ValpoScholar Valparaiso University Law Review

Volume 3
Number 1 *Fall 1968*

*pp.*57-68

*Fall 1968*

# A Double Standard of Obscenity: The Ginsberg Decision

# NOTES

## A DOUBLE STANDARD OF OBSCENITY: THE GINSBERG DECISION

### INTRODUCTION

The basic constitutional view of obscenity has undergone a subtle transformation as the result of several recent Supreme Court decisions, culminating in *Ginsberg v. New York*.[1] Throughout these decisions, the underlying problem concerning the issue of obscenity has not been whether obscenity is constitutionally protected, for obscene material has long been deemed to fall outside the protection afforded by the First Amendment.[2] The difficulty has been, rather, in determining what actually constitutes obscene material. Traditionally, the criterion for determining obscenity has been based on the effect such material would have on members of society.[3] An inherent difficulty in such an approach lies in deciding what members of society are to be considered in determining the effect of the literature. Should the standard be geared to minors, who are generally very impressionable, or should the adult mind constitute the indicia? A second difficulty encountered in the obscenity cases is the insistence by many that obscenity is an *inherent* characteristic, rather than a variable to be classified according to the type of people who read the questioned material.[4]

Throughout the attempt to determine a sufficient definitional basis for obscenity, a conflict has also existed between the freedom of expression guaranteed by the Constitution and the state's desire to protect its more impressionable younger citizens from the effects of questionable material. Initially, literature could be declared obscene if the Court felt it aroused the sexual interests of the young and immature.[5] Such rulings relegated adults to reading only that literature deemed suitable for children. Later decisions, however, swung to the opposite end of the spectrum and set forth the standard of obscenity as embracing only that material which would appeal to the "prurient interest" of an average adult.[6]

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1. Ginsberg v. New York, 88 S. Ct. 1274 (1968).
2. Roth v. United States, 354 U.S. 476 (1957).
3. *See* notes 8-34 *infra* and accompanying text.
4. Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966).
5. Regina v. Hicklin, L.R.3 Q.B. 360 (1868).
6. Roth v. United States, 354 U.S. 476 (1957).

The most pragmatic approach to solving the conflicts discussed above seems to have been enunciated in *Ginsberg v. New York*.[7] In the *Ginsberg* case, the Supreme Court upheld a New York statute which set forth a separate test for obscenity in regard to minors. The statute determined that certain literature could be declared obscene *only* as it related to minors. The adult standard was not set forth in the statute, but rather was to be determined by prevailing Supreme Court decisions.

It is the purpose of this note to review the various obscenity standards and to analyze the evolution of the law, with special emphasis on its relation to minors, to its present status as set forth in *Ginsberg v. New York*.

## The Development of Recent Obscenity Law

### *The Beginning of Obscenity Standards*

The first recognized approach to defining an obscenity standard is found in the English case of *Regina v. Hicklin*.[8] The *Hicklin* case enunciated a test based upon the effect literature would have upon the most susceptible of potential recipients.[9] The court stated:

> [T]he test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication may fall.[10]

A necessary inference from such a statement is that the question involved in applying this method of determining obscenity status is whether the material tends to incite *anyone*[11] who may read it.

The *Hicklin* doctrine was initially accepted in the United States in *United States v. Bennett*.[12] Subsequent decisions, however, tended to reject the *Hicklin* test.[13] Thus the court in the *United States v. Levine*,[14] a prosecution for sending obscene material through the mails, rejected a jury instruction to the effect that the statute in question was designed to protect the young and immature and thus the jury should consider the effect of such material on a child's mind rather than its effect on a mature person.[15]

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7. 88 S. Ct. 1274 (1968).
8. Regina v. Hicklin, L.R. 3 Q.B. (1868).
9. *Id.* at 371.
10. *Id.*
11. Emphasis added.
12. United States v. Bennett, 24 F. Cas. 1093 (No. 14571) (S.D.N.Y. 1879).
13. Roth v. United States, 354 U.S. 476 (1957); United States v. Levine, 83 F.2d 156 (2d Cir. 1936).
14. United States v. Levine, 83 F.2d 156 (2d Cir. 1936).
15. *Id.*

Problems involving contemporary obscenity statutes protecting minors came into sharp focus in *Butler v. Michigan*.[16] In that case the Court reversed defendant's conviction under a state statute which prohibited the sale of *any book* which would sexually excite minors.[17] The rejected statute was analagous to the *Hicklin* approach. In dismissing the action, the Court stated that although a state's motives in attempting to protect its youth were meritorious and within the state's powers, a statute restricting the reading material of all was not reasonably restricted to the evil toward which the statute was directed.[18] The Court said that: "Surely, this is to burn the house to roast the pig."[19] Continuing, the Court stated, "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[20]

Thus, *Levine, Butler* and other decisions marked a discernible trend toward greater liberality in the determination of a standard of obscenity.

