Touro Law Review

Volume 12
Number 3 *New York State constitutional Decisions: 1995 Compilation*

Article 33

1996

Freedom of Speech and Press

are no real distinctions to be drawn, under either federal or state constitutional analysis, when dealing with the right to freedom of the press, particularly public and media access to courtroom proceedings.

City of New York v. Dana[384]
(decided April 16, 1995)

The defendants, Raymond Dana and 236 W. 54th St. Corp., owners and operators of an adult movie theater known as "The New David Cinema," opposed a proceeding that would grant the City of New York a preliminary injunction to close the cinema. Defendant's argued that the injunction would violate the New York State Constitution's guarantee of freedom of expression.[385] Defendants urged that article I, section 8, of the New York State Constitution as construed by the New York Court of Appeals in *Arcara v. Cloud Books*,[386] precluded granting the preliminary

384. 165 Misc. 2d 409, 627 N.Y.S.2d 273 (Sup. Ct. New York County 1995).

385. *Id.* at 414, 627 N.Y.S.2d at 276. N.Y. CONST. art. I, § 8. This section states in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.* The defendants did not invoke their right to free speech under the United States Constitution. *See* U.S. CONST. amend. I. The First Amendment states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

386. 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). In *Arcara*, the New York Court of Appeals held that "when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose." *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The *Arcara* court stated that "[if] other sanctions, such as arresting the offenders, or injunctive relief prove unavailing," then the state's burden under the standard would be met. *Id.* at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The important state interest in *Arcara* was the abatement of public nuisances (the premises were used to engage in prostitution). *Id.* at 556, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

injunction.[387] The defendants in *Dana* argued solely on the basis of the New York State Constitution and made no claim as to any protection offered them under the Federal Constitution.[388] The defendants relied only on New York constitutional grounds because the New York Court of Appeals decision in *Arcara* had been previously reviewed by the U.S. Supreme Court[389] where the federal constitutional standard was articulated prior to reversing and remanding the case back to the New York Court of Appeals.[390] On remand, the court of appeals affirmed its previous decision based on their right to exercise independent judgment on issues involving fundamental rights in free speech matters under the New York Constitution.[391]

In *Dana,* the Supreme Court, New York County, held that defendants' freedom of expression was not violated because the city had met its burden under the "least restrictive means test," finding that no other course of state action could halt the risky sexual activity that was taking place within the cinema without having to close it.[392]

Defendant 236 W. 54th St. Corp. conducted business as The New David Cinema in premises located at 236 West 54th Street where defendant owned and operated a movie theater.[393] On or about April 3, 1995, plaintiffs named and served defendant with an amended summons and complaint.[394] In support of this proceeding, plaintiffs had submitted affidavits of two inspectors from New York City's Department of Health.[395] The inspectors' affidavits documented that high risk sexual activity was occurring at the cinema regularly.[396] Between March 7, 1995, and March 20, 1995, the inspectors noted at least 45 incidents of sexual

387. *Dana*, 165 Misc. 2d at 414, 627 N.Y.S.2d at 276.
388. *Id.* at 414-15, 627 N.Y.S.2d at 276.
389. 478 U.S. 697 (1986).
390. *Id.* at 707.
391. *Arcara,* 68 N.Y.2d at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.
392. *Dana*, 165 Misc. 2d at 415, 627 N.Y.S.2d at 276-77.
393. *Id.* at 410, 627 N.Y.S.2d at 274.
394. *Id.* at 411-12, 627 N.Y.S.2d at 274.
395. *Id.* at 412, 627 N.Y.S.2d at 274.
396. *Id.*

activity engaged in by cinema patrons.[397] These inspections came after two letters of warning from the Department of Health dated August 10, 1993 and February 10, 1995.[398] Prior to the March, 1995 inspections, the Associate Commissioner of Health wrote to the cinema on August 10, 1993, requesting the cinema's cooperation with the city's efforts to thwart the spread of AIDS.[399] In a reply letter, the cinema stated that a program of periodic theater inspections as well as posted conspicuous signage had been instituted to halt such conduct and an employee would eject perpetrators if necessary.[400]

Despite this exchange of correspondence, investigators continued to observe sexual activity at the cinema.[401] On February 10, 1995, Deputy Health Commissioner Dr. Benjamin A. Mojica, wrote to the defendants.[402] Dr. Mojica enclosed a copy of section 24-2 of the State Sanitary Code proscribing establishments as defined in the State Sanitary Code.[403] The doctor's letter further notified the defendant that recent inspections had revealed the frequent occurrence of prohibited sexual activities at the cinema and that inspections of the cinema would be conducted on a continuing basis.[404]

Although defendants did not dispute receiving the letters, there was, according to the inspectors, some reduction in sexual activity at the cinema after the February 10, 1995 letter was sent.[405] However, this proved to be temporary.[406] Between March 7, 1995 and March 20, 1995 the two inspectors observed at least 45 incidents of sexual activity engaged in by patrons of the cinema.[407] Subsequently, plaintiffs commenced this action.[408]

