



# **mattachine REVIEW**

JANUARY 1962

FIFTY CENTS

BEGINNING OUR **8**TH YEAR OF PUBLICATION

IN THIS ISSUE: THE CHALLENGE OF CHANGE  
NEW PENAL CODE IN ILLINOIS  
PORNOGRAPHY, ART AND CENSORSHIP  
CALIFORNIA'S NEW OBSCENITY LAW  
PRAYER FOR THE NEW YEAR

—AND OTHER FEATURES



# Calling Shots

## THE CHALLENGE OF CHANGE—1955-1962

Thomas Jefferson provided the words for the cover of the first issue of *Mattachine REVIEW* which appeared in January 1955—eight years ago. They were the words inscribed on the wall of the Jefferson Memorial in Washington, D. C., and were selected to appear under the heading, "The Challenge of Change," which the editors chose to be the keynote for the new magazine.

At the beginning of the *REVIEW*'S eighth year, it seems appropriate to return to Thomas Jefferson and his wisdom:

"I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear

still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."

That is the inscription barely visible behind the statue of Jefferson on the cover of this issue. They were true in the days when the U. S. was born; they are just as true today.

Thinking adults are meeting the challenge of change. Since 1945—and particularly since 1948—changes in thinking about matters of sex have gone deeper into the mores of the American culture and progress has been noted. A greater number of people than ever are now advocating attitudes of enlightenment and freedom from the old myths and prejudices.

But this change isn't easy, and it isn't swift, except when compared to the total of man's recorded history. Attitudes and prejudices which may span up to 25 or so centuries of the Christian-Jewish tradition do not get erased in a generation.

Here are some of the significant changes noted over the past eight years:

1. A greater "freedom to read" in the English-speaking world, particularly in the U. S. Pressure of the censors remains, but laws and courts progressively permit greater freedom. In California in December a jury acquitted a bookseller on the charge of selling an obscene book ("Tropic of Cancer"), and therefore the book was technically declared not obscene, although some jurors thought it so.

2. Greater freedom for adults en-

(Continued on page 30)

*mattachine* REVIEW



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COVER: Jefferson Memorial, Washington, D. C., commemorating Thomas Jefferson, America's advocate of human dignity.



## CHANGES OF ADDRESS

Notice of change of address should be sent not less than two weeks prior to the date change becomes effective. Send the address at which copies are now being received and the new address at which you wish to receive copies.

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CONSENTING SEX RELATIONS IN PRIVATE ARE LEGAL

## New Penal Code for ILLINOIS

First of the fifty states to revise laws whereby consenting sex acts between adults in private are no longer a crime is Illinois. A completely revised penal code went into effect in that state at the beginning of the New Year on January 1, 1962. The code has been interpreted to mean that homosexual acts between adults without pressure are no longer criminal, when conducted in private, according to the Chicago *Sun-Times* on December 21.

This means that the essential recommendations of the Wolfenden Committee as concerns homosexuals in England have been adopted in an American jurisdiction before the changes were adopted in Great Britain, and this is a surprise to many who have studied the matter.

However the Illinois legal revision didn't come as a "change in sex laws" designed mainly to ease a situation for male homosexuals as the Wolfenden recommendations can be interpreted. Instead the legal sanctions are designed to extend to all adults, and they came with a sweeping revision of the entire criminal code of Illinois.

Among other important changes is the matter of obscenity. Says the Chicago *Sun-Times* "The possession of obscene literature and materials will no longer be a crime as long as they are not sold or disseminated to persons under 18 years. Also it will not be a crime for the person in possession of the materials to show them to adult 'friends'."

Some new offenses appear in the new code: Indecent solicitation of a child was added to contributing to the sexual delinquency of a child; any person 17 years of age or older who solicits a child under 13 to perform a sexually indecent act can be arrested, and receive a maximum penalty of \$500 fine or 6 months imprisonment or both. Aggravated battery becomes an offense, including "physical contact of an insulting nature." So does "reckless conduct" which causes bodily harm or endangers the safety of others.

## Who Has the **Book** Matches Now?

Grove Press of New York has probably advanced the cause of "Freedom to Read" as much as any other commercial enterprise in the U.S. during the past two years—at least from the standpoint of production of works previously banned in the American trade book field.

Some may argue with documented evidence that the cause has been advanced in reverse—that is, the storms of controversy stirred by the "decent literature" groups have set machinery in motion in the courts which resulted in (a) clearance for most of the books in question, (b) the overturning of many state and local obscenity laws as unconstitutional, and (c) the sobering of legislative bodies into consideration of laws which will stand the test of constitutionality. In some cases, however, such as in Colorado, the laws passed were on the side of the censors.

In 1959-1960, *Lady Chatterley's Lover* occupied center stage in the book scene as the fuel for those with matches to light the book piles. Hardbound copies were followed by several paper editions. The book can be sold everywhere in the U.S. today, except possibly Boston, but that isn't the point: Copies have been discounted and otherwise moved where possible from the dusty shelves, and they are corrupting nobody.

In *Tropic of Cancer* in 1961, Grove may have published some four-letter words which D. H. Lawrence didn't use. At any rate, out came the book which had been banned for more than 30 years, and it roiled the waters. By December there were 22 localities—states and cities—where the work was on trial. They spread from New England to Honolulu, although in the latter police reneged after ordering it off the bookstore shelves, and it went back on sale. But it was due to come up in court in January.

The issue in every case against *Tropic* called it "dirt for dirt's sake." Miller's left-bank life in Paris with bums, whores and pimps for associates was seen by the censors as having no redeeming social or literary importance. In some places it was even called a conspiracy to undermine American morals, and sponsored by you-know-whom.

In California in December the book went on trial with a Marin County bookseller and before a jury of eight women and four men who represented the "average" in the community. This was the only court action taken to date before a jury; all others were trials to be held before judges only.



After a sensationally covered trial, the verdict came in: Not Guilty. Thus under California's new state obscenity law, the dealer was acquitted of selling an obscene book, therefore the book was not obscene.

But across the continent in Maryland, *Tropic* didn't fare so well. There a judge took the opposite viewpoint, labeled it as unlawful, and over the objection of a defense which was not permitted to introduce experts to give evidence as to its merit, and its sociological and literary importance.

Other trials are yet to come. The outcome will be to keep up the demand for the book, which already is reaching sales heights seldom equalled. For instance, a California newspaper called the district attorney of Marin County one of the most astute and successful book salesmen in the history of the publishing industry.

Cognizant of the uproar today and aware of the promise of books to come tomorrow (Grove Press already has *Tropic of Capricorn* at the printer's), in this first issue of a new year we have chosen to present some strong arguments on the side of freedom to read. Two articles following cover aspects of censorship important to everyone who wants to choose freely what he reads without a government official saying it cannot be done.

We urge you to read them carefully.

EDITOR'S NOTE: The copyrighted article, "Pornography, Art & Censorship," by Paul Goodman, is reprinted from *COMMENTARY*, published by the American Jewish Committee, 165 East 56th Street, New York 22; 60¢ per copy, 7.00 per year. The article on "California's New Law on Obscene Matter" by Terry L. Baum, is reprinted from the *Journal of the State Bar of California*, published at 601 McAllister Street, San Francisco 2, by the State Bar of California, on a bi-monthly schedule; 1.00 per copy, 5.00 per year.

### CHOOSE TO KNOW!

One of the facts of life is that astrology, divorced from charity and generalized sun sign readings, is true science. Who can afford to deny life the advantage of knowledge? Yet if ignorance were bliss happiness would oftener be the rule. The twin truth of karma and astrology (cause and effect) reveals fate to whomever will seek to know it thereby. Your inquiry is welcome.

I have had over twenty years' research and experience in the occult and believe that a properly delineated horoscope is the most valuable property one can ever own! I charge ten dollars for drawing the life chart and answering questions regarding personal fate, i.e. career, health, finances, emotional concerns, past experiences, future plans—and describe the individual's destiny in terms of these, offering advice if so requested. I have a sincere desire to employ my knowledge in the service of worthy and interested persons! Please include moment of birth if known as well as the year, month, day and place with the precise questions desired answered. Fee promptly refunded if dissatisfied! All work personally done and typewritten.

