Supreme Court of the United States

In the Matter of:

GROVE PRESS, INCORPORATED, et al.

Appellants;

vs.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

Docket No. 63

Place Washington, D.C.

Date November 10, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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October Term, 1970

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The above-entitled matter came on for argument at 2:05 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 63, Grove Press against the Maryland State Board of Censors.

You may proceed whenever you are ready, Mr. de Grazia.

ARGUMENT OF EDWARD DE GRAZIA, ESQ.

ON BEHALF OF APPELLANTS

MR. DE GRAZIA: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on appeal from a judgment of the Court of Appeals of Maryland which affirmed an order of the Circuit Court of Baltimore City upholding a decision by the State Board of Censors disapproving the film I am Curious (Yellow) for exhibition in the State of Maryland.

The Maryland film censorship scheme under which I am Curious (Yellow) was banned throughout the state is an amended version of the law which this Court held (without dissent) to be an unconstitutional "previous restraint" in Freedman v. Maryland.

Maryland, in fact, is the only state which still retains a law on its books making criminal the failure of motion picture exhibitors to obtain prior approval by a censorship board of a film intended to be shown to adults.

I am Curious (Yellow) was imported from Sweden by its American distributor, Grove Press, and it immediately became the subject of a customs forfeiture proceeding, but eleven months

later was finally held to be constitutionally protected and not obscene by the U. S. Court of Appeals for the Second Circuit.

Soon thereafter Appellant 5 West Amusement Co., Inc. contracted with Grove to exhibit I am Curious (Yellow) in Baltimore. In accordance with Grove's national distribution policy the agreement provided that admission to the film would be limited to persons 18 years of age and older, and that Grove would supply all advertising copy.

On July 1, 1969, as required by the statute, appellants submitted I am Curious (Yellow) to the Maryland Film Censorship Board, consisting of three adult ladies, who following consultation with the state's chief law enforcement officer, the Attorney General of Maryland, found the film obscene. No record was made of the board's proceedings and although witnesses were heard, their identity and their testimony was kept secret. No findings or supporting reasongs were given by the board in issuing its decision.

As required by the statute, following its disapproval, the Censorship Board petitioned the Circuit Court of Baltimore City, asking it to approve its decision, and after a hearing, an adversary hearing in which witnesses were heard on both sides, the Court affirm the board's decision.

Appellants here appealed that decision to the Court of Appeals of Maryland, which considered the matter de novo and found the statute constitutional and the motion picture obscene.

The Maryland Court of Appeals reached its decision by a four to three division, disagreeing sharply over the conclusions to be drawn from application to the film of this Court's Roth/Memoirs tests for distinguishing protected expression from obscenity. The majority saw fit also to disregard the decision reached with regard to the same film by the Second Circuit.

Q Was the Second Circuit also divided in its opinion?

A Two to one.

Q You didn't say that before. I just wanted to know.

A It was a majority of two to one, with Judges Hays and Friendly being the majority and Judge Lumbard dissenting.

Q But you emphasized the Maryland court as four to three, but you didn't mention the two-to-one decision in the Court of Appeals.

A In fact, Your Honor, I refer to Judge Lumbard's decision in the case later on. I think it is notorious that the very rare cases in this field in which there is not a division of the justices at every level of court that we look at.

The issues presented by this appeal are two-fold.

Oh, before I get to the issues, I would like to state that in terms of the Court of Appeals of Maryland the majority opinion applied the Roth/Memoirs three-pronged test. The Court

gave special weight to "the visual impact of a motion picture as contrasted with the printed word."

The issues presented by this appeal are two: First, is the Maryland statute defective as applied to I am Curious (Yellow)? And second, is I am Curious (Yellow) obscenity or is it protected expression?

It is our position that the Maryland film censorship scheme is fatally defective because it is overbroad in acope and because it fails to provide adequate procedural safeguards.

The statute requires the board to disapprove any film that is obscene. The only definition of "obscene" provided by the statute, however, reaches any film whose effect is to "arouse sexual desires" if that effect probably "outweighs whatever other merits the film may possess." The trouble with this definition is that it is in conflict with Roth and every other case that has followed.

This Court has never to my knowledge suggested that books or films may be censored for arousing sexual desires. Any film with a handsome actor might be perceived by lady censors as arousing sexual desires -- particularly if the actors appears naked, if only for a few moments as he did in I am Curious (Yellow).

Similarly, any film starring a nubile woman may be perceived by a man as arousing sexual desires, particularly if the actress appears naked, even for a few moments, as she did in

I am Curious (Yellow).