---

397. *Id.*
398. *Id.* at 412, 627 N.Y.S.2d at 274-75.
399. *Id.* at 412, 627 N.Y.S.2d at 275.
400. *Id.* at 412-13, 627 N.Y.S.2d at 275.
401. *Id.* at 413, 627 N.Y.S.2d at 275.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*

Plaintiffs moved for a preliminary injunction and continuation of the temporary closing order previously granted.[409]

Plaintiffs maintained that the cinema constituted a public nuisance which should be temporarily shut down pursuant to New York City Administrative Code section 7-707(a), pending a permanent injunction.[410] Plaintiffs sought this relief based on the investigation by the two inspectors who discovered numerous acts of high risk sexual activity as defined by the New York State Sanitary Code, occurring during their twenty-two visits to the cinema over a two month period.[411]

Prior to a move to close the cinema, the Department of Health issued two warning letters two years apart.[412] The second warning letter indicated that the cinema would be subject to an action to close if it failed to comply with the Department of Health's requests.[413] The court concluded that the Department of Health, by sending these warning letters, attempted to limit the unlawful sexual activity without interfering with the defendant's motion picture business.[414]

Furthermore, the court found that there did not exist a plan of state action that would attenuate the nuisance without closing the cinema.[415] Due to the fact that the cinema had already tried various preventative measures such as monitors, signs and

409. *Id.* at 410, 627 N.Y.S.2d at 273.

410. *Id.* at 410, 627 N.Y.S.2d at 274. The New York City Administrative Code defines "nuisance" as follows: "The word 'nuisance' shall be held to embrace public nuisance, as known at common law or in equity jurisprudence; whatever is dangerous to human life or detrimental to health . . . . All such nuisances are hereby declared illegal." *Id.* at 411, 627 N.Y.S.2d at 274 (citation omitted).

411. *Id.* at 410, 627 N.Y.S.2d at 274. The New York State Public Health Council concluded that two of the most serious risk behaviors that are associated with the transmission of the HIV virus are fellatio and anal intercourse. *Id.* at 411, 627 N.Y.S.2d at 274. The State Sanitary Code declared that "facilities where such activities take place 'shall constitute a threat to the public health' and are prohibited, and may be closed by local health officers as constituting a 'public nuisance.'" *Id.* (citations omitted).

412. *Id.* at 415, 627 N.Y.S.2d at 276.

413. *Id.*

414. *Id.* at 415, 627 N.Y.S.2d at 277.

415. *Id.* at 416, 627 N.Y.S.2d at 277.

pamphlets, and that these efforts had not prevented the prohibited activity, the court found that any system that required the cinema to police itself was not a viable alternative.[416] Considering that a serious health risk was at issue in the case, the court concluded the only effective method to prevent the illicit sexual conduct at the cinema was to close it.[417]

The court relied upon the standard set forth in *Arcara*, in order to determine the extent of protection offered a defendant under the New York State Constitution.[418] As stated previously, the *Arcara* court held that the New York State Constitution goes further than the Federal Constitution in protecting individuals from incidental burdens on free expression.[419]

In *Arcara*, the respondents operated a store where they sold adult books and showed movies which were sexually explicit but not obscene.[420] As in *Dana*, customers used the premises for illegal sexual acts.[421] The store owner in *Arcara* was aware of the activities but did nothing to prevent them.[422] The District Attorney became aware of the acts which were observed by an investigator from his office, but had not arrested the offenders nor had them criminally prosecuted.[423] Furthermore, the prosecutor had not applied for an injunction to prevent future illegal acts from occurring on the premises.[424] Instead, the

---

416. *Id.*

417. *Id.*

418. *Id.* at 414-15, 627 N.Y.S.2d at 276.

419. *Arcara*, 68 N.Y.2d at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846. The *Arcara* court stated:

> We, of course, are bound by Supreme Court decisions defining and limiting Federal constitutional rights but in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.

Id. (citations omitted).

420. *Id.* at 556, 503 N.E.2d at 493, 510 N.Y.S.2d at 845.

421. *Id.*

422. *Id.*

423. *Id.* at 556, 503 N.E.2d at 493-94, 510 N.Y.S.2d at 846.

424. *Id.* at 556, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

prosecutor moved to close the bookstore for a year under article 23, title II of the Public Health Law.[425] Respondents alleged that a closure order would impermissibly interfere with their state constitutional rights of free expression.[426]

The United States Supreme Court in *Arcara* considered the application of the *O'Brien*[427] balancing test.[428] This four part test had been applied exclusively to cases involving the governmental regulation of conduct that was deemed to have an expressive element.[429] Under this test, a governmental regulation aimed at non-speech activity which has an incidental effect on speech is justifiable if: (1) the regulation is "within the constitutional power of the [g]overnment," (2) if the regulation furthers "an important or substantial government interest," (3) if the government interest is "unrelated to the suppression of free expression" and (4) the incidental restriction on First Amendment freedoms is no greater than is necessary to [further] that interest" (the "least restrictive means" test).[430]

The Supreme Court found that the sexual activity that occurred in *Arcara* contained no expressive element whatsoever[431] and that the imposition of the closure order had nothing to do with

---

425. *Id.*

426. *Id.* at 555-56, 503 N.E.2d at 493, 510 N.Y.S.2d at 845. Framing the issue, the *Arcara* court stated:

> It would appear, without more, that closing the store would be equally disruptive or ineffective with respect to the activities of both the bookstore and its customers. The primary question is whether it implicates the bookseller's constitutional rights of free expression so as to require a balancing of the competing interests.