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PAUL GOODMAN

## PORNOGRAPHY, ART & CENSORSHIP

**P**RESENT THINKING about obscenity and pornography is wrongheaded and damaging. In order to protect vital liberties, the higher, more intellectual courts often stand out against the police, the postmasters, and popular prejudice; yet since they don't give the right reasons, the issues are never settled. And worse, the courts lend themselves to the sexual attitude which, at this moment in our history, creates the very "hard-core" pornography that is objected to. That is, the court corrupts, it helps the censors corrupt. It ought to give light and provide leadership, and instead it stands in the way of progress. And worst of all, finally, by misunderstanding the nature of art and speech, the court emasculates them and prevents them from playing their indispensable social role. These are harsh words. Many of the readers of this magazine are going to be offended by this essay: they won't like my statement of the problem and they will think my remedies are worse than the disease. Nevertheless let us reason about it.

We are faced with the dilemmas of a society in transition. In discussing censorship, it is impossible to make good sense and good law without sociological and psychological analysis; rehashing the statutes

PAUL GOODMAN is currently making a study of the nature of language and communication; both this essay and "The Human Uses of Science" (December 1960) are parts of that study. Mr. Goodman's most recent books are *Growing Up Absurd* and *Our Visit to Niagara*.

will not do. But it is no secret that in this field earnest authorities angrily clash on the most material issues (this is a sign of transition). Take the most undoubted sadistic pornography, socially worthless and sold at a criminal profit: one psychologist will say that its effects are disastrous, it causes "sex crimes" and juvenile delinquency; yet another psychologist will flatly assert that no such connection has ever been proved, there is no clear and present danger to warrant legal action. Now in this particular difficulty, the courts seem to have a convenient out: since admittedly the dubious object has no social merit, since its associations are unsavory and the purveyor is a racketeer, why shouldn't the court go along with the censorship? No real freedom is impugned. But here is a dilemma: *what if the censorship itself, part of a general repressive anti-sexuality, causes the evil, creates the need for sadistic pornography sold at a criminal profit?* The tone of the censorship—and of the usual court decisions—is vindictive and anxious; it is not the tone of a simple prudential choice in terms of broad social policy. The censoring is a dynamic and emotional act, with novel and perhaps unthought-of effects. The social question is not the freedom of a venal purveyor, though the case is always argued in his terms since he is the one brought to court; the question is whether the sexual climate of the community is being perverted by the censorship.

The censorship justifies itself as protec-



tion of children and adolescents. But consider this issue in terms of an accepted commonplace of contemporary pedagogy, that we must provide the child a "structured permissiveness" to grow in: permissiveness so that he can act without fear, shame, and resentment, and learn by his mistakes; and a structure of firm parental morals and culture, how "we" behave, with which he can identify when he needs security and guidance in his anxiety and confusion. A good parent rarely sees a clear and present danger (of the sort of being hit by a car or swallowing poison). Most dubious associations and behaviors of a child outgrow themselves in his ongoing career in a moral and cultural environment. And indeed, this ongoing career is the only real solution for him; whereas a "protective" parental attitude will almost surely communicate the parents' anxieties and complicate things further.

If this is a correct analysis, then the recent "liberal" decision on *Lady Chatterley's Lover* is inadequate. It is not permissive in the right way and it does not provide a firm moral and cultural support. I am urging the court to re-examine its own anxieties and ask if the pornographic is in fact, in our times, obscene.

# I

JUDGE BRYAN's exoneration of *Lady Chatterley* takes its doctrine from Woolsey on *Ulysses* (1933) and Brennan in *Roth vs. United States* (1957). Let us consider these in turn.

Judge Woolsey's method in clearing *Ulysses* is as follows: he defines the obscene as the pornographic, as "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts," and he proceeds to show that the book does neither but "is a sincere and serious attempt to devise a new literary method for the observation and description of mankind." Let us postpone the literary criticism till the next section, but here stop short at the definition of obscenity.

The notion that sexual impulse or stirring sexual impulse is a bad thing comes from an emotional climate in which it was generally agreed that it would be better if sexuality did not overtly exist, when people bathed and slept fully clothed, and a bull was called a he-cow. Then anything which was sexual in public, as by publication of "detailed representation in words or pictures," violated society's self-image and was certainly obscene. In our times such a notion cannot define obscenity. The pornographic is not *ipso facto* the obscene. As Judge Jerome Frank pointed out in 1949, "No sane man thinks that the arousing of normal sexual desires is socially dangerous." We live in a culture where all High Thought insists on the beauty and indeed hygienic indispensability of sexual desires, and where a vast part of commerce is busy in their stimulation. Nevertheless, Judge Bryan on *Chatterley* repeats the doctrine in 1960! This leaves us in utter confusion. For consider: Bryan goes on to define the "prurient . . . that is to say, shameful or morbid interest in sex"; but, if the stirring of desire is defined, and therefore treated, as obscene, how can a normal person's interest in sex be anything else but shameful? This is what shame is, the blush at finding one's impulse to be unacceptable. Only a brazen person would not be ashamed. So the court corrupts. It is a miserable social policy. I would rather have Lawrence condemned than defended by such reasoning.

But it is Woolsey's second clause, "leading to lustful thoughts," that is the more interesting, for this is the likely and immediate effect of literary or pictorial stimulation. Bluntly, "lustful thoughts" means incitement to masturbate; and I guess that in the overwhelming majority of cases this is the chief use of pornography. Let us again look to history. In the 19th century, all sexual facts were suspect, but masturbation was a mortal sin and the prelude to insanity. Let me quote from a great, good-humored, and liberal man, the prince of the Enlightenment: "Nothing weakens

the mind as well as the body so much as the kind of lust directed toward oneself. It is entirely at variance with the nature of man. We must place it before the youth in all its horribleness," etc., etc. (Immanuel Kant, *On Education*). Contrast with this a philosopher of our own day: "Left to itself, infantile masturbation has, apparently, no bad effect upon health and no discoverable bad effect upon character; the bad effects which have been observed in both respects are, it seems, wholly attributable to attempts to stop it" (Bertrand Russell, *Education and the Good Life*). But this is pretty nearly the identical opinion of Benjamin Spock, M.D., in his pocket book of *Child Care* which is, I suppose, in every middle-class home in America (more than 12,000,000 copies of the paperback have been sold). And since the connection between pornography and juvenile delinquency is much touted, let me quote the identical opinion of a revered criminologist: "Masturbation is a habit without deleterious effects in itself, yet a source of behavior difficulties because of strong social disapproval" (Donald Taft).\*

My point is not that the habit is good; it is morally otiose. But when the court says that stirring to masturbate is obscene, certainly the court corrupts. It is claimed that the court must judge according to public sentiment; but there is plenty of better public sentiment. Why must the police and the courts follow the worst part of the population instead of leading with the best? A more enlightened court would not solve these problems any more than it has created integration in the South; but, by the same example, a good decision is not irrelevant.

THIS BRINGS US to the doctrine of *Roth vs. United States*. The standards to be applied in determining obscenity, Bryan quotes Judge Brennan, are "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest." Part of this sentence, "the dominant theme taken as a whole," is used by Bryan to prove that *Lady Chatterley* is a "serious" work, following the tactics of Woolsey, and again let us defer the literary criticism. Here let us stop at "applying contemporary standards," which is an attempt on the part of the court to cope with the changes in emotional climate that we have just been discussing. As Judge Bryan puts it, "Much of what is now accepted would have shocked the community to the core a generation ago." I don't think that this is a sufficient account. What is the history?

As one reviews the many cases in James Kilpatrick's *The Smut Peddler*† (which, despite its outrageous title and a vulgar first chapter, has many good pages), one is struck by how, year after year, this theme of changing standards recurs in the decisions: "What was regarded as indecent in the days of the Floradora Sextette, is decent in the days of the fan dance." But what is most striking is that in the long chain of decisions over two generations, the standard becomes increasingly broader, in almost every respect: the bathing suits more scanty, the four-letter words more tolerable, the descriptions of the sexual act more realistic, the "unnatural" themes more mentionable. It is just this tendency through time that the courts fail to take into account as they judge each case. Therefore they are always behind, they miss the essential nature of the phenomena they are judging, and this has consequences.

