People of the State of California
v.
Lawrence Ferlinghetti

Decided October 3, 1957

Howl Obscenity Trial

Originally, the case name read *People of the State of California, Plaintiff vs. Shigeyoshi Murao, No. B27083 and Lawrence Ferlinghetti, No. B27585, Defendants.* The case against Murao was dismissed before Judge Horn issued his opinion in the matter of *People v. Ferlinghetti*. None of the surviving versions of *People v. Ferlinghetti* contained authoritative citations within the body of the opinion. The authors researched and reinserted the citations in all of the appropriate places. Hence, this is the most definitive existing version of the opinion in print. Excerpted from Ronald Collins & David Skover, *Mania: The Story of the Outraged & Outrageous Lives that Launched a Cultural Revolution* (Top Five Books, 2013), pp. 357-368.

IN THE MUNICIPAL COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALIFORNIA

HONORABLE CLAYTON W. HORN, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff

vs.

LAWRENCE FERLINGHETTI, NO. B27585
Defendant

Thomas C. Lynch, District Attorney
Ralph McIntosh, Deputy District Attorney
for the People

J.W. Ehrlich
Lawrence Speiser
Albert Bendich
for the Defendants

HORN, CLAYTON W., J. The defendant is charged with a violation of Section 311.3 of the Penal Code of the State of California. Defendant pleads Not Guilty. The complaint alleged that the defendant did wilfully and lewdly print, publish and sell obscene and indecent writings, papers and books, to wit: "Howl and Other Poems."

It is to be noted that the statute requires proof of criminal intent, namely, that the defendants did wilfully and lewdly commit the acts specified. It should also be noted that no reference to minors is made in the statute.

It must be borne in mind that the prosecution has the burden of proving beyond a reasonable doubt and to a moral certainty two things: first, that the book is obscene and,

second, that the defendants wilfully and lewdly committed the crime alleged. It is elementary that where a statute makes a specific intent an element of an offense, such intent must be proved. People v. Wepplo, 78 Cal. App. 2d Supp. 959, 965, 178 P.2d 853, 857 (1947). The proof may be circumstantial; but if so, the circumstances must be such as reasonably to justify an inference of the intent. Id. at 857–58.

The prosecution has advanced the theory that the word "indecent" means something less than obscene.

In their broadest meaning the words indecent and obscene might signify offensive to refinement, propriety and good taste. A penal statute requiring conformity to some current standard of propriety defined only by statutory words would make the standard in each case, ex post facto.

Unless the words used take the form of dirt for dirt's sake and can be traced to criminal behavior, either actual or demonstrably imminent, they are not in violation of the statute. Indecent as used in the Penal Code is synonymous with obscene, and there is no merit in the contention of the prosecution that the word indecent means something less than obscene.

The evidence shows that "Howl" was published by the defendant and therefore it remains to be seen whether said book is obscene and if so, whether this defendant wilfully and lewdly published it. The prosecution contends that having published the book defendant had knowledge of the character of its contents and that from such knowledge a lewd intent might be inferred.

The mere fact of knowledge alone would not be sufficient. The surrounding circumstances would be important and must be such as reasonably to justify an inference of the intent. To illustrate, some might think a book obscene, others a work of art, with sincere difference of opinion. The bookseller would not be required to elect at his peril. Unless the prosecution proved that he acted lewdly in selling it, the burden would not be met.

Written reviews of "Howl" were admitted in evidence on behalf of the defendants, over the objection of the District Attorney. One was from The New York Times Book Review, dated September 2, 1956; one from the San Francisco Chronicle, dated May 19, 1957, which included a statement by Ferlinghetti; one from the Nation dated February 23, 1957. All of the reviews praised "Howl."

The practice of referring to reviews in cases of this nature has become well established. Opinions of professional critics publicly disseminated in the ordinary course of their employment are proper aids to the court in weighing the author's sincerity of purpose and the literary worth of his effort. These are factors which, while not determining whether a book is obscene, are to be considered in deciding that question.

Over the objection of the prosecution the defense produced nine expert witnesses, some of them with outstanding qualifications in the literary field. All of the defense

experts agreed that "Howl" had literary merit, that it represented a sincere effort by the author to present a social picture, and that the language used was relevant to the theme. As Professor Mark Schorer put it: "'Howl,' like any work of literature, attempts and intends to make a significant comment on, or interpretation of, human experience as the author knows it."

