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Ginzburg v. United States : a chapter in the Supreme Court's evolving obscenity standard

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Heard by the Supreme Court in late 1965, Ginzburg v. United States
had invited the Court to continue its attempts to define and clarify the
limits of First Amendment protection of materials dealing with sex, specif-
ically the federal statute prohibiting "obscene" materials from the U.S.
mails. Although the Court had previously decided in Roth v. U.S. that
obscenity was not protected by the Constitution, doubts abounded about the
precise definition of "obscenity." The Ginzburg standard was an attempt
to solve this problem by adopting what legal experts have called "variable"
obscenity, an approach to defining obscenity according to the specific
circumstances in which the materials at issue were published and distributed.
The variable standard differed significantly from the approach of earlier
cases which had used the "constant" obscenity definition and which had
focused solely on the materials while disregarding the setting. Unfortunately,
the effectiveness of this new standard has been extremely limited.

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GINZBURG v. UNITED STATES:

A Chapter in the Supreme Court's Evolving
Obscenity Standard

Introduction 1

Obscenity and the Judiciary Before 1966 6

The Emergence of the New Standard 14

Criticism, Reaction, and the Failure of the Standard 30

The Ginzburg Postscript 37

Notes

Bibliography

GINZBURG v. UNITED STATES

A Chapter in the Supreme Court's Evolving
Obscenity Standard

On March 21, 1966, Justice William Brennan announced the Supreme Court's majority decision in a major and very controversial obscenity case Ginzburg v. United States.¹ Appealed from the Eastern District of Pennsylvania where it was originally heard in June of 1963, Ginzburg invited the Court to continue its attempt to define and clarify the limits of First Amendment protection of materials dealing with sex, specifically the meaning of the federal statute prohibiting "obscene" materials from the United States mails. Although the Court had previously accepted, in Roth v. United States, the principle "that obscenity is not within the area of constitutionally protected speech or press,"² doubts abounded regarding the precise, practical, and workable definition of "obscenity." Expressed in the opinion of the five-justice majority, the new Ginzburg standard was Justice Brennan's attempt to solve this problem by adopting what legal experts have called "variable" obscenity,³ an approach to defining obscenity according to the specific circumstances in which the materials at issue were published and distributed. The "variable" standard differed significantly from the approach of earlier cases which had used the "constant" obscenity definition and which had focused solely on the materials while disregarding the setting.

Unfortunately, the effectiveness of this new standard has been extremely limited, and the opinion itself has been severely criticized. In particular, Brennan has been accused of simply adding to the confusion of an already hopelessly entangled mass of judicial opinion about a subject which the Court has actually no authority to review. Although the standard has some roots in judicial tradition, its emergence within the Ginzburg case as a major issue seems to occur only at the level of the Supreme Court; the opinions of the district and circuit judges as well as the arguments of both the defendants and the government at trial rely on the Roth opinion without reservation. Eventually, amiss criticism and confusion, Brennan himself admitted the difficulty of defining obscenity, and the Ginzburg standard would fade into just one of the fifty-five separate opinions written on thirteen obscenity cases heard between 1957 and 1968.⁴

The statute involved in the case is title 18 of the United States Code, section 1461:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
 Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any such mentioned matters, articles, or things may be obtained or made. . . .
 Is declared to be non-mailable matter. . . .

The first such obscenity law was enacted in 1865 (13 Stat. 504) to stop the mailing of such materials to soldiers in the Union army. In 1973, the statute was expanded and became a forerunner of section 1461, the Comstock Act of 1973 (ch. 258, 17, Stat. 598). Anthony Comstock, its namesake and the head of

the Society for the Suppression of Vice, used his influence to see that the law was vigorously enforced: "By January 1, 1974, Comstock could boast of seizing . . . 194,000 obscene pictures or photographs, 134,000 pounds of books, 14,000 stereo-view plates, 60,300 rubber articles (the nature of which is not disclosed), 5,500 sets of playing cards, and 31,150 boxes of substances purporting to be aphrodisiacs."⁵ The statute was revised in 1909 and again in 1911, and amended in 1958 to strengthen punishments for repeat offenses.

On December 19, 1962, a United States marshal delivered a notice to Ralph Ginzburg at his office in New York, informing him of his indictment on 28 counts of violating this statute. Ginzburg, as well as three of his corporations, were named as defendants and later as petitioners.

A young entrepreneur, publisher, and writer, Ralph Ginzburg was called "a prototypical American 'success story'"⁶ in Playboy magazine. Born in Brooklyn of immigrant parents on October 28, 1929, Ginzburg was employed by Look magazine, supervising a staff of 24 and a \$2 million advertisement budget when he was just 23 years old. In 1956, he became Esquire's editor of articles, and during this time, he expanded a previously written article, "An Unhurried View of Erotica," into a book. He earned \$150,000 from the project, but in the process, he lost his position at Esquire.

By 1957, Ginzburg was the owner of a small publishing company, Olive Branch Press. After the Roth decision was announced that year, Ginzburg decided to emulate the success of such publications as Playboy and American Heritage with his own

special touch: "The time had at last come when Americans could enjoy a magazine that would print many long-suppressed masterpieces of art and literature, and I decided to publish such a magazine myself."⁸ He was then 27 years old.

Ginzburg's magazine was called Eros, after the Greek god of love, and the company that Ginzburg created for the project, Eros Magazine, Inc., became the first corporate defendant. As he intended, the magazine was an anthology of articles dealing with sex and love. Ginzburg described it in his editorial forward as a "new quarterly on the joys of love. . . . It will be edited for broad-minded adults and will not be inhibited by formulae or fig-leafed by censors. It will be the mirror of love in beaux-arts and belles-lettres of all mankind."⁹ However, the government did not see Eros's virtues in the same manner, describing the including of 'long-suppressed masterpieces of art and literature' as "merely a facade to disguise and protect the basic purpose and effect of the entire work."¹⁰ The government was particularly offended by such articles as "Frank Harris, His Life and Loves," "Bawdy Limericks," "The Natural Superiority of Women as Erotocists," and "Black and White in Color," the latter a photo essay depicting a black man and a white woman engaging in various sexual activities. Given racial attitudes in 1962, such a subject would be perceived as particularly shocking. The first issue of Eros appeared on February 14 -- Valentine's Day --, 1962, and only four issues were published before proceedings against the magazine halted further publication.

