cites *People v. Estreich*¹⁰ as authority for such a proposition. This case held a statute making it a misdemeanor for a junk dealer to receive stolen goods was unconstitutional, because it punished a dealer who had made a reasonable inquiry as to the merchandise's title. The court failed to explain why such a regulation deprives a person of his liberty without due process of law.

The main criticism of the New York court in both of these cases is not the standard of due process used, but the manner in which it was applied. The broad generalization relied upon by the court in the instant case¹¹ is of little aid in understanding the particular objections that make the statute unconstitutional. These cases, and especially the principal case, would have been of greater value as precedent and as guides to the legislature if the following issues had been dealt with: the harm caused by the statute, the utility of the statute, whether the harm outweighed the utility, and whether there were any alternatives which might have accomplished the same purpose without causing as much harm.

By prohibiting the sale of coverless periodicals, the legislature restricts the bookseller's right to engage in his occupation, a right which many have urged should be as highly protected as those embodied in the first amendment.¹² The impact in this case is substantial because the statute provides no exception for a bookseller who, using reasonable diligence, attempts to determine the wholesaler's right to sell the coverless magazines.

The statute certainly accomplishes its purpose. By prohibiting all sales of coverless literature, it deprives the dishonest wholesaler of his market thereby discouraging him from engaging in these activities. The benefit to society is indirect. It is the publishers and retailers of new periodicals who are being cheated by these illicit activities; therefore, the prevention of these activities provides a direct benefit only for the retailers and publishers. However, there may be a potential indirect benefit to be derived by society, since the prevention of these activities might reduce the

⁷ *Id.* at 274.

⁸ *Id.* at 274.

⁹ *Defiance Milk Products Co. v. DuMond*, 309 N.Y. 537, 132 N.E.2d 829 (1956); *Noyles v. Erie & Wyoming Farmers Co.*, 281 N.Y. 187, 22 N.E.2d 334 (1939); *P & A Carting Co. v. New York*, 7 Misc. 2d 815, 158 N.Y.S.2d 296 (1956).

¹⁰ *People v. Estreich*, 297 N.Y. 910, 79 N.E.2d 742 (1948).

¹¹ *People v. Bunis*, *supra* note 2, at 274, ". . . it is unreasonable and beyond the legitimate exercise of the police power for the Legislature to interdict all sales, permissible and illicit alike in order to prevent those which are illicit."

¹² See Gellhorn, *Individual Freedom and Governmental Restraints*, 105 (1956).

publisher's expenses, thereby enabling them to market their periodicals to the public at a reduced price. The distinction between direct and indirect effects is important because the New York courts appear to be more favorable to statutes curtailing illicit practices which directly affect the consuming public.¹³

Whether the harm to booksellers outweighs the utility to society depends upon an important fact not mentioned in the opinion—the magnitude of the illicit practice. If there were merely a few instances in which wholesalers resold coverless periodicals after claiming credits from the publishers, it seems that utility derived from making this isolated act illegal would not be sufficient to override the harm done to the second-hand bookdealers. If, on the other hand, the illicit practices were so numerous that publishers' expenses were doubled and the public was required to pay twice as much for periodicals as they ordinarily would, the utility would probably overbalance the harm caused to the bookdealers. Both these propositions are no doubt exaggerated; the situation is in all likelihood somewhere in between. This consideration, however, appears to be important, and it should have been explored by the New York court.

Assuming that the court found in the preceding issue that the utility was greater than the harm, it is necessary to consider alternative measures of regulation, since a positive finding would certainly be relevant to a consideration of reasonableness. What alternative measures would have stopped the illicit practice without as great an infringement upon the bookdealer's rights? A licensing statute providing for revocation in the event a wholesaler or retailer knowingly handles coverless books for which a credit has been given by the publisher would differ from the present statute in two ways. First, the penalty is forfeiture of a license instead of a monetary fine, and secondly, all coverless books would not be prohibited *per se*, but only those which the dealer knew had been returned for credit. Such a statute would doubtlessly afford few revocations because of the difficulty of proving *mens rea*. Because of this, the deterrent effect upon the wholesalers would be lost, and the statute would be open to criticism because it would not accomplish its purpose.

The publishers might also relieve themselves from their unfortunate predicament by changing their marketing methods. Certainly, if the books and magazines in their entirety were required to be returned, rather than merely the covers, the illicit sales would be stopped. Such an alternative anticipates no legislation at all, but should be considered by the court. For the court to determine that such a practice would involve less burden on constitutionally protected interests than did the challenged statute would require knowledge of the costs of such a marketing change. No doubt such information was not before the court at the time it rendered its decision.

It is apparent from the foregoing that the court, in order to render

¹³ *People v. American Wool Stock Corp.*, 286 N.Y. 77, 35 N.E.2d 905 (1941); *Meltzer v. Nurman*, 190 Misc. 149, 71 N.Y.S.2d 598 (1947).

a decision on due process grounds, must have many extra-judicial facts at its disposal. It is likewise apparent that the highest court in the state has no opportunity to acquire these facts when they are not supplied by counsel. In such a situation, the court has three possible alternatives. First, they may decide the case regardless of the lack of facts, thereby taking the chance that the wrong decision will be made. Second, they may remand the case to a lower court and require them to obtain the necessary information. Third, they may simply defer to the judgment of the legislature. This alternative would result in the forfeiture of their power of judicial review. The second alternative appears the most desirable, and, although it is expensive and time-consuming, it does afford an opportunity for reasoned judicial review.