Also the statute commands that the arousing effect be weighed against the film's other values. In this respect it is submitted the statute is in conflict with this Court's judgment and Mr. Justice Goldberg's opinion in Jacobellis v. Ohio, and is also in conflict, we submit, with Mr. Justice White's dissent in Memoirs v. Massachusetts.

Finally, the board is not required by the statute to consider whether the film goes substantially beyond contemporary community standards in its depictions, as this Court in Manual Enterprises v. Day has held must be done before the material can be found obscene. In this regard the statute is also in conflict with this Court's judgments and the prevailing opinions in Jacobellis, Memoirs and Redrup v. New York.

Secondly, the Maryland censorship scheme is defective because of its procedural defects. No record is made or required to be made. The witnesses, there is no requirement that witnesses be revealed and the deliberations of the board are secret. No grounds are given for a decision.

The censors here have no function other than censorship, whereas in the case of the Post Office, which has been been described today, a possibly analogous role, the censors deal with other matters than obscenity.

Q Mr. de Grazia, am I right that you don't like the wording of the statute in the Maryland Court of Appeals in terms

of the Roth and Memoirs standards?

A That is correct, Mr. Justice Harlan.

Q So you are not making a -- on that basis why the statutes aren't based on something or other material from our standpoint?

A I believe that there have been opinions by justices of this Court, including Mr. Justice Blackmun, to the effect that it may be necessary for the statute itself to define the specificity, the requirements and criterion for censorship.

Q You mean on the chilling effects?

A In the case of Aptheker v. Secretary of State, which is cited in our brief at page 44, the Court I think clearly held that the courts are not unlimited in the authority to rewrite otherwise defective statutes.

Q Well, I say the Supreme Court is so far as is required. We just take the statutes as "brown" and the State Court says that really means "green," then the state law is that it means "green" and that's the way we take it.

A Well, Mr. Justice Stewart, it may be that you do that. I am not sure the censorship board would take it that way. The ladies on the censorship board are not, I think, trained in the law. There is not indication that ---

Q But here we have the Maryland Court of Appeals, the highest State Court.

A Yes, Your Honor, but we are here dealing also

with the censorship system which requires the prior submission and the suppression by a board, an administrative board, of material which only later is judicially adjudicated for its obscenity.

Q Well, let's assume that the first action was inadequate in some way. Was it irrelevant after the Court of Appeals of Maryland had taken its steps?

A Mr. Chief Justice, if this statute permitted this film or any film, at least any film that had been the subject of a prior positive judicial action to remain free for exhibition during the pendency of the board's hearing and the legal proceedings thereafter, I would say "yes." But I don't believe that is the teaching of this Court that censorship boards are free to reach erroneous conclusions through inadequate practices. The proceedings are subject to the saving grace of a final judicial decision, which as is perfectly plain in this case is more than a year after the film was originally suppressed and run.

I would like to further point out the teaching of Kingsley Books v. Brown in which the Court held material ought to be permitted to circulate pending the final judicial decision, subject only to a subsequent contempt proceedings. Again I wish to emphasize that in cases such as this where the film is already known to the censorship board and known to the courts, the film already had been held constitutionally protected by the Second Court of Appeals.

Surely in a case such as this there is no sufficient warrant for a board or court to suppress the exhibition of a film pending the final adjudication by this Court.

My second point is I am Curious (Yellow) cannot be held to be obscene, when any of this Court's tests are used.

Q What inference do you want us to draw, if any, from the fact a Federal Court of three judges held one way and a State Supreme Court held another way? Does that prove anything more than reasonable men take a different view of some of these things?

A Mr. Chief Justice, ---

Q You are not suggesting that the Second Circuit's holding is binding upon the Court of Appeals of Maryland, are you?

A I suggest that in the area, sir, as difficult as this one is that the Court of Appeals of Maryland indeed and the Circuit Court of Baltimore should have heeded -- should not have followed the decision by the Second Circuit Court of Appeals, but should have seen as a matter of law that if a majority of the High Federal Bench sees social importance in a film, sees on insufficient prurient appeal and insufficient patent sensitiveness in the film, that surely the film cannot be said to be utterly without social importance, without violence.

It seems to me that a decision by any judge, any justice

of a Federal or state court should be enough to warn another away from a decision which suppresses a film.

In Roth this Court said that obscenity was not protected expression, but in doing so the Court emphasized that sex is not synonymous with obscenity. "The portrayal of sex, for example, in art, literature and scientific works, is not sufficient reason," this Court said, "to deny material the constitutional protection of speech and press."

