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Ginzburg et. al.--An Attack on Freedom of Expression

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NOTES

*Ginzburg et. al. — An Attack on
Freedom of Expression*

ON MARCH 21, 1966, the United States Supreme Court struck a forceful blow at the dissemination of purportedly obscene material. In *Ginzburg v. United States*¹ and *Mishkin v. New York*,² it upheld criminal convictions for the purveyance of "obscene" materials, emphasizing a new element. Intrinsically non-obscene material may now become suppressible depending on the method and manner employed in advertising it.³ In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*,⁴ although it reversed the non-criminal finding of obscenity, the Court emphasized the same new element, thus nullifying the import of its reversal.

These decisions were received with surprise by many attorneys and laymen inasmuch as none of the Supreme Court's prior decisions concerning obscenity portended such an outcome. Prior decisions, perhaps most notably *Jacobellis v. Ohio*,⁵ indicated the extreme confusion of the Court in this area and the division in views among the nine Justices. But *Roth v. United States*⁶ had enunciated a test which was given an increasingly more liberal interpretation in subsequent decisions. *Ginzburg et. al.* constitutes a dangerously regressive step.

This Note will analyze the three new decisions and attempt to determine their significance. First, it will be necessary to review briefly the history of the Court's behavior in the area of obscenity. Second, a detailed commentary on the views of the different Justices in *Ginzburg et. al.* will be attempted. Finally, an attempt will be made to isolate and analyze the factors combining to attain such a result — a result which is a serious step backward in the evolution of freedom of expression.

¹ 383 U.S. 463 (1966)

² 383 U.S. 502 (1966)

³ This element is first mentioned in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966) [hereinafter cited as *Fanny Hill*] and emphasized in *Mishkin* and *Ginzburg*.

⁴ 383 U.S. 413 (1966).

⁵ 378 U.S. 184 (1964)

⁶ 354 U.S. 476 (1957).

I. A BRIEF REVIEW OF THE HISTORY OF OBSCENITY

In *Regina v Hicklin*,⁷ Chief Justice Cockburn stated: "I think the 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 of this sort may fall."⁸ Thus, according to this early English view — probably the first obscenity standard enunciated — a work would be obscene if *any part* of it so appeared in the opinion of the least sophisticated members of a community.

After extensive use in most American jurisdictions, this severe standard was challenged by Judge Learned Hand in *United States v. Kennerly*⁹ in 1913. Judge Hand portended the "contemporary community standards" element of the current obscenity test, emphasizing the lack of reason in forcing society to accept as its own the limitations of its weakest members.¹⁰

If there be no abstract definition [of obscenity] should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* To put thought in leash to the *average conscience of the time* is perhaps tolerable but to fetter it by the necessities of the lowest and least capable seems a fatal policy.¹¹

The *Hicklin* test was finally rejected in *United States v. One Book Entitled Ulysses*,¹² when the Second Circuit recognized the necessity of examining a work in its entirety before reaching a determination of whether it is "obscene."

The Supreme Court was first directly confronted with the issue of obscenity in the 1957 case of *Butler v. Michigan*.¹³ In that decision, the Court made clear that adults could not be denied access to material merely because it might tend to corrupt minors. That same term, the Court handed down the key decision of *Roth v. United States*.¹⁴ There it held that obscenity is not protected by the first amendment, as obscene matter is utterly without redeeming social

⁷ L.R. 3 Q.B. 360 (1868)

⁸ *Id.* at 371. (Emphasis added.)

⁹ 209 Fed. 119, 120-21 (S.D.N.Y. 1913).

¹⁰ *United States v. Kennerly*, 209 Fed. 119, 120-21 (S.D.N.Y. 1913).

¹¹ *Id.* at 121.