The fact is that our generations are living through a general breakdown of repressive defenses, increasingly accelerating; and therefore a deepening social

\* Let me spell out the damage. According to sexologists the dangers in this act come from (a) inhibited performance, (b) guilt and shame of the act, (c) guilt about accompanying images. Our public policy obviously enhances the first two conditions, but it is also importantly responsible for the guilt-inducing images, for it associates lust with punishment and degradation and so creates sado-masochistic thoughts.

† Doubleday, 312 pp., \$3.95.

neurosis. Freud's doctrine, let us remember, is that it is not repression (total amnesia) that causes neurosis, but the failure of repression, so that repressed contents return in distorted guise. The process is irreversible; our culture has experienced too much of it to ban it, or frighten it, out of mind. Therefore the only recourse is to try to get, as methodically and safely as possible, to the end of it, so that the drives can reappear as themselves and come to their own equilibrium. This involves undoing the repressive attitude itself. It is just in this that our high courts, like the Lords in England, could be excellent social counselors. With expert advisors they could try to forecast, and guide toward, a sane sexual policy. Instead, they cling to an outmoded concept of obscenity and they prevent outmoded statutes from becoming dead letters. At the same time, they are forced to cede to changing public taste and relax standards. Now this must lead to social chaos, as we are witnessing with the pornography, for so long as the attempted repressing continues, the repressed contents must continually emerge in more and more distorted form. And of course we also get legal chaos, as the court twists and turns to avoid the outmoded statutes.

For a writer like myself, there is a bitter irony in Bryan's statement that the previously shocking is now acceptable. Yes it is—because Flaubert, Ibsen, and Wedekind, and Dreiser, O'Neill, and Joyce paid their pound of flesh to the censor. They opened the ever new sensibility and were punished for it. Probably this is inevitable, and any advance worth having is worth suffering for; but it is a bitter proceeding. And now *Lady Chatterley* is accepted as a "community" art-work just when it has ceased to be a living art-work. Lawrence has explicitly told us that he wrote it "in defiance of convention"; that defiance, and its awkward rusticity, were its life. Now we are left merely with a rather neurotic fantasy of a frigid woman and a class-resentful "dominating" man. The court's lagging

acceptance of bygone classics for the wrong reasons makes it difficult for a living classic to be accepted and exert an influence in the living community.

In the breakdown of repression, the artists do their part by first dreaming the forbidden thoughts, assuming the forbidden stances, and struggling to make sense. They cannot do otherwise, for they bring the social conflicts in their souls to public expression. But the court does not do its duty; and the critics (I will mention no names) go along with the court's convenience and lie and lie.

What is the court's duty as I see it? To set aside the definition of pornography as obscenity—just as it set aside the doctrine of equal but separate facilities—and to clarify and further the best tendency of the sexual revolution. To call not obscene whatever tends to joy, love, and liveliness, including the stirring of lustful impulses and thoughts. I shall argue at the end of this paper that such a policy would tend to diminish pornography—make it not a big deal.

As it is, for well-known historical reasons, we live in a stimulating, unsatisfying society midway in transition; and while the liberal court hedges in embarrassment and the critics lie, the police and the administrators lurk to get convictions on any grounds. The police make wholesale raids for girlie magazines, they entrap a harmless old man for his lustful habit, the postmaster bars Lawrence from the mails, and the Drug Administrator burns the books of Wilhelm Reich as "labels" for a contraband commodity. To restore order, there has to be a wiser policy.

## II

LET ME PROCEED to a philosophical question raised by these decisions, which is, in my opinion, even more important for our society than the sexual matter: what is the nature of speech and art? To protect their "serious" books, the courts attempt to distinguish speech as communication of an idea or even as talk-

ing about a subject, from speech as an action doing something to its speaker, subject, and hearer. This is the tactic of Woolsey when he devotes most of his opinion to Joyce's "new method for the observation and description of mankind" and of Bryan when he says that the plot of *Lady Chatterley's Lover* "serves as a vehicle through which Lawrence develops his basic . . . philosophy. Most of the characters are prototypes." The judges reason that if something like this can be established, a book can be protected under the Bill of Rights guarantee of freedom to communicate opinion. Yet, although this is a useful distinction for some kinds of speech—e.g. scientific reporting and conscientious journalism—it simply does not apply to common speech, and it is necessarily irrelevant to art, for one essential function of art is to move the audience. If Joyce and Lawrence felt that all they had done was to convey ideas, they would have considered themselves failures.

(Naturally the decisions themselves, based on an unphilosophical distinction, have been notoriously inconsistent. For example, *The Well of Loneliness* was banned because "it seeks to justify the right of a pervert . . . it does not argue for repression of insidious impulses . . . it seeks to justify and idealize perverted ideas." Yet these are merely the ideas of the author. But contrariwise, Justice Stewart defended the film of *Lady Chatterley* by saying, "The picture advocates an idea—that adultery under certain circumstances may be proper behavior. The First Amendment guarantee is freedom to advocate ideas." Jerome Frank has wryly commented that if an "idea" is eloquently argued, it is in danger; if it is dully argued, it is safe.)

Here is an example of the legal doctrine at work. At the Marble Arch in London, crowds gather to listen to popular orators vent their grievances and longings on every topic under the sun, freedom for Nigeria, a subscription for the Irish Revolutionary Army, the ethics of deceiv-

ing one's wife, the nearest way to salvation. Like Bernard Shaw, the orators test their repartee against a powerfully insolent audience. All is strictly legal. But if a man comes within twenty-four inches of the speaker, he is at once hauled off by a guardian bobby! A man can say anything, but he mustn't do anything; he can lie to anything, but he mustn't let himself be aroused. Freedom of speech means freedom to talk about. Speech is not saying-as-an-action. The limitations are clear. If there would be incitement to riot, the freedom would cease. "Fighting words" are forbidden because they lead to fights. Pornography is forbidden because it is in the nature of detailed sexual reporting that it leads to physiological reactions and likely acts. Blasphemy and obscenity are forbidden because they are acts as such, they break a taboo in their very utterance, as well as presumably undamning what is held in repression by the taboo. Also, there are even particular topics, like the subject of *Lolita*, where merely to treat them at all in some public way is tantamount to sanctioning their existence in the universe. Here speech becomes magic, to name the Name creates the thing.

JEFFERSON and other revolutionaries who insisted on the Bill of Rights probably had a more risky notion of freedom of speech than our courts, as they did of political action in general. But if to them freedom of speech meant merely freedom to communicate opinions, they could not have intended the First Amendment to apply to belles-lettres at all, for the neo-classical aesthetic doctrine of their time held that the function of art was to move and instruct, to instruct by moving. In our modern aesthetics the legal embarrassment is even worse; we pay less attention to imitating reality and lay all the more emphasis on speech as action. To Freud, the art-act alleviates a repressed conflict by daring to express and publish it (this is Lawrence's "defying convention"). In advance-guard art, where the artist is reacting to and



vomiting up something intolerable in society, the art-act cannot help being offensive. Since the 19th century, the naturalists have meant to defy and shame when they stripped away the mask of hypocrisy. The primary aim of Dada is to shock. In his *Theater of Violence*, Antonin Artaud declares that theater is precisely not communicating ideas but acting on the community, and he praises the Balinese village dance that works on dancers and audience till they fall down in a trance. (For that matter, the shrieking and wailing that was the specialty of Greek tragedy would among us cause a breach of the peace. The nearest we come are adolescent jazz sessions that create a public nuisance.) The "poetry readings" of the Beats try to give us their "existent situation," usually drunken, and the audience copes with it as best it can. I could continue a long list.