The second corporate defendant was Liaison Newsletter, Inc. Sold by subscription mostly to Eros's audience, Liaison was a biweekly publication that, in Ginzburg's own words, "consisted largely of interviews with psychologists; reviews of articles in medical, folklore, and other specialty magazines; and digests of scientific papers."¹¹ In addition, the government was to argue that the contents of Liaison included rhymes which clearly go beyond contemporary community standards of humor, even in applying liberal night club standards."¹² The prefatory "Letter from the Editors" was also interesting, especially its dedication to "keeping sex an art and preventing it from becoming a science."¹³

The last corporate defendant was Documentary Books, Inc., which published and sent through the mails Lillian Maxine Serett's The Housewife's Handbook on Selective Promiscuity written under the pseudonym of Rey Anthony. Mrs. Serett's book was described as a "sexual autobiography"¹⁴ of her intimate experiences from age 3 until age 36 and their accompanying psychological effects. Since the Handbook had been published and sold privately to doctors, psychologists, and therapists before Ginzburg acquired the rights to sell it to the general public, Ginzburg tried to establish the book's value as a commentary on "sex education of children, laws regulating private consensual adult practices, and the equality of women in sexual relationships."¹⁵ The government had a different interpretation:

The descriptions leave nothing to the imagination, and in detail, in a clearly prurient manner offend, degrade, and sicken anyone however healthy his mind was before exposure to this material. It is a gross shock to the mind and a chore to read.¹⁶

Obscenity and the Judiciary before Ginzburg

Thus, in early June of 1963, Ralph Ginzburg, Eros Magazine, Liaison Newsletter, and Documentary Books were summoned to go to trial in the federal district court of Eastern Pennsylvania. The essence of the case seemed simple; to prove that Ginzburg had violated title 18 of the United States Code, section 1461, the government had to establish a legal definition of obscenity and demonstrate that Eros, Liaison, and the Handbook fit this definition. However, the entire judicial background of obscenity cases prior to 1966 focused on an attempt to develop a definition of obscenity and establishing a fair standard, but a review of the Court's decisions only demonstrated the confusion and difficulty in formulating this type of First Amendment limitation.

The judicial background of the Ginzburg case illustrates the shift in the approach to defining obscenity from a "constant" to a "variable" method, with the Ginzburg standard as the ultimate expression of "variable" obscenity. The terms of "constant" and "variable" were used by William Lockhart and Robert McClure in their 1960 Minnesota Law Review article to describe the central issue in obscenity cases:

The issue, of course, is whether obscenity is an inherent [constant] characteristic of obscene material, so that material categorized as obscene is always obscene at all times and places and in all circumstances, or whether obscenity is a chameleonic quality of material that changes [or varies] with time, place, and circumstances. 17

The cases of Regina v. Hicklin, United States v. Dennette, United States v. One Book Called Ulysses, Butler v. Michigan, Roth v. United States, Manual Enterprises v. Day, and Jacobellis v. Ohio illustrate the development of "constant" obscenity definitions, their subsequent application and rejection, and the rise of "variable" obscenity.

Although it was heard and decided in England, Regina v. Hicklin was the basis of most American court opinion on the obscenity issue prior to 1957. As an extreme expression of "constant" obscenity, the Hicklin test surveyed the possible effects of reading the materials on the most vulnerable groups, such as children or the mentally disturbed, and completely disregarded any possible literary merit that the works might have. This rigid Victorian standard forced the English court to examine "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" (L.R. 3 Q.B. 360 at 371).

In order to make the Hicklin test more flexible for literary works, the American courts further developed the "constant" obscenity definition in order to consider the effect of the work as a whole. In United States v. Dennette, the court reversed the conviction of a woman who had sold a sex education pamphlet, which she had originally written for her own children, because the work at issue was "an accurate exposition of the relevant facts of the sex side of life [stated] in decent language and in manifestly serious and disinterested spirit." Consequently,

"any incidental tendency to arouse sex impulses' was considered apart from and subordinate to its main effect."¹⁹ A more famous example of the application of this test occurred in United States v. One Book Called Ulysses in which the court upheld the sale of James Joyce's novel Ulysses in the United States. The court noted "that numerous long passages in Ulysses contain matter that is obscene . . .; yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or to portray filth for its own sake" (72 F.2d 705 at 706-707).

By February of 1957, the English Hicklin test was no longer an acceptable standard for obscenity litigation in the United States. Writing for the Court majority in Butler v. Michigan, Justice Felix Frankfurter declared unconstitutional a Hicklin-based law that rigidly restricted obscene materials: "Surely this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population to reading only what is fit for children" (352 U.S. 380 at 383). Although Butler offered no alternative standard, the Court clearly had begun to re-evaluate obscenity standards in order to provide for a restrictive test that was also respectful of the possible literary merits of allegedly obscene materials. On June 24 of that year, Justice Brennan offered the standard later known as the Roth test as an alternative.

In Roth v. United States and its companion case, Alberts v. California, the constitutionality of obscenity legislation was directly addressed by the Court, and the result was another

version of "constant" obscenity. The publisher in the former case, Samuel Roth, was indicted under section 1461 after he advertised and sold "'American Aphrodite,' a quarterly publication dealing in literary erotica which appeared in bound volumes retailing for a price of ten dollars each, and sets of nude photographs." Roth was acquitted on the photograph charges but convicted on the sale of the magazine itself. David Alberts was convicted under a California state law similar to section 1461: "Unlike Roth, Alberts disseminated pictures of 'nude and scantily-clad women,' sometimes in bizarre poses and without any literary pretensions."²⁰

The Roth opinion first examined the constitutionality of 18 United States Code, section 1461. After reviewing the history of previous Court opinions and legislative actions, Brennan asserted that "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance" (354 U.S. 476 at 483). However, according to Brennan, to protect utterances from arbitrary censorship, the Court had limited only those expressions to ones which had absolutely no "redeeming social importance" (at 484). For Brennan, obscenity was one of these restricted areas. Brennan supported this statement by citing the case of Chaplinshki v. New Hampshire (315 U.S. 568, 571-572):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality.

Therefore, said Brennan, "We hold that obscenity is not within the area of constitutionally protected speech or press" (at 485).

Relying on the American Law Institute's Model Penal Code²¹, Brennan continued his opinion by attempting to formulate the definition of the unprotected subject, using a "constant" approach. However, instead of addressing the issue in the main text of the opinion, Brennan placed the core of his definition in a note following the assertion that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest" (at 487). The note first cited Webster's dictionary definition of "prurient": "Itching; longing; uneasy with desire or longing; or persons, morbid, or lascivious longings" (at 487, note 20). Second, it cited the Model Penal Code's interpretation of obscenity:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, . . . and if it goes substantially beyond the customary limits of candor in description or representations of such matters (at 487, note 20).