¹² 72 F.2d 705 (2d Cir. 1934)

¹³ 352 U.S. 380 (1957) See 16 W. RES. L. REV. 780 (1965); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5 (1960)

¹⁴ 354 U.S. 476 (1957)

importance.¹⁵ Obscenity was defined as material dealing with sex in a manner which appeals to the prurient interest, that is, material which tends to excite lustful thoughts.¹⁶ Any idea with "even the slightest redeeming social importance" is fully protected by the Constitution unless it infringes on a more important interest. Next, the Court enunciated a standard by which obscenity must be judged: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁷

In its next serious consideration of the obscenity issue, *Jacobellis v. Ohio*,¹⁸ the Court clarified one element of the *Roth* decision. The "contemporary community standards" referred to in *Roth* relate to a national, not a local concept; the standards are determined by society as a whole, not by the local community.¹⁹ The wisdom and the practicability of such a standard will not be discussed here.²⁰

Concerning the definition of obscenity, *Jacobellis* clarifies another element left uncertain in *Roth*. *Roth* adopted the Model Penal Code test of appeal to prurient interest,²¹ but defined obscene material as that "having a tendency to excite lustful thoughts,"²² the latter having been rejected by the Model Penal Code. Thus, the true meaning of the Model Penal Code test was rejected in *Roth*. In *Jacobellis*, however, the Court emphasized that in order to be obscene, material must not only appeal predominantly to prurient interest, but must *in addition* go "substantially beyond customary

¹⁵ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁶ *Id.* at 487 n.20. See 16 W RES. L. REV. 780, 781 (1965).

¹⁷ 354 U.S. at 489. This standard had already been utilized by some American jurisdictions in lieu of that of *Hicklin*. In affirming *Roth*, the Court noted that its standard had been correctly applied in the lower courts.

In four later per curiam decisions, the Court reversed decisions of courts of appeals supporting censorship. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *One Inc. v. Olesen*, 355 U.S. 371 (1958); *Mounce v. United States*, 355 U.S. 180 (1957); *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957). These cases are discussed in Lockhart & McClure, *supra* note 13, at 5, 32-33 nn. 163-66.

In *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N. Y.*, 360 U.S. 684 (1959), the Court forbade ideological censorship. In that same year, the Court had opportunity to indicate the necessity of scienter as an element of the crime, *Smith v. California*, 361 U.S. 147 (1959).

¹⁸ 378 U.S. 184 (1964).

¹⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); 16 W RES. L. REV. 780, 782 (1965).

²⁰ See Lockhart & McClure, *supra* note 13; 16 W RES. L. REV. 780, 782-84 (1965).

²¹ *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

²² *Ibid.* Model Penal Code § 207, 10(2), comment 2(a) (Tent. Draft No. 6, 1957).

²³ Model Penal Code § 251.4(1) (Proposed Official Draft, 1962).

limits of candor in describing or representing such matters."²³ This is stressed as a separate and distinct element of obscenity by the Model Penal Code.

Thus, after the *Jacobellis* decision, it appeared that obscenity required proof of three distinct elements: (1) that the material as a whole appeal to prurient interest; (2) that this aspect of appeal dominate other appeal or value of the material; and (3) that the material be "patently offensive."²⁴ This latter element had been grafted onto the *Roth* test by *Manuel Enterprises, Inc. v. Day*.²⁵ Since the *Jacobellis* Court referred to *society's* standards of decency in evaluating the character of a work, apparently a national standard was to be applied here too.²⁶

In the *Jacobellis* case, six different opinions were written, reflecting the confusion and lack of agreement among the members of the Court. Nevertheless, in 1964, it appeared that certain criteria had been established in the Court's position on obscenity: (1) The Court will give de novo review to questions of constitutional fact; (2) No material may be examined in isolated parts; (3) A national standard is to be applied in evaluating "obscenity"; (4) Material with any amount of social value must be protected under the first and fourteenth amendments; and (5) Obscenity is a variable concept, allowing protection of minors from access to material which may be proper for adults.²⁷

II. GINZBURG ET. AL.

A. *The Cases*

From all fourteen opinions written in the *Ginzburg* group of cases, one element becomes clear: intrinsically non-obscene material may become suppressible material according to the *method used in advertising it*, even though the material could not itself satisfy the tests of the *Roth* and later cases. Thus, it is now apparently quite possible to determine that a work has "redeeming social value," and yet suppress it depending on the manner utilized in its dissemination.