To these facts of modern art, the doctrine of Woolsey, Brennan, and van Pelt Bryan is not adequate. Such art cannot be defended as communicating ideas, and anything objectionable in it (there is much) must condemn it. Indeed, the arguments of the censoring customs officer or postmaster betoken a more genuine art-response, for they have been directly moved, although in an ignorant way, by the excitement and inner conflict of Joyce and Lawrence. Their experience is ignorant and low-grade because they are unwilling to let the sexual excitement belong to a larger world, and this is why they excerpt passages. But at least they have been made to feel that the world is threateningly sexual. As the British Magistrate Mead said, on paintings by Lawrence, "Art is immaterial. . . . Obscene pictures should be put an end to like any wild animal which may be dangerous." And so Justice Manton, in his dissent on *Ulysses*, "Obscenity is not rendered less by the statement of truthful fact," for it is precisely the fact, the nature of things, that is obscene, to the censor.

Woolsey's doctrine is insulting to the

artist. He says that the book did "not tend to excite lustful thoughts, but the net effect was a tragic and powerful commentary" (italics mine). Surely the author wants to say, "It is lustful among other things, and therefore its net effect is tragic."

IN OUR culture an artist is expected to move the reader; he is supposed to move him to tears, to laughter, to indignation; to compassion, even to hatred; but he may not move him to have an erection or to mockery of public figures making a spectacle of themselves. Why not? By these restrictions we doom ourselves to a passionless and conformist community. Instead of bracketing off the "classics," as especially the British courts do—indeed, the legal definition of a classic seems to be a "non-actionable obscenity"—let us pay attention to the classical pornography and we shall see that it is not the case, as the court feels obliged to prove, that a work has a "net" social use despite its sexual effect, but rather that the pornography, in a great context and spoken by a great soul, is the social use. Aristophanic comedy was still close to a seasonal ritual to encourage rebelliousness and lead to procreation. Rabelais is disgraceful like a giant baby, and this is the Renaissance. Catullus teaches us the callous innocence of high-born youth, free of timidity and pettiness; and Tom Jones is a similar type, with a dash of English sentimentality. If we may believe their preludes, both the *Arabian Nights* and the *Decameron* are cries of life in the face of death; and in our times Jean Genet, one of our few fine writers, is pornographic and psychopathic because only so, he tells us, can he feel that he exists in our inhuman world. But apart from these lofty uses, there are also famous pornographic books made just for fun, since sex is a jolly subject.

To explore the nature of speech as action, consider the other forbidden topic, the mockery of sacred public figures. In our country we suffer from a gentleman's

agreement that is politically and artistically disastrous. For instance, our recent President could not frame an English sentence, and according to some observers his career as the head of a great university was dimly hilarious. "Dwight Eisenhower at Columbia" is a title to rouse an Aristophanes. In the 18th century Ike would have been richly mauled. But our satirists on stage and TV avoid such subjects. Then there cannot be great comedy, for if you dare not mock the pink elephant looming in the foreground, you can't mock anything. Instead, our satire consists of isolated gags that do not add up to an explosion. But satire is an essential of democracy, for how can we expect our leaders to be anything but front-figures if they do not take any personal risk and cannot be stung?

The court is not philosophical. It does not see that lively speech is active speech. Sexual action is a proper action of art. The question is not whether pornography, but the quality of the pornography. To stifle powerful figures into a personal engagement is a proper action of art, otherwise we sink in a faceless swamp. What the more intellectual court does do is to protect exceptional cases against vulgar prejudices and police busy-work. (But often, as in the astounding case of the revocation of Bertrand Russell's appointment at New York's City College, the matter never gets to a better court.) This is not enough to improve the cultural climate. In principle, the living writers are not exceptional and famous cases. Rather, it works out as follows: publishers will not publish what will get them into trouble; authors cease to write what will not be published, or what the editor censors the heart out of; soon the public has lost its authors at their best, and the authors have lost the common touch. The actual situation is that there is little that is published, and perhaps not much that is written, that does or would get into trouble with the censorship, except precisely the hard-core pornography. Why is there so little? If the

publishers and authors were doing their duty, the courts would be battlegrounds. Instead, the void is soon filled with safe entertainers, gag-men, sensation-mongers, pap-journalists. Advertising is the chief public art. The community is starved of ideas.

### III

IT HAS BECOME THE fashion to say that the aesthetic and libertarian matters we have been discussing have no relation to the actual police problem of hard-core pornography; let the police be careful not to encroach on serious writers, and let the writers leave the police to their raids and entrapment. This schizophrenic theory is false. We are one community, and the kind of high culture we have and the kind of low culture we have are opposite faces of the same lead quarter. But let us look at the hard-core pornography in itself.\*

I have been arguing in this essay that not only is there innocent and useful pornography that ought not to be censored, but the method of censorship helps create the very kind of harmful pornography that we should like to see checked. The case is similar—and not causally unrelated—to the social creation of juvenile delinquency by social efforts to control it. When excellent human power is inhibited and condemned, it will reappear ugly and dangerous. The censorious attitude toward

\* Most simply, we must bear in mind the remark of William Sloane of Rutgers, cited by James Kilpatrick: "I am unimpressed with the record of repressive legislation in this country. The laws against narcotics, for example, are supporting a large criminal class and leading to large-scale corruption of our youth. The laws against off-track betting are supporting a large criminal class and lead directly to police corruption. No set of laws will prevent the bootlegging of pornography." But they will make it profitable. When J. Edgar Hoover favors us with his periodic philippics about the frighteningly increasing rate of crime, flood of pornography, theft of autos, etc., and asks for more teeth in the laws and more money for enforcement, surely he proves too much. There is the possibility that his methods, since they do not work, might be the wrong methods.



the magazines and pictures is part of the general censorious attitude that hampers ordinary sexuality and thereby heightens the need for satisfaction by means of the magazines and pictures. It is said that the pornography artificially stimulates, and no doubt this is true (though there is no evidence that there can be such a thing as "too much" sex), but it is not so importantly true as that the pornography is indulged in because of a prior imbalance of excessive stimulation and inadequate discharge. Given such an imbalance, if the pornography heightens satisfaction, as it probably does in many cases, it is insofar therapeutic. This is an unpleasant picture of our country, but there is no help for it except to remedy anti-sexuality. I have argued that the revolution is irreversible, and the attempt to re-establish total amnesia must lead to more virulent expressions, e.g. still less desirable pornography.

LET US consider two aspects of poor pornography, its mere sexuality or "lust," devoid of any further human contact, drama, or meaning; and its very frequent sado-masochism.

The experience of mere "lust" in isolation is a neurotic artifact. Normally, affection increases lust and pleasure leads to gratitude and affection. The type neurotic case is the sailor ashore, who seeks out a "pig" and works very hard *not* to get emotionally involved. Why should he behave so strangely? Let me suggest an explanation. His promiscuity is approved by his peers but, more deeply and morally, it is disapproved by himself. If he regarded the woman as a person, he would feel guilty and hate her, and sometimes he manifests this as brutal violence, really meant for himself. More decently, he restricts his experience to bare lust, though this is not much of a sexual experience. I choose the example because it is a fair analogy of the attitude of a large population in America, not unknown in middle-class suburbs. We accept the naturalness of sexuality in an abstract and permissive

way, but we have by no means come to terms with its moral, family, and pedagogic dilemmas during a hard period of transition. There then occurs an isolated "sexuality" which at its best is hygienic and at its worst is mate-swapping, disowning the sexuality of those we love. Finally, I would suggest that this is the style of much of what the court elegantly calls "dirt for dirt's sake," the sexually stimulating without dramatic, plastic, or other artistic value. Necessarily this must be limited to a few stereotyped anecdotes and a few naked poses; and it must soon become boring.