Falling into the "constant" category, this definition asserted that obscene materials have some special ingredient that spoils the entire flavor of the work. Unfortunately, the exact name of this spice was not given. Brennan recognized this problem near the end of the opinion: "the thrust of [that] argument is that these words [in the definition] are not sufficiently precise because they do not mean the same thing to

all people, all the time, everywhere" (at 491). He answered this criticism by asserting that:

These words . . . give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact or situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense (at 491).

This "marginal case" category raised precisely the nature of the issues in Ginzburg v. United States. Thus, Brennan's Roth criteria that 1) the obscene quality of the work applies to the publication as a whole, 2) that the publication goes beyond contemporary community standards of candor, 3) that the material appeals to prurient interests, and 4) that the material have absolutely no redeeming social value, would be difficult to use under the circumstances of the Ginzburg case.

Although Brennan's opinion had sufficient support to become the official opinion of the Court, Chief Justice Earl Warren wrote a concurring opinion that recognized the problem of "constant" obscenity and effectively became a statement of theory for Brennan's later switch to "variable" obscenity in the Ginzburg standard. Warren's opinion was very interesting because, instead of formulating a broad standard, he proposed to "limit our decision to the facts before us and to the validity of the statutes in question as applied" (at 494).

Warren's opinion focused on the dividing line mentioned in Brennan's answer to the anticipated criticism. Noting that the line between "obscene" and "non-obscene" "is not straight or

unwavering," Warren asserted that obscenity "laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached" (at 495, emphasis added). However, the cases are not that simple because section 1461 provides for prosecution of people, not literary materials, who act in a proscribed manner. Further, "the nature of the materials 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" (at 495). Thus, the obscene quality of a work originates from an external source, unlike the intrinsic ingredient suggested in Brennan's definition.

In the specific case, Warren would have the Court examine the action of the defendants to determine if the convictions were valid. Since "they were plainly engaged in the commercial exploitation of the morbid and shameful craving, for materials with prurient effect" (at 496), Warren concurred with the affirmation of Roth and Albert's convictions.

Two later cases attempted to clarify the Roth decision. First, Manual Enterprises v. Day [370 U.S. 478 (1962)] addressed the meaning of prurient appeal of the works in question. In the case, Manual Enterprises published and sent through the mail several magazines written and edited for a reading audience composed of homosexuals. Since the magazine's appeal was intended for a specific and restricted group, Manual Enterprises

contended that the Roth criteria of community standards had not been met, and thus, the magazines were not obscene. However, the Court disagreed and clarified that aspect of Roth to mean prurient appeal without regard to the question of audience: "It is only in the unusual instance where, as here, the prurient interest appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not material is patently offensive" (370 U.S. at 486).

Second, Jacobellis v. Ohio [378 U.S. 184 (1964)] addressed Roth's protection of literary and artistic effort while restricting obscenity. Writing about the French film Les Amants, Justice Brennan tried to clarify the social importance qualifications of the Roth test by asserting that no work "that has literary or scientific or artistic value or any other form of social importance, may be branded as obscenity and denied the constitutional protection" (378 U.S. at 191). Although Justices Potter Stewart, William Douglas, and Hugo Black agreed with the judgment, only Justice Arthur Goldberg concurred in that opinion.

By 1965 then, when Ginzburg v. United States was about to be argued, the Supreme Court had modified the standard for judging obscenity from the Hicklin test of Victorian England to the uncertain "constant" approach for defining obscenity that was articulated in Roth v. United States and in subsequent litigation. Ginzburg v. United States would mark the failure of "constant" obscenity standards as outlined in Roth, but Justice Brennan's adoption of the "variable" obscenity standard in the

Ginzburg case would prove no more successful than its predecessor.

The Emergence of a New Standard

By March of 1966, the Ginzburg standard had been formulated, announced, and used to affirm the conviction of Ralph Ginzburg, Eros Magazine, Liaison Newsletter, and Documentary Books. However, the use of a "variable" obscenity definition occurred only at the level of the Supreme Court. Although the lower district court, the circuit court, and the arguments of both the defense and prosecution were aware of those aspects of the case that were important to a variable definition, they nevertheless relied on Roth's criteria without reservation. The modification of the standard by the Supreme Court is probably due to Justice Brennan's recognition that the Roth decision would simply not work in a case where the obscenity status of the works in question could not be established by expert testimony. Thus, the Ginzburg standard was an attempt to modify Roth so that the Supreme Court would not be forced to become the final arbiter of all allegedly obscene materials.

After the right of a jury trial had been waived because of perceived public objection to allegedly obscene materials, argument in United States v. Ralph Ginzburg, Eros Magazine, Liaison Newsletter, and Documentary Books commenced in Philadelphia on June 10, 1963, before District Judge Ralph C. Body. Attorneys for the defense were David T. Sharpio and Sidney Dickstein. Although the trial record only identifies "Mr. Creamer" as the attorney for the government, the government's

motion to strike Ginzburg's affidavit and evidence appended to the defendant's motion to dismiss the indictment was signed by Drew J.T. O'Keefe, United States Attorney, and Issac S. Garb, Assistant United States Attorney.

The record of testimony of the five-day trial revealed the structure of the arguments of the government, the defense, and of the government's response. Although this testimony and the submitted evidence recognized an important aspect of "variable" obscenity, the intent of Ginzburg and his corporations, their structure lay within the framework of the Roth decision.

Although the government based its entire argument on the works themselves, the government's attorneys supplemented their case with the testimony of three postmasters, a postal inspector, and a former writer for Liaison to demonstrate Ginzburg's intent. Arthur J. Rogers, Jr., the postmaster of Blue Ball, Pennsylvania, testified that he received a letter from Eros Magazine dated October 18, 1961, requesting mailing privileges and concluding that: "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city."²² Bertha N. Martin, postmaster of Intercourse, Pennsylvania, testified that she received a similar letter. The defense objected that these questions and responses were irrelevant, but Mr. Creamer's response apparently convinced the court to overrule these objections. It also showed the reason the government used this testimony in their argument: "I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating the material"²³ Finally,

Robert W. Sanders, postmaster of Middlesex, New Jersey, testified that he also received a letter from Eros, but he issued the requested permit. His post office handled approximately 5 million advertisements for Eros and an additional 5,543 for Documentary Books.