In *Roth*, as in all subsequent cases, the determination of obscenity or non-obscenity was based solely on an examination of the material itself. Now, under *Ginzburg et. al.*, extrinsic matters — the

²⁴ 16 W RES. L. REV. 780, 785 (1966)

²⁵ 370 U.S. 478, 482-88 (1962), in which Justice Harlan referred to the quality of "patent offensiveness" or "indecentcy" as a distinct element of obscenity.

²⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964) (Emphasis added.)

²⁷ 16 W RES. L. REV. 780, 787 (1965) See Lockhart & McClure, *supra* note 13.

nature and quality of advertising — may also be considered. The only prior indication of the interjection of this new element can be found in Chief Justice Warren's concurring opinion in *Roth*:

[T]he conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but *the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.*

The personal element in these cases is seen most strongly in the requirement of *scienter*. The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct.²⁸

In *Ginzburg*, petitioners were charged with violations of the federal obscenity statute.²⁹ The only issue to be decided involved whether the *Roth* standards had been correctly applied to the case in the lower courts. Justice Brennan, delivering the opinion of the Court, pointed out that prior to this case, only the materials at issue were considered in the determination of obscenity. Here, however, the prosecution charged the offense "in the context of the circumstances of production, sale, and attendant publicity"³⁰ and admitted that, considered on their merits alone, the publications themselves might not be obscene.

Looking at the three publications involved here — *Eros*, *Laason*, and *The Housewife's Handbook on Selective Promiscuity* — Justice Brennan stated that consideration of the "setting" in which the publications were presented was permissible in determining the question of obscenity — that the publications were being viewed against "a background of commercial exploitation of erotica solely for the sake

²⁸ *Roth v. United States*, 354 U.S. 476, 495-96 (concurring opinion) (Emphasis added).

²⁹ 18 U.S.C. § 1461 (1964). The statute provides in part:

Every obscene, lewd matter, thing and . every written or printed card, letter book advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any 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 of anything declared by this section to be nonmailable shall be fined not more than \$5000 or imprisoned not more than five years, or both, for the first such offense

³⁰ *Ginzburg v. United States*, 383 U.S. 463 (1966)

of their prurient appeal."³¹ In fact, the Court "assumed without deciding" that the prosecution could not have succeeded otherwise.

Examining the context in which all three publications were sold, the Court concluded that the "leer of the sensualist" permeated their advertising.³² Thus, the publicity stressed the sexual candor of the publication. There was definite emphasis and even boasting that the publishers were taking full advantage of the license allowed under the liberal Supreme Court decisions in the obscenity area. Concerning the *Handbook* specifically, the Court was disturbed by the fact that the solicitation was "indiscriminate" and not limited to those who might be able to identify the book's "therapeutic worth," such as physicians or psychiatrists.³³ In a controlled environment, the book could have value, namely, if directed to a *limited audience*. But here, according to the Court, the petitioners emphasized the "sexually provocative aspects of the work, in order to catch the salaciously disposed,"³⁴ proclaiming its obscenity rather than any value it might have. Thus, it was only reasonable for the lower court to adopt the publisher's own evaluation of the work, despite other evidence. The Court summarized its feelings here in stating:

Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. . . . [T]he fact that [the materials involved] originate or are used as a subject of pandering is relevant to the application of the *Roth* test.

We perceive no threat to First Amendment guarantees in thus holding that *in close cases* evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.³⁵

Further, "questionable" publications become obscene in a *context* which renders them obscene according to *Roth* standards.³⁶ The exploitation of the publications involved here on the basis of their appeal to prurient interests lends itself to the conclusion that no sales of constitutionally protected matter were involved here, but rather only sales of "illicit merchandise," with no claim to first amendment protection.³⁷

The Court concluded its opinion by impliedly emphasizing the

³¹ *Id.* at 466.

³² *Id.* at 468.

³³ *Id.* at 469-70.

³⁴ *Id.* at 472.

³⁵ *Id.* at 470-71, 474. (Emphasis added.)

³⁶ *Id.* at 475.

