

Docket No. 47
Constitutional Law
(Obscenity--Special
Child Statute)

ASSOCIATION OF AMERICAN LAW SCHOOLS

Committee on Supreme Court Decisions

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SAM GINSBERG v. THE STATE OF NEW YORK

Docket No. 47

Memorandum on Case in the United States Supreme Court

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Analysis prepared by:
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January 12, 1968

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SAM GINSBERG v. THE STATE OF NEW YORK

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(Appeal from Appellate Term of the Supreme Court
of the State of New York, Second Judicial Department)

Decision below: no opinion written

Statement of the Case

Ginsberg operated a small stationery, candy and luncheonette store in Bellemore, New York, where he also sold newspapers and magazines. On April 20, 1966, in the District Court of Nassau County he was convicted of violating Section 484-h of the New York Penal Code (Child obscenity statute--see below) for selling to a 16 year old boy four magazines that contained pictures of nudes, two of which also contained verbal descriptions of "sexual excitement and sexual conduct." These were the Fall 1965 issue of "Mr. Annual," the December 1965 issue of "Sir", the January 1966 issue of "Man to Man" and the December 1965 issue of "Escapade." Ginsberg was given a suspended sentence. His conviction was upheld in the Appellate Term of the New York Supreme Court. The Court of Appeals denied permission to appeal on the ground that no question of law was involved, apparently because the Court of Appeals had upheld the constitutionality of Section 484-h

a few months previously in The Bookcase, Inc. v. Broderick, 18 N.Y. 271 (July 7, 1966) and People v. Tanenbaum, 18 N. Y. 2d 268 (September 29, 1966).

Section 484-h made it a misdemeanor "knowingly" to sell or loan "for monetary consideration" to any "minor":

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

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

Section 484-h defined nudity, sexual conduct, etc. in specific terms not here significant. It defined "minor", "harmful to minors" and "knowingly" as follows:

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

.....

(f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

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

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

- (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and
- (ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

Significance of the Case

The case involves a constitutional question of great popular interest: May a state prohibit the sale to children under 17 of material relating to sex that would be constitutionally protected if sold to adults? If so, does the New York statute establish constitutional standards for controlling the sale of such material to children?

Under recent constitutional decisions the sales for which Ginsberg was convicted would have been constitutionally protected had the sale been made to an adult. Indeed, Sir was one of the magazines the Supreme Court held protected by its constitutional standards last May 8, 1967. See Gent v. Arkansas (Sub. nom. Redrup v. New York), 386 U.S. 767 (1967). In that case in a short unsigned opinion the Court left open the question whether a different standard might be applied in the case of sales to children by pointing out that "in none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles." In an earlier opinion, two members of the Court had invited states to consider "whether their objectives might be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination." See opinion of Brennan, J., joined by Goldberg, J. in Jacobellis v. Ohio, 378 U.S. 184 (1964); see also the suggestion in the same case by Chief Justice Warren, joined by Clark, J. that a "treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' when sold or displayed to children."

The Ginsberg case raises the issue hinted at but not reached in the earlier opinions. It confronts the Court with the question whether to make a constitutional distinction between sales to adults

and sales to children under a law aimed only at preventing sales to children.

Principal Issues Raised

The more significant issues facing the Court are these:

1. Will the Court extend the "variable obscenity" concept first recognized in Mishkin v. New York, 383 U.S. 502(1966) in the case of sales to deviants, so as to find material "obscene" under its constitutional standards when sold to normal children, even though the same material is not obscene when sold to adults? In Mishkin the Court applied a variable obscenity concept in upholding a conviction for the sale of material "designed for and primarily disseminated to a clearly defined deviant sexual group", even though the material had no prurient appeal to the normal person. There the Court stated, "...our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons." The question in Ginsberg is whether the Court will extend this variable obscenity approach to sales to the very broad class of normal juveniles under a statute aimed only at sales to juveniles.

2. A related question is whether the Court will find constitutionally acceptable the statutory standard by which the New York legislature modified the Supreme Court's constitutional standard in the foregoing "harmful to minors" definition, adapting the prurient appeal, offensiveness, and social importance elements of the constitutional standard to fit the special interest in protecting youth. Under this modification, if material meeting the nudity-sex specifications has prurient appeal to minors, and has no social importance to them, New York forbids its sale to children if it is "patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors." The issue this raises, in the words of counsel for the state, is whether "the adult viewpoint, being more mature, should have controlling force with respect to what is suitable for minors" since "children are not intellectually and emotionally mature enough to deal with materials that adults are capable of handling." (Appellee's Brief p. 47)

3. One contention the Court will face is whether a statute forbidding the sale to children of material constitutionally protected in sales to adults should be struck down because of its potential chilling effect on the availability of such material to adults. Mostly on the basis of conjecture, the parties are in dispute as to whether problems in policing sales, in determining whether materials fall within the ban of the statute, and ascertaining the age of purchasers, might cause dealers not to handle material clearly

protected in sales to adults but questionable as to children.

4. Even if the Court were to find that the material is not "obscene" under its constitutional standard for obscenity, the briefs still raise the question whether applying normal First Amendment standards the state interest in protecting "the morals of its young and the moral foundations of society" (Appellee's Brief p. 69) is sufficiently great to permit the state to forbid the sale to children of non-obscene sex-oriented materials banned by the statute. This issue is summarized and posed as follows by counsel for the state:

"Whether the social value to children of sex-oriented literature and pictures or of material designed primarily to arouse sexual excitement is so great that, in the absence of scientifically certain knowledge of its precise effects on the young, which may never be available, society must be rendered impotent to limit its distribution to children and made to run the risk of the considerable damage which present knowledge indicates may well flow from it?"
(Appellee's Brief p. 51)

Necessarily involved in such issues are the hotly debated questions as to the propriety of controlling distribution of material because of its effect on outlook toward sex as distinct from its effect on objective conduct.

5. An issue of less public interest is whether the new terms imported into obscenity adjudication by the New York statute are unconstitutionally vague and uncertain. If this contention by appellant were sustained, the Court could avoid the foregoing more difficult issues. Thus far in the obscenity area the Court has ruled against such contentions despite the broad uncertainties in the terms of earlier obscenity statutes.