That reasoning, we feel, precisely covers this case. I am Curious (Yellow) is two hours of filmed art. Dozens of witnesses and critics proved that, were it not otherwise perfectly clear from the viewing of this film. The portrayal in this film of ten minutes of sexual relations cannot taken to destroy the film's entitlement to constitutional protection.

The relationship of the sexual episodes to the balance of the film was described at the trial and is contained in our brief on the merits at footnote 32.

I would like to read to you one sentence of what Mr. Vincent Canby of the New York Times said on this point: "A full-length portrait of the Lena, the trouble, liberated woman, simply could not exist without these sexual scenes."

As Judge Hays said in the Second Circuit decision, "Whatever the dominant theme may be said to be, it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful

that interest in it should be characterized as 'prurient'."

The conclusion that this film is constitutionally protect plainly follows from this Court's decisions subsequent to Roth.

I would wish to mention at this juncture two important facts about the Roth/Memoirs test. First, as was documented by the Commission on Obscenity and Pornography's recent report, and I must quote this to you, "The three-part definition adopted in the plurality opinion in the Fanny Hill case" is the version which has been codified into a number of state statutes and "is the one which is almost universally used in state and lower Federal courts."

Second, the judgments required by Memoirs "are enormously difficult to make with regard to particular materials and it is very easy for different judges and jurors to reach opposite conclusions as to the same works."

The recommendations of the Commission are that all laws which prohibit or interefere with consensual distribution of "obscene" materials to adults should be repealed, and that, as this Court has intimated in such decisions as Redrup and Stanley and Rowan v. Post Office, only laws aimed at the protection of juveniles or at the prevention of obtrusive or assaultive communications to unwilling or captive adults are consistent with theconstitutional values of free expression.

Q Are you going to devote any more time to the

argument that the Chief Justice inquired about, namely, what the impacts of the Second Circuit's decision should be?

I understood your brief to argue that in the First Amendment field, not as a matter of res adjudicata, but as a matter of giving protective effect to either supremacy matter or the preemption matter and to relieve people in this field from the threat of different kinds of decisions from state courts and then being given by the Federal Courts, that the first Federal decision is a matter of supremacy law or preemption law, which should be controlling.

A Well, that is our position.

Q You are not going to argue that any more?

A Perhaps I can say a few more words about it.

Q Well, I thought it was quite an interesting argument myself.

A It seems to me that this field already replete with conflicting decisions, conflicting rules, overlapping tests could be improved were state courts to learn the courtesy or supremacy to the judgments of Federal Courts in this area. I would think that the Federal Courts might similarly respect the prior judgments of state courts at least if the state courts are applying the correct standards.

But there is no suggestion in the Maryland Court of Appeals decision that the Second Circuit Court had applied standards different from those which Maryland chose to apply.

In such situations, it seems to me, that the prior judicial decision could be treated as, in effect, binding on the second court.

Q Would you carry that beyond the First Amendment in all areas of the adjudication of the Federal Constitution?

A Mr. Justice Harlan, I wouldn't. I haven't investigated that matter, but I doubt that I would.

Q Suppose the Second Circuit had gone the other way with Judge Friendly resolving his distrusting doubt the other way, would you make the same argument?

A If, Mr. Justice Blackmun, the Second Circuit Court of Appeals had ruled differently, we would have appealed the decision to this Court. And I had been involved in that case and I had every confidence that this Court would have reversed the Second Circuit Court of Appeals.

I think that we should ---

Q Well, keep in mind suppose some other counsel had handled it and didn't appeal.

A Mr. Justice Blackmun, I am sure that any competent counsel in that case would have appealed to this Court.

I want to emphasize a point with which the Commission on Pornography, it seems to me, is doubly persuasive, and that is in this area where is a doubt, the expression should be permitted to continue and to exist, and doubt should be resolved in favor of the expression and of the decisions upholding the

expression because there is absolutely no evidence of social danger to individuals or to society from the chills of the time which are suppressed by statutes like this.

I mention the Commission's report today not because its findings are necessary to support our side. They are not. The Roth/Memoirs tests, and in the alternative the Kingsley Books v. Brown and Freedman cases, are all the law we believe we need for reversal.

However, the report is unquestionably the most important and authoritative commentary in this field of obscenity to have appeared since the American Law Institute's draft of a Model Penal Code, and I have no doubt that you will have reference to it in the event you should decide on clearer definitions or tests should be introduced in this or related cases.