The sado-masochistic pornography, however, that combines lust and punishment, torture, or humiliation, is the darker effect of a more restrictive and guilty-making training, for example certain kinds of religious upbringing. There are comparatively few real-life sado-masochists, but all the more do the smash hits of popular culture cultivate fantasies that proceed in guilt and end in punishment, genre of Tennessee Williams. This calamitous requirement, that the lust be punished, used to be a standard of legality employed by learned judges. How stupid can grown men be! For the consumer, such fantasies have a dual advantage, they satisfy both the need for righteousness (sadistic super-ego) and the "weakness" of giving in to pleasure; they embody an exciting conflict. But the bother with such images when used privately as pornography is that they are socially disapproved and enhance individual guilt; the excitement proceeds against strong resistance, and mounting fear, and often dies; and there is a tendency to raise the ante. It is said that this kind of pornography creates juvenile delinquents; my hunch is rather that the type of delinquent who has a need to prove his potency has a hankering for such pornography, all the better if it can be combined with cerebral know-how, as in hipster literature. Nevertheless, it doesn't do him any good, for, on balance, it increases tension.

FROM EVEN SUCH rudimentary analysis, it is clear that we can differentiate the moral quality of various pornography and make a rough rating of useful, indifferent, damaging. The social question, obviously, is how to improve the first and eliminate the last. Police courts and administrative officers, however, and even jury courts and high courts, are hardly the right forum for important and subtle moral debates. But expert opinion doesn't agree either; I could quote a crashing dissent to every proposition I have been making (except this one). Still, I am even less impressed by the bellow of J. Edgar Hoover that the police cannot wait for the experts to make up their minds, since one of the few things that is demonstrable is that ignorant suppression is wrong.

Yet I do not think that moral problems are private problems and can be left alone. Here I must dissent from my bold and honest classmate Judge Murtagh, who wants to leave most such issues to a person's conscience before God. On the contrary, it is because moral problems are so publicly important that they must be on-goingly decided by the whole public; and they are so subtle that only the manifold mind of all the institutions of society, skirmishing and experimenting, can figure them out and invent right solutions. In this essay I have been proposing to the judges a particular public experiment, a particular "firm morals and culture" and "permissiveness" in which there might be both the on going solution of these social evils and, more important, a growth into a more living culture. Let us speculate about it. Suppose that the courts altered their previous doctrine, as I have suggested, and now decided that it was not obscene to stir sexual desires and thoughts. And suppose that at the same time they somehow strengthened the requirement of a provable social or human utility (as would be a reasonable requirement for TV stations, for instance, since they use the public channels). This decision would simply express our best present-day think-

ing: that sexual feeling is a *fine* part of life and it is a *part* of life.

What might occur?

An immediate effect of this drastic change would be to open to the legal public media a very large, and I think soon preponderant, part of the traffic that is now subterranean and culturally uncontrolled. This is an advantage, for now the traffic can meet open evaluation, the appraisal of critics, the storm of angry letters that frightens advertisers.

In principle anything might now be shown, from a hint of sexual desire to the drama of the sexual act itself. Since the change-over would be so drastic, the court might aim at a deliberate slowness, and the great mass media would wisely want to meet together and agree on a prudent rate of change. The test of proper deliberateness would be that, *regarded as mere isolated and excerpted pornography*, showing the act would be little more interesting than the hint. And in between, it is hoped, there would develop the habit of treating sexual facts as the common part of life which they are.

Artistically, of course, the extremes are quite different, for it requires a setting of powerful passion and beauty to make artistically workable so vivid a scene as the sexual act. And indeed, one of the most salutary and hoped-for effects of the change I am proposing would be the radical diminution in sheer quantity, and the improvement in variety and quality, of the hundreds of shows that a person exposes himself to every year. Since at present the stimulation is low-grade, the repetition is chronic; perhaps if the experience were fuller, there would be less repetition. Perhaps we could have something else than the endless westerns, crime stories, and romances if there were more animal satisfaction and not merely the stereotyped symbolic satisfactions that these genres offer, with the sex climaxing in shooting, which for some reason can be shown. As it is, the public never gets beyond sex and violence. *Culturally, the*

# PAGINATION IRREGULAR

*"Dorian Book Service"*

*(4p.) occurs between pp. 16-17*

*greatest curse of censorship is that it produces too many and too trivial art works, all of them inhibitedly pornographic.*

The aim is to establish a principled general policy. The states and localities could continue to enforce whatever censorship they please, so long as they do not risk a national suit and are content to do without some of the national culture. The situation, as I envisage it, is somewhat the opposite of the school-integration decision; for the federal court is not intervening in any region, but is insisting that national policy must provide intellectual and historical leadership unhampered by local prejudices; yet as far as possible it will keep hands off to allow for various regional experimentation. This is not the effect of the court's present policy—e.g. in opening *Lady Chatterley* to the mails—for that does do violence to local sensibilities, necessarily, in order to give some scope for mature experience. But if there were a more principled general policy, and the courts were not continually obliged to fight, a generation too late, a rear-guard action against morons, the nation could allow the localities to be much more restrictive and self-defensive; in order to protect local option, they could even uphold the postmaster. It is possible in a federal system to decentralize the cultural climate. This allows for experiment and for citizens to have a freer choice of the life that suits their needs; but there must be freedom to experiment. Now we have the worst of the contrary situation: a degenerate centralism, a conformist mass made of the lowest common denominator of the narrow provincial multiplied by the venality of Hollywood and Madison Avenue.

**L**EGALIZED PORNOGRAPHY would, naturally, deplete the criminal market. (As Morris Ernst has speculated, the price on dirty postcards would drop from three for a dollar to three for a nickel.) In my cynical opinion, a first effect would be that the great publishers, networks, and film producers that now righteously keep their

skirts clean and censor the prose and poetry of their moral and intellectual betters, would eagerly cash in. But a fairly quick effect, it is to be hoped, would be that such isolated pornography as a genre would simply become boring and diminish, just as women's short skirts today create not a flurry.

Finally, there would be immense cultural advantages. Less embarrassment, a franker language, and a more sensual feeling would magnify and ennoble all our art and perhaps bring some life to the popular culture; and conversely, the exposure to such art would help to humanize sexuality and break down the neurotic compartment of "mere lust." In the difficulties of our modern sexual transition—where we do not know the best form of the family, the proper attitude toward pre-marital and extra-marital sex, nor even what physical behavior is "normal"—we certainly can profit from the warm fantasy of these subjects in lyric and tragic art. And not least, any social change in the direction of permissiveness and practical approval, which integrates sexual expression with other ordinary or esteemed activities of life, must diminish the need to combine sex with punishment and degradation. To increase the possibility of satisfaction in real situations is to make unnecessary the hipster struggle for violent and apocalyptic experiences.

My argument is a simple one: a more principled high-level policy on obscenity, which realistically takes into account the tendency of our mores, would facilitate the moral and cultural structuring that can alone solve the problems of hard-core pornography; and it would also have beautiful cultural advantages. Whereas the present attempted repression by the police, administrators, and lower courts not only must continue to fail but keeps creating the evil it combats. Certainly many earnest people would consider the remedy I suggest to be worse than the disease, and they would prefer to muddle along. I am not sure that we can.



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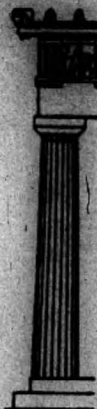
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## California's New Law

# On Obscene Matter

By Terry L. Baum\* of Sacramento

Effective September 15, 1961, California's law on obscene matter was revised. Chapter 2147 of the Statutes of 1961 (Assembly Bill No. 1979) repealed the bulk of existing statutory provisions on the subject (Pen. C. secs. 311-314; Pen. C. sec. 968 relating to the form of accusatory pleadings was not affected and the indecent exposure provisions formerly in sec. 311 are reenacted without change in Pen. C. sec. 314) and added extensive provisions which include a definition of "obscene" and change the law as to the media to which the law applies, intent, the acts penalized, penalties, seizure and destruction of alleged obscene matter, and perhaps the relationship of state law to local ordinances (Pen. C. secs. 311-312). Such a revision is of particular interest in a state in which each of three cities has been alleged (with perhaps a touch of chamber of commerce enthusiasm) to be the "smut capital" of the United States.

In this article, the new law, its differences from the old, and some of the problems it suggests will be briefly discussed.

Insofar as it related to writings, pictures, and three-dimensional figures, former section 311 of the Penal Code provided:

Every person who wilfully and lewdly . . . :

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure . . . is guilty of a misdemeanor.