The prosecution produced two experts in rebuttal, whose qualifications were slightly less than those of the defense. One testified that "Howl" had some clarity of thought but was an imitation of Walt Whitman, and had no literary merit; the other and by far the most voluble, that it had no value at all. The court did not allow any of the experts to express an opinion on the question of obscenity because this was the very issue to be decided by the court.

Experts are used every day in court on other subjects and no reason presents itself justifying their exclusion from this type of case when their experience and knowledge can be of assistance. The court also read many of the books previously held obscene or not for the purpose of comparison.

In determining whether a book is obscene it must be construed as a whole. Wepplo, 78 Cal. App. 2d Supp. at 961, 178 P.2d at 855. The courts are agreed that in making this determination, the book must be construed as a whole and that regard shall be had for its place in the arts.

The freedoms of speech and press are inherent in a nation of free people. These freedoms must be protected if we are to remain free, both individually and as a nation. The protection for this freedom is found in the First and Fourteenth Amendments to the United States Constitution, and in the Constitution of California, Art. I, sec. 9 which provides in part:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . ."

The Fourteenth Amendment to the Federal Constitution prohibits any State from encroaching upon freedom of speech and freedom of the press to the same extent that the First Amendment prevents the Federal Congress from doing so. Commonwealth v. Gordon, 66 Pa. D. & C. 101, 138–39 (1949).

These guarantees occupy a preferred position under our law to such an extent that the courts, when considering whether legislation infringes upon them, neutralize the presumption usually indulged in favor of constitutionality. Id. at 139.

Thomas Jefferson in his bill for establishing religious freedom wrote that "to suffer the Civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty. . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Id. at 139–40 (quoting Thomas Jefferson, "A Bill

for Establishing Religious Freedom," 12 June 1779).

The now familiar "clear and present danger" rule represents a compromise between the ideas of Jefferson and those of the judges, who had in the meantime departed from the forthright views of the great statesman. Under the rule the publisher of a writing may be punished if the publication in question creates a clear and present danger that there will result from it some substantive evil which the legislature has a right to proscribe and punish. Id. at 140.

Mr. Justice Brandeis maintained that free speech may not be curbed where the community has the chance to answer back. He said: "those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the *cost* of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it." Whitney v. California, 274 U.S. 357, 377, 47 S.Ct. 641, 648–49 (1927) (Brandeis, J., concurring).

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society—the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." Gordon, 66 Pa. D. & C. at 140–42.

"The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful Ignorance." Id. at 143 (quoting Martin v. Struthers, 319 U.S. 141, 143 (1943)).

I agree with the words of Macaulay who finds it "difficult to believe that in a world so full of temptations as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them." Id. at 155.

I do not believe that "Howl" is without redeeming social importance. The first part of "Howl" presents a picture of a nightmare world; the second part is an indictment of those elements in modern society destructive of the best qualities of human nature; such elements are predominantly identified as materialism, conformity, and mechanization leading toward war. The third part presents a picture of an individual who is a specific

representation of what the author conceives as a general condition.

"Footnote to Howl" seems to be a declamation that everything in the world is holy, including parts of the body by name. It ends in a plea for holy living.

The poems, "Supermarket," "Sunflower Sutra," "In the Baggage Room at Greyhound," "An Asphodel," "Song" and "Wild Orphan" require no discussion relative to obscenity. In "Transcription of Organ Music" the "I" in four lines remembers his first sex relation at age 23 but only the bare ultimate fact and that he enjoyed it. Even out of context it is written in language that is not obscene, and included in the whole it becomes a part of the individual's experience "real or imagined," but lyric rather than hortatory and violent, like "Howl."

The theme of "Howl" presents "unorthodox and controversial ideas." Coarse and vulgar language is used in treatment and sex acts are mentioned, but unless the book is entirely lacking in "social importance" it cannot be held obscene. This point does not seem to have been specifically presented or decided in any of the cases leading up to Roth v. United States.

No hard and fast rule can be fixed for the determination of what is obscene, because such determination depends on the locale, the time, the mind of the community and the prevailing mores. Even the word itself has had a chameleon-like history through the past, and as Mr. Justice [Holmes] said: "A word is not a crystal, transparent and unchanged. It is the skin of living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). The writing, however, must have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires. Commonwealth v. Isenstadt, 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945).

The effect of the publication on the ordinary reader is what counts. The Statute does not intend that we shall "reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few." United States v. Roth, 237 F.2d at 812 (1956). This test, however, should not be left to stand alone, for there is another element of equal importance—the tenor of the times and the change in social acceptance of what is inherently decent.

