

U.S. Supreme Court

GROVE PRESS v. GERSTEIN, 378 U.S. 577 (1964)

378 U.S. 577

GROVE PRESS, INC., v. GERSTEIN, STATE ATTORNEY, ET AL.
ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF
APPEAL OF
FLORIDA, THIRD DISTRICT. No. 718.
Decided June 22, 1964.

Background:

There was a ban imposed on Henry Miller's 'Tropic of Cancer' in the State of Florida for sexually explicit content. Grove Publishers had challenged this ban.

"Certiorari granted and judgment reversed.

PER CURIAM.

The petition for a writ of certiorari is granted, and the judgment is reversed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would reverse for the reasons stated in the opinion of MR. JUSTICE BLACK in Jacobellis v. Ohio, ante, p. 196. MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG would reverse for the reasons stated in the opinion of MR. JUSTICE BRENNAN in Jacobellis, ante, p. 184. MR. JUSTICE STEWART would reverse for the reasons stated in his opinion in Jacobellis, ante, p. 197. THE CHIEF JUSTICE, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied."

Jacobellis v. Ohio, 378 U.S. 184 (1964)

Background:

Appellant, manager of a motion picture theater, was convicted under a state obscenity law of possessing and exhibiting an allegedly obscene film, and the State Supreme Court upheld the conviction.

Held: The judgment is reversed.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE GOLDBERG joins.

Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press. *Joseph Burstyn, Inc. v. Wilson*, [343 U. S. 495](#). But, in *Roth v. United States* and *Alberts v. California*, [354 U. S. 476](#), we held that obscenity is not subject to those guarantees. Application of an obscenity law to suppress a motion picture thus requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. *Bantam Books, Inc. v. Sullivan*, [372 U. S. 58](#), [372 U. S. 66](#); see *Speiser v. Randall*, [357 U. S. 513](#), [357 U. S. 525](#). [[Footnote 2](#)] It has been suggested

that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that, in any event, the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law.

The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that the test for obscenity enunciated there --

"whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest,"

-- is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance," and that

"[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."

Id., 354 U.S. at [354 U. S. 484](#), [354 U. S. 487](#). It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp. v. Regents*, [360 U. S. 684](#), or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. [[Footnote 7](#)] Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" without social importance. See *Zeitlin v. Arnebergh*, [59 Cal. 2d 901](#), 920, 31 Cal. Rptr. 800, 813, 383 P.2d 152, 165 (1963). It should also be recognized that the *Roth* standard requires, in the first instance, a finding that the material "goes substantially beyond customary limits of candor in description or representation of such matters." This was a requirement of the Model Penal Code test that we approved in *Roth*, 354 U.S. at [354 U. S. 487](#), n. 20, and it is explicitly reaffirmed in the more recent Proposed Official Draft of the Code. [[Footnote 8](#)] In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into the allegedly prurient appeal of a work of expression can be squared with the guarantees of the First and Fourteenth Amendments. See *Manual Enterprises, Inc. v. Day*, [370 U. S. 478](#), [370 U. S. 482](#)-488 (opinion of Harlan, J.).

It has been suggested that the "contemporary community standards" aspect of the *Roth* test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of *Roth*. The concept of "contemporary community standards" was first expressed by Judge Learned Hand in *United States v. Kennerley*, 209 F. 119, 121 (D.C.S.D.N.Y.1913), where he said:

"Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its memberships. If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* . . . To put thought in leash to the *average conscience* of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."

"Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject matter is left to the gradual development of general notions about what is decent. . . ."

(Italics added.) It seems clear that in this passage Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large; . . . the public, or people in general." [Footnote 9] Thus, he recognized that, under his standard, the concept of obscenity would have "a varying meaning from time to time" -- not from county to county, or town to town.

We have applied that standard to the motion picture in question. "The Lovers" involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene. The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national stature among the best films of the year in which it was produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in Roth v. United States and Alberts v. California, which we reaffirm here.

Reversed.

MR. JUSTICE WHITE concurs in the judgment.

"It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

MR. JUSTICE STEWART, concurring.

It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, [354 U. S. 476](#), in a variety of ways. In saying this, I imply no criticism of the Court, which, in those cases, was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, [[Footnote 2/1](#)] that, under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard core pornography. [[Footnote 2/2](#)] I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

MR. JUSTICE GOLDBERG, concurring.

The question presented is whether the First and Fourteenth Amendments permit the imposition of criminal punishment for exhibiting the motion picture entitled "The Lovers." I have viewed the film, and I wish merely to add to my Brother BRENNAN's description that the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something "questionable" is being portrayed. Except for this rapid sequence, the film concerns itself with the history of an ill-matched and unhappy marriage -- a familiar subject in old and new novels and in current television soap operas.