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Obscenity--Obscene Publications--Pandering [*Books, Inc. v. United States*, 388 US. 449 (1967)]

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Recent Decisions

OBSCENITY — OBSCENE PUBLICATIONS — PANDERING

Books, Inc. v. United States, 388 U.S. 449 (1967).

On June 12, 1967, the last day of the October 1966 term, the United States Supreme Court rendered several two-line per curiam decisions in cases involving obscenity censorship. It appears that these short opinions may be useful in clearing up some of the confusion which exists in this area of constitutional law. The utility that these opinions may possess can be ascertained only after a perhaps unnecessarily rigorous examination and comparison of the facts, issues, and holdings of several cases. Although the Supreme Court's use of these very short per curiam opinions may be a rather vague method of clarifying its previous decisions, the procedure is not without precedent.[1]

It is the purpose of this article to examine the contribution of one recent per curiam decision, *Books, Inc. v. United States*,[2] toward reducing the confusion in the area of obscenity censorship. Briefly, it may be said that this case clarifies the rule announced in *Ginzburg v. United States*[3] pertaining to evidential requirements in criminal prosecutions under obscenity statutes. It also appears that while the *Ginzburg* rule has survived, its scope may have been effectively limited to its facts. A further, but weaker, implication may be drawn that the Court is becoming more liberal in its outlook on censorship. Before presenting an analysis of *Books, Inc. v. United States*,[4] it would be well to first examine the development of the common law regarding censorship of allegedly obscene material.

This area of constitutional law is concerned with the first amendment rights of freedom of speech and freedom of the press. In February 1957, the United States Supreme Court established in *Butler v. Michigan*[5] the principle that first amendment protection (via the 14th amendment) would be afforded to persons prosecuted under State obscenity statutes. Although this first step was significant and carefully taken, many questions were yet to be answered.

After *Butler*, the question remained whether *any* statute would

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[1] *See* text accompanying notes 9-14 *infra*.

[2] 388 U.S. 449 (1967).

[3] 383 U.S. 463 (1966).

[4] 388 U.S. 499 (1967).

[5] 352 U.S. 380 (1957).

be proper. If this question were answered affirmatively, the Court would be faced with determining what standards a statute must meet so as not to violate the first amendment. The Court addressed itself to this issue in *Roth v. United States*.[6] The most important part of the holding in *Roth* was that a federal statute[7] making it a criminal offense to deposit obscene material in the United States mail was held constitutional.[8] This established the principle not articulated in *Butler* that obscene material would not be afforded the protection of the first amendment. In addition, the Court announced a test for obscenity: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[9]

Depending on how stringently the Supreme Court wished to apply this broad test, either a liberal or conservative standard of obscenity censorship could have resulted. It was generally felt that the Court meant to adopt a conservative standard; that is, one favoring broad powers of censorship.[10] But this interpretation was shortly proved wrong when, in 1957, the Supreme Court handed down four per curiam decisions[11] which reversed lower court decisions upholding obscenity censorship. In all of the cases the Court simply cited *Roth v. United States*,[12] or *Alberts v. California*,[13] a companion case to *Roth*, and gave no further opinion. After resorting to the lower court opinions for the facts and comparing them with the *Roth* standard for censorship, one might conclude that the Court intended to apply "the constitutional guarantees of freedom of expression [so as] to confine obscenity censorship, within very narrow limits . . . ."[14] However, this conclusion would be based on more speculation than is usually necessary to ascertain a rule of law from a Supreme Court opinion.

Even though these short opinions indicated the Court's general

6 354 U.S. 476 (1957). For an excellent discussion of the other two cases and the other issues decided in *Roth*, see Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 18-32 (1960).

7 62 Stat. 768 (1955), *as amended*, 18 U.S.C. § 1461 (1964).

8 354 U.S. at 492.

9 354 U.S. at 489.

10 *See* Lockhart & McClure, *supra* note 6, at 31-32.

11 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).

12 354 U.S. 476 (1957).

13 *Id.*

14 Lockhart & McClure, *supra* note 6, at 35. For a complete analysis of how this conclusion is supported, see *id.* at 32-39.

approach to the censorship issue, neither did they indicate with certainty where the line lay between the obscene and the nonobscene, nor did they shed much light on some of the problems inherent in the *Roth* test. For example, was a book which had great literary value but whose dominant theme also appealed to prurient interest to be withheld from the reading public? Also, did the Court intend to make it impossible for research organizations to obtain admittedly obscene and pornographic material for study purposes?[15] To apply the *Roth* standard, even under the liberal interpretation given it by the 1957 term per curiam decisions, would have been to uphold censorship of both literarily valuable books and the pornographic material requested by the research organization. This was an unsatisfactory situation, and one that was probably not intended by the Court when it attempted to define obscenity in the *Roth* case.