Note: Despite the literal terms of subdivision 3, that provision had been so interpreted that all the verbs applied to

\*Deputy Legislative Counsel of California. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Legislative Counsel.



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## On Obscene Matter

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all the nouns. For example, it was an offense to distribute or exhibit an obscene picture, even though, literally, distribution and exhibition seemed to be offenses only when the materials distributed or exhibited were writings, papers, or books (*In re Sekuguchi*, 123 Cal.App. 537, 11 P.2d 655 (1932)).

### Meaning of "Obscene"

The former statute applied to "obscene" or "indecent" matter of specified classes, but there was no statutory definition of either term. Most of the reported California cases dealing with this statute came from the Appellate Department of the Los Angeles Superior Court. That court stated that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire" (*People v. Wepplo*, 78 Cal.App.2d Supp. 959, 178 P.2d 853 (1947)), a definition which the United States Supreme Court in *Roth v. United States*, 354 U. S. 476, 1 L.Ed.2d 1498 (1957), the case in which the court first directly held that obscene matter may constitutionally be banned, found satisfactory.

The new law applies generally to "obscene matter," and provides (Pen. C. sec. 311, subd. (a)):

'Obscene' means that [1] to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, [2] i.e., a shameful or morbid interest in nudity, sex, excretion, which goes substantially beyond customary limits of candor in description or representation of such matters [3] and is matter which is utterly without redeeming social importance.

Part 1 of this provision is a definition of obscene found in the *Roth* case, above, and approved by the United States Supreme Court, except that there is missing a specific requirement that the standards be "community" standards. This omission is probably not of great practical significance. Whether or not the instructions to the jury refer to the "community," and whether "community" means city, county, state, or nation, the jury will presumably tend to reflect the attitudes prevalent in the locality in which it sits. In any event, it appears that the United States Supreme Court, and other appellate courts, will, in deciding an obscenity case, make an independent determination (see *One, Inc. v. Olesen*,

355 U. S. 371, 2 L.Ed.2d 352 (1958); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, 2 L.Ed.2d 352 (1958); *Grove Press, Inc. v. Christenberry*, 175 F.Supp. 488, 494 (S.D.N.Y. 1959) aff'd. 276 F.2d 433; *Commonwealth v. Moniz*, 155 N.E.2d 762, 765 (Mass. 1959)). Part 2 of the definition of obscene, i.e., the definition of "prurient interest," is language devised by the American Law Institute for its Model Penal Code (Model Penal Code, sec. 207.10(2), Tent. Draft No. 6, 1957) and sanctioned by the United States Supreme Court in the *Roth* case.

Part 3 of the definition—"and is matter which is utterly without redeeming social importance"—is perhaps the most intriguing portion of the entire law. This language (which doesn't quite fit grammatically with what precedes it) was evidently inspired by this portion of the majority opinion in the *Roth* case (354 U. S. at pp. 484-5):

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (free speech and free press) guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Thus, the United States Supreme Court took the position that matter which predominantly appeals to prurient interest does not have the slightest redeeming social importance and is not protected matter. Because the language in the statute—"is matter which is utterly without redeeming social importance"—is linked to the rest of the definition by "and," the statute literally seems to assume that matter can predominantly appeal to prurient interest yet have redeeming social importance, and thus be protected. This appears to be the understanding of the California Supreme Court. In a case decided before enactment of the new law (*Aday v. Superior Court*, 55 A.C. 796, 362 P.2d 47 (1961)), in which the court was concerned with probable cause for issuance of a search warrant for alleged obscene matter, it noted that "the literary, educational, scientific, or other social values of a book alleged to be obscene are to be taken into consideration" and went on to say:

[The text of the books involved in the case] is such that an average person, applying contemporary



community standards, could reasonably believe that their dominant theme appeals to a lascivious, shameful, and morbid interest in sex and that they are totally lacking in redeeming value, literary or otherwise. (Emphasis added.)

This would, incidentally, appear to conflict with a contemporaneously expressed lower court view that "The fact that a book has literary merit does not prevent it from being obscene, if otherwise it has that character" (*People v. Harris*, 192 A.C.A. 103 (1961)).

The interpretation that matter, though predominantly appealing to prurient interest, must be completely without redeeming social value to be obscene, has startling possibilities. There is substantial basis for contending that all material predominantly appealing to prurient interest has redeeming social importance. For example, it can be contended that such matter serves as a safety valve for some persons; that in practice such matter is a principal effective means of sex education; and that obscene motion pictures and exhibitions are a financial mainstay of numerous veterans', service, and fraternal organizations. It is unlikely, however, that the language in question will be so interpreted that the new law is a nullity.

Political and religious tracts have social importance. Assuming again that "and is matter which is utterly without redeeming social importance" states a distinct, additional requirement, would an otherwise obscene writing be beyond the scope of the new law if its creator has a character interject, in a bedroom scene, a speech on behalf of the Republican Party or Moral Rearmament? Again it seems unlikely that the courts will sanction such a stratagem, with the result of virtual nullification of the new law. A court could well take the position that the test is that appeal to prurience must so predominate as to submerge any ideas of redeeming social importance (see *Grove Press, Inc. v. Christenberry*, *supra*) and by this test such material is nonetheless obscene. In other words, what the matter must be "utterly" or "totally" without is not merely any passage or picture which, considered in isolation, has social importance, but rather socially important expression of such consequence as to redeem the matter, and the lone political or religious interjection isn't enough to redeem it.

Considering the apparent source of the "without social

importance" language, it is possible that this language will eventually be construed not as an additional requirement at all but as a codification of the finding of the United States Supreme Court that matter appealing predominantly to prurient interest necessarily does not have redeeming social importance. Even if so construed, the language is not without a function in the new law. It can serve as a reminder of the conclusion of the United States Supreme Court that sex and obscenity are not synonymous (*Roth*, at p. 487) and perhaps also of the court's earlier conclusion that material is not the less within the scope of constitutional protections because some might consider it merely entertaining rather than uplifting or even informative (see *Burstyn v. Wilson*, 343 U. S. 495, 96 L.Ed. 1098 (1952)).

The term "indecent," which appeared in the old law, does not appear in the new. Gone is the problem whether that term is synonymous with "obscene," or means something else, and, if something else, what. Otherwise, there does not appear to be any basis for concluding that the new law is broader than the old with respect to the qualities of material to which it applies. Much of the public indignation about the quality of magazines on the stands is concerned with publications that are merely in bad taste. It would not seem that the new law, any more than the old, applies to such material.

The definition of obscene refers to the appeal of the matter to the "average person." What of matter that is designed to please sadists or others with off-beat interests, but which presumably leaves the average man cold (or so we like to think)? It would not appear to be covered by this statute. It might be contended that the average man language in the new law means not that the matter must arouse prurience in the average man, but that the average man would consider the matter to be such as to arouse prurience (though not necessarily in himself). But it appears from the *Roth* case that the United States Supreme Court, when it imposed an average man standard, was referring to the effect of the matter on the average man, as distinguished from its effect on especially susceptible persons (354 U. S. at pp. 488-490). It should be noted, however, that one United States Court of Appeals, concerned with the mailability of a magazine aimed at homosexuals, has concluded that the "average man" language in the *Roth* case referred to the average member of the class for whom the magazine was intended (*Manual*



*Enterprises, Inc. v. Day*, 289 Fed.2d 455 (D.C. Cir. 1961), petition for cert. filed, 29 L.W. 3373 (U. S. May 29, 1961) (No. 1009)).

It can scarcely be claimed that the new statutory definition of "obscene" is precise, but, the subject being what it is, precision has never been a characteristic of legislation in this field and is not likely ever to be. Our sympathies go out to those who must label matter "obscene" or "not obscene." It is suggested, however, that much help for a person who must decide whether or not written material is obscene can be found in *Pornography and the Law*, a remarkable book by Drs. Eberhard and Phyllis Kronhausen, published in 1959, in which the distinguishing characteristics of obscenity and "erotic realism" are discussed in objective terms and within the framework of the rules announced in the *Roth* case.