³⁷ *Ibid.*

variable nature of its concept of obscenity while material in certain contexts might not be obscene, an "exploitation of interests in titillation" by extensive emphasis on the sexual aspects of the same material may render it such.³⁸ Before analyzing the import of the *Ginzburg* decision and its dissenting opinions, it is essential to examine briefly its two companion cases, *Mishkin v. New York*³⁹ and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.⁴⁰

In *Mishkin*, the Court again upheld convictions under a criminal obscenity statute.⁴¹ Fifty books were involved in this case, portraying both normal and abnormal sexual relations and activities, including homosexuality and sado-masochistic acts. The Court first rejected appellants' contention that the New York law was invalid on its face as exceeding first amendment limitations and that it was impermissibly vague, on the ground that the New York definition of "obscenity"⁴² was even more narrowly defined than that of *Roth*. Next, the Court examined the nature of the material being sold by appellant. Appellant urged that since the materials involved portrayed certain *abnormal* sexual practices, for example, flagellation and lesbianism, they could not satisfy the *Roth* criterion of appealing to the prurient interest of the "average person," and that on the contrary they would "disgust and sicken."⁴³ The Court rejected this reasoning as an incorrect interpretation of the prurient appeal criterion:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than 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 in sex of the members of that group.⁴⁴

Justice Brennan went on to explain that the "average" or "normal" person concept was utilized in *Roth* in order to express rejection of the *Hicklin* "most susceptible person" standard. Since this material would appeal only to the sexually immature, the prurient-appeal re-

³⁸ *Ibid.*

³⁹ 383 U.S. 502 (1966).

⁴⁰ 383 U.S. 413 (1966).

⁴¹ N. Y. Penal Code § 1141 was involved here. Appellant was convicted of violating this law by hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.

⁴² *Mishkin v. New York*, 383 U.S. 502, 506 (1966). See *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 586-87, 175 N.E.2d 681, 685-86 (1961).

⁴³ *Mishkin v. New York*, 383 U.S. 502, 508 (1966)

⁴⁴ *Ibid.*

quirement must be adjusted to "social realities," namely, by assessing its appeal to its *intended audience*, although not to the most susceptible members of the community.⁴⁵ In *Mishken*, the books were "conceived and marketed" for sexually deviant groups and the Court found that they appealed to the prurient interest of these groups.⁴⁶

In *Fanny Hill*, the Supreme Court reversed the Massachusetts' court's finding of obscenity. A civil equity suit was involved in this case, rather than a criminal prosecution, and in effect the book itself was placed on trial rather than the publisher. As indicated previously, this decision is no victory for the proponents of free expression. For in this case, the Court merely determined that one of the three elements of the *Roth* obscenity test had been incorrectly applied by the lower courts.

The three requisite elements of obscenity, as defined in *Roth*, elaborated in subsequent cases, and reiterated here, are: (1) that the dominant theme of material taken as a whole appeals to the prurient interest; (2) that the material be patently offensive because it affronts contemporary community standards in the representation of sex; and (3) that the material be utterly without redeeming social importance.⁴⁷ The lower court in *Fanny Hill* held that although the book might have minimal literary value, nevertheless it may not be of any social importance and that, at any rate, it need not be unqualifiedly worthless before it can be considered obscene if it satisfies the first two criteria of obscenity. The Supreme Court emphasized that each criterion is a federal constitutional standard which must be applied independently.⁴⁸ A book cannot be proscribed unless it is *utterly* without redeeming social importance. Thus, no balancing of the criteria, one against the other, is permissible; each is absolute.

These statements by the Court, and its holding in *Fanny Hill*, are of little significance. Since only the book itself was being "judged" and no criminal conviction was involved, a reiteration of the *Roth* standards — in a manner consistent with cases subsequent to *Roth* — was only to be expected. Furthermore, apparently to make certain of no misunderstanding, the Court continued its opinion by eliminating all doubt of "victory" for those opposing censorship:

⁴⁵ *Id.* at 508-09.

⁴⁶ *Id.* at 509.

⁴⁷ *Fanny Hill*, 383 U.S. 413, 418 (1966)

⁴⁸ *Id.* at 419.

