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Constitutional Law: A Revised Standard of Obscenity

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CASE COMMENTS

CONSTITUTIONAL LAW: A REVISED STANDARD OF OBSCENITY?

Ginsburg v. United States, 86 S. Ct. 942 (1966); *Mishkin v. New York*, 86 S. Ct. 958 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 86 S. Ct. 975 (1966)

On March 21, 1966, the Supreme Court announced decisions in three obscenity cases. In *Ginsburg v. United States*,[1] petitioner was convicted in United States District Court[2] for mailing obscene materials in violation of federal statute.[3] The Court of Appeals, Third Circuit, affirmed.[4] Certiorari was granted on the issue whether the trial judge correctly applied the standard of obscenity as enunciated in *Roth v. United States*.[5] The Supreme Court HELD, although accused publications might not themselves be intrinsically obscene, convictions could be sustained in view of petitioner's pandering in production, sale, and publicity with respect to the publications. Judgment affirmed, Justices Black, Douglas, Harlan, and Stewart dissenting.[6] In *Mishkin v. New York*[7] defendant was convicted of violating a New York obscenity statute[8] by hiring others to prepare

1. 86 S. Ct. 942 (1966).

2. United States v. Ginzburg, 224 F. Supp. 129 (1963).

3. 18 U.S.C. §1461 (1964). This is the federal obscenity statute, and provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . . . Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or from whom, or by what means of such mentioned matters . . . may be obtained . . . . Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery or anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense . . . ."

4. United States v. Ginzburg, 338 F.2d 12 (3d Cir. 1964).

5. 354 U.S. 476 (1957).

6. Ginzburg v. United States, 86 S. Ct. 942 (1966).

7. 86 S. Ct. 958 (1966).

8. N.Y. PEN. LAW §1141. In appropriate part, this statute reads as follows: "(1) A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . or who (2) in any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them, Is guilty of a misdemeanor . . . . (4) The possession by a person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section. (5) The publication for sale of any book, magazine or

obscene books with the intent to sell them. *Mishkin* involved fifty books that portrayed sexuality in many guises, with sundry sexual deviations depicted in most of them. Defendant claimed on appeal that the books did not appeal to the prurient interest of the average person. The Court HELD, when material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than to the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest of sex of the members of that deviant group. Conviction affirmed, Justices Black, Douglas, and Stewart dissenting.[9] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*[10] arose as a petition to have the book *Fanny Hill*[11] declared obscene pursuant to Massachusetts statute.[12] *Fanny Hill* tells the story of an 18th century prostitute with frank descriptions of her many sexual experiences. The Superior Court of Suffolk County, Massachusetts, found that the book was obscene, and the decision was affirmed by the Supreme Court of Massachusetts.[13] On appeal to the Supreme Court HELD, a book cannot be proscribed as obscene unless it is found to be utterly without redeeming social value; but as in *Ginsburg*, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. Reversed, noting there was no evidence as to how the book was purveyed. Justices Clark, Harlan, and White dissenting.[14]

The earlier American decisions concerning obscenity followed the test announced in *Regina v. Hicklin*,[15] which held material obscene when isolated passages of the text appealed to the prurient interest of some particularly susceptible person – the sexually abnormal or

pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

9. Mishkin v. New York, 86 S. Ct. 958 (1966).

10. 86 S. Ct. 975 (1966).

11. The full title of this book is *John Cleland's Memoirs of a Woman of Pleasure*. *Fanny Hill* is the name by which it is commonly known.

12. MASS. GEN. LAWS ch. 272, §§28C-28H (1961).

13. Attorney Gen. v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 206 N.E.2d 403 (Mass. 1965).

14. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975 (1966).