Id. at 556-57, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

427. United States v. O'Brien, 391 U.S. 367 (1968). In determining that the activity involved in *Arcara* was not expressive and, therefore, not protected under *O'Brien*, the Supreme Court stated, "[t]he defendant in *O'Brien* had, as respondents here do not, at least the semblance of expressive activity in his claim that the otherwise unlawful burning of a draft card was to 'carry a message' of the actor's opposition to the draft." *Arcara*, 478 U.S. at 702.

428. *Id.* at 703.

429. *Id.* at 707.

430. *Id.* at 703.

431. *Id.* at 705.

any expressive conduct at all.[432] Therefore, the Court concluded, the four part *O'Brien* test should not be applied.[433] The Court concluded that the bookstore's First Amendment rights were not affected because the object of the order was the illegal conduct of the bookstore's customers and not the bookselling itself.[434] Thus, under the Federal Constitution, the "least restrictive means" test only applies when government action was triggered by and directly aimed at curtailing "conduct that has an expressive element."[435]

On remand from the United States Supreme Court, the New York Court of Appeals in *Arcara* decided that greater protection was due the bookseller under the New York State Constitution's guarantee of freedom of expression.[436] The court of appeals found that the crucial factor in determining if a state action affects freedom of expression is the "impact of that action on the protected activity" (in this case, bookselling) and "not the nature of the activity which prompted the government to act" (the sexual conduct).[437] The test then, the court of appeals concluded, focused not on the non-expressive conduct aimed at by the regulation, but rather the protected expressive conduct that is incidentally hit and affected by the regulation.[438]

The burden, therefore, fell on the state to prove that in seeking to close the store, "it had chosen a course that was no broader

---

432. *Id.* at 705-06 n.2.

433. *Id.* at 707.

434. *Id.* According to the Court, "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707.

435. *Id.* at 703 ("The [New York] Court of Appeals thus misread *O'Brien*, which has no relevance to a statute directed at imposing sanctions on nonexpressive activity.").

436. *Arcara*, 68 N.Y.2d at 555-56, 503 N.E.2d at 493, 510 N.Y.S.2d at 845.

437. *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

438. *Id.* The court of appeals had previously determined "that the closure remedy fell within the constitutional power of the State; that the closure remedy furthered a substantial state interest in thwarting prostitution; and that the purpose of the closure remedy was unrelated to the suppression of speech." *Arcara*, 478 U.S. at 701.

than necessary to accomplish its purpose."[439] However, the court of appeals found that other less intrusive sanctions might be appropriate.[440] Such sanctions included arresting the offenders or injunctive relief.[441] If these sanctions are ineffective then the state's burden would be met.[442]

Unlike *Arcara*, although the regulation in *Dana* was also aimed at sexual conduct, the substantial public interest there was to protect the public from the spread of AIDS rather than the mere abatement of prostitution.[443] Furthermore, and more important to this case from a technical legal standpoint, the court in *Dana* concluded that because futile attempts had been made to halt the illegal activity in the theater (such as the sending of warning letters and the theater's failure to police itself), the state met its burden of showing the means chosen were the least restrictive of defendants' right to free expression.[444]

It is worth restating that if *Dana* had been decided under the Federal Constitution, the "least restrictive means" test set out in *O'Brien* would have never applied. Under the Federal Constitution, the *O'Brien* test only applies "when the government's action was triggered by and directly aimed at curtailing 'conduct that has an expressive element.'"[445] However, *Dana* was able to invoke the "least restrictive means" test because of the expansive protection of freedom of expression provided under the State Constitution. More specifically, the state constitution provides a broader definition of what may be incidentally affected. As the court of appeals stated, the focus is

---

439. *Arcara*, 68 N.Y.2d at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

440. *Id.*

441. *Id.* at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

442. *Id.*

443. *Dana*, 165 Misc. 2d at 416, 627 N.Y.S.2d at 277. "[U]nlike *Arcara*, the closing of the Cinema is motivated by the AIDS crisis [and] life and death are at issue here." *Id.*

444. *Id.*

445. *Arcara*, 68 N.Y.2d at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846 (citations omitted). The New York Court of Appeals in *Arcara* explained that the Supreme Court focused on the illegal sexual activity which is not "expressive" and considered the effect on defendant's bookselling activities to be too remote. *Id.*

on "the impact of the action on the protected activity and not the nature of the activity which prompted the government to act."[446] In summary, the court of appeals stated that the focus is not on "who is aimed at but who is hit."[447]

446. *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.
447. *Id.*