It does not necessarily follow from this reversal that a determination that *Memours* is obscene in the constitutional sense would be improper under all circumstances. On the premise that *Memours* has the requisite prurient appeal and is patently offensive but has only a minimum of social value *the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected.*⁴⁹

The Court alleged that this did *not* involve a relaxation of the "utterly without redeeming social importance" concept, but rather involved only the acceptance of the publisher's own evaluation of his publications. Thus, if his entire emphasis is on the "sexually provocative" aspects of his publications, this will be accepted.⁵⁰ Again, the Court emphasized that this particular proceeding was devoid of any specific facts concerning circumstances of production, sale, and publicity. Had the situation been otherwise, the result might well have been different.

No attempt will be made here to discuss every concurring and dissenting opinion in all three cases. Only the most interesting ones will be mentioned.

It suffices to clarify the position of each of the Justices. Justice Brennan delivered the opinions of the Court in all three cases; Black, Stewart, Douglas, and Harlan dissented in *Ginzburg*, as did the three former in *Mishken*; Douglas concurred in *Fanny Hill*, in which Clark and Harlan dissented.

The most interesting arguments are brought forth in the *Ginzburg* dissents. A major point emphasized by several of the dissenting Justices involved the violation of due process inherent in *Ginzburg's* conviction. Justice Black pointed out that the majority of the Court had essentially rewritten the federal obscenity statute, imposing certain standards and criteria which, if intended by Congress, were never enacted. *Ginzburg* was not charged with violation of this "amended" statute in the lower courts, but was nevertheless being convicted of violating it in the highest Court — clearly a violation of due process.⁵¹ Similarly, Justice Stewart, in a brilliant dissent, emphasized that *Ginzburg* was found guilty by the Court of "commercial exploitation," "pandering," and "titillation" — acts for which he was never charged, which are not made criminal by any statute, and which no statute could make criminal without being

⁴⁹ *Id.* at 420. (Emphasis added.)

⁵⁰ *Ibid.*

⁵¹ *Ginzburg v. United States*, 383 U.S. 463, 476-78 (1966) (dissenting opinion).

unconstitutionally vague and therefore void.⁵² Justice Harlan asserted the same point. According to him, the Court here was writing a new statute, taking the objective test of *Roth* and supplementing it by another test concerning whether the mailer's goal is to "pander to" or to "titillate" those to whom he mails questionable matter.⁵³ Harlan points out that prior to *Ginzburg*, evidence of a defendant's conduct was only admissible to show "relevant intent." Now, evidence as to "attitude" and "motive," as well as conduct, is allowed on the basic question of obscenity. "I have difficulty seeing how these inquiries are logically related to the question whether a particular work is obscene. Such a test for obscenity is impermissibly vague and unwarranted."⁵⁴

Justice Douglas emphasized another point: a book should be judged on its intrinsic merits, not on the reasons for which it was written or the advertising or "wiles" used in selling it.⁵⁵ To him, emphasis on certain parts of the Bible in its dissemination could not render it outside the protection of the first amendment. The "test" being used by the majority, he asserted, is characterized primarily by "uncertainty," which is necessarily detrimental to free expression.⁵⁶ Black asserted a similar proposition in stressing that judges and jurors cannot apply any of the elements composing obscenity with any uniformity or certainty. In each case, only a completely subjective determination could be made by these individuals, which would actually depend on their own personal habits and proclivities and which would vary from community to community as well. After the *Ginzburg* majority opinion, Black is convinced that no one can know what is obscene and what is not. So obnoxious is this condition that — although in his view the first amendment forbids all censorship of views as distinguished from conduct⁵⁷ — censorship in advance of publication could be preferable to this "unpredictable book-by-book censorship into which we have now drifted."⁵⁸

B. *An Evaluation*

With *Roth v. United States*, in 1957, it appeared that the test established by the Supreme Court was intended to accomplish two

⁵² *Id.* at 497, 500 (dissenting opinion)

⁵³ *Id.* at 493, 494 (dissenting opinion)

⁵⁴ *Id.* at 497

⁵⁵ *Id.* at 482.

⁵⁶ *Id.* at 483.

⁵⁷ *Id.* at 481. Justices Black and Douglas of course adhere to this proposition.