Jack Darr, a former writer for Liaison, was a much more important witness for the government because he was able to describe the contents as well as the purpose of the articles in Ginzburg's publications. Darr testified that he wrote and submitted several articles, including "How to Run a Successful Orgy," "Sing a Song of Sex Life," and "Semen in the Diet." The witness said that he also wrote the statement of policy for Liaison, but he stated that Ginzburg never discussed its content with him. During his testimony, the government submitted a copy of Liaison, and after Darr was excused, the attorneys offered copies of Eros and the Handbook as evidence.

By the end of the initial government argument, eighteen exhibits of evidence had been submitted, consisting of copies of the publications, advertisements sent to specific people mentioned in the indictment, and copies of the letters requesting mailing privileges from those unique-named towns. In the defense's subsequent motion for dismissal, the defense recognized both side's reliance on Roth:

We feel that under the law, under the tests set forth in the Roth, Manual Enterprises cases, . . . this two fold test of obscenity that is set forth in the ALI penal code has not been established on the face of the documents in this case, and since that is the only thing upon which the Government relies to establish it, we say that the Court should dismiss the indictment. 24

This motion was denied.

The defense endeavored to support its argument that the materials were not obscene with the testimony of five expert witnesses, the author of the Handbook, and a lawyer who completed some research about the presence of similar magazines in New York. By such testimony, Ginzburg's attorneys were attempting to demonstrate that the magazines and the Handbook did not fit the Roth criteria.

The expert witnesses were Charles G. McCormick, a professional psychologist; Horst W. Janson, a professor of Fine Arts and Chairman of that department at New York University; Dwight MacDonald, a literary critic, staff writer for The New Yorker Magazine, and also film critic of Esquire; Peter G. Bennett, another professional psychologist; and George Von Hilsheimer III, an ordained Baptist minister and graduate of the University of Chicago's divinity school. Each witness was asked questions related to the social value and predominant appeal to prurient interests of the materials in question. The government routinely objected when these experts made any attempt to discuss a community standard. Objecting to McCormick's answers, Mr. Creamer asserted that "[t]here has been no qualifications in his area to testifying as to the average citizen"²⁵; his comments were overruled when the defense argued that, referring to McCormick:

As a psychologist he has been both trained and experienced in the emotional aspects of people individually, of mental health, of mental illness, and for purposes of the definition of what is pornographic material, of course, what is obscene material, one must weigh this material in terms of its effects on the average individual. 26

McCormick differentiated pornographic from "erotic education or material"²⁷ in terms of the effect on the reader. He testified that Eros, Liaison, and the Handbook did not fall into this category.

The balance of the expert testimony followed this same pattern with the exception of Dwight MacDonald, the literary critic. When asked about the literary value of Liaison, he answered, quite frankly, that "I consider it not a particularly interesting book. It has no literary value."²⁸ Dickstein also asked him if he thought the newsletter went substantially beyond the community standards of candor. MacDonald responded: "No, I would not, but I must also add that I think it was an extremely tasteless, vulgar and repulsive issue. . . . Later issues seem completely unobjectionable even from that point of view, but the fact that it is tasteless and vulgar doesn't, in my mind, make it obscene or pornographic."²⁹ His testimony certainly did not help the defense's argument, demonstrating the varied opinions of the quality of the works involved. George Von Hilsheimer III, the Baptist minister, also provoked some controversy with his comments about the benefits of allowing children to read the Handbook; Judge Body himself questioned the witness extensively, but in the later opinion, he did not hold the witness's testimony in high regard.

The testimony of Lillian Maxine Serett, the author of The Housewife's Handbook on Selective Promiscuity, was intended to support the literary and social value of that publication, but Judge Body did not find her statements credible, judging by his later opinion.

Finally, Arthur Galligan, a law partner of Dickstein, testified about his research respecting community standards for materials dealing with sex. After the defense offered 31 exhibits which Galligan had collected from newsstands and bookstores in New York, the defense cited Justice John Marshall Harlan's concurring opinion in Smith v. California:

The community can not, where liberty of speech and press are at issue, condemn that which is generally tolerated. This being so, it follows that due process, using that term in its primary sense of an opportunity to be heard and to defend a substantive right, requires a state to allow a litigant in some manner to introduce proof on this score 3c

In rebuttal, the government summoned three expert witnesses of its own, Dr. Nicholas George Frignito, an associate professor of neurology at Hahnemann Medical College and medical director and chief psychiatrist of the County Court of Philadelphia; Ann Hankins Ford, former chief of psychiatry at the Women's Hospital, Pennsylvania, and, in 1963, consultant for psychoanalysis at that hospital; and Adolph Emil Kannwischer, another ordained Baptist minister, a professor of psychology, and director of guidance at Eastern Baptist College. These witnesses simply contradicted the testimony of the earlier expert witnesses called to support the argument of the defense that the works had redeeming social and literary qualities.

The arguments in the trial concluded on June 14, 1963, with the central points of difference focusing on Eros, Liaison, and the Handbook's socially redeeming qualities, the community's standard of candor, and the effect of each work as a whole. Both the defense and prosecution thus operated within the framework of

the Roth decision, despite the recognition of Ginzburg's "intent" in the testimony of the postmasters and Jack Darr.

On the same day, Judge Body announced the verdict, and Ginzburg and his corporations were found guilty on all 28 counts of the indictment. His special findings of fact were not filed until August 6, 1963, and he did not issue his opinion denying the defense's motion for a new trial until November 21, 1963, five months after the trial. Ginzburg later said that this delay was indicative of the court's confusion with regard to a standard: "Although it had taken Judge Body less than 24 hours to decide that I was guilty, it took him approximately half a year to figure out why".³ Actually, Judge Body's opinion clearly accepted Roth as a controlling precedent.

The opinion (224 F.Supp. 129) was organized around the Special Findings of Fact and the specific objections of the defense in its motion for a new trial. The Special Findings of Fact consisted of 19 short statements that the court accepted as fact after the trial. Of these, six statements asserted that the Handbook's characteristics were compatible with the Roth standard of obscenity; another five discussed Liaison, and the last four involved Eros. The first four of the nineteen findings purported to establish that Ginzburg and his corporations mailed the materials, but one of the findings focused on a fact that would be important to Justice Brennan when he later wrote the "variable" Ginzburg standard: "The particular places referred to in Finding No. 3 were chosen in order that the postmarks on

mailed material would further defendant's general scheme and purpose" (at 131).

