



Chapter 10

Variable Obscenity and the Harmful to Minors Standard



The concept of variable obscenity primarily arises out of society's concern for the display and availability of pornography to minors. The concern goes beyond the obscene works defined in *Miller v. California*, 413 U.S. 15 (1973), and reaches materials which might not be obscene under *Miller's* three-prong test. In attempting to protect minors from certain materials while allowing access to those materials by adults, the Court has carved out the variable obscenity approach. In short, the Court will adjust the test of legal obscenity according to the audience, thereby permitting the material to be judged in terms of the sexual interests of minors, and not according to adult community standards.

A review of the development of this concept is helpful. In 1957, the Court in *Butler v. Michigan*, 352 U.S. 380 (1957), struck down a Michigan statute making it an offense to make available for adults or the general public any book that was found to have a potentially deleterious influence upon youth. In doing so, that Court implicitly approved of another Michigan statute which was specifically limited to the distribution of harmful material to minors. *Butler*, at 383. In 1964, the Court in *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964), specifically "recognize[d] the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children." In grappling with this issue, however, the Court reemphasized that this interest could not justify the total suppression of such material, "the effect of which would be to 'reduce the adult population...to reading only what is fit for children.'" The Court suggested that state and local authorities should aim their laws "specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination." *Jacobellis*, at 195. Whereas the state law in *Butler* prohibited all sales of items unfit for children, even to adults, today's harmful to minors and display laws only prohibit the distribution to minors or exposure to minors, leaving adults free to obtain non-obscene items which may be "harmful to minors" with only time, place, and manner restrictions.

Impetus for utilization of variable obscenity was also aided by the Court's holding in *Ginzburg v. United States*, 383 U.S. 463 (1966), on pandering. There the Court permitted the contextual concept of pandering to be determinative on the issue of obscenity. After *Ginzburg*, evidence of the circumstances of production and distribution was relevant to the test of obscenity. Hence, the obscenity of material was not constant. It could vary depending on extrinsic circumstances.

The Court finally solidified these principles by enunciating the

concept of "variable obscenity" in *Ginsberg v. New York*, 390 U.S. 629 (1968). There the Court held that it is constitutional to proscribe the sale of "girlie magazines" to minors, where the magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults.¹ The Court reasoned that the well-being of children is a subject within a state's power to regulate. The state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent well-developed persons and citizens. Because the materials were "harmful to minors," the Court found that the New York legislature could find a rational relationship between the type of materials involved and harm to minors. *Ginsberg*, at 642-643. The Court found that material which is "harmful to minors" is not entitled to First Amendment protection when distributed to minors. In determining what is or is not protected as to minors, the state may adjust "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." *Ginsberg*, at 638.

The Court relied upon its analysis in *Mishkin v. New York*, 383 U.S. 502 (1966), where it adjusted the prurient appeal element of the *Miller* test where the materials were "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large." The Court expressed a willingness to "adjust" the obscenity test "to social realities by permitting the appeal of this type of material to be assessed in terms of sexual interests of its 'intended and probable recipient group....'" *Mishkin*, at 508-509.

The three-prong test in *Ginsberg* for judging the obscenity of material sold to minors "is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs v. Massachusetts ...*" *Ginsberg*, at 635. But the *Roth-Memoirs* test was adjusted to the social reality of the material's exposure to minors.

[M]aterial 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

¹The New York statute made it a crime "'knowingly to sell...to a minor' under 17 '(a) any picture...which depicts nudity...and which is harmful to minors, and '(b) any...magazine...which contains...(such pictures)...and which taken as a whole, is harmful to minors.'" It defined "harmful to minors" as "'that quality of...representation...of nudity...(which)...(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.'" *Ginsberg v. New York*, at 632-633.

group to whom the questionable material is directed or from whom it is quarantined. Because of the state's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare, and morals of its community to barring the distribution to children of books recognized to be suitable for adults. *Ginsberg*, at 636.

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Variable obscenity...furnishes a useful analytical tool for dealing with the problem of denying access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means of delineating the obscene in each circumstance. *Ginsberg*, at 636, n.4.

The Court recognized that different factors come into play where the interest at stake is the effect of erotic expression upon children. The factor of immaturity imposes different requirements when communications are addressed to them and these requirements need not conform to the requirements of the First Amendment in the same way as those applicable to adults. See also: *FCC v. Pacifica*, 438 U.S. 726 (1978).