⁵⁸ *Ibid.*

goals. First, an attempt was made to set forth an objective standard which trial courts would be able to apply and which would obviate constant appeals to and review by the United States Supreme Court. Second, although obscenity was excluded from the purview of first amendment protection, there was a great interest in protecting freedom of expression by guarding anything not obscene from overzealous censors. These two goals appeared to remain present in the Court's attitude toward obscenity in all decisions subsequent to *Roth* and prior to *Ginzburg*. It now seems entirely reasonable to assert that each of these goals has been seriously subverted by the *Ginzburg* group of cases.

With *Ginzburg et. al.*, a highly subjective element has been engrafted onto the *Roth* test and standards for judging obscenity. This added element will further confuse trial courts — already embroiled in an area which defies any real delineation — and add to the Supreme Court's flood of censorship cases. And, as previously indicated, it will seriously deter freedom of expression and expose this area to the self-appointed "watch-guards" of the moral fiber of our society.

While *Fanny Hill* reaffirmed the three requisite elements of the test in *Roth* and subsequent cases, it held that all three elements must *coalesce* and must be independently satisfied before a determination of obscenity may be reached. But the *Ginzburg* decision added the new element: when objective examination of the three criteria is not conclusive, the courts may examine the publisher's intent and motives as established by his marketing and advertising practices. If he attempted to pander to or to titillate the public's sexual interest, stressing this aspect of the material he is selling, then his own evaluation of the material may be taken "at its face value" and a finding of obscenity established. The *Mishkin* decision redefined the element of prurient appeal by asserting that it is really not the "average person" whose prurient interest must be aroused in order for a work to be obscene; a work may be obscene if it is designed for deviant sexual groups and appeals to the prurient interest of the "average member" of *these groups*.

In evaluating these three decisions, a preliminary question might well concern the source and reason for the engrafting of the new "pandering" element. It is submitted here that just as the Supreme Court has relied extensively on Lockhart and McClure, the two leading experts in the constitutional area of obscenity, in all prior obscenity decisions, it again relied on them in the *Ginzburg* group of

cases.⁵⁹ Although the Court had avoided adoption of this facet of their ideas until this year, much of *Roth* and *Jacobellis*, for example, stemmed directly from their writings. In *Jacobellis*, the opinion of the Court did indicate a *variable* concept of obscenity, for the Court stated that had the film involved been directed toward minors, the standard employed and result attained might well have been different.⁶⁰ But a concept of obscenity which is variable *only* on the basis of a distinction between adults and minors is far different from the one now adopted by the Court. For the concept now adopted by the Court is a *totally* variable one. In judging obscenity, the intrinsic nature of the material will depend on the audience to which it is directed via marketing and advertising. This is basically the position advanced by Lockhart and McClure:⁶¹ censorship should be limited to material "*treated*" as hard-core pornography, because it is the "manner in which it is marketed and the primary audience to which it is sold" which should be determinative of obscenity, *not* the intrinsic value of the material alone.⁶² It is by this means alone, they claim, that hard-core pornography may occasionally be distributed legitimately for scientific purposes, "while at the same time censorship of material that is *not* intrinsically hard-core pornography can be permitted when the manner of marketing and the primary audience to which it is marketed indicate that it is being treated as hard-core pornography — that its function in that setting is to nourish erotic fantasies of the sexually immature."⁶³ It is submitted here that there are some basic problems inherent in a concept of obscenity this variable. Primarily, while the first goal of allowing occasional dissemination of even hard-core pornography may be achieved under this concept, there is every reason to believe that many "average" adults will effectively be prevented from all exposure to material which has intrinsic social value in order to "protect" the "sexually immature." The Lockhart and McClure theory assumes that it is *necessary* to protect the sexually immature in our society *and* that it is possible to determine who these people are.

It is urged here, first, that no reason has been shown for such protection of society. The only justification for censorship would

⁵⁹ See Lockhart & McClure, *supra* note 13.

⁶⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

⁶¹ See Lockhart & McClure, *supra* note 13; Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue — What is Obscene?* 7 UTAH L. REV. 289, 298 (1961).

⁶² Lockhart & McClure, *supra* note 61, at 298.