The modern rule is that obscenity is measured by the erotic allurement upon the average modern reader; that the erotic allurement of a book is measured by whether it is sexually impure—i.e., pornographic, "dirt for dirt's sake," a calculated incitement to sexual desire—or whether it reveals an effort to reflect life, including its dirt, with reasonable accuracy and balance; and that mere coarseness or vulgarity is not obscenity. Gordon, 66 Pa. D. & C. at 136.

Sexual impurity in literature (pornography, as some of the cases call it) is any writing whose dominant purpose and effect is erotic allurement; a calculated and effective incitement to sexual desire. It is the effect that counts, more than the purpose, and no indictment can stand unless it can be shown. Id. at 151.

In the Roth case no question of obscenity was involved or considered by the court.

The sole question was whether obscenity as such was protected by the constitution and the court held it was not. Roth v. United States, 354 U.S. 476, 481 (1957). In the appeals involved the material was obviously pornographic, it was advertised and sold as such. The United States Supreme Court refers to the various rules on obscenity by stating that: "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The 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. at 486–87.

The following instruction, given in the Alberts case, is approved in Roth: "The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged, as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourself does it offend the common conscience of the community by present-day standards. In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children." Id. at 490.

Mr. Chief Justice Warren, concurring in the result in the Roth case, stated: "I agree with the result reached by the court in these cases, but the line dividing the salacious or pornographic from literature or science is not straight and unwavering, the personal element in these cases is seen most strongly in the requirement of scienter. Under the California law, the prohibited activity must be done 'wilfully and lewdly.'" Id. at 494.

There are a number of words used in "Howl" that are presently considered coarse and vulgar in some circles of the community; in other circles such words are in everyday use. It would be unrealistic to deny these facts. The author of "Howl" has used those words because he believed that his portrayal required them as being in character. The People state that it is not necessary to use such words and that others would be more palatable to good taste. The answer is that life is not encased in one formula whereby everyone acts the same or conforms to a particular pattern. No two persons think alike; we were all made from the same mold but in different patterns. Would there be any freedom of press or speech if one must reduce his vocabulary to vapid innocuous euphemism? An author should be real in treating his subject and be allowed to express his thoughts and ideas in his own words.

In People v. Viking Press, the court said: "The Courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manner just indicated, its effect would be to prevent altogether the realistic

portrayal in literature of a large and important field of life. . . The Court may not require the author to put refined language into the mouths of primitive people," 174 Misc. 813, 814–816, 264 N.Y.S. 534 (1933), and in People v. Vanguard Press, the court observed: "The speech of the characters must be considered in relation to its setting and the theme of the story. It seems clear that use of foul language will not of itself bring a novel or play within the condemnation of the statute." 192 Misc. 127, 129, 84 N.Y.S.2d 427 (1947). "As I have indicated above, all but one of these books are profoundly tragic, and that one has its normal quota of frustration and despair. No one could envy or wish to emulate the characters that move so desolately through these pages. Far from inciting to lewd or lecherous desires, which are sensorially pleasurable, these books leave one either with a sense of horror or of pity for the degradation of mankind. The effect upon the normal reader, *l'homme moyen sensuel* (there is no such deft precision in English), would be anything but what the vice hunters fear it might be. We are so fearful for other people's morals; they so seldom have the courage of our own convictions." Gordon, 66 Pa. C. & D. at 109.

In Commonwealth v. Gordon: "the test for obscenity most frequently laid down seems to be whether the writing would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires." Id. at 113. "The statute is therefore directed only at sexual impurity and not at blasphemy or coarse and vulgar behavior of any other kind. The word in common use for the purpose of such statute is 'obscenity.'" Id. The "familiar four-letter words that are so often associated with sexual impurity are, almost without exception, of honest Anglo-Saxon ancestry, and were not invented for purely scatological effect. The one, for example, that is used to denote the sexual act is an old agricultural word meaning "to plant" and was at one time a wholly respectable member of the English vocabulary. The distinction between a word of decent etymological history and one of smut alone is important; it shows that fashions in language change as expectably as do the concepts of what language connotes. It is the old business of semantics again, the difference between word and concept. But there is another distinction. The decisions that I cite have sliced off vulgarity from obscenity. This has had the effect of making a clear division between the words of the bathroom and those of the bedroom; the former can no longer be regarded as obscene, since they have no erotic allurement, and the latter may be so regarded, depending on the circumstances of their use. This reduces the number of potentially offensive words sharply." Id. at 114.

