The Test of Civilization

by R. Kathleen Molz*

Historically, the trinity of censorship efforts has been brought to bear on the eradication of the heretical, the seditious, and the obscene. Books and other materials were banned because, being heretical, they were considered offensive to the Church and organized religion; being seditious, they were offensive to the State; and being obscene, they were believed offensive to the social order and public morality.

In a nation where Church and State have been historically separated, no one has ever been convicted for the publication of an heretical book. The only case within recent memory in which the specter of heresy was raised as a possible cause for extra-legal proscription was that of Nikos Kasantzakis's novel, *The Last Temptation of Christ.*

Supression of materials on the grounds of sedition waned as a concept during the 1950's, ironically, at a time when the country seemed most harried over the infiltration of Communistic propaganda. In the case of *Lamont v. Postmaster General,* the Supreme Court declared unconstitutional Congressionally enacted legislation that had made it possible for the postal authorities to suspend deliveries of printed materials from abroad which appeared to be propaganda from Communist countries. Delivery of such mail was delayed until the addressee, upon receipt of a post card from the postal authorities, declared his intent that he wished the material sent to his home. Through this means, the postal authorities were obviously enabled to derive two lists of persons: Those whose names had been appropriated from other mailing lists and who would not necessarily wish to receive the material, and those who had requested the material and indeed wished to read it. Corliss Lamont, author of *The Peoples of the Soviet Union* and at one time chairman of the National Council of American-Soviet Friendship, was the principal involved in the litigation and the Supreme Court sustained his case on the premise that the legislation passed by Congress impinged on his right to receive information, a right that was constitutionally protected.

With activities in the areas of the heretical and the seditious seemingly allayed, the censor was left to rake the coals over the third burning issue: The obscene. As a cause for supression, the obscene is a relative newcomer. Its appearance in the criminal codes of American jurisprudence was partially stimulated by reasons of religion. A 1712 statute enacted by the Massachusetts Bay Colony made it criminal to publish "any filthy, obscene, or profane

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song, pamphlet, libel or mock sermon" imitating or mimicking religious services. All of the fourteen States (i.e., the original Colonies and Vermont) which had ratified the Constitution by 1792 made either blasphemy or profanity, or both, statutory crimes.

It is from these and other precedents that Mr. Justice Brennan in writing the majority opinion in *Roth v. United States* held "that obscenity is not within the area of constitutionally protected speech or press."

Yet, although the obscene has not been granted immunity on the grounds of First Amendment protections, the nation's highest court exhibited considerable latitude toward allegedly salacious material during the decade of the sixties. In the case of *Manual Enterprises v. Day*, the Court ruled that a number of magazines geared toward the interests of homosexuals were not obscene. Although the Court found that the journals in question would appeal to the prurient interest of homosexuals, the magazines could not be "deemed so offensive on their face as to affront the current community standards of decency." In *Jacobellis v. Ohio*, the Supreme Court held that a film, *The Lovers*, was constitutionally protected. There, the Court defined three distinct and separate criteria:

1. The work had to go substantially beyond customary limits of candor in the description or representation of matters relating to sex or nudity;
2. The work had to appeal to the prurient interest of the average adult; and
3. The work had to be utterly without redeeming social importance.

The 1964 decision in the *Jacobellis* case was coupled with the decision to grant a reversal of lower-court decisions prohibiting the dissemination of Henry Miller's *Tropic of Cancer*. In *Grove Press, Inc., v. Gerstein* on petition for writ of certiorari to the District Court of Appeals of Florida, the high court granted the petition and reversed the judgment of the Florida court. Five Justices based their decisions upon opinions stated in *Jacobellis*, but four, including the Chief Justice, were of the opinion that the writ should be denied. Nevertheless, the majority of the jurists held that *Tropic of Cancer* was not obscene. The *Jacobellis* and *Cancer* decisions were handed down on June 22, 1964, thus ending, and yet beginning, another chapter in the Supreme Court's interpretation of what in sexual depiction is to be allowed and what is to be proscribed.

Two years later, on March 21, 1966, the Supreme Court handed down three more decisions, one of them much publicized. It upheld a lower-court conviction of publisher Ralph Ginzburg for the issuance of *Eros* and other erotic literature. Here the Court went beyond the test of obscenity set in the *Roth* case by declaring that material which might not be in itself obscene could become so because of "the context of the circumstances of production, sale and publicity." In the second decision, the Court upheld the conviction of Yonkers publisher Edward Mishkin for the publication and sale of sado-masochistic works, and in the third, the Court reversed a lower-court decision proscribing "Fanny Hill" or the *Memoirs of a Woman of Pleasure*, first published in 1750 and, ironically, the very book which had occasioned the first American court case involving the obscene, which took place in 1821 in Massachusetts.

With the exception of *Ralph Ginzburg v. United States*, which had introduced obscenity by context as a rationale for conviction, the Supreme Court had shown considerable latitude in allowing the distribution of allegedly obscene works. It was within this mood of greater judicial relaxation that Manhattan attorney Charles Rembar, who had argued the case for *Tropic of Cancer*, entitled his book *The End of Obscenity*, published in the late sixties.So, too, was the verdict of Philalelphia attorney Albert B. Gerber, whose article appeared in a 1