GINZBURG v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
383 U.S. 463
March 21, 1966
[5 - 4]

OPINION: Justice Brennan...A judge...[convicted Ginzburg of violating] the **federal** obscenity statute, 18 U.S.C. §1461. Each count alleged that a resident...[received one of three publications challenged as obscene], or advertising telling how and where the publications might be obtained. The Court of Appeals...affirmed [and] we affirm...[T]he only serious question is whether [the] standards [of *Roth v. United States*[1]] were correctly applied...

In the cases in which this Court has decided obscenity questions since *Roth*, it 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 the 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...[W]e view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.** The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.

The three publications were *EROS*,...*Liaison*,...and *The Housewife's Handbook on Selective*

[1]Case 1A-S-10 on this website.

Promiscuity (hereinafter the *Handbook*)...*EROS*...contains 15 articles and photo-essays on the subject of love, sex, and sexual relations...*Liaison*...contains a prefatory "Letter from the Editors" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two articles concerning sex and sexual relations which had earlier appeared in professional journals and a report of an interview with a psychotherapist who favors the broadest license in sexual relationships. As the trial judge noted, "while the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit." The *Handbook* purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36... It was claimed at trial that women would find the book valuable...as a marriage manual or as an aid to the sex education of their children.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the **sordid business of pandering** -- "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *EROS* early sought mailing privileges from the postmasters of **Intercourse** and **Blue Ball, Pennsylvania**. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal; the facilities of the post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of **Middlesex, New Jersey**...The "leer of the sensualist" also permeates the advertising for the three publications...The solicitation was...not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth...

The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was...**pretense or reality**...Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity...

A proposition argued as to *EROS*, for example, is that the trial judge improperly found the magazine to be obscene as a whole, since he concluded that only four of the 15 articles predominantly appealed to prurient interest and substantially exceeded community standards of candor, while the other articles were admittedly non-offensive. But the trial judge found that "the **deliberate and studied arrangement** of *EROS* is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of non-offensive material."...*EROS* was created, represented and sold solely as a claimed instrument of the sexual stimulation it would bring...Petitioners' own expert agreed, correctly we think, that **"if the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is**

pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion.

A similar analysis applies to the judgment regarding the *Handbook*...**[A] number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral, environment. Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed.** They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence...

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...*Affirmed*.

DISSENT: Justice Black...Ginzburg is...condemned to serve five years in prison for distributing printed matter about sex which neither [he] nor anyone else could possibly have known to be criminal...I believe the Federal Government is without...power...under the Constitution to put any type of burden on speech and **expression of ideas of any kind** (**as distinguished from conduct**)... Even assuming, however, that the Court is correct in holding today that Congress does have power to clamp official censorship on some subjects selected by the Court,...I believe that the federal obscenity statute...should be held invalid on two other grounds...

Experience...and wisdom...long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance. To this end, at least in part, written laws came into being, marking the boundaries of conduct for which public agents could thereafter impose punishment upon people. In contrast, bad governments either wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents at the moment of trial, or sometimes, history tells us, wrote their laws in an unknown tongue so that people could not understand them or else placed their written laws at such inaccessible spots that people could not read them. **It seems to me that these harsh expedients used by bad governments to punish people for conduct not previously clearly marked as criminal are being used here to put Mr. Ginzburg in prison for five years.**

I agree with my Brother Harlan that the Court has in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about; or if it did think about them, certainly it did not adopt them. Consequently, Ginzburg is, as I see it, having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. Such an affirmance we have said

violates due process...I [also] think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so **vague and meaningless** that they practically leave the fate of a person charged with violating censorship statutes to the **unbridled discretion, whim and caprice** of the judge or jury which tries him...

(a) The **first element** considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the **prurient interest in sex**. It seems quite apparent to me that human beings, serving either as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror, would reach about whether the material appeals to "prurient interest in sex" would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or juror's personality, habits, inclinations, attitudes and other individual characteristics. **In one community...a matter would be condemned as obscene under this so-called criterion but in another community,...the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.**

(b) The **second element** for determining obscenity...is that the material must be "**patently offensive because it affronts contemporary community standards** relating to the description or representation of sexual matters..." Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court leaves me with any kind of certainty as to whether the "community standards" referred to are world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing "community standards" on such a subject? **Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California?** So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held...

(c) A **third element** which three of my Brethren think is required to establish obscenity is that the material must be "**utterly without redeeming social value**." **This element seems to me to be as uncertain...than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights**, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is "utterly without redeeming social value..." Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. **A case-**

by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

My conclusion is that...no person...is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity" as that term is confused by the Court today. For this reason even if...this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. **As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted...**

It is obvious that the effect of the Court's decisions...is to make it exceedingly dangerous for people to discuss either orally or in writing anything about sex. Sex is a fact of life. Its pervasive influence is felt throughout the world and it cannot be ignored. Like all other facts of life it can lead to difficulty and trouble and sorrow and pain. But while it may lead to abuses,...no words need be spoken in order for people to know that the subject is one pleasantly interwoven in all human activities and involves the very substance of the creation of life itself. It is a subject which people are bound to consider and discuss whatever laws are passed by any government to try to suppress it. Though I do not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems. I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussion should not be made a crime...