I wish to point out that in my judgment this case and this film provide the Court with a rare opportunity to reach a judgment that is unanimous, and announce a clear and uniform opinion which might significantly relieve this Bench and lower state and Federal courts as well of the flood of litigation and conflicting decisions which have been the inevitable prices paid for the disagreements between the members of this Bench, and for tests which fail adequately to be in touch with the realities of sexual attitudes, behavior and expression.

I therefore suggest the Court might wish to go beyond a reversal of Maryland on the basis of Roth/Memoirs or Brown/

Freedman, and reverse on the basis of a new formulation which finds its common rationale in a distillation of the wisdom of the opinions of Mr. Justice Harland in Manual Enterprises, Mr. Justice Brennan in Memoirs, Mr. Justice Stewart's opinion in Ginzburg and Mishkin, the per curiam opinion in Redrup, Mr. Justice White's opinion in Memoirs, Mr. Justice Marshall's opinion in Stanley, and the Chief Justice's opinion in Rowan.

Q What is the rule you just -- (laughter)

A Yes, the rule, Mr. Justice Harlan, is that Federal agencies and courts would be admonished not to obstruct or interfere with disseminations of films or any other material unless they are hard-core pornography, but they would be given leeway to prevent or prosecute these whenever the mode of their distribution carries with it the risk of exposure to unwilling adults or to children.

Here may I remind you that general commercial motion picture distribution generally carry far fewer such risks than books. That is exposure to children or to unwilling adults.

Your Honors all have had an opportunity to see this film, and to have experienced its dominating concern with political and social and moral values, its exploration of personal and national ethics of violence and nonviolence, or criticism of American, Swedish, Russian, Chinese and Spanish Governments, of youthful reactions to the war in Vietnam and the aspiration for a country which could adopt a policy of nonviolent

defense, of the ideals of Martin Luther King, of the irresponsibility of some parents and the anger of their children.

We have furnished the Court with copies of the film's scenario so that you may be able, if you desire, to refresh your recollection of the film's social theme and intellectual ideas.

Q How many state of the Union has this film been shown in?

A This film has been shown to 5.5 million persons in 40 states of the Union and in approximately 180 cities.

Q Has it created any sort of war-like factions?

A The South seems to be a little more resistant to the exhibition of this film and parts of the Midwest also than the North and the Far West.

Q Do you people go to see it there?

A The people are going to see it all over, yes.

Q Well,---

A Except in Maryland.

Q They have large audiences. Are you very concerned about the Maryland situation? They have a pretty good market in there.

A Your Honor, we are concerned. We are concerned for the state of freedom in this country, for motion pictures. We are concerned about the freedom for other motion pictures that these appellants might want to distribute or exhibit, and we are concerned about the state of other films, books, magazines

and newspapers that should be distributed throughout the country.

Q What about the equal protection of the people who live in Montgomery County and Prince Georges County, who come to Washington? And the people in Baltimore are too far away. You don't want to make that one, too, do you, while you are at it?

A Mr. Justice Marshall, we mentioned that we touch them in our brief on the merits. I personally cannot see how this country can tolerate a constitution which gives a freedom of expression to conceive, it gives him freedom to conceive ideas, which is totally dependent upon state, county and municipal boundaries.

I think there is a denial of equal protection of the laws, of the constitutional laws in such a case.

Q How does that apply to this suit? For people who are unable to see this picture, you keep grieving for them, but they are not parties to this suit.

A Distributors and exhibitors under the laws of ---

Q They are not for it, to start off with, so they are not in this group.

A I didn't hear that.

Q They are not for.

A I am sorry, would you repeat your question?

A I said that the people that are deprived of what you consider their right to see this picture, they are not

parties to this suit.

A They are not parties. It is the responsibility for supporting their rights and defending their rights under the law of this land seems to rest on the shoulders of commercial distributors and exhibitors of films and books of this kind.

Q Yes, because that is the only handy way to get to it.

A That is only way we can get to it.

I would like to save the remaining few minutes.

Q Mr. de Grazia, you say this has been shown in 40 states?

A Yes, Mr. Justice Black.

Q Why are the people of the other nine states deprived of the social message of this film?

A I believe entirely because of litigation which commence in those cases, which has not finally been resolved in cases, civil and criminal, which are pending -- which have been suspended pending the decision of this Court in this case.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ARGUMENT OF FRANCIS B. BURCH, ESQ.

ON BEHALF OF APPELLEE

MR. BURCH: Mr. Chief Justice, may it please the Court:

I would make apologies at the outset if I have a question put to me and I have a little difficulty hearing it, and I just simply want to apologize in advance.