15. 3 Q.B. 360 (1868).

immature. This test gave no consideration to the total effect of the material in question.[16] *Hicklin* underwent gradual modification until 1957 when the Supreme Court handed down its first major decision on obscenity, *Roth v. United States.*[17] In this landmark case, it was held for the first time that obscenity is not included within the first amendment guarantees of free speech and press;[18] thus constructively eliminating the clear and present danger test used in other areas to limit speech and press.[19] In *Roth,* material was obscene if: "[T]o the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[20]

The first significant modification of *Roth* occurred in *Manual Enterprises, Inc. v. Day.*[21] The subject material in that case consisted of photographs of nude male models and was held to be completely devoid of literary, scientific, or any other merit. It was found to have been composed primarily for homosexuals, to appeal principally to homosexuals, and to be almost exclusively purchased by homosexuals. The Court refused to define the proper audience by which prurient interest appeal should be determined, but reversed conviction, holding that the magazines could not "[B]e deemed so offensive on their face so as to affront current community standards of decency."[22]

The Court further clarified *Roth* in *Jacobellis v. Ohio,*[23] holding that a film, *The Lovers,* was not obscene. This holding emphasized that *Roth* held that prurient appeal is not to be weighed against social value in determining obscenity; but rather that social value must be examined in a separate context and, for material to be adjudged obscene, it must be utterly without redeeming social value.[24] The Court further stressed that "community" referred to society at large, rather than to a state or local area.[25]

Therefore, before *Ginsburg* it was believed that obscenity was established if all the following requirements were met: (1) the material, being judged in its entirety and not by isolated passages, appealed to the prurient interest of the "average" person[26] (2) the material was completely offensive to contemporary community standards

16. *Ibid.*
17. 354 U.S. 476 (1957).
18. *Id.* at 484.
19. See Beauharnais v. Illinois, 343 U.S. 250 (1952).
20. Roth v. United States, 354 U.S. 476, 489 (1957).
21. 370 U.S. 478 (1962).
22. *Id.* at 482.
23. 378 U.S. 184 (1964).
24. *Id.* at 191.
25. *Id.* at 193.
26. Roth v. United States, 354 U.S. 476 (1957).

of decency;[27] and (3) the material was utterly without redeeming social value.[28] In light of the above, Ralph Ginsburg's belief that his publications would not be deemed obscene seems justified.[29]

The first requirement was modified in *Mishkin* when the Court answered the question avoided in *Manual Enterprises, Inc. v. Day*. The prurient appeal of the material is now to be judged by its appeal to the group for which it is primarily composed and by which it is primarily purchased,[30] thus changing the definition of the "average" person, making him the "average" person of a special group, rather than of the nation as a whole. This redefinition of "average" person has broadened the definition of obscenity, although the requirement has not been changed by *Mishkin* if the material is neither designed for nor purchased by any special group. To some extent, this requirement has been modified by *Ginsburg* if the material is represented as being erotically stimulating. The Court assumes that persons reading material so represented will be looking for titillation, which will be presumed found.[31] The result is that where materials are disseminated to a special group or advertised for erotic appeal, it is reasonable to infer that the requirement has been modified in a way calculated to make findings of obscenity easier to sustain.[32]

The second requirement, that the material must be completely offensive to contemporary community standards of decency, is still

27. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

28. Roth v. United States, 354 U.S. 476 (1957); Jacobellis v. Ohio, 378 U.S. 184 (1964).

29. The Court here noted Ralph Ginzburg's advertising, which in part read as follows: "The publication of this magazine—which is frankly and avowedly concerned with erotica — has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of act." Ginsburg v. United States, 86 S. Ct. 942, 946 n.9 (1966). See also Interview with Ralph Ginzburg as reported in Playboy Magazine, July 1966, p. 48: "The Court said in the *Roth* case that a publication was not obscene if it had 'even the slightest redeeming social importance'! It was on the basis of this that I decided *Eros* could be published. *Eros* contained reproductions of many masterpieces of art, as well as original contributions by some of the most gifted contemporary writers, artists and photographers. . . . So I thought I was completely within the law. Indeed, in the advertising for *Eros*, I stated that only because of current Supreme Court rulings was it possible to publish this magazine. I was stunned when they came out of left field and — zap! — hit me with the advertising bit."

30. Mishkin v. New York, 86 S. Ct. 958 (1966).

31. See Ginzburg v. United States, 86 S. Ct. 942, 947 (1966).

32. An exception would be when material is published for and purchased by persons making a scholarly study of sexual deviation. From the holding in *Mishkin* and *Ginzburg*, this material would not be obscene unless it appealed to the prurient interests of members of that group. This exception, however, is of limited importance because it would probably be rare in occurence.

33. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v.

present.[33] But in the final analysis, this point too has been modified if the material is purveyed for erotic content. The rationale is that such purveying forces public confrontation with the aspects of the work that are potentially offensive; this brazen appeal is considered as heightening the offensiveness of the material to those persons likely to be offended by it.[34]

The third requirement, that material must be utterly without redeeming social value, still must be met in order to judge material as obscene.[35] While this is true, the nature of evidence probative in determining a lack of social value has been changed. The manner of advertising and purveying now can be used in considering the presence or absence of such value. The Court may now take the purveyor of alleged obscenity at his own word, if the material is of the type lending itself to such treatment.[36] This emphasis on the purveyor, rather than on the material itself, is not a completely new concept. Mr. Chief Justice Warren expressed a similar emphasis in his concurring opinion in *Roth*.[37]

A persistent minority of the Court continues to insist that obscenity cases should not even be considered by the Court because all such material is completely within the constitutional guarantees of free speech and press.[38] The Court has not as yet been willing to accept this view and continues to grant to legislative bodies a limited prerogative in dealing with offensive material. Having granted this prerogative, the court is bound to resolve problems resulting from its exercise. These three cases do not serve to finally resolve the inherent residual ambiguity of the *Roth* test, but raise questions that themselves are ambiguous. One question raised is the probative value of pandering in a civil action against the book itself. A possible

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Massachusetts, 86 S. Ct. 975, 977 (1966).

34. Ginzburg v. United States, 86 S. Ct. 942, 947 (1966).

35. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975, 977 (1966).

36. Ginzburg v. United States, 86 S. Ct. 942 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975 (1966).

37. Roth v. United States, 354 U.S. 476, 495 (1966) (Warren, C.J. concurring). The pertinent part reads as follows: "[I]t is not the book that is on trial, it is a person. The conduct of the Defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in a context from which they draw color and character. A wholly different result might be reached in a different setting."

38. Justices Black and Douglas have consistently expressed this view. See Ginzburg v. United States, 86 S. Ct. 942, 950 (1966) (Black, J. dissenting); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975, 983 (1966) (Douglas, J. concurring); Roth v. United States, 354 U.S. 476 (1957) (Douglas, J. dissenting).

answer is to be found in *Memoirs*. There it is mentioned that the manner in which the book was published, sold and purveyed would be relevant in determining whether its publication and distribution are constitutionally protected.[39] This, of course, assumes the presence of other requisite factors with, at most, a minimal amount of social value. However, since *Memoirs* was a civil equity action against the book itself, the question remains whether a book should be banned as intrinsically obscene when a court is judging the conduct of a particular individual's handling of that book.

This raises questions concerning the precedential value of obscenity determinations and convictions based in part on pandering in subsequent actions involving the same material. Would the determination in *Ginsburg* that *Eros* was obscene be controlling in a prosecution against a neighborhood newsdealer for the selling of obscene material? It is quite possible that many of the newsdealer's sales of *Eros* would result from the advertising given the material by Ginzburg. However, due to the emphasis in *Ginzburg* upon the conduct of the defendant,[40] it does not seem likely that a conviction could be sustained unless the local newsdealer himself was guilty of pandering.[41] As mentioned above, there were two different methods of suppressing obscenity in these three cases: by ruling as to the material's obscenity in a civil equity suit and by proceeding criminally against a person for his handling of such material. A prosecutor interested solely in removing material from publication will now be faced with a serious dilemma. If he chooses to criminally charge a distributor, then he can use evidence as to that person's pandering; but he would have to realize that a conviction might not effectively ban the material because other possible defendants might use different techniques in their advertising of the same material. Should he move against the material itself in a civil action, he again might use evidence of pandering, but lack of such evidence might foreclose a decision that the material is obscene. Lower courts, being particularly susceptible to local community pressure, are generally more strict in obscenity cases. It is a possible result that they will accept an appellate court's determination of the obscenity of particular material even though that decision was based upon the conduct of a different person. The feared result is that trial courts, while officially recognizing the constitutional standard of obscenity, will ban worthwhile material in all

39. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975, 978 (1966).

40. Ginzburg v. United States, 86 S. Ct. 942 (1966).

41. "In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." Ginzburg v. United States, 86 S. Ct. 942, 944 (1966).

contexts because of one person's handling of that material. The conduct of the defendant or purveyor in the first case to reach an appellate court might well determine the obscenity of the material in that jurisdiction.