It is important to note that while *Ginsberg* dealt with the "sale" of harmful materials to children, lower courts have extended *Ginsberg* to support prohibitions on the "display" of such materials where children are present. Generally, these laws prohibit material which is "harmful to minors" from being on display in commercial establishments and on motion picture screens where minors could view them. If the material is out of sight, then no violation occurs.² To date, the

² Most states have some form of "harmful to minors" legislation. See: Ala. Code Sections 13A-12-170, -171 (1982); Ariz. Rev. Stat. Ann. Section 13-3501, -3506, -3507 (1978); Cal. Penal Code Sections 313, 313.1 (West Supp. 1984); Colo. Rev. Stat. Sections 18-7-501, -502 (Supp. 1983); Conn. Gen. Stat. Sections 53a-193, -196 (1972 & Supp. 1984); Del. Code Ann. tit. 11, Sections 1361, 1365 (1979); Fla. Stat. Ann. Sections 847.012, .013 (West 1976 & Supp. 1984); Hawaii Rev. Stat. Sections 712-1210, -1215 (1976 & Supp. 1983); Idaho Code Sections 18-1513, -1514, -1515 (1979); Ill. Rev. Stat. ch. 38, Section 11-21 (1975); Ind. Code Section 35,493-3 (Supp. 1984); Iowa Code Sections 728.1, .2, .3 (1979) (prohibits exhibition to minors of material obscene as to adults); Kan. Stat. Ann. Sections -21-4301, 4301a (1982) (prohibits exhibition to minors of material obscene as to adults); Ky. Rev. Stat. Sections 531.010, .020, .030 (1975) (prohibits exhibition to minors of material obscene as to adults); La Rev. Stat. Ann. Section 14:106 (Supp. 1984) (prohibits exhibition or display in the

most significant case upholding such a law is *M.S. News Company, Inc. Casado*, 721 F.2d 1281 (10th Cir. 1983). *Casado* sustained the Wichita, Kansas, "display ordinance" designed to prevent minors from being exposed to sexually oriented materials that are harmful to them. The ordinance makes it an offense to display such material to minors if, as a part of the invited general public, they will be exposed to it. It further proscribes selling such material to minors. The Wichita ordinance defined harmful to minors as a variation of the *Miller* obscenity test, rather than the *Roth-Memoirs* test which was in effect at the time of *Ginsberg*.

In upholding the *Wichita* ordinance, *Casado* held that it was perfectly permissible to replace the *Roth-Memoirs* language with the current *Miller* language in formulating its harmful to minors law. Further, it held that the "display" proscription was permissible since it was limited to material which is "'harmful to minors,' and this term is defined to include only material that is obscene as to minors under the *Miller* test as adapted to evaluate whether material is harmful to minors." *Casado*, at 1289. Thus, "harmful to minors" laws may employ a *Miller*-ized *Ginsberg* test and prohibit "display" as well as "sale." Other decisions which have upheld minors display laws are *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) and *American Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919 (Pa. Super. 1984).

It is important to point out that under "variable obscenity," a law which seeks to prohibit dissemination to minors of material that is not even "obscene as to minors" may be overbroad. When courts have struck down statutes limiting minors' access to merely sexual, but not