I had originally intended to argue this case by addressing myself, first, to the obscenity issue and then very lightly at the end to the questions raised by my brother with respect to the statute itself, the whole system of pre-censorship in Maryland and the question of preemption by the Second Circuit.

But let me, since he made quite a point of both of those matters -- let me first, if I may, go to the question of the other buts of the Maryland statutes. I believe, Mr. Justice Stewart, you pointed out that the Court of Appeals in the Sanza case addressed itself specifically to that problem and held that obscenity was obscenity within the constitutional sense, and that was all that could be banned by the Maryland Board of Censors.

And I might say that brings to mind the Shuttlesworth case in Alabama, where this Court held that plastic surgery on a statute which was otherwise be in violation of First Amendment rights could act prospectively so that the surgery would correct whatever defect there was.

But we think Shuttlesworth is a complete answer to the point raised by my brother on that question.

With respect to the preemption, again going to the question of the statute itself, my brother refers to the Kingsley case, the Brown case. I simply point out that that was in 1957. The Freedman case, which dealt specifically with the Maryland system of pre-censorship, was decided in 1965 and it is

very much on point, so I don't know why he would ask this Court, having once addressed itself to the Maryland statute, having found that it could constitutionally be amended -- and it was so amended -- that now he brings up the Brown case of 1957.

On the question of preemption by the Second Circuit, first of all we have an entirely different situation. It would be a completely new theory of the law. In fact, we assert we find nothing which would suggest that preemption would be appropriate in this particular case.

But let's look at the points. First of all, we were not party to the Federal suit in New York. There was no expert witness offered by the Federal Government. The case was tried before a jury. We had no right of appeal, so we would say that if a court in some other jurisdiction were to decide the issue without our having had any opportunity whatever to enforce the rights of our statutes, that we should be preempted.

I think such is a question for the states to answer. I don't believe this Court will ever take such a position.

Now let me get to the question about obscenity, the description that my brother had given of the sex in this picture. He talked about a few fleeting moments of a man in the nude and a girl in the nude. He says that he acknowledges that hard-core pornography, even under the unusual circumstance that he suggests, that hard-core pornography would be properly banned by any jurisdiction, whether it be Federal or state.

I would like, if the Court is not already familiar with it, simply to refer to the description of the 17 -- in the -- pardon me for just a minute, I would like to find the particular reference to what this film is all about.

While I look for that, I would like to make one further comment about the theme of this movie. There was some very interesting characterizations of the various things, about Martin Luther King, the unrest in Sweden and this and the other thing and that this, therefore, gave it "redeeming social value."

I think it is interesting, if the Court will recall, in our brief the reference to Rex Reed's critiques, I think in the New York Times, in which he related a very interesting incident when the film had been shown to those who were going to write it, the critics, that after the film had been shown it was found out that the projectionist had put the second reel -- the third reel second and the second reel last. In other words, the theme was so completely disorganized and there wasn't really any theme. They didn't know which film went where.

And if you will look at Judge Lumbard's opinion in the New York case, you will find that they did the same thing when that film was exhibited to the Court and the jury, because in his opinion Judge Lumbard says, "The final scene in conformity to the dominant theme shows the female lead performing an orchiectomy or peotomy, or both, on her murdered lover with a kitchen carving knife."

This happened to be in the second reel and not the third reel, but when they showed it to the jury and the Court, it ended up by being in the third reel.

Now let's look at what sex is in this movie. I am not going to use some of the expressions that were used, such as in the opening scene when the young lady tells about what she can do in Rio de Janeiro for free, but you have an erotic display of Indian sculpture depicting a man with his hand on the woman's vagina. You have a discussion between Lena and another girl about different methods of masturbation.

You have the dialogue, "Are you that * * * stupid?" Also, you don't give a you-know-what about it. There is a detailed love-making scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Börje caressing the girl's breasts with his tongue.

There is a scene depicting sexual intercourse between Börje and Lena on the palace balustrate in which, although the parties are clothed, the act of intercourse is vividly displayed. Also we see scenes of nudity at the retreat and scenes depicting Lena looking at a sex manual showing various unusual positions for sexual intercourse.

There is a scene at the retreat showing Börje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena

kissing Börje's penis as he caresses her vagina. There is a discussion regarding sex which "makes them both horny."

We see a scene depicting intercourse in the water; a scene depicting sexual intercourse in a tre between Lena and Börje; a scene showing fully the naked bodies of the two lying on the floor engaged in either actual sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation.

I could talk about the genitals in other scenes; I could talk about the tremendous active scene where he chases her into another room and throws her to the floor and has what appears to be intercourse in the nude.

