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CRIMES AND OFFENSES Vetoed Bill: Distribution and Display of Sexually Explicit Material to Minors

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Vetoed Bill: Distribution and Display of Sexually Explicit Materials to Minors

On April 17, 1987, Governor Joe Frank Harris vetoed HB 197, a bill that had substantially amended current Georgia law dealing with the distribution and display of sexually explicit materials to minors.[1] The amending legislation was passed in response to a federal district court's ruling regarding the constitutionality of the Code section.[2]

The Constitutional Challenge

In 1984, the General Assembly amended O.C.G.A. §§ 16-12-102—16-12-104.[3] The legislation significantly changed a 1981 law in regard to the sale, distribution, and display of sexually explicit materials to minors. The Act was signed into law by Governor Joe Frank Harris on April 5, 1984, and was to have taken effect on July 1, 1984.[4] However, on April 6, 1984, various associations of booksellers, publishers, periodical distributors, college stores, and retailers, two bookstores, and an author brought an action in federal court for declaratory and injunctive relief, challenging the constitutionality of the recently enacted statute.[5] The plaintiffs charged that the Act was unconstitutionally overbroad, violated the first amendment rights of adults, was an unconstitutional prior restraint on free speech, was unconstitutionally vague for lack of fair notice as to what constitutes a criminal offense, violated equal protection because libraries were exempt from the Act, and unconstitutionally interfered with the rights of parents to rear their children. In addition, the plaintiffs charged that the Act violated the Georgia constitutional prohibition on the passage of any bill containing more than one subject matter.[6]

The federal district court decided to abstain from deciding the federal constitutional issues until the state court had the opportunity to decide the state constitutional claim. However, the federal court did grant interim relief in the form of an injunction against enforcement of O.C.G.A. § 16-12-103(e).[7] This Code section made it "unlawful for any person

1. Final Composite Status Sheet, March 12, 1987.
2. *See infra* text accompanying notes 27-34.
3. *See* American Booksellers Ass'n v. Webb, 590 F. Supp. 677 (N.D. Ga. 1984) (the bill amending these Code sections is set out in full in the appendix to the case at 694-96).
4. American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1548-49 (N.D. Ga. 1986).
5. American Booksellers Ass'n v. Webb, 590 F. Supp. 677 (N.D. Ga. 1984).
6. *Id.* at 682. GA. CONST. art. III, § 5, ¶ 3.
7. *Webb*, 590 F. Supp. at 693-94.

knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors" any materials deemed by the Code section to be harmful to minors.[8]

The Georgia Supreme Court considered the state constitutional claim and found that the Act did not violate the state constitution's prohibition on the passage of any bill containing more than one subject.[9] Furthermore, the court refused to construe the part of the Act dealing with the display of materials to minors.[10]

The plaintiffs then returned to federal court. The court determined no constitutional problem existed with the variable obscenity standard as applied to minors or with the prohibition on sale, distribution, or exhibition of the defined materials to minors.[11] However, the court did find constitutional violations in two sections of the Act. First, the court concluded that the display provision imposed an unreasonable burden on the first amendment right of adult readers and booksellers. The court found that the display provision was substantially overbroad in that it prohibited the display not only of sexually explicit materials, "but also of classic works of literature and a significant percentage of popular fiction. Thus, the Act would, in effect, reduce an adult's selection of reading materials to a book list suitable for a fifth-grade class."[12]

The court also found a constitutional infirmity in O.C.G.A. § 16-12-104 which exempted any public or school library from the provisions of the Act. The court determined that this section violated the equal protection clause of the fourteenth amendment. Finding no state interest to justify this exception, the court held the classification invalid.[13]

The only question left undecided by the district court was the severability of the unconstitutional parts of the statute. The plaintiffs contended that the entire Act must fail if any portion was found to be unconstitutional.[14] Since the Georgia Legislature has created a general

8. O.C.G.A. § 16-12-103(e) (1984). *See* American Booksellers Ass'n v. Webb, 590 F. Supp. at 687 (the court distinguished between the statutory prohibition against exhibiting, which the court defined as exhibiting or presenting objectionable material to minors, and the statutory prohibition against displaying, which the court defined as displaying in a public place where minors might be present).

9. American Booksellers Ass'n v. Webb, 254 Ga. 399, 329 S.E.2d 495 (1985).

10. *Id.* at 401, 329 S.E.2d at 497-98.

11. American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1552 (N.D. Ga. 1986) ("The state has somewhat broader power to regulate expression if such regulation serves the state's well-established interest in the well-being of its youth"). *Accord* Ginsberg v. New York, 390 U.S. 629 (1968) (Supreme Court expressly approved the concept of a variable obscenity standard which allows more stringent restrictions as applied to juveniles).

12. American Booksellers Ass'n v. Webb, 643 F. Supp. at 1548.

13. *Id.* at 1555-56.