*The Roth Test*

Present obscenity law had its true inception in *Roth v. United States*[21] wherein the Court specifically rejected the *Hicklin* test by stating:

> The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.[22]

The test in *Roth* is also, by its terms, an a priori rejection of the

16. Butler v. Michigan, 352 U.S. 380 (1957).
17. *Id.* at 381. The statute (declared unconstitutional) read as follows:
Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor.
*Id.*
18. *Id.* at 381.
19. *Id.* at 383.
20. *Id.*
21. Roth v. United States, 354 U.S. 476 (1957).
22. *Id.* at 489.

*Hicklin* approach. In contrast to the "most susceptible" basis, the standard used in *Roth* is "whether to the *average person*, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest."[23] Thus, the *Roth* case included two main elements in the standard it set forth: (a) the dominant theme of the material, taken as a whole, must appeal to the prurient interest; (b) the material must be patently offensive because it offends contemporary community standards. The contemporary community standard involved in the case is national in scope.[24] Concerning the national scope of the *Roth* test, the Court in *Jacobellis v. Ohio* stated that:

> It has been suggested that the "contemporary community standards" aspect of the *Roth* test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of *Roth*.[25]

Indeed, to allow a state to develop its own statutory standard by which to measure obscenity would negate the very idea of a national standard as set out in *Roth* and *Jacobellis*.

In *Memoirs v. Massachusetts*,[26] the *Roth* test was expanded to include "utterly without redeeming social value" as a new element in the test of obscenity. In enunciating the more liberal standard, the Court stated:

> A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.[27]

*Modifications of the Roth Test*

The *Roth, Butler* and *Memoirs* decisions reflect the crest of the degrees of protection given material under the First Amendment. These decisions have embodied the most unrestrictive concepts enunciated to date. Since these cases, however, several rulings handed down by the

23. *Id.*
24. Jacobellis v. Ohio, 378 U.S. 184, 192 (1964).
25. *Id.*
26. Memoirs v. Massachusetts, 383 U.S. 413 (1966).
27. *Id.* at 419.

United States Supreme Court have eroded many of the small, but important, distinctions inherent in the *Roth* test.

The *Roth* test was altered by the Supreme Court in *U.S. v. Ginzburg*.[28] This case held that although publications themselves may not be obscene, the circumstances of their sale and distribution may render them so.[29] The fact that the purveyor's sole emphasis is on the sexually provocative aspects of the material offered for sale may thus be determinative in finding obscenity.[30]

The *Roth* test was further altered by the Supreme Court in *Mishkin v. New York*.[31] Reasoning that the material in question was stimulating only to a deviant group and repugnant to the average man, the appellant asserted that the *Roth* test did not apply. The Court rejected this contention. Holding the material obscene, the Court found that the prurient appeal of the material was directed to certain deviant groups within society and was thus objectionable on the basis that the material was specifically aimed for distribution to such groups.[32] In adjusting the *Roth* test, the Court stated:

> We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.[33]

Through these modifications, the Court indicated a willingness to restrict the *Roth* test in certain instances where the demands of society required such a restriction.

*Hints of the Ginsberg Approach*

Judges, both state and federal, attempted to find a means whereby children could be protected from material which might "corrupt" or "deprave" them. One such attempt involved "variable obscenity." The concept of "variable obscenity," which was enunciated in *Bookcase v.*

28. Ginzburg v. United States, 383 U.S. 463 (1966).
29. *Id.*
30. *Id.* at 470.
31. Mishkin v. New York, 383 U.S. 502 (1966).
32. *Id.* An earlier district court decision also applied the prurient appeal requirements to a narrow group. In United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957), the court found that material—even though it would appeal to prurient interest of the average person—is not obscene when the only people who have access to the material are scientists who will use it for research.
33. Mishkin v. New York, 383 U.S. 502, 509 (1966).