Throughout this picture you have 10 or 12 minutes of sexuality that is the most explicit sexuality that has ever been shown. You also have in the record the statement of the producer, that what he said over here in the United States, to Grove Press, as the material that would be used to sell the picture was mostly the emphasis on the sexual aspect of the film.

All of this is the dominant theme and it was so held by the lower court in our case. It was held by the lower court jury in the New York case; it was held by the lower court in the New York case; it was held by one of the two judges in the Second Circuit.

It was held by the lower court in our case and it was held by the Court of Appeals by a divided four-to-three opinion.

It was also held by a number of other cases in courts throughout the country that have had the opportunity to address itself to the issue. They have found that this is a predominantly sexual, obscene picture and that it has no redeeming social value.

Q What is this scoreboard of the Judiciary on this? How many courts have been noted on this?

A I do not -- we recite in our brief a number of cases where it has been held to be obscene. There has been held to be hard-core pornography and that is exactly what it is.

The sex is used to sell the film. The rest of it is nothing. The I am Curious (Yellow) case, this picture was developed by a series of interviews such as you see Lena conducting on the street and what-not. They took all of that and they extracted from it that which they wanted to put in I am Curious (Yellow), which was about 90 percent of the sex scenes they filmed. They put that together and they sold I am Curious (Yellow).

Then they came along with I am Curious (Blue) and what a disappointment to those who were looking for sex, because it reminded me of the comment by Mr. Justice Stewart or Mr. Justice Goldberg, who said, in the Jacobellis case, that the sex was so fleeting that you wouldn't have known unless you had been a censor.

In this case this is exactly what they did and they ended up with I am Curious -- and what happened? 5.5 million

people have gone to see I am Curious (Yellow), according to my brother. In 40 states it has been shown. It was the top of the box office.

I can tell you I went all over those figures. It was in the top ten or the top two or three for five weeks running. Along came I am Curious (Blue) with no sex, the same type of interviews, the same depiction of unjust social matters and this and the other thing, and what happens? In about four or five weeks it has fallen flat on its face and I doubt very seriously that it is being shown in any other state in the country today.

Why? Because it has no theme, it has no social redeeming value, and it has no sex. If it had the sex that I am Curious (Yellow) had, it would also probably be seen by the same number of people that they had in the past.

So, this now gets me to the part of the argument of addressing myself to what is the state of the law on this whole question, and I agree it is confusing. I agree that it is very difficult to read the opinions in these cases. I have tried to make a summary of what each of the justices in the 15 years has done in the various cases and quite frankly, and I say it with some apology, there is really no complete consistency among the views of the justices and among some of the justices' own views.

They say one thing one time and they say one thing another time, and they come back and they end up with a somewhat different view from what they even had the second time.

Again I say it with an apology, but this is really the problem, and I think the Court recognizes the problem. I think the Court sees that it has to resolve the problem.

Now throughout the country today all the courts are viewing the whole question of obscenity with the three-pronged test as being the applicable test. Well, I have read every case on the subject and I have yet to find where a majority of the courts has agreed on the three-pronged test, or the majority of any court has agreed on the three-pronged test.

Mr. Justice Brennan introduced the three-pronged test in Memoirs and he came out with the "socially utterly social redeeming values." But there hasn't been a majority of the court that has subscribed to this as the viable concept and the principle which shall be applied in decisions such as this.

What is the test? I think the answer is what Mr. Justice Harlan has suggested, and which I believe has been generally adopted by the Chief Justice and Mr. Justice Blackmun and to a somewhat lesser extent by Mr. Justice White, and that is that you have got to let the states use a rational basis in making a determination. We have got to let the states determine whether it is obscene and whether it is in violation of that particular statute.

This is the only way we are going to make any sense out of it and it is the only way we are going to end up the clogging of the courts with these cases coming in day in and

day out all over the United States, whether we are talking about Federal courts or whether we are talking about state courts, whether we are talking at the lower level or whether we are talking at the appellate level.

We have today the biggest backlog of cases in the criminal field throughout all the courts in the United States, and because of the inability of the court to determine with some reasonable definition of what constitutes "obscenity," the states have a right to control -- because of that we are causing all of these criminals or those who have been charged with criminal acts to languish in jail, waiting for these other cases to be tried.

Quite frankly, I know that some will criticize me for what I am about to say, but I would rather see the whole law abolished than to have this state of confusion continue. I think this serves no good purpose. I think, however, that the public has a right, based on the acts of the Legislature, to have some protection in the field of obscenity. I think this Court has said that it has to.