The remainder of the opinion answered the defense's objections in the motion. The first two points were procedural in nature and not important to the development of the standard. However, the last point concentrated on the obscenity of the works themselves, and Judge Body clearly used Roth to defend his findings:

In order that freedom of speech may remain protected and inviolate, the law requires definite standards for a finding of obscenity. These standards are set forth generally in the case of Roth v. United States All ideas, no matter how obnoxious, unorthodox, or controversial are protected. If material has any redeeming importance it is protected. Beyond this, material to be obscene must encroach upon significant interests of society, and thereby in society without justification (at 133).

He continued by considering each work in this regard and found that each publication was offensive, totally without redeeming social value, and solely designed for prurient appeal.

Although Judge Body's opinion presumably relied on the opinions of higher courts, Ginzburg criticized the document with a valid argument. He noted in Fact that Judge Body "totally ignored the testimony of [the defense's expert witnesses and] relied, instead, only upon the testimony of Government witnesses"³². Although experts could be used to help determine whether a publication had socially redeeming qualities, no consensus by the specialists could be reached about the particular materials. Judge Body's opinion probably rested more

on personal emotions aroused by the magazines than on reliable evidence.

Despite Ginzburg's understandable comments, he certainly did not stimulate much sympathy from the court. Throughout the trial, Ginzburg had dressed in a black pin-striped suit with a white carnation in the lapel, and a flat straw hat; Judge Body was overheard commenting to a clerk: "Where does he think he's going, to his wedding?"³³ On December 19, 1963, Judge Body fined Ralph Ginzburg and his corporations \$42,000 and sentenced Ginzburg to five years in prison.

Ginzburg appealed the decision immediately, and on June 16, 1964, arguments were heard by the United States Court of Appeals for the Third Circuit. Specifically, the case was reviewed by Judges Gerald McLaughlin, Harry E. Kalodner, and Austin L. Staley. Their opinion (338 F.2d 12) affirmed the original judgments. Writing for the court, Judge McLaughlin based his argument on an analysis of the materials in light of the Roth precedent. Moreover, he suggested a line of reasoning similar to that which Justice Brennan would later advance:

What confronts us is a sui generis operation on the part of experts in the shoddy business of pandering to and exploiting for money one of the greatest weaknesses of human being. Appellants' fundamental objective obviously was and is to, more or less openly, force their invitations to obscenity upon the American public through the United States mails (at 15).

The opinion of Judge McLaughlin continued by examining Eros, Liaison, and the Handbook. McLaughlin determined that the district judge had correctly found that all three materials were patently offensive and published solely to appeal to a prurient

interest. Judge McLaughlin argued that if the magazine Eros were to be mailed, "it would stultify the carefully wrought formula whereby the basic law guarding the national community from obscenity is upheld but not at the expense of honest ideas founded on at least some social importance even if it be the slightest" (at 15).

Thus, while the case was in the lower courts, the primary standard utilized was that contained in the Roth decision and its "constant" approach to defining obscenity. Although both lower courts were unwilling to alter the Roth standard, they did recognize and articulate the issue of pandering which subsequently would become the theme of Justice Brennan's Ginzburg opinion. Meanwhile, both sides would pursue the Roth line of argument in the briefs and oral argument before the Supreme Court of the United States.

The argument in the briefs for both the petitioners and respondent were interesting because, as the petitioner's reply brief observed, "[t]here is no significant difference between petitioners' and respondent's views on the proper standard for determining obscenity."³⁴ Despite three amici curiae briefs filed to encourage the Court to overrule Roth's prohibition of obscene materials from constitutional protection, Ginzburg's attorneys as well as the Government were willing to accept Roth and argue over the application of that standard.

Dated in the October Term of 1965 with case number 42, the Petitioner's Brief on a Writ of Certiorari had five significant points in its argument. First, the petitioners reviewed in great detail the standard of obscenity articulated in Roth and

discussed the meaning of the criteria carefully; in particular, they asserted the meaning of redeeming social importance, patent offensiveness, and pruriency in order to demonstrate that "prurient interest and sexual stimulation were not synonymous"³⁵ Second, they argued that the only class of materials that would fit the Roth criteria was "hard-core pornography," another of those terms with a vague definition. Petitioners offered the Solicitor General's definition contained in a brief for Roth v. United States, but unfortunately, it described instead of defined: "This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudoscientific or 'arty' terms (at 37). Third, the brief reviewed each of the materials at issue and asserted their literary and social merit. Fourth, since the materials had literary and social merit, it was argued that they were not hard-core pornography. Consequently, the Roth test could not be applied, and Ginzburg had not violated 18 U.S.C.A., section 1461. The last point of the argument discussed three alleged procedural errors that would justify a new trial. The only one that was related remotely to the changing approach to defining obscenity was the objection that the trial judge had used the testimony of the postmasters of Blue Ball and Intercourse against Liaison Newsletter and Documentary Books instead of solely against Eros Magazine.

After reviewing the statute and the materials at issue, the government's brief advanced four central arguments. The first aspect asserted that "there is no occasion to re-examine the

holding of Roth v. United States,³⁶ in response to the amici curiae briefs. Second, the government argued that the lower courts had applied this standard correctly. To do this, the brief reviewed the materials' impact on the average reader, their interpretation of general community standards of candor, and the issue of redeeming social value. The hard-core pornography issue was also discussed: "A mere change of labels would not, we think, make the underlying issues of policy more malleable [Jacobellis v. Ohio, . . . 378 U.S. at 201 (Warren, C.J., dissenting)], and a 'hard-core' pornography' test would most likely be nothing more than a change in verbal characterization" (at 25). The third aspect of the government's argument reviewed the characteristics of Eros, Liaison, and the Handbook to demonstrate that the lower courts had found properly that the publications fit the Roth criteria and thus violated the statute. Finally, the brief responded to the allegedly procedural errors that the Brief for the Petitioners had raised.

On December 7, 1965, Ginzburg v. United States finally reached the Supreme Court for oral argument. At the time, the liberal "Warren Court" was, of course, headed by Chief Justice Earl Warren and composed of Justices Hugo Black, William Douglas, Tom Clark, John Marshall Harlan, Potter Stewart, Byron White, Abe Fortas, and William Brennan. Sidney Dickstein continued to appear on behalf of Ginzburg. As assistant to the Solicitor General, Paul Bender argued for the government; the Solicitor General was Thurgood Marshall who would take Justice Tom Clark's seat on the Court in less than two years.

The oral arguments presented to the Court were very similar to those in the briefs, but the questions of the justices indicated their concerns about the legal implications of this case and suggested the line of thinking they would take in reaching their decisions.