⁶³ *Ibid.*

arise from reasonably conclusive evidence of a correlation between obscene materials and anti-social behavior, for example, sex crimes. No such correlation has been proven and authoritative studies appear to negate the correlation, and occasionally even to support the value of obscenity.⁶⁴ It is urged that until this correlation is shown, only censorship of hard-core pornography directed at *minors* alone is justifiable. There is no other certain or objective way of discriminating among "types of audiences." Further, as pointed out elsewhere⁶⁵ and by Justice Stewart in his *Ginzburg* dissent, censorship inherently reflects a lack of self-confidence of a society in its people, a feeling that moral tutelage is necessary and that pluralistic standards of private conduct are impermissible. The more primitive or the more totalitarian a society, the more extensive its censorship. Let society expend its efforts in enforcing prohibitions on sales of certain materials to minors, rather than in limiting the individual's essential need for freedom of expression by proscribing materials for all. If no harm to others results from exposure to obscenity, let each individual guard his own "moral fiber." Government has no place here.

The addition of the "pandering" element to the obscenity test has even more serious faults. Despite pronouncements of the majority opinions in *Ginzburg et. al.* to the contrary, this element in practical effect negates the meaning of the *Roth* decision. For in "close cases" — which must mean in almost every case — there will inevitably be some doubt or question as to satisfaction of the three objective criteria set forth in and developed from *Roth*. And once this doubt or question appears, the courts may examine the advertising involved. If it is not clear whether a work appeals to the prurient interest, sexually stimulating advertising will be held to determine the point. And if the advertising dwells on the sexual aspects of a work, this will be considered to support its "patent offensiveness." Finally, it is submitted that the third *Roth* criterion — "redeeming social value" — is now totally nullified. A work is no longer examined for its intrinsic value alone. Thus, a determination that a work had some value, that it was not "utterly without redeeming social importance," may apparently be off-set by the circumstances of the marketing of the work. Publications with

⁶⁴ See studies by Margaret Mead and other leading sociologists and anthropologists, in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5 (1960). See Murphy, *The Value of Pornography*, 10 WAYNE L. REV. (1964).

⁶⁵ 16 W. RES. L. REV. 780, 786 (1965).

admitted social value may be suppressed, even though the advertising employed is *not by itself obscene and even though the material by itself and by definition is not obscene*. In 1966, this is a tragic defeat for those believing in the sanctity of freedom of expression. As Justice Stewart said:

Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.

In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother.⁶⁶

One further aspect of the *Ginzburg* group of cases should be examined. This is the "redefinition" of the "average person" concept enunciated in *Roth* as related to the prurient appeal aspect of that test. In *Mishkin v. New York*,⁶⁷ as previously discussed, material concerned with deviant sexual practices which allegedly appealed to the prurient interests of those groups — and those groups alone — was held to be obscene. The Court claimed that the terms "average" or "normal" person utilized in *Roth* were only intended to reject the "most susceptible person" standard enshrined by the *Hicklin* case.⁶⁸ Prurient appeal must now be assessed in terms of "the sexual interests of its intended and probable recipient group";⁶⁹ and since this group must be defined more specifically than merely as "sexually immature," the Court claims that it avoids the inadequacies of the *Hicklin* test.⁷⁰

It should first be admitted that the Court's view is entirely logical in its development. That is, the *nature* of the *appeal to prurency* is no different under *Roth* than under *Mishkin*; it is the *nature of the group* that is different in its particular demands, tastes, and inclinations. In *Mishkin*, as previously in *Roth*, the Court did indeed

⁶⁶ *Ginzburg v. United States*, 383 U.S. 497, 498-501 (1966). (dissenting opinion)

⁶⁷ 383 U.S. 502 (1966)

⁶⁸ *Id.* at 509.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

reject the *Hicklin* standard. According to *Hicklin*, in order for material to be obscene, it would have to "deprave and corrupt" the susceptible;⁷¹ according to *Roth*, it would have to stimulate the sexual interest of the average or normal person, not "deprave and corrupt;" and according to *Mishkin*, it *could* not deprave or corrupt, because the particular group established as the criterion would already be "depraved and corrupt." Under *Hicklin*, there could be no finding of obscenity given the *Mishkin* situation, because the materials could not deprave or corrupt a group which is *already* both. Under *Roth*, read literally and logically, there could be no finding of obscenity given the *Mishkin* situation because the materials dealing with aberrant sexual practices could not (within the realms of knowledge in this area) appeal to the average or normal person — they could only disgust. The result is different under *Mishkin*, because the nature of the group examined is different and the resulting definition of "average" is changed accordingly.