The dilemma posed by the logical extention of the *Roth* test to cover these extreme cases, as well as some other problems concerning obscenity censorship, was solved by the Court in a set of three decisions in 1966. These three decisions were: *A Book Named Memoirs v. Attorney General*,[16] *Ginzburg v. United States*,[17] and *Mishkin v. New York*.[18] In the first of these cases, *Memoirs*, the Court said that the *Roth* definition of obscenity, "*as elaborated in subsequent cases*,"[19] meant that there must be a coalescence of three elements:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[20]

Essentially this three-element test breaks the *Roth* definition of obscenity into two parts, (a) and (b), and adds a third element — social value. It is important to note that this definition explicitly

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[15] For a complete discussion of these and other problems raised by the *Roth* decision, see Lockhart & McClure, *supra* note 6, and Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue — What is Obscene?*, 7 UTAH L. REV. 289 (1961).

[16] 383 U.S. 413 (1966).

[17] 383 U.S. 463 (1966).

[18] 383 U.S. 502 (1966).

[19] 383 U.S. at 418 (emphasis added). Unfortunately, Mr. Justice Brennen did not say what these "subsequent cases" are, but presumably they include the four per curiam decisions discussed in the text accompanying notes 9-14 *supra*.

[20] 383 U.S. at 418.

requires that the three elements must be established independently; a failure to establish any one of them will result in a judgment that the material involved is not obscene.[21] The addition of the last element solves part of the dilemma posed by a strict interpretation of the *Roth* definition. If material must be "utterly without redeeming social value" to be held obscene, then the literarily valuable, but sex-oriented, book should not be condemned. This third element announced in *Memoirs* may even partially solve the hypothetical problem of the obscene material requested by the research organization.

Thus far in the discussion both criminal and civil actions have been considered without differentiation. The differences between these two kinds of actions becomes important in the next step in the evolution of the test for obscenity. In a civil action, such as a declaratory judgment where for example a book is sought to be condemned as obscene, it is the book that is on trial; it is examined *in vacuo* according to the current definition of obscenity. Other factors such as evidence of contemporary community standards may be considered, but these factors are relevant only as they aid the Court's understanding of the meaning and effect of the words of the book.[22]

On the other hand, in criminal actions, such as a violation of an obscenity statute, it is a person, not a book, that is on trial; it is the defendant's conduct that is being examined. Until the *Memoirs* decision the Court, with few exceptions,[23] looked at the nature of the material alleged to be obscene as a factor separated from the conduct of the defendant.[24] The issue of obscenity in the criminal case was therefore treated the same as it was in civil cases.

This compartmentalized thinking strains the very fabric of the criminal case; it forces apart two elements that, united, form the basis of the crime. This process is unnatural, and causes the kind of dilemma posed by the research organization hypothetical mentioned previously. The only reason why this dilemma arose was the fact that the intended use of the pornographic material seemed quite proper; and yet under a strict interpretation of the *Roth* definition of obscenity, the material would have been condemned. The

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21 *Id.* at 419.

22 *See, e.g.*, A Book Named Memoirs v. Attorney General, 383 U.S. 413 (1966).

23 *See, e.g.*, Butler v. Michigan, 352 U.S. 380 (1957). Here Justice Frankfurter implied by way of dictum that material too indecent for children to read might not be obscene by an adult standard. *Id.* at 383.

24 *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957).

dilemma could have been avoided if the *Roth* standard had been flexible enough to give weight to the future conduct of the organization.

Likewise, a strict interpretation of the words of the *Memoirs* three-element test for obscenity would result in the same dilemma for the research organization. In all three elements of the *Memoirs* definition the word "material" is used; there is no mention of conduct. Thus the use that the hypothetical research organization planned for the pornographic material could not influence the result of the application of the new standard. The new "social value" element would not justify an exception to the rule; it is clear that "social value," under strict interpretation, applies to the material itself, not to the use of the material. This problem could, of course, be resolved if the Court did not insist upon separating conduct from the nature of the material.

Although the addition of the social value element solves the problem of the sex-oriented but literarily valuable book, it creates a new one. For material to be considered obscene, it must be "*utterly* without redeeming social value."[25] This means that if a book has any merit at all, either socially, literarily, or historically, then it cannot be judged obscene. The practical effect of this requirement could make it possible for any book to be saved from the censor's ban merely by the addition of a chapter on, for example, history. If such a chapter were totally unassociated with the rest of the book, the Court would probably ignore it as spurious. But it would not take much ingenuity to integrate this kind of material without destroying the dominant theme. It seems clear, therefore, that a strict interpretation of the *Memoirs* definition could have the practical effect of vitiating the whole concept of obscenity censorship. Unquestionably, the United States Supreme Court is not going to go this far; yet, strictly speaking, *Memoirs* does just that. It would appear reasonable that if the conduct of the person dealing with such a book were considered, then at least a partial solution to this newly created problem could be achieved.