Discussing the qualifications that were expressed in the Roth test, Dickstein's first argument produced very few comments; Justice Stewart wanted a clarification of the Roth test, and Justice Harlan asked about how the petitioners viewed "the job this Court is confronted with"³⁷. However, Bender's argument for the government stimulated inquiries which generally addressed two broad issues. First, the ex post facto implications of Roth was of particular concern to Justice Black. After Bender reviewed the Roth criteria, Black asked: "Which one of those [criterion] do you consider the most definite, so that a man can have an idea whether he will go to jail or not?"³⁸ Bender had trouble answering this question which had focused on the arbitrary power of the Court under the test in deciding the status of a work. Black would later dissent. Second, the Court was very interested in how the parties viewed the function of the Court in these cases. Specifically, Chief Justice Warren asked Bender:

Do we have to read every one of those [accused] books to determine whether, in our independent judgment, to make an independent judgment, as to whether each one of them has social value?

MR. BENDER: I don't think so.

[WARREN]: That's what I'm trying to find out. Where are we trying to draw the line? I'm sure this Court doesn't want to be a final censor in reading all the prurient literature in the country to determine whether it has any social value. ³⁹

Although Warren's last comment produced some laughter in the courtroom, his question revealed a serious concern within the humor. The Court did not want this role that would call for independent, arbitrary censorship of materials, and was looking for concrete, methodical means to determine obscenity and violations of section 1461. Benders's answer justified their fears: "Works are judged below on the basis of the works themselves, and if you are going to review the case, it seems to me you have got to look at the works themselves"⁴⁰

Justice Brennan's comments throughout the hearing were very limited, and his first significant question occurred later during Dickstein's rebuttal and concerned Chief Justice Warren's inquiry about the role of the Court as this arbiter. As Dickstein discussed the social merits of the books, Brennan interrupted: "How are we going to know it it has the value claimed for it without reading it?" Dickstein responded by referring to descriptions in the brief, but Brennan replied: "I have seen many descriptions of books and pictures as to which, I must say, the resemblance is completely coincidental when I read it."⁴¹

Although the parties did not push for an alternative, the Roth "constant" standard was obviously vulnerable. The Court was trying to prohibit from the mails the materials that really did offend them while still maintaining fairness and avoiding the role of a final censor. Although four justices, Black, Harlan, Stewart, and Douglas, dissented, five justices, Warren, Clark, Fortas, and White, did agree with Brennan's change to "variable" obscenity in an attempt to accomplish this task.

Justice Brennan's opinion in Ginzburg v. United States⁴² began by addressing the central issue in the case, "whether those standards [articulated in the Roth decision] were correctly applied" (at 465). The paragraph that followed did not answer the question; rather, it formulated an alternate method to be used if the Roth test was not effective. This new method was the Ginzburg standard. Since the Roth case, the Supreme Court:

has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise (at 465-466).

As a more flexible version of Roth, the Ginzburg standard was intended by Justice Brennan to help determine obscenity according to something more substantial than a judge's personal estimate of community standards and the publication's social merits.

Unfortunately, the statements on which this standard was based were not true. The prosecution at the district court level never conceded that the obscenity of the works was based solely on the circumstances and setting; indeed, the entire purpose of their argument was to prove obscenity based on the materials themselves. Judge Body's opinion adopted this wholeheartedly, especially with its reliance on the government's rebuttal witnesses. However, since the government received the affirmation of the conviction that it sought, the acceptance of this standard is easy to understand.

The opinion of Justice Brennan continued by examining each Ginzburg publication with careful regard to such circumstances as the attempt to mail Eros from Blue Ball and Intercourse, Liaison's advertising promise of sexual candor and editorial policy, and the Handbook's advertisements which guaranteed "full refund on the price of the [Handbook] if the book fails to reach you because of U.S. Post Office censorship interference" (at 470). In his opinion, such "evidence . . . serves to resolve all ambiguity and doubt [because t]he deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not saving intellectual content" (at 470). Therefore, "the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test" (at 471).

Justice Brennan intended that his Ginzburg standard would only be a "variable" application of the "constant" Roth test. However, each test stressed different and almost opposite pieces of evidence; the "constant" approach looked at the materials themselves, while the "variable" definition concentrated on the intent of the publisher and magazine toward its effect on the reader, and the manner in which it was presented or, in the Ginzburg case, "pandered" to emphasize the sexy qualities of the magazine. Consequently, the effect was a virtual overruling of the Roth criteria as an ineffective method to determine obscenity.

Finally, after citing several cases to support this argument, including Chief Justice Warren's "variable" statement

from his concurring Roth opinion, Brennan restated the standard as follows:

It is important to stress that this analysis simply elaborates the test by which the obscenity or non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation (at 475-476).

Ginzburg demonstrated the weakness of Roth. However, the Court only complicated the situation further, because the Ginzburg standard recognized that obscenity can be created by circumstances. Obscenity's real definition was still confusing and vague.

Criticism, Reaction, and the Failure of the Standard

The Ginzburg decision surprised many people because, according to The New York Times, the Court had granted certiorari to reduce what was perceived as an overly harsh sentence.⁴³ Consequently, the Brennan opinion and its "variable" obscenity definition received severe criticism from many sectors, with a exception of a Times editorial which praised the Court for its "wisdom and moral courage in the subtle and arduous task of upholding the law against obscenity while still protecting liberty of expression."⁴⁴ However, legal experts quickly pointed to some real problems and inconsistencies that would render the decision useless by 1973; at that time, Justice Brennan himself would dissent in the obscenity cases of Miller v. California and

Paris Adult Theater I, v. Slaton, admitting the failure of the Ginzburg standard.

Within the Supreme Court itself, the dissents to the Ginzburg standard demonstrate four valid criticisms. In particular, Justice Black discussed the ex post facto implications of the decision, while Justice Stewart attacked using due process arguments. Justice Harlan called the standard vague and confusing, but all four, including Justice Douglas, addressed the entire constitutionality of federal censorship.⁴⁵

Although Justice Black would reverse the conviction on the grounds alone that any federal censorship is prohibited by the First Amendment, he criticized the majority's opinion because the crime in this case seemed to occur "after the fact," or ex post facto. Ginzburg could not have possibly known that his "pandering" actions were criminal until the Court told him four years later. Especially with the variety of opinion on the Court about what exactly was obscene, Justice Black feared the effects of this decision in the future: "I find it difficult to see how talk of sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers that we can anticipate at the moment" (383 U.S. at 482).

Justice Stewart criticized the use of pandering evidence as a violation of due process. His argument began by noticing that the Court seemed to admitting that Ginzburg's publications were protected by the First Amendment, although his conviction was affirmed: "Why? Because, says the Court, he was guilty of 'commercial exploitation,' of 'pandering,' and of 'titillation.'" But Ginzburg was not charged [with these crimes] . . .

Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny him due process of law" (at 500). Justice Stewart also agreed with Justice Black that the Court had no power to accomplish this under the Constitution.

Although Justice Harlan accepted the constitutionality of prohibiting "hard-core pornography" from the mails, he attacked the Ginzburg standard as a confusing method that allowed for too much opportunity for the judiciary to base its opinions on a personal, not legal, grounds. Future obscenity cases would now investigate:

the defendant's conduct, attitude, [and] motive [which] seems to me a mere euphemism for allowing punishment of a person . . . just because a jury or judge may not find him or his business agreeable. . . . What I fear the Court has done today is in effect write a new statute, but without sharply focused definitions and standards necessary in such a sensitive area (at 494).

Harlan called the entire standard "judicial improvisation" (at 495).

Finally, Douglas discussed the unconstitutionality of the standard which the other three justices implied in their dissents. His opinion advanced three central points. First, the pandering evidence of the "variable" definition did not accomplish what the majority perceived as establishing the obscene content; the use of suggestive advertising for such products as "lotions, tires, food, liquor, clothing, autos, and even insurance policies . . . neither adds or detracts from the quality of the merchandise. . . . And I do not see how it adds to or detracts one whit from the legality of the book being distributed" (at 482). Second, Douglas asserted that the

existing Roth test should have been sufficient to acquit the defendants, especially, as he noted, with the testimony of the defense's expert witnesses that seemed to have been ignored throughout the litigation. Finally, he attacked the basic premise of the Ginzburg standard as well as that of Roth: "I do not think it permissible to draw lines between the 'good' and 'bad' and be true to the Constitution. . . . [U]nder our charter, all [such] regulation or control is barred" (at 491-492). The government's function of censor to determine what is fit for the people to read was unnecessary: "People are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and hopefully, to move from plateau to plateau and finally reach the world of enduring ideas" (at 492).

Thus, from within the Court itself, four severe, but valid criticisms emerged. The opinions of contemporary legal experts repeated and expanded the ideas expressed in these dissents. However, Richard B. Dyson in an article in the University of Pittsburgh Law Review noticed another aspect of the decision:

I suggest that the majority, distracted by Ginzburg's immediate commercial goals, failed to recognize that he is in the mainstream of a broad and significant social movement. Freedom of expression is an integral part of the current drive to change freedom from a familiar slogan to an activist credo 46

As Dyson noticed even in 1966, this decade witnessed tremendous social change, and in many ways, the Warren Supreme Court participated in this development, particularly with such decisions as Renolds v. Sims [377 U.S. 533 (1964)], the one-man-

one-vote principle, the cases expanding equal protection into a complicated three-tier system of suspect classifications and fundamental rights, and the expansion of rights to counsel with the decision in Miranda v. Arizona (384 U.S. 436) which was also decided in 1966. Apparently, obscenity was one subject about which the Warren Court showed a conservative attitude.

More criticism appeared from other source, but these comments were not as complicated as the previous points. In his column in The New York Times, Russell Baker suggested a "I know it when I see it" test for determining obscenity: "If after plucking the magazine off the rack and paying for it, the buyer tells the clerk, 'Wrap it up,' it is convicted."⁴⁷ However, his last point repeated the argument of Justices Black and Douglas in a much clearer manner: "Since practically all of us are better equipped than the Supreme Court to make the distinction, the Court might save itself further embarrassment by henceforth leaving it up to us."

Ralph Ginzburg himself responded to the Court's decision and the Times's editorial that had praised the new standard. In a letter to the editor dated March 25, 1966, Ginzburg asserted that obscenity was legally indefinable: "For what we are dealing with in the concept of 'obscenity' is not anything measurable or palpable. What we are dealing with, very simply, is individual taste."⁴⁸ In other comments, Ginzburg displayed a less prudent interpretation: "I am being sent to prison as a 20th century witch!"⁴⁹

Perhaps the most bitter criticism of the Ginzburg standard emerged seven years after it was announced, and ironically,

Justice Brennan wrote it in a 41 page dissent to Paris Adult Theater I. v. Slaton [413 U.S. 49 (1973)]. Announced on the same day as Miller v. California (413 U.S. 15), another obscenity case that represented the Berger Court's attempt to define obscenity, the case developed from a suit filed by the district attorney of the Atlanta area to prohibit the owners of the theater from showing two allegedly obscene films. The case was especially significant because at trial, "the judge dismissed the complaint [by] ruling that the exhibition of the pictures to consenting adults in the confines of a commercial theater was 'constitutionally permissible.'"⁵⁰ Further, the judge's decision was based on no expert testimony. The Georgia Supreme Court reversed and declared that the films were hard-core pornography, and the owners of the theater sought certiorari by the Supreme Court.

In a 5-4 decision, the Berger Court upheld the ruling that obscenity was not protected by the Constitution, but instead of relying on precedent and tradition, Berger based the majority's decision on an evaluation of the state's interest to the limitation, a method used in other cases involving restrictions of civil liberties; such legitimate reasons for the statute "include the interest of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and, possibly, the public safety itself" (413 U.S. at 58). However, the legal definition of obscenity remained as vague and unclear as that in the Roth decision.

Justice Brennan dissented and was joined by Justices Stewart and Thurgood Marshall; Justice Douglas wrote a short, separate dissent that called obscenity "hodge-podge" (at 43) and praised Justice Brennan for his final conversion. Essentially, the opinion conceded that obscenity was protected by the Constitution. However, Brennan based his change of position on the vagueness aspect that Justice Harlan noted in his Ginzburg dissent. After reviewing the recent history of obscenity litigation, Brennan admitted that:

After 15 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas . . . can reduce the vagueness to a tolerable level. . . . Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary values," and the like. The meaning of these concepts necessarily varies with experience, outlook, and even idiosyncrasies of the person defining them (at 84).

Consistency and fairness are the most important aspects of a legal system, but unfortunately, both the "constant" and "variable" approach to defining obscenity have produced neither characteristic. Thus, the Court has failed to fulfill its central function in this area of law.

Justice Brennan wrote and completed a full circle of obscenity opinions. Roth v. United States asserted the Court's authority to restrict obscene materials using a "constant" approach. Ginzburg v. United States admitted the failure of Roth and instigated the "variable" method as an alternative test. Finally, the dissent in Paris Adult Theater I. v. Slaton recognized the inability of the Court to act fairly and consequently, conceded the failure of the Ginzburg standard. In

short, the progression of the Brennan opinions demonstrate that the Constitution cannot restrict what it cannot define.