Under the new law the defense can be made that an act involving concededly obscene matter was committed in aid of "legitimate scientific or educational purposes" (Pen. C. sec. 311.8). This was not provided in the former statutes, and it does not appear that any California court ever had occasion to decide whether or not such a defense was available. Without the aid of such a provision a federal court was able to conclude that otherwise obscene material was not obscene when intended for the exclusive use of the Kinsey researchers (*United States v. 31 Photographs*, 156 F.Supp. 350 (S.D.N.Y. 1957)), and it may be that the California courts, if presented with the same question, would have reached the same conclusion.

### Media to Which the New Law Applies

The new law applies to obscene "matter," and this term is defined in subdivision (b) of Penal Code section 311. The definition is such that the new law, like the old, applies to such objects as books and pictures and is more explicit in its application to motion pictures. In addition, the definition of "matter" includes a catchall reference to "any other articles, equipment, machines or materials," which did not appear in the old law. If Aldous Huxley's "feelies" ever become a reality, they will be covered by this definition. Although oral expression (not produced by playing a record or by other artificial means) is not within the definition of "matter," certain oral expression is covered by the new law, as it was by the old, and this is discussed further below.

### Intent

Whereas the former law required that the act, to be punishable, be committed "wilfully and lewdly," the new law requires, instead, that it be committed "knowingly," i.e., with knowledge that the matter is obscene (Pen. C. sec. 311, subd. (e)). Thus, formerly a lewd intent was required, which could be inferred from knowledge of the contents of the book, magazine, etc. (see *People v. Wepplo*, *supra*). Under the new law, knowledge that the material is obscene is sufficient whether or not defendant has a nasty purpose, and presumably knowledge need not necessarily be derived from examination of the material. But the requirement that defendant know that the matter is obscene would seem to be more generous to defendants than the requirement, said to be imposed by the former law, that defendants know the "contents" of the material (*People v. Harris*, *supra*).

### Acts Penalized

The new law is broader than the old in terms of the acts covered. In addition to those acts formerly penalized it penalizes the act of knowingly sending obscene matter into, or causing such matter to be sent into this State, or bringing it into, or causing it to be brought into the State, for the purpose of sale or other distribution. It makes it an offense to possess obscene matter with intent to sell or otherwise distribute it (distribution may be without consideration), exhibit it, or offer to distribute it (Pen. C. sec. 311.2), whereas under the corresponding provision of the former law, it was an offense only to possess for sale. Offering to distribute is an offense under the new law.

The provisions of the new law relating to advertising differ substantially from the corresponding provisions of the old law. Under the old law it was an offense wilfully and lewdly to write, compose, or publish any notice or advertisement of an obscene writing, paper, book, picture, print, or figure. Under the new law a person who "writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene" is guilty of a misdemeanor (Pen. C. sec. 311.5). If a purveyor of obscene matter composes the copy for an advertisement for matter represented to be obscene, or asks a newspaper publisher to publish such an advertisement, it is clear that he has vio-

lated the section. When a newspaper publisher publishes it, does he commit an offense? Apparently not, unless "writes" or "creates" is to be interpreted very broadly. Further, this provision applies only when the matter is "represented" or "held out" to be obscene. Thus, creation of a decorous advertisement for obscene matter would not be punishable (although it might be punishable under another section as a knowing offer to distribute obscene matter), but the holding out as obscene of matter which in fact is not obscene would be punishable. This latter offense is one that arouses indignation among all factions.

The new law separately defines the offense of knowingly distributing or exhibiting obscene matter or offering to distribute it to a person under 18, if the offender knows or is in possession of facts from which he reasonably should know that the person is of such age (Pen. C. sec. 311.3). In addition it creates the offense of hiring, employing, or using a minor (not just persons under 18 in this case) to prepare, distribute, etc., obscene matter, when the offender knows or is in possession of facts from which he reasonably should know that the person hired, employed, or used is a minor (Pen. C. sec. 311.4).

The new law includes a prohibition against tie-in sales and consignments. It makes it a misdemeanor "knowingly" to require as a condition of sale, allocation, consignment, or delivery for resale of any "paper, magazine, book, periodical, publication or other merchandise" (here the defined term "matter" is not used) that the purchaser or consignee receive any obscene matter (Pen. C. sec. 311.7). At its 1961 session the Legislature also enacted another law generally prohibiting tie-in sales and consignments of publications, which law is not restricted to tie-ins of obscene matter (Bus. & Prof. C. sec. 16604, as added by ch. 2029, Stats. 1961) and it had previously prohibited tie-in sales and consignments of "horror comic books" (Bus. & Prof. C. sec. 1955, added by ch. 214, Stats. 1955). A tie-in sale of course involves sale of obscene matter, which would have been punishable under the old law as well as the new, but the new law actually goes further than prohibiting tie-in sales and consignments. It prohibits also denial of a franchise, revocation or threatening to revoke a franchise, or imposition of any penalty for failure to accept, or for return of, obscene matter (Pen. C. sec. 311.7).

It continues to be an offense to sing or speak obscene words in a public place (Pen. C. sec. 311.6; the former law referred

also to "any place where there are persons present to be annoyed thereby") but gone is a provision which has long fascinated persons concerned with the law in this field. The last paragraph of former section 311 of the Penal Code provided, in part:

The provision [prohibiting speaking of obscene words in public places] shall not apply to any person participating in violation thereof only as an actor, unless and until the proper court shall have passed upon the matter and found the actor to have violated [said provision] . . .

This provision seemed to say that an actor could not commit the offense unless convicted of it, and must have been unique in the law. Gone also is the provision imposing liability:

. . . where after a complaint has been filed against the owner, manager, producer or director charging a violation of said [provision], and pending the determination thereof an actor or actress utters the particular word or words complained against or other word or words of the same or similar import, in connection with such performance, act, play, drama, exhibition or entertainment.

Under the new law, an actor is liable for uttering an obscenity, regardless of the fate of the owner, manager, producer, or director, just as a bookseller is liable for knowing distribution of obscene matter whether or not the publisher or writer has been charged.

### Penalties

Under the old law, all offenses were misdemeanors, punishable by imprisonment in the county jail not exceeding six months or fine not exceeding \$500 or both (former Pen. C. sec. 311; Pen. C. sec. 19). Under the new law (Pen. C. sec. 311.9), permissible penalties have been increased in all cases; second and subsequent offenses are more severely punished than first offenses; and, particularly, a second or third offense, depending on the offense committed, is a felony. In no case has probation been restricted. An unusual feature of the penalty provisions of the new law is that for the basic offenses of preparing, distributing, importing, and exhibiting obscene matter and other offenses described in Penal Code,



section 311.2, the maximum fine and the maximum term of imprisonment increase in stated amounts with each unit of matter involved, up to very high ceilings.

### Searches and Seizures

The former sections relating particularly to seizure and destruction of matter believed to be obscene were repealed (Pen. C. secs. 312-314). Under these provisions a magistrate could destroy all matter he found to be obscene (saving one copy for the district attorney), even though there had not yet been a trial on the issue. Under the new law, there are no provisions relating to seizure. This subject will be governed by the general law. There is, however, an authorization for the court, after conviction, to order destruction of matter adjudged to be obscene which is in possession of the district attorney and to destroy such matter in its own possession (Pen. C. sec. 312).

### Some Open Questions

Under the old law the Appellate Department of the Los Angeles Superior Court took the position that expert opinions on what is obscene and what are contemporary community standards are not admissible (*People v. Harris, supra*). The new law does not expressly deal with admissibility of evidence, and there is no controlling decision from a higher court. A related question that can be raised is whether there is really one set of contemporary standards and whether the same "limits of candor" prevail for all media. Although *Lady Chatterley's Lover* has received judicial clearance as a book, presumably something like a nuclear explosion would occur if the book in its entirety were read on a network television program. A jury is probably reasonably acquainted with the standards that prevail in public speech and on television, but are book standards the same? As most people read scarcely any books at all (see, e.g., 56 News Notes of California Libraries, 18), it is suggested that the average jury is not really in a position, without expert aid, to judge the degree of candor prevailing in current fiction or to judge a factor such as literary merit. It would not appear that the new law precludes admission of expert testimony to any factor relevant to a determination of the question of obscenity.