"The law does not undertake to punish bad English, vulgarity, or bad taste, and no matter how objectionable one may consider the book on those grounds, there is no right to convict on account of them." Id. at 122 (citing Commonwealth v. Dowling, 14 Pa. C. C. 607 (1894)). The dramatization of the song 'Frankie and Johnnie' caused much furor, but the court there held that "the language of the play is coarse, vulgar and profane; the plot cheap and tawdry. As a dramatic composition it serves to degrade the stage where vice is thought by some to lose 'half its evil by losing all its grossness.'" Id. at 134. "That it is indecent from every consideration of propriety is entirely clear, but the court is not a censor of plays and does not attempt to regulate manners. One may call a spade a spade without offending decency, although modesty may be shocked thereby. The question is not whether the scene is laid in a low dive where refined people are not found or whether the language is that of the bar room rather than the parlor. The question is whether the tendency of the play is to excite lustful and lecherous desire." Id.

(internal citations omitted).

"To determine whether a book falls within the condemnation of the statute, an evaluation must be made of the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior. Various factors must be borne in mind when applying the judicially accepted standards used in measuring that effect. Among others, these factors include the theme of the book, the degree of sincerity of purpose evidenced in it, its literary worth, the channels used in its distribution, contemporary attitudes toward the literary treatment of sexual behavior and the types of readers reasonably to be expected to secure it for perusal." People v. Creative Age Press, 192 Misc. 188, 190–191, 79 N.Y.S. 198 (1948).

Material is not obscene unless it arouses lustful thoughts of sex and tends to corrupt and deprave l'homme moyen sensuel by inciting him to anti-social activity or tending to create a clear and present danger that he will be so incited as the result of exposure thereto.

If the material is disgusting, revolting or filthy, to use just a few adjectives, the antithesis of pleasurable sexual desires is born, and it cannot be obscene.

In United States v. Roth, a footnote to the concurring opinion of Judge Frank is of interest: "The very argument advanced to sustain the statute's validity, so far as it condemns the obscene, goes to show the invalidity of the statute so far as it condemns 'filth,' if 'filth' means that which renders sexual desires 'disgusting.' For if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial." United States v. Roth, 237 F.2d at 801.

"To date there exist, I think, no thoroughgoing studies by competent persons which justify the conclusion that normal adults reading or seeing of the 'obscene' probably induces anti-social conduct. Such competent studies as have been made do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity' represents a ponderable causal factor in sexually deviant behavior. Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior. What little competent research has been done, points definitely in a direction precisely opposite to that assumption." Id. at 812.

While the publishing of "smut" or "hard core pornography" is without any social importance and obscene by present-day standards, and should be punished for the good of the community, since there is no straight and unwavering line to act as a guide, censorship by Government should be held in tight rein. To act otherwise would destroy our freedoms of free speech and press. Even religion can be censored by the medium of taxation. The best method of censorship is by the people as self-guardians of public opinion and not by government. So we come back, once more, to Jefferson's advice that the only completely democratic way to control publications which arouse mere thoughts or feelings is through

non-governmental censorship by public opinion.

From the foregoing certain rules can be set up, but as has been noted, they are not inflexible and are subject to changing conditions, and above all each case must be judged individually.

1. If the material has the slightest redeeming social importance it is not obscene because it is protected by the First and Fourteenth Amendments of the United States Constitution, and the California Constitution.
2. If it does not have the slightest redeeming social importance it may be obscene.
3. The test of obscenity in California is that the material must have a tendency to deprave or corrupt readers by exciting lascivious thoughts or arousing lustful desire to the point that it presents a clear and present danger of inciting to anti-social or immoral action.
4. The book or material must be judged as a whole by its effect on the average adult in the community.
5. If the material is objectionable only because of coarse and vulgar language which is not erotic or aphrodisiac in character it is not obscene.
6. Scienter must be proved.
7. Book reviews may be received in evidence if properly authenticated.
8. Evidence of expert witnesses in the literary field is proper.
9. Comparison of the material with other similar material previously adjudicated is proper.
10. The people owe a duty to themselves and to each other to preserve and protect their constitutional freedoms from any encroachment by government unless it appears that the allowable limits of such protection have been breached, and then to take only such action as will heal the breach.
11. I agree with Mr. Justice Douglas: I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.
12. In considering material claimed to be obscene it is well to remember the motto: "Honi soit qui mal y pense." (Evil to him who evil thinks.)

Therefore, I conclude the book "Howl and Other Poems" does have some redeeming social importance, and I find the book is not obscene.

The defendant is found not guilty.