The Ginzburg Postscript

Despite the Court battle over the constitutionality of obscenity standards, the affirmation of Ginzburg's conviction did not end his legal story. Less than a month after the Court's announcement, Ginzburg petitioned for a rehearing, but his motion was denied on May 2, 1966. He then returned to the district court to appeal the sentence of five years and the fine of \$42,000. A hearing was not granted until the Circuit Court forced the district court with a 4-3 ruling to hear the case. On March 27, 1970, the district court reduced Ginzburg's sentence to three years.

During early 1971, Ginzburg appealed again to the Circuit Court, asking for probation. They refused on February 4, and he immediately sought review by the Supreme Court. They denied his request on June 22, 1971, and on January 29, 1972, District Judge E. MacTroutman gave Ginzburg his surrender date. The following day, Ginzburg ran a full page ad in the Sunday edition of The New York Times with the headline "DON'T SEND ME TO PRISON!" in two inch letters. In this "open letter" to the Supreme Court, Ginzburg bitterly protested his conviction: "You have suppressed my publications, you have concocted a special crime ('pandering') in order to convict me, and you have condemned me to prison."⁵¹

Regardless of his valid point about the "concocted" standard, Ralph Ginzburg entered a small federal penitentiary in Pennsylvania on February 17, 1972, after almost ten years of

litigation. He served for eight months before his release on parole.

NOTES

- ¹Ginzburg v. United States, 383 U.S. 463 (1966).
- ²Roth v. United States, 354 U.S. 476 at 485 (1957).
- ³William Lockhart and Robert McClure, "Censorship of Obscenity: The Developing Constitutional Standard," 45 Minnesota Law Review 5 (1960), p. 68.
- ⁴Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States (New York: Alfred A. Knopf, 1988), p. 807.
- ⁵Teddy M. Jones, Jr., "Obscenity Standards in Current Perspective," 21 Southwestern Law Journal 285 (Spring 1967), note 12, p. 286.
- ⁶Nat Hentoff, "Playboy Interview: Ralph Ginzburg," Playboy, July 1966, p. 48.
- ⁷"Publisher of Erotica: Ralph Ginzburg," The New York Times, March 22, 1966, 25:1.
- ⁸Ralph Ginzburg, "Eros on Trial," Fact (1965), p. 3.
- ⁹Ibid., p. 4.
- ¹⁰Brief for the United States at 6, Ginzburg v. United States, 383 U.S. 463.
- ¹¹Hentoff, p. 50.
- ¹²Brief for the United States at 5.
- ¹³Ginzburg v. United States, 383 U.S. at 466.
- ¹⁴Ginzburg, Fact, p. 8.
- ¹⁵Ginzburg v. United States, 383 U.S. at 467.
- ¹⁶Brief for the United States at 8.
- ¹⁷Lockhart and McClure, p. 52.
- ¹⁸Regina v. Hicklin, L.R. 3 Q.B. 360 (1868); U.S. v. Dennette, 39 F.2d 564 (1930); U.S. v. One Book Called Ulysses, 72 F.2d 705 (1934); Butler v. Michigan, 352 U.S. 380 (1957); Roth v. United States, 354 U.S. 476 (1957); Manual Enterprises v. Day, 370 U.S. 478 (1964); and Jacobellis v. Ohio, 378 U.S. 184 (1964).

- 19 Both quotations are taken from Charles Phillip Schiller, "Constitutional Law--First Amendment--Evidence of Pandering," 16 The American University Law Review 122 (Dec. 1966), p. 123. Schiller attributes the quotations to 39 F.2d 564 at 569.
- 20 Craig R. Ducat and Harold W. Chase, Constitutional Interpretation, 4th edition (St. Paul: West Publishing Co., 1988), p. 1409.
- 21 Section 207.10(2), Tent. Draft No. 6, 1957. Cited in the Brennan opinion in Roth at 487.
- 22 Joint Appendix of Briefs to the Supreme Court, Transcription of the trial at the Eastern District of Pennsylvania at 155a, United States v. Ginzburg 224 F.Supp. 129.
- 23 Ibid.
- 24 Ibid., at 186a.
- 25 Ibid., at 189a.
- 26 Ibid., at 194a-195a.
- 27 Ibid., at 210a.
- 28 Ibid., at 236a.
- 29 Ibid., at 237a.
- 30 Ibid., at 254a-255a.
- 31 Ginzburg, Fact, p. 60.
- 32 Ibid.
- 33 Ibid.
- 34 Reply Brief for Petitioners at 1, Ginzburg v. United States.
- 35 Brief for Petitioner at 23, Ginzburg v. United States. Remaining references to this source will be cited by page number within the text.
- 36 Brief for the United States at 13, Ginzburg v. United States. Remaining references to this source will be cited by page number within the text.
- 37 Leon Friedman, ed., Obscenity: The Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases (New York: Chealsea House Publishers, 1970), p. 207.
- 38 Ibid., p. 36.

- ³⁹Ibid., pp. 216-217.
- ⁴⁰Ibid., p. 217.
- ⁴¹Ibid., p. 221.
- ⁴²Ginzburg v. United States. References to this opinion will be further cited with a running note.
- ⁴³Fred P. Graham, "High Court Rules Ads Can Be Proof of Obscene Work," The New York Times, March 22, 1966, 1:8 at 25:1.
- ⁴⁴"The Obscenity Cases," The New York Times, March 24, 1966, p. 38.
- ⁴⁵The quotations that follow in the next pages are from the dissents which are also reported in 383 U.S. 463. Further citation will be made with a running note.
- ⁴⁶Richard B. Dyson, "Looking Glass Law," 28 University of Pittsburgh Law Review (October 1966), p. 18.
- ⁴⁷Russell Baker, "Observer: Some Advice to the Supreme Court," The New York Times, March 24, 1966, 38:3. The next quotation is from the same source.
- ⁴⁸Ralph Ginzburg, "Ginzburg Denies Pornography In Eros" in "Letters to the Editor of The Times," The New York Times, April 2, 1966, 28:4.
- ⁴⁹"Ginzburg Denied of Review of Sentence for Obscenity," The New York Times, May 3, 1966, 1:2.
- ⁵⁰Ducat and Chase, p. 1428.
- ⁵¹Ralph Ginzburg, "DON'T SEND ME TO PRISON!" The New York Times, January 30, 1972, IV, p. 14. The information in the above can be chronicled from various articles listed in the index of The New York Times.

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