presence of minors of material obscene as to adults); Me. Rev. Stat. Ann. tit. 17, Sections 2911, 2912 (1983 & Supp. 1983-84); Md. Ann Code art. 27, Section 419 (1982 & Supp. 1983) (prohibits display to minors of material obscene as to adults); Mass. Gen. Laws Ann. ch. 272, Sections 28, 29, 31 (Supp. 1984-85); Mich. Comp. Laws Sections 722.671 to .677 (1968 & Supp. 1983); Minn. Stat. Ann Sections 617.292, .293, .294 (West Supp. 1984); Miss. Code Ann. Sections 97-5-27, -29 (Supp. 1983); Mo. Ann. Stat. Sections 573.010, .040 (Vernon 1979); Mont. Code Ann. Sections 45-8-201, -202 (1983); Neb. Rev. Stat. Sections 28-807, -808, -809 (1979); Nev. Rev. Stat. Sections 201.256 to .264 (1957); N.H. Rev. Stat. 571-B:1, -B:2 (Supp. 1983); N.J. Stat. Ann. Sections 2C:34-3, -4 (West 1982); N.M. Stat. Ann. Sections 30-37-1, -2, -3 (1980); N.Y. Penal Law Sections 235.20, .21 (McKinney 1980); N.C. Gen. Stat. Sections 14-190.1, .13-.15 (1981); N.D. Cent. Code Section 12.1-27.1-03.1 (Supp. 1983); **Or.** Rev. Stat. Sections 167.075, .080 (1983); 18 Pa. Cons. Stat. Ann. Section 5903 (Purdon 1983); R.I. Gen. Laws Section 11-31-10 (Supp. 1983); S.C. Ann Sections 16-15-290, -390 (Supp. 1983); S.D. Codified Laws Ann, Sections 22-24-27, -29.1 to -30 (1979); Tenn. Code Ann. Section 39-6-1136 (1982); Tex. Penal Code Ann. Section 43.24 (1974); Utah Code Ann. Sections 76-10-1201, -1206 (1978); Va. Code Section 18.2-391 (1982); Vt. Stat. Ann. tit. 13, Section 2804b (Supp. 1983); W. Va. Code Sections 61-8A-1, -2 (prohibits exhibition or display to minors of material obscene as to adults); Wis. Stat. Ann. Section 944.25 (West 1982) (civil procedure); Wyo. Stat. Sections 6-4-301, -302 (prohibits exhibition to minors of material obscene as to adults).

”harmful,” materials, it has generally been on grounds of overbreadth. See: *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance making it an offense for outdoor drive-in theatre to exhibit film containing any nudity; the Court noted that the ordinance was not limited to ”sexually explicit nudity” nor by the harmful to minors test); *American Booksellers’ Ass’n v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga. 1981) (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition may extend to material not obscene as to minors); *Allied Artists Pictures Corp. v. Alford*, 410 F.Supp. 1348 (W.D. Tenn. 1976) (ordinance overbroad because it may prohibit exposing juveniles to film containing language that was not obscene as to juveniles); *American Booksellers Ass’n, Inc. v. Superior Court*, 181 Cal.Rptr. 33 (Cal.Ct.App. 1982) (ordinance overbroad because it may require sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors); *Calderon v. City of Buffalo*, 402 N.Y.S.2d 685 (App.Div. 1978) (ordinance overbroad because it may prohibit sale and exhibition to juveniles of material that was not obscene as to juveniles); *Oregon v. Frink*, 653 P.2d 553 (Or.Ct.App. 1982) (statute prohibiting dissemination of all nudity to minors overbroad because it does not limit prohibition to material that is obscene as to juveniles). See also: *Capitol News Co. v. Metro. Gov’t.*, 562 S.W.2d 430 (Tenn. 1978) (construing display law and upholding ordinance).

In *Erznoznik v. City of Jacksonville*, the Court could not extend the concept of variable obscenity to save an ordinance making it an offense for a drive-in theatre to exhibit films containing nudity, when the screen was visible from a public street or place. The Court cannot ”construe” state laws and the ordinance was not construed or limited by the state courts. On its face, all nudity, even dead war victims and babies, could be covered by the ordinance. The Court held that the ordinance unlawfully deterred drive-ins from showing movies containing *any* nudity, however innocent or educational. In dealing with the argument that the ordinance sought to protect youths from viewing scenes of nudity, the Court, at 213-14, found this feature overly broad.

The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness...Clearly, all nudity cannot be deemed obscene even as to minors...Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

The Court indicated, however, that the ordinance would have been permissible had it only banned nudity "harmful to minors." "The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors." *Erznoznik*, at 216 n.15. Hence it is likely that a drive-in movie ordinance prohibiting the exhibition of films containing nudity "harmful to minors" when the screen is visible from a public street or place would be upheld. See: *Cinecom Theatres v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973); *State v. Cardwell*, 539 P.2d 169 (Or.Ct.App. 1975); *American Booksellers Assn. v. Rendell*, 481 A.2d 919 (Pa.Super. 1984).

The following cases have invalidated display statutes which employed the *Ginsberg* harmful to minors test on grounds that they constitute a prior restraint or are overbroad. *American Booksellers Ass'n v. Webb*, 643 F.Supp. 1546 (N.D. Ga. 1986); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (resting on alternative state law grounds); and *American Booksellers Ass'n v. Com. of Va.*, 802 F.2d 691 (4th Cir. 1986), the Supreme Court vacated and certified factual and legal questions to the Virginia Supreme Court, _____ U.S. _____, 98 L.Ed.2d 782 (1988).