It has also said that obscenity is not entitled to the protection of the First Amendment. I believe it is correct. I believe it would be a sad day if it is ever the view of this Court that obscenity can run rampant and nobody can do anything about it.

Now let's talk for a minute about the difference between

censorship in books -- obscenities in books and obscenities in films.

Q Is there an enormous background of obscenity cases in Maryland?

A I am just saying that there are 144 cases dealing with I am Curious (Yellow) throughout the United States right now. This is in the brief by my brother here.

We have maybe three or four or five cases a years that come up and go to the courts. They have to go through the process of the appellate court, they come up here to the Supreme Court.

Aside from anything else on the great constitutional questions dealing with other First Amendment rights before this Court, obscenity cases seem to me to have taken up a good part of this Court's time. I would be hopeful that this Court might be able to come up with a definition and, quite frankly, Mr. Justice Harlan, I subscribe to your approach to the problem because I think it is reasonable.

I think Mr. Chief Justice Warren here --

Q What definition ---

A Pardon me, sir?

Q What definition would you suggest?

A If it is determined by a state court that on a reasonable that the particular matter is obscene, then on the sufficient evidence rule that would be permitted to stand.

Q In other words, your definition would be if the

court thinks it is obscene, it is obscene.

A If after ---

Q As a definition.

A Pardon?

Q Is that a definition?

A If there is a reasonable basis that the evidence shows that to be, the nature of the sexuality as to the experts if you must have experts say that something is a predominantly prurient scene ---

Q Who do you use as the experts?

A Well, I am sure I wouldn't use the experts my brother used in I am Curious (Yellow). We have people who are professors, who have studied in the arts ---

Q Professors?

A Yes. At the Johns Hopkins University. We have psychologists.

Q Do you have ---

A Pardon me?

Q Do you have anyone else besides professors?

A Psychologists.

Q Anyone else?

A And I would like to see somebody who represents the community as distinguished from somebody who is a man of letters.

Q It seems like you are getting that from the 5.5

million or whatever it is who have been seeing the picture.

(Laughter.)

A Well, there are some 210 million that may well be upset by what has been done by it and I don't see any of those 5.5 million who attended that movie for sex, and many, I am sure, walked in without the realization of what it was. Others, I am sure, went out of curiosity and many who came out were disgusted, and probably would never go back to see a picture like that again.

Q If they wouldn't, that would be a good way to stop it.

A If they what.

Q If they wouldn't go back. They get disgusted and don't want to see it.

A That may be true, but those people who walked in that theater ---

Q You don't want them ---

A You what?

Q You don't want them destroyed in the meantime.

A I believe in everybody having their rights within reasonable bounds. I believe that everybody should have the right to read what they want to read, and I am 100 percent with Stanley. But I do not agree that the public should have foisted upon its sensitivities that which somebody wants to see themselves in a public or a semi-public place.

That is why I think there is a distinction. Mr. Justice Black, may I say this in some respect, sir?

?

I believe that even under a room principle that this film can be barred because you say that censorship is permissible where there is a -- where it is based on illegal action. And I say that ---

Q I didn't say that.

A It is concurring with Mr. Justice ---

Q It said, "where you have conduct which can be regulated."

A And I say this is conduct.

Q There is lots of conduct.

A Pardon? I didn't hear you, Mr. Justice Harlan.

Q Never mind.

Q (question blurred)

A This was the point I was about to address myself to.

Q I suggest in all seriousness, Mr. Attorney General, that what you are objecting to is the condoning of conduct which, if it occurred in a public place, would be arrested in every one of the 50 states.

A Exactly right.

Q Possibly would be arrested ---

A Exactly right. And that is my question. I would like to answer it by posing a question.

Suppose we were entered ---

Q And it makes some difference in living or whether they see it depicted on film or in the mirror.

A It makes no difference.

Q It makes no difference?

It makes no difference whether it is a publication or a picture or whether the thing is being done, you would say then that the First Amendment means nothing, would you?

A I would say that if in a public place or in a semi-public place there was obscene conduct, I see ---

Q Well, you haven't defined "obscene" for us yet.

A Well, copulation, homosexuality, hedonism, I call that "obscene." If that isn't obscene -- Mr. Justice Stewart says he can't define "pornography," but he knows it when he sees it. And I can tell you that he referred to the Solicitor General of the United States the very acts I am talking about in I am Curious (Yellow), which are the very acts referred to in a brief of the Solicitor General in, which Mr. Justice Potter Stewart made reference to when he said, "I know pornography when I see it."