Has the state pre-empted the field to the exclusion of counties and cities? Could a city, for example, make it an offense knowingly to possess obscene matter without intent

to distribute it? Under the old law, the Appellate Department of the Los Angeles Superior Court concluded, two to one, that the state had not pre-empted the field (*People v. Smith*, 161 Cal.App.2d Supp. 860, 327 P.2d 636 (1958), *rev'd. on other grounds, Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205 (1959)). It is suggested that a stronger argument for pre-emption of the field by the new law can be made than could have been made for pre-emption of the field by the old law when the *Smith* case was decided. For one thing, the new law is more comprehensive than the old in terms of the acts covered, as described above. It would also appear that the California Supreme Court has since evidenced greater liberality in finding a pre-emption of the field by the state than was evidenced by its subordinate court in the *Smith* case (see *Abbott v. City of Los Angeles*, 53 Cal.2d 674, 349 P.2d 974 (1960)). Further, although the statute as enacted does not contain any express statement of intent to pre-empt or not to pre-empt the field, there is significant legislative history on the point. The bill repealing the old law and adding the new was at one stage amended to include an express statement of intention not to pre-empt the field (A.B. 1979, as amended in Senate June 13, 1961) but was later amended to delete this entire provision (A.B. 1979, as amended in Senate June 14, 1961). Amendments in the course of passage of a bill can be referred to as an aid to interpretation (see *Consolidated Rock etc. Co. v. State of Cal.*, 57 Cal.App.2d 959, 135 P.2d 699 (1943)). This bill, incidentally, was amended numerous times and in any other instance in which the new law does not seem clear on its face, it would be worth the time spent to check the history of the bill.

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### PRAYER FOR THE NEW YEAR

Our Father which art above and within us,  
Hallowed be Thy Presence.

Thy kingdom come into manifestation.

Thy will be fulfilled on earth as it is in Thy perfect design.

Give us this day our daily portion in this fulfillment.

Forgive us our way of life as we forgive those who speak vilely  
against us.

Lead us not into dishonor but deliver us from those who see evil.

For Thou art I, and mine is the kingdom and the power and the  
glory now ever.

—Anon.

# BOOKS

## BETRAYAL ALMOST BOOMERANGS

*THE YOUNGEST DIRECTOR* by Martyn Goff. New York & London: Putnam & Co., Ltd., 1961. 237 pages, 3.75. Reviewed by John Logan.

Those who have been looking for the most recent and human gay novel will probably find this a rewarding book. It tells a story that is altogether plausible, entertaining, and not weighed down with tragedy; its characters and their loves and conflicts are the product of today; its minimum of preaching is sane and dispassionate. Moments of happiness balance this story's concern with social problems.

Leonard at 32 has risen to a directorship in a corporation. His office is in London, where his firm follows the policy of the American headquarters: All directors must be married soon after attaining this position if they make it that high without a wife.

But Leonard, a self-confessed homosexual with awareness of this going back more than a decade, resists this arbitrary inroad into his private life. About the same time, he meets John, 10 years younger and a hustler of sorts who measures his success in terms of how many beds he bounds into and out of. They fall in love, with Leonard's erudite and sophisticated friends predicting doom for the relationship on the one hand, and with John's more earthy and sexually gregarious buddies coming around to help wreck the affair on the other.

Leonard's parents and a long-time married couple of which the husband is a fellow director at Leonard's firm all team up, it seems, with the Chairman of the Corporation to help bring events to what so often is the logical end in a book of this nature. But doom, always impending, settles so that the reader is left wholly satisfied, and Leonard and John DO come out of it with a future of hope and happiness ahead.

Martyn Goff is known for his novel, "The Plaster Fabric," and is also a music critic of note. But here again he takes the taboo subject of an all-male love affair, lets the protagonists have a privately passionate relationship, treats them like ordinary human beings and has them enact a story so convincingly that it could be happening to people you know and admire.

## CALLING SHOTS

(Continued from page 2)

gaging in sex relations in private without force. In England, a great stir was created by the Wolfenden Committee and its recommendations to remove from criminal category all consenting homosexual acts between adults in private. Twice this came before Commons, once for a vote, but it was defeated. However, the Homosexual Law Reform Society of London is still at work pressing for legal reform. In New Mexico in January 1961, the legislative wheels for revising the penal code along lines recommended by the American Law Institute turned part of the way: The lowerhouse approved measures which would have permitted private freedom in sexual relations between consenting partners of whatever sex. Then in Illinois a complete revision of the penal code was passed, making this the first of 50 states to take this forward step (See page 4). In other

states, study commissions for such revision were called for.

3. A U. S. Supreme Court decision in January 1958 flatly stated that magazines such as *ONE* had the right to publish and use the U. S. mails.

4. Educational organizations working in the fields of sex behavior problems, civil liberties, freedom to read, etc., have grown in size, number and influence in this period. Many of these organizations, such as Mattachine, would have been unthinkable before World War II; today their work is generally regarded as unsensational and matter-of-fact.

5. Research has been accelerated. The first "Kinsey Report" in 1948 probably marked the beginning of serious investigation into the varied sex behavior patterns which have long existed and equally long ignored on a wide scale. Other brilliant students of sexology existed before Kinsey, it is true; but his work at

(Continued on page 32)

## Tropic of Cancer

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# READERS *write*

Letters from readers are solicited for publication in this regular monthly department. They should be short and all must be signed by the writer. Only initials of the writer and the state or country of residence will be published. Opinion expressed in published letters need not necessarily reflect that of the REVIEW or the Mattachine Society. No names of individuals will be exchanged for correspondence purposes.

REVIEW EDITOR: I have just read "Mattachine Challenge" (Dec. 1961) and I know exactly how you feel. We have the same problem in church. Our parishoners and others always know to come to us in times of trouble, for baptisms and weddings and burials, but when we go to them to ask them to support the budget, they have forgotten the aid and ministrations they received. I wish I could really bolster your spirit with a larger check, but I have my budgetary problems too. I shall always continue as a supporting member and try in the new year to send a little extra now and then. Keep up the good work—the REVIEW is always read with interest.—Rev. K. B., California

REVIEW EDITOR: In response to your challenge in December I am enclosing a check to cover a one year extension to my subscription and a small extra contribution toward the more than magnificent work (selfless service) you Blessed Ones are doing (practically without help)...I hope and pray that enough others respond and keep on responding to your pleas for assistance.—Mr. C. L., Illinois

REVIEW EDITOR: I can no longer be a failure in supporting your work. Although I pledge only \$5 per month, I am sure it is needed—after all I would probably pay that much for the REVIEW itself if that was the only way to get it.—Mr. J. F., Texas

REVIEW EDITOR: I am making an early New Year's resolution: To help support Mattachine with a monthly contribution. It has been my intention to do this before but somehow I just did not get around to it. Further delay is impossible after reading "Mattachine Challenge."—Mr. T. R., New York

REVIEW EDITOR: The picture on the December 1961 issue of the Review has long been a favorite of mine and I enjoyed seeing it on the Review. I first

saw it in New York in 1955 or so at an exhibit at the Museum of Modern Art. It was an exhibit put together by Edward Steichen, and called The Family of Man. At the exhibit a catalog was sold and it



contains reproductions of the pictures. The picture you reproduce is to be found on page 149 with the information that the photograph was taken by Al Chang of the U. S. Signal Corps in Korea. The entire catalog is well worth looking at and reading. The words are few but beautiful, and along with the pictures should be required reading for everyone.—Mr. H. B., Kentucky

## EUROPE 1962

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## CALLING SHOTS

(Continued from page 30)

least captured the interest of a modern world which needed it.

- With the beginnings of the atomic age scientists in every field saw the writing on the wall: Old concepts of science and mathematics had to give way to the truth of the new discover-

ies. In the same way old concepts of religion, morality and ethics have to be weighed in newer terms, and that which is found wanting has to be discarded.

All of this means progress. It is slow in coming, perhaps, but no one can deny that the challenge of change is making itself felt everywhere.



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