In *Ginzburg v. United States*,[26] Justice Brennen, writing for a majority of the Court, discussed the defendant's conduct in regard to the issue of obscenity. Specifically, the Court held that evidence of pandering would be relevant to the issue of obscenity "*in close*

[25] A Book Named Memoirs v. Attorney General, 383 U.S. 413, 418 (1966) (emphasis added).

[26] 383 U.S. 463 (1966).

cases"[27] — that is, in cases in which it is questionable whether or not the material is obscene. Justice Brennen even said, at the beginning of his opinion, that "standing alone, the publications themselves might not be obscene."[28] Thus, under *Ginzburg* the Court can look at the material to see whether it is sex oriented. If it is, then it can pass immediately to an examination of the defendant's conduct in relation to the material; a specific finding that the material is obscene, by itself, is not necessary.

Essentially, the elements of pandering which the Supreme Court felt relevant to the case can be grouped into two broad categories, as follow: (1) the presence of deliberate representations on the material itself indicating that it is erotically arousing and pruriently oriented without saving intellectual content, and (2) circumstances of presentation and dissemination which are obviously designed to attract the prurient minded. The Court did not say specifically whether proof of all or any one of the issues or categories of issues was necessary; all the Court said was that the evidence was "relevant in determining the ultimate question of obscenity."[29] This ambiguity appears to have been resolved by a recent per curiam decision, *Books, Inc. v. United States.*[30]

Books was a criminal case involving the prosecution of a paperback book distributor for violation of a federal statute prohibiting the transportation of obscene books in interstate commerce for the purpose of sale or distribution.[31] At a jury trial, the defendant had been found guilty of transporting the book *Lust Job* in interstate commerce. On appeal, the court of appeals affirmed the conviction.[32] District Judge Wyzanski, writing the opinion of the court, described the book in the following manner:

> [A] tale exclusively devoted to the sexual adventures of its principal characters. Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse, but sodomy and other perversions. There is not any serious effort to portray the reality of cultural or social conditions of even the most neurotic or sordid portion of the population.[33]

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[27] 383 U.S. at 474 (emphasis added).

[28] *Id.* at 465.

[29] 383 U.S. at 470.

[30] 388 U.S. 449 (1967).

[31] 18 U.S.C. § 1465 (1964).

[32] Books, Inc. v. United States, 358 F.2d 935, 936 (1st Cir. 1966), *rev'd*, 388 U.S. 449 (1967).

[33] *Id.*

Based on the results of this analysis of the contents of the book, the circuit court felt that a jury could find *Lust Job* obscene within the definition of obscenity announced in the *Memoirs* case.[34] Judge Wyzanski went on to bolster the court's finding of obscenity by noting that according to *Ginzburg*, in borderline cases the circumstances under which the material is commercially exploited (pandering) can have a decisive effect upon the determination of the question of obscenity.[35] Standing on this precedent, he then pointed to the district court's discussion of the front and back covers of the book and found therein evidence of pandering. He said that the title of the book itself, *Lust Job*, was suggestive, and that the illustration on the cover of the book enhanced this suggestion. Concerning the back cover, the court quoted the following description found thereon: "A time for shame and lust and everything that added up to wild bedroom orgies where nobody cared what anybody did as long as they did it and never stopped!"[36]

On appeal, the United States Supreme Court summarily reversed[37] citing *Redrup v. New York*.[38] The *Redrup* decision was a composition of three State obscenity cases.[39] In a per curiam opinion, the Court said that in none of these cases was there evidence of the sort of pandering which it had found significant in *Ginzburg*, nor did it feel that the material involved in the three cases was obscene.[40]

Since the Supreme Court in *Books, Inc.* cited the *Redrup* decision, and since *Redrup* dismissed the pandering doctrine announced

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[34] *Id.* at 937. Although it appears that the court may have been merely passing judgment on the *sufficiency* of the evidence to support the jury verdict, the fact that it cited Jacobellis v. Ohio, 378 U.S. 184 (1964), and that it listed the elements of obscenity set forth in *Memoirs*, indicate that the court was aware of and carried out its duty to make an *independent* judgment of the book's obscenity, as required by the *Jacobellis* decision. Thus, when the court said that "a jury could find *Lust Job* obscene within the meaning of 18 U.S.C. § 1465," it must have meant that it had read the book and found it to be obscene, and therefore *agreed with* the conclusion of the jury. 358 F.2d at 937.

[35] 358 F.2d at 937-38.