Is the Supreme Court's logic adequate? Is it based on a consideration of the whole meaning and import of the *Roth* test? The *Roth* test goes beyond prurency to the question of redeeming social value. On this basis, although the *Mishkin* test appears logical as far as it goes, it is so narrowly focused as to ignore the concept of the total role of literature in society. This, it is submitted, is the real reason for the strong dissents and the general dissatisfaction with the decision. The real element of inadequacy in the *Mishkin* decision, as in *Ginzburg*, is that it results in the exclusion of certain groups, *ipso facto*, from the whole realm of social value. What is of value to these groups, namely, to homosexuals, sadists, and masochists, is declared to be of *no* value by the Court. Thus, the Court is making a sociological, rather than a legal, determination as to what has social value versus what does not — and a sociological determination which has no sufficient basis and which cannot be supported. It is condemning entire *groups* of people by not allowing them free expression, essentially saying that they are "obscene," since anything which appeals to them becomes automatically obscene.

The repugnant nature of such a test is probably best expressed by Justice Douglas in his combined *Mishkin-Ginzburg* dissent.⁷² There he raises certain fundamental questions about the majority's outlook and analysis of this facet of the obscenity standards. Why is it unlawful to cater to the needs of deviant sexual groups? Even if their

⁷¹ *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868)

⁷² *Ginzburg v. United States*, 383 U.S. 463, 482 (1966).

ideas are nonconforming or unappealing, should such groups be prevented from being able to communicate with each other "by the 'written word' "73

When the Court today speaks of "social value" does it mean a "value" to the majority? Why is not a minority "value" cognizable? If we were wise enough we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without any redeeming social importance"? "Redeeming" to whom? "Importance" to whom?74

Implicit in Douglas' words is another consideration: certainly members of these deviant groups can communicate with each other in all respects (for example, verbally and sexually) except by the written word. Why should they be deprived of this medium of communication? Is it for the Court to decide that nothing they could communicate in writing could be beautiful, meaningful, or have value to them? This communication might actually serve positive goals by encouraging expression, rather than repression, of inner desires and perhaps even by helping to *prevent* anti-social behavior. Certainly it is not for the Court to decide what should be orthodox in literature. "An omniscience would be required which few in our whole society possess."75

III. CONCLUSION

If the first amendment has any meaning, it is that ideas which are not utterly worthless or which do not incite to action must be allowed free expression — whether they are "good," "bad," appealing, or non-appealing. The tragic aspect of the *Ginzburg* group of cases is that this basic protection of expression in our society has suffered a serious set-back.

It is not enough, however, merely to criticize the decisions; a substitute should be suggested. It is submitted here that obscenity should be considered within the ambit of the first amendment. If this were the case, the clear and present danger test could then be applied, so that any materials which might incite to "action" could be

73 *Id.* at 489.

74 *Id.* at 489-90. Earlier, in *One, Inc. v. Olesen*, 355 U.S. 371 (1958), the Court reversed the judgment of the Ninth Circuit which had forbidden the dissemination of a homosexual magazine. There can be little doubt that this result would now have to be reversed.

75 *Ginzburg v. United States*, 383 U.S. 463, 491 (1966)

proscribed. All other material would be allowed free reign so that all members and groups in our society — representing majority or minority views, normal or abnormal ideas — could express themselves without fear of legal repercussions. Surely, our society is mature enough to tolerate in writing that same pluralism of private moral standards which obtains in fact in the realm of conduct. Why should a free society fear to write and read about the “darker” or deviant aspects of human emotions and conduct? Surely, the danger of such writings to our society is less than that of a capricious censorship which, with no sound basis in sociology, psychology, or law, would stifle the freedom of expression we consider to be our right. The day will come when Ginzburg will be considered a victim, not a criminal.

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