14. *Id.* at 1556.

presumption of severability,[15] the court concluded that the legislature would wish to sever the display provision and leave the definition, distribution, and exhibition provisions intact. The court, however, felt that the library exception posed a greater problem in regard to severability and directed the parties to address this issue.[16]

HB 197

HB 197, in its original form, attempted to prevent the distribution to minors of materials depicting aggravated violence. The introduction of the bill was prompted by concerns over materials, especially video tapes, which contained scenes of graphic violence and were entirely unregulated and available for distribution to children.[17] The original version of the bill would have added a definition of "aggravated violence" to O.C.G.A. § 16-12-102 and would have inserted the words "aggravated violence" into the appropriate sections of the Code, dealing with sale, distribution, exhibition and display of such materials to minors.[18] The House Judiciary Committee changed the definition of aggravated violence,[19] and the definition was changed again with a House floor amendment.[20] The bill was passed with the floor amendment in place by the full House on February 18, 1987.[21]

On February 20, 1987, the federal district court ruled on the previously undecided severability issue in the constitutional challenge to this section of the Code.[22] The court had anticipated that the legislature, in response to the earlier court ruling, would amend the Code section and render the severability issue moot.[23] Since no such bill was pending, and the defendants indicated that they intended to appeal the court's decision on behalf of the state, the court ruled on the severability issue. The court found the library exception not severable and concluded that the entire Act must fall.[24] Enforcement of all provisions of the Act was enjoined, but the injunction was stayed as to the definition, distribution, and exhibition provisions pending appeal by the defendants. This stay was granted to allow the state interim enforcement of the constitutionally acceptable provisions of the Act, which the court felt could be done without harm to the plaintiffs.[25]

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15. O.C.G.A. § 1-1-3 (1982).
16. American Booksellers Ass'n v. Webb, 643 F. Supp. at 1556.
17. *Telephone interview with Representative Jim Pannell, House District No. 122,* (April 28, 1987) [hereinafter Pannell Interview].
18. HB 197, as introduced, 1987 Ga. Gen. Assem.
19. HB 197 (HCS), 1987 Ga. Gen. Assem.
20. HB 197 (HCSFA), 1987 Ga. Gen. Assem.
21. Final Composite Status Sheet, March 12, 1987.
22. American Booksellers Ass'n v. Webb, 654 F. Supp. 503 (N.D. Ga. 1987).
23. *Id.* at 505.
24. *Id.*
25. *Id.*

Following this decision in federal court, the Senate Special Judiciary Committee took up consideration of HB 197. In the absence of any clear case law on the state's ability to restrict the availability of violent materials to minors, several members of the committee expressed concerns about the constitutionality of the bill. Because of these reservations and the uncertainty created by the federal district court decision, the committee seemed prepared to defer any action on HB 197 until the 1988 session.[26]

The Senate committee then decided, with the consent of the original sponsor of the bill, to use HB 197 as a vehicle to address the constitutional problems of this Code section as identified by the federal district court. The intent was to write a statute that the state could enforce.[27] The Senate committee substitute eliminated O.C.G.A. § 16-12-103(e), which contained the display provision and also eliminated the library exception.[28] In addition, the substitute limited the prohibition of the sale, distribution, and exhibition provisions to those activities done without the consent of parents.[29] This change appears to be in response to the issue raised by the plaintiffs in federal court regarding the infringement of the parents' right to raise their children without undue state interference.[30] This issue, however, was not addressed by the federal court.[31]

This totally rewritten version of HB 197 was passed by the full Senate and agreed to by the House.[32] The intent in rewriting this bill was to address specifically the concerns which the federal court identified. The rationale was, that should the state lose the appeal, it would be better to have an enforceable statute than to risk having no statute.[33] This action was taken with the knowledge that the passage of this bill would render the state's appeal moot.[34] A similar statute in Virginia was struck down by a federal court, and the United States Supreme Court has been asked to consider this ruling.[35] It was believed that the legislature could pass an enforceable statute consistent with the federal court's ruling, and later amend it if the Supreme Court's ruling on the Virginia statute so allowed.[36]

When HB 197 reached Governor Harris' desk, he vetoed it. This deci-

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26. Pannell Interview, *supra* note 17.
27. *Id.*
28. HB 197 (SCS), 1987 Ga. Gen. Assem.
29. *Id.*
30. American Booksellers Ass'n v. Webb, 590 F. Supp. 677, 682 (N.D. Ga. 1984).
31. *See* American Booksellers Ass'n v. Webb, 643 F. Supp. 1546 (N.D. Ga. 1986).
32. Final Composite Status Sheet, March 12, 1987.
33. Pannell Interview, *supra* note 17.
34. *Id.*
35. American Booksellers Ass'n v. Stobel, 617 F. Supp. 699 (E.D. Va. 1985), *aff'd sub nom.* American Booksellers Ass'n v. Virginia, 792 F.2d 1261, *modified on other grounds*, 802 F.2d 691 (4th Cir. 1986).
36. Pannell Interview, *supra* note 17.

sion was based on the pending state appeal of the district court's ruling. The administration did not wish to moot the appeal. Rather, it believed that the appellate court might overturn the lower court's ruling. Therefore, to sign such legislation would be tantamount to an admission that the present Code is unconstitutional.[37]

If the federal appellate court upholds the district court's ruling, regarding the unconstitutional sections of the present Code and the nonseverability of these parts, Georgia will not have a statute prohibiting the sale of sexually explicit materials to minors. This situation would result even though the federal district court found the sale, distribution, and exhibition provisions of the law were not unconstitutional. The district court recognized the state's role in regulating these activities when minors are involved. Because the injunction was stayed pending appeal, the state presently can enforce these provisions. However, if the state loses the appeal, the entire statute may be struck. If that happens, the Legislature probably would enact a new Code section, similar to the vetoed version of HB 197.

L. DiSantis

37. Telephone interview with Russell N. Sewell, Governor's General Counsel (Apr. 30, 1987).