*New York*,[34] defines obscenity in terms of its appeal to the group to which the material is primarily directed.[35] Thus, material may have an obscene status if directed toward one group and yet be unobjectionable when directed toward another.[36] The Court in *Bookcase* introduced the "variable obscenity" concept when it stated:

> The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.[37]

The Court further enunciated the concept, saying:

> It is clear that there is no such thing as "obscenity in the air"—that is, obscene matter does not exist in a vacuum but can be found only by reference either to the group *to* whom the matter is directed or *from* whom it is barred.[38]

In contrast to the variable approach to obscenity is the "constant" approach which assumes an inherent quality in material that renders such material either unfit for anyone or, conversely, fit for everyone.[39] Some courts have attempted to work within this framework rather than alter the obscenity standard as set forth in the *Roth* test. Such an approach would necessarily result in carving out an exception for minors. Thus, the District Court for the Eastern District of Louisiana in *In re Louisiana News Companies*[40] deduced that the Supreme Court might accept as constitutional a statute directed solely at youth:

> While we have no occasion here to pass on the constitutionality of such a law, it would seem that a state might enact a valid statute "specifically designed to protect its children" from suggestive books and magazines that are not too rugged for grown men and women, without at the same time burning the house down to roast the pig by restricting everyone else to

34. Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 668 (Ct. App. 1966).
35. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 77 (1960).
36. *Id.*
37. Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 668, 671 (Ct. App. 1966).
38. *Id.* at 872.
39. Lockhart & McClure, *supra* note 35, at 85.
40. *In re* Louisiana News Company, 187 F. Supp. 241 (E.D. La. 1960).

> reading such fiction as Boy's Life at the magazine stand and the Five Little Peppers at the bookstand.[41]

Several Supreme Court Justices had also indicated that they would accept a statute which limited only the reading material of minors.[42] In *Jacobellis v. Ohio*[43] Justice Brennan, joined by Justice Goldberg, stated:

> State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than totally prohibiting its dissemination.[44]

Although Justices Goldberg and Brennan were the only members of the Court to definitively express their acceptance of such a statute, three other Justices intimated that they might be disposed to uphold such a law.[45]

## THE GINSBERG APPROACH

### *The Ginsberg Case*

In *Ginsberg v. New York*,[46] the Supreme Court rejected an attack on the constitutionality of a New York statute which made it unlawful to sell material deemed "harmful to minors" to anyone under seventeen years of age.[47] Such material was described as follows:

> Harmful to minors means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic 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.[48]

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41. *Id.* at 247.
42. Jacobellis v. Ohio, 378 U.S. 184 (1964). For a complete discussion see Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966).
43. 378 U.S. at 184 (1964).
44. *Id.* at 195.
45. Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590, 595 (5th Cir. 1966).
46. Ginsberg v. New York, 88 S. Ct. 1274 (1968).
47. *Id.*
48. N.Y. PENAL LAW § 484-h (McKinney 1967).

Appellant, Sam Ginsberg, who operated "Sam's Stationery and Luncheonette," was prosecuted under the New York statute for selling two "girlie" magazines to a sixteen year old youth.[49] Neither of the magazines sold by the appellant had been classified as obscene under the prevailing adult standard.[50] The appellant's primary attack on the statute rested upon the argument that the state did not have the power to regulate an adult's available reading matter upon a determination that the material was obscene, according to the statutory norm, as to minors.[51]

The majority opinion, written by Justice Brennan,[52] rejected this contention. The Court held that the statute in question did not invade a constitutionally protected area of freedom, but rather simply "adjusted" 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."[53] The Court found that the state had the power to adjust this definition in view of its right to control the conduct of children to a *greater*[54] extent than the conduct of adults.[55] The Court stated:

> 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. . . .[56]

Granting this power of the state to "infringe" on the rights of expression in regard to distribution of material to minors, the question, then, is whether the legislature can rationally conclude that exposure to such material constitutes an abuse as to minors to the extent that the material should not be constitutionally protected.[57] The Court concluded that the legislature could reasonably have found that such material is harmful to minors. The power of the state to assume parental duties through a statutory framework was justified by the Court thusly:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent

49. Ginsberg v. New York, 88 S. Ct. 1274, 1276 (1968).
50. *Id.* at 1277.
51. *Id.* at 1278.
52. There was also a concurring opinion by Justice Stewart and a dissent by Justices Black and Douglas.
53. 88 S. Ct. 1274 at 1279-80 (1968).
54. Emphasis added.
55. 88 S. Ct. 1274 at 1280 (1968).
56. *Id.*
57. *Id.* at 1281.

> interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.[58]

*Ginsberg's Place in the Pattern*

The Supreme Court's holding in *Ginsberg* becomes relevant by reason of its emphasis upon measuring materials in relation to the group toward whom the material is directed. As a result of *Ginsberg*, the state may now define or classify material as unfit for distribution to minors.

Since the Court in *Ginsberg* artfully avoided any reference to the *Roth* test as such, it cannot be unequivocally stated that the *Roth* test has been altered. However, the test as set forth by *Roth* and subsequent decisions is no longer the only criterion by which New York judges may measure the prurient appeal of questionable material, at least insofar as their rulings relate to sales to minors. Thus, the *Roth* test was modified or, as the Court says, "adjusted," to fit the social realities of the situation.

Even assuming that the *Roth* test was rejected as to minors, this is not to say that the doctrine of "variable obscenity" was adopted. The Court in *Ginsberg* adroitly avoided acceptance of the concept of variable obscenity. However, the very fact that the appeal may be judged in light of either youthful desires or adult desires, is to accept the basic tenet of variable obscenity.

*The Effects of Ginsberg*

New York now has two standards by which obscenity may be judged—the standard test applied to the sale of materials to an adult and a more stringent one governing sales to minors. As a practical matter, the aesthetic realities of the two tests are at great variance. As to adults the standard is analagous to that of the United States Supreme Court permitting free access to most modern publications. In *Redrup v. New York*,[59] such magazines as *Gent, Swank, Bachelor, Modern Man, Ace* and *Sir* were cleared of any taint of obscenity.[60] Under the *Roth* standard, pictures of nude women, including genitilia, have been found not to be obscene.[61] Nor, the Court has held, will seductively posed nude

58. *Id.* This was first enunciated in People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333 (Ct. App. 1965).
59. Redrup v. New York, 386 U.S. 767 (1967).
60. *Id.*
61. United States v. 1,000 Copies of a Magazine Entitled Solis, 254 F. Supp. 595 (D. Md. 1966).

women appeal to the prurient interest of the average man.[62]

In marked contrast to the adult standard, the New York statute makes it unlawful to sell, to anyone under seventeen years of age, any picture which portrays nudity.[63] The statute defines nudity thusly:

> Nudity means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.[64]

The Court upheld the New York statute as valid on its face. Thus, the Court did not deal with the obscenity of the magazines involved, nor did it establish a constitutional basis for obscenity as to minors. By upholding the statute on the basis of a state's police power, it would seem that the criterion of obscenity as to minors will henceforth depend upon the reasonableness of the state statute involved. This being so, it is submitted that serious doubts are raised as to the establishment of a national community standard, similar to the one involved in the *Roth* test, as to minors.

Thus, at least in relation to youth, the utilization of a state standard, based on local community mores may have the "intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency."[65] Furthermore, the disparity between different states as to the age group deemed "minors" will result in children in one state not having access to material which children of equivalent age would have in another state.

## Conclusion

The *Ginsberg* decision is but one in a series of cases rejecting or modifying the *Roth* test. The decision reached by the Court recognizes a reality of life: some material is more sexually exciting to one group than another. Unfortunately, by utilizing the police power doctrine to uphold the statute, the Court failed to resolve the problems inherent in present obscenity law. Nevertheless, the approach used in *Ginsberg*—setting a different standard for those under the age of seventeen—is the most pragmatic method yet devised to accomplish the interests of society in

62. Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962).
63. N.Y. Penal Law § 484-h, 2(b) (McKinney 1967).
64. N.Y. Penal Law § 484-h, 1(b) (McKinney 1967).
65. Manual Enterprises v. Day, 370 U.S. 478, 488 (1962).

protecting children from material that they cannot yet deal with on a mature level, while yet allowing the more mature segments of society the pleasure of adult literature.

## APPENDIX A

NEW YORK PENAL LAW § 484-h as enacted by L. 1965, ch. 327, provides:

§ 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sado-mashochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic 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 for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.