[36] *Id.* at 937.

[37] 388 U.S. at 449.

[38] 386 U.S. 767 (1967).

[39] The other two cases were Austin v. Kentucky, and Gent v. Arkansas.

[40] 386 U.S. at 770. It is interesting to note the method the Court used to arrive at its conclusion that the material was not obscene. Although not mentioning them by name, the independent views of seven of the Justices on the definition of obscenity were succinctly set forth. (The views of Justices Clark and Harlan, who dissented in the case, were not included.) The Court then said that no matter which of the views were applied to the cases under consideration, the finding would be that the materials were not censorable obscenities. *Id.* at 770-71.

in *Ginzburg* as not pertinent to its decision, one could arrive at only two conclusions: either the Court felt there was no evidence of any kind of pandering in *Books, Inc.*,[41] or the Court felt that there was no evidence of the sort of pandering which it had found significant in *Ginzburg*. Clearly, the first alternative is false because of the substantial evidence of pandering presented to the circuit court in *Books, Inc.* This leaves the second alternative, and there are two inferences that can be drawn from it, either one or both of which can be true. The first inference is that by the use of the word, "significant," the Court may have indicated, in a subtle manner, the necessary elements to the proof of pandering. As mentioned above,[42] in *Ginzburg* the Court discussed two elements which it considered evidence of pandering. But the Court did not say which of the elements or categories of elements were necessary to the proof of pandering. The circuit court in *Books, Inc.* presented evidence of pandering, consisting of a discussion of the front and back covers of the book *Lust Job*.[43] Since the Supreme Court in *Books, Inc.* effectively disregarded, through reference to *Redrup*, the evidence of pandering discussed by the lower court, it might be fair to assume that the Court did not consider to be relevant to proof of pandering deliberate representations on the material that it is erotically arousing. If this is true, then the Court was saying retrospectively that it did not find the representations made on the material significant in the *Ginzburg* case. If this reasoning is correct, then only the evidence pertaining to the circumstances of dissemination of the material must be deemed significant to the proof of pandering. To carry this rationale one step further, it might be said that the Court was also distinguishing between the publisher-defendant and the distributor-defendant. *Ginzburg* involved the former; *Books, Inc.* the latter. If evidence pertaining to the circumstances of dissemination is all that is to be considered relevant to the proof of pandering, common sense dictates that a distributor such as found in *Books* will rarely fall within the purview of the *Ginzburg* doctrine. A distributor does not advertise to the public, he is a middleman; whereas the publisher prints the books, and the retailer sells them. Finally, distributors seldom engage in advertising.

A second inference that can be drawn from interrelating the

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41 *See* text accompanying note 36 *supra.*

42 Text accompanying note 29 *supra.*

43 358 F.2d at 937; text accompanying note 36 *supra.*

three cases — *Books, Inc.*, *Redrup*, and *Ginzburg* — is that the Supreme Court's use of the phrase *sort of pandering* in *Redrup v. New York*[44] might indicate an intention to limit *Ginzburg* to its facts. First of all, it is clear that there *was* evidence of pandering in *Books, Inc.* Also, this evidence was of the same variety as some of the evidence of pandering found in *Ginzburg*. Therefore, if the Court was saying that the pandering in *Books, Inc.* was not the same sort of pandering in *Ginzburg*, it might have meant that all of the evidence of pandering in *Ginzburg* was to be treated as one unit, rather than several individual elements. The practical effect of treating all the little bits and pieces of evidence that support the verdict in a given case is to limit that case to its facts. However, the most important doctrine established by *Ginzburg* would still be left intact: a defendant's conduct in relation to obscene or almost obscene material can be relevant to the ultimate determination of obscenity.

It remains to be considered whether *both* inferences can be drawn at the same time, and, if so, what the implications would be. The first inference results in eliminating, as irrelevant to the proof of pandering, the consideration of deliberate representations on the material that it was erotically arousing. The second inference is that *Ginzburg* has been effectively limited to its facts. There seems to be no reason why these two inferences may not be drawn simultaneously. The result would be that representations on the material would not be considered in regard to the pandering issue. Pandering would only be found if the circumstances of distribution were essentially the same as those of *Ginzburg*.

Regardless of whether one draws the first, second, or both inferences, the resulting *Ginzburg* rule on pandering would be more difficult to use to obtain a conviction for an obscenity statute violator. Therefore, so long as at least *one* inference is in force, one could say that *Books, Inc.* indicates that a subtle change has taken place in the Supreme Court's collective attitude toward obscenity censorship. This change is in the direction of a more liberal concept of what should be censored, or conversely, what should receive the protection of the first amendment rights of freedom of speech and freedom of the press.

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[44] 386 U.S. at 769.