I know it when I see it and I think any person knows it. Of course if you want to close your eyes and say it doesn't exist, no. Those who want to sell their smut, no, it doesn't exist. It is not pornography. It is not obscene.

This is the freedom of expression, the freedom of

somebody of somebody to do what he wants to do and the society be damned.

The point is let's go into that theater where that movie is being shown. Let's have a couple sitting there copulating in the aisle. Are they going to be subject to prosecution for obscenity, for lewdness? If they are, are their First Amendment rights being denied because they were in a place where there was a little privacy, that they didn't have to go to in the first place?

Q --- that the First Amendment was prohibited for that?

A Well, the counsel in the case who argued Memoirs has written a book, and he made a bit to do about he addressed this Court on the so-called "parade of horrors." He said he could see that this Court would not buy the possibility that these other things could happen, so that what he did was he devised his argument to say that what applies to a book obviously doesn't necessarily apply to a movie or apply to conduct.

It doesn't apply what you show in your home on a television. But we have given them an inch. They haven't taken a mile, they have taken at least 20 leagues. And this is what is going to happen because if this Court says that this kind of stuff should be shown indiscriminately in the movies, I am telling you that you are going to people who are going to be able to commit acts of sexual intercourse down in the Block in

Baltimore City, down in Bourbon Street in New Orleans and other places like that.

Q Do you mean the case that held that people could publish what they wanted to, to prevent the people, would justify saying that the same Amendment which protects people from having sexual intercourse in the streets, on the sidewalks and all that?

A I would say that I can see that as a logical extension of the argument. Yes, I can see it. I would pray that that would never come to pass, but I can see that it logically could happen. Because basically what is the difference between liveconduct, on the one hand, and the portrayal of it with music and all of the other "living color" and what-not, on the other, on the screen.

It may even be far worse, sexually stimulating, to see that all of the adornments -- the technicolor, the music, as I said before -- it is far worse than sitting in the park engaging in some form of sexual activity. Is it possible? Yes, it is possible.

This is what I am saying. I am saying this is a logical extension. I have seen, with apologies to the Court -- I have been at the Bar for 27 years. I have seen the extension of doctrines, nudes -- you don't measure today with what happened yesterday, or a year ago. You measure it with what happened yesterday.

That now becomes the new test. Then you go over here

and you have got the new test and so on and so forth. The first thing you know, you are diametrically at opposite poles.

This is what I say can happen and this is what I say might well happen.

Q Mr. Attorney General, you say you want to straighten this up and in the next breath you say you want to straighten this up with about 50 other things. Can't you just stick with this one point?

A I am not saying I want you to straighten anything up other than this particular matter, Mr. Justice.

Q Just this one point. And you are suggesting, as I understand, that the state court wants to decide it, but you haven't mentioned what standard the state court would apply.

That is my question.

A I would say, like we have in the trial of criminal cases, that if there is sufficient evidence, as I believe Mr. Chief Justice Warren suggested -- that is there is sufficient -- and I believe it is the view of Mr. Justice Harlan and Mr. Chief Justice Burger and Mr. Justice Blackmun and it might very well be Mr. Justice White's view, that I think that if that is established, at least we could caress unless there is clear air, unless there is a substantial amount of evidence to support the facts, that then the banning of the particular film would apply.

Q But would you go as far as to say that -- do you

still have eight judges on the Court of Appeals?

A Seven.

Q Seven.

A Yes. Five sit -- generally only five sit.

Q Then it is the five individuals' opinion that this is obscene, period. You want more than that, don't you?

A Everything in life has got to be based on somebody's judgment of valuations. There were two justices in New York against one, but it got this jury of 12 that this was obscene, and that it was an affront to community standards and that it doesn't haven't any redeeming social value.

All these people -- the two judges against one said it was all right. And with all due respect again to this Court, this Courts acts similarly. This Court puts itself in the position of the community. And I have heard other members of this Court criticize the fact that this is happening and I heard Mr. Justice Brennan say, "Let's don't talk about super-censors." But that is what this Court is; it is a "super-censor."

And as long as you are going to be a "super-censor," you are going to end up by having yourself completely choked by the mass of cases that are going to continue to come unless you -- I won't use the expression.

You know what Confucius once said, that unless you suddenly realize that you are going to throw everything to the winds and let it happen, this is where your face is.

I am sorry. I hope I have addressed myself to some of the problems that the Court faces.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. de Grazia, you have one minute left.

MR. DE GRAZIA: I have nothing to add.

MR. CHIEF JUSTICE BURGER: Very well, the case is submitted.

(Whereupon, at 3 p.m. the argument in the above-entitled matter was concluded.)