DISSENT: Justice Douglas...This new exception [on First Amendment rights] condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. **I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does their unostentatious inclusion in the average edition of the Bible...**

Certainly without the aura of sex in the promotion of these publications their contents cannot be said

to be "utterly without redeeming social importance." *Roth.* One of the publications condemned today is the *Housewife's Handbook on Selective Promiscuity*, which a number of doctors and psychiatrists thought had clinical value. One clinical psychologist said: "I should like to recommend it...to the people in my church to read, especially those who are having marital difficulties, in order to increase their tolerance and understanding for one another. Much of the book...would be very suitable reading for...teen age young women who could empathize strongly with the growing up period that [the author] relates...[and] would make very good reading for the average man to help him gain a better appreciation of female sexuality." The Rev. George Von Hilsheimer III, a Baptist minister, testified that he has used the book "insistently in my pastoral counseling and in my formal psychological counseling..."

Then there is the newsletter *Liaison*. One of the defendants' own witnesses, critic Dwight Macdonald, testified that while, in his opinion, it did not go beyond the customary limits of candor tolerated by the community, it was "an extremely tasteless, vulgar and repulsive issue." This may, perhaps, overstate the case, but *Liaison* is admittedly little more than a collection of "dirty" jokes and poems, with the possible exception of an interview with Dr. Albert Ellis. As to this material, I find wisdom in the words of the late Judge Jerome Frank:

> "...Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Associations or of alumni of our leading law schools, **tales are told fully as 'obscene' as many of those distributed by men...convicted for violation of the obscenity statute**..."

Liaison's appeal is neither literary nor spiritual. But neither is its appeal to a "shameful or morbid interest in nudity, sex, or excretion." The appeal is to the ribald sense of humor which is -- for better or worse -- a part of our culture. **A <u>mature</u> society would not suppress this newsletter as obscene but would simply ignore it.**

Then there is *EROS*. The Court affirms the judgment of the lower court, which found only four of the many articles and essays to be obscene. One of the four articles consisted of numerous ribald limericks, to which the views expressed as to *Liaison* would apply with equal force. Another was a photo essay entitled *"Black and White in Color"* which dealt with interracial love: a subject undoubtedly offensive to some members of our society. Critic Dwight Macdonald testified:

> "I suppose if you object to the idea of a Negro and a white person having sex together, then, of course, you would be horrified by it. I don't. From the artistic point of view I thought it was very good. In fact, I thought it was done with great taste...; he is obviously an extremely competent and accomplished photographer."

...Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued...Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in

the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual... But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?...

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum....[W]ho am I to say that others' tastes...have no "social importance"?...Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires...How can we know that this expression may not *prevent* antisocial conduct?

I find it difficult to say that a publication has no "social importance" because it caters to the taste of the most unorthodox amongst us. **We members of this Court should be among the last to say what should be orthodox in literature.** An omniscience would be required which few in our whole society possess. **This leads me to the conclusion that the First Amendment allows all ideas to be expressed** -- whether orthodox, popular, offbeat, or repulsive. **I do not think it permissible to draw lines between the "good" and the "bad" and be true to the constitutional mandate to let all ideas alone...**The theory is that 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...It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.

DISSENT: Justice Harlan...I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only "hardcore pornography." Because I do not think it can be maintained that the material in question here falls within that narrow class, I do not believe it can be excluded from the mails.

The Court recognizes the difficulty of justifying these convictions...In fact, the Court in the last analysis sustains the convictions on the express assumption that the items held to be obscene are not, viewing them strictly, obscene at all.

This curious result is reached through the elaboration of a theory of obscenity entirely unrelated to the language, purposes, or history of the federal statute now being applied, and certainly different from the test used by the trial court to convict the defendants. While the precise holding of the Court

is obscure, I take it that the objective test of *Roth*, which ultimately focuses on the material in question, is to be supplemented by another test that goes to the question whether the mailer's aim is to "pander" to or "titillate" those to whom he mails questionable matter.

...**The First Amendment, in the obscenity area, no longer fully protects material on its face non-obscene, for such material must now also be examined in the light of the defendant's conduct, attitude, motives**. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury or a judge may not find him or his business agreeable. Were a State to enact a "panderer" statute under its police power, I have little doubt that -- subject to clear drafting to avoid attacks on vagueness and equal protection grounds -- such a statute would be constitutional. Possibly the same might be true of the Federal Government acting under its postal or commerce powers. What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a straightforward 101-year-old statute is for me an astonishing piece of **judicial improvisation**...I would reverse the judgments below.

DISSENT: Justice Stewart...There was testimony at...trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. **But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's. Censorship reflects a society's lack of confidence in itself.** It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. **They believed a society can be truly strong only when it is truly free.** In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. **So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance.** A book worthless to me may convey something of value to my neighbor. **In the free society to which our Constitution has committed us, it is for each to choose for himself.**

...There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hardcore pornography, without trying further to define it...Although arguments can be made to the contrary, I accept the proposition that the general dissemination of matter of this description may be suppressed under valid laws...But material of this sort is wholly different from the publications mailed by Ginzburg in the present case, and different not in degree but in kind...

Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam's Sons, [a major U.S. book publisher]. In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. **For then we forsake a**

government of law and are left with government by Big Brother. I dissent.