An issue still remains as to the definition of pandering. An accepted definition is that pandering is the "catering to the lust of others . . . ."[42] The Court in *Ginzburg* apparently defines it as: "[E]xploitation of interests in titillation by pornography . . . [in] respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters . . . ."[43] Either definition is relatively easy to apply to the facts of *Ginzburg* as there was involved a mass mailing campaign directed to millions of people. The decision was based on the obvious facts of that particular case. How is this definition to be applied to a mass mailer whose advertising is ambiguous and does not obviously "cater to the lust of others." Perhaps he just quotes an excerpt from the material that may have erotic appeal and concludes with a mention of some possible secondary social value. His motive may have been to appeal to prurient interest of others, but can he be considered to have been pandering by quoting from material to which he ascribes social value? It is even more difficult to apply this definition to a local retailer or a book on a local newstand. Seldom would the book be publicly advertised. Would the prominent display of a book with sexually provocative covers, implying that the text of the book solely dealt with material in a manner that would appeal to a person's prurient interest in sex, be considered pandering? It is quite possible that trial courts might conclude that it is.

The entire standard will be difficult to apply in any context. The Court has supposedly set a constitutional standard of obscenity — a standard that can be no more than a series of value judgments. No judge, nor any jury, can truly determine prurient appeal other than by the material's appeal to themselves. Similarly, the only way to determine what offends contemporary community standards of decency is by looking at it from one's own viewpoint, unless, as the standard seems to require, testimony is to be elicited in each case from representative members of all the various groups present in the nation. Nor is it to be seriously believed that a jury in a small isolated community will apply the same "national" standard that a jury drawn from a large metropolitan area would apply. Yet, as the Court stressed in *Jacobellis*, the same standard must be applied nationwide.[44] What constitutes social worth will depend also on the values of the person

42. State v. Basdew, 31 Wash. 2d 63, 196 P.2d 308, 313 (1948).
43. Ginzburg v. United States, 86 S. Ct. 942, 950 (1966).
44. Jacobellis v. Ohio, 378 U.S. 184, 193 (1964).

making the determination. The Court in these cases has not clarified, but instead has compounded, the problem of determining what constitutes obscene material. They have increased the number of determinative factors that will vary from case to case. They will now be required to determine the issue of a book's obscenity based on the facts of each particular case and that determination will be strongly affected by the individual values of the nine men then composing the Court. It has been pointed out that it is now unlikely that anyone can know whether particular material is obscene until the Court announces its opinion in the case.[45]

Ginzburg and *Mishkin* were extreme cases, and obscenity has been defined in light of them. The real decision perhaps was that the particular defendants involved were themselves obscene. In defining obscenity in this light, with the apparent goal of sustaining the convictions of these particular men, the result may well be the suppression of worthwhile material and a limitation on free speech and press.

There is no assurance that these decisions have set a lasting standard for the determination of obscenity, as the Court's philosophy is subject to constant change. There was no consistent majority in these three cases, and fourteen separate opinions were written by seven Justices.[46] The Court will probably continue to face this issue as there is a sincere feeling on the part of many that there is something wrong with this type of material.[47] It is probable that most of these people believe the more significant harm to be to children who happen to read or see it.

There is a possible solution to this problem that the Court might well adopt. There are more important questions to be answered by the Court than whether a book is "dirty" enough or a picture "filthy" enough to be banned. The Court should place this material within the guarantees of the first and fourteenth amendments where it belongs. A decade ago it was decided that the adult population of the United States was not to be limited in available reading matter to that material that was fit for consumption by children,[48] yet this

45. Ginzburg v. United States, 86 S. Ct. 942, 952-53 (1966) (Black, J. dissenting). Mr. Justice Black concluded: "[N]o person, not even the most learned judge much less a layman is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."

46. Mr. Justice Brennan wrote the Court's opinion in each case. Mr. Chief Justice Warren and Mr. Justice Fortas concurred with Mr. Justice Brennan in each case, writing no separate opinion of their own.

47. For possible reasons for enactment of legislation suppressing such material, see A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 86 S. Ct. 975, 994 (1966) (Clark, J. dissenting).

48. Butler v. Michigan, 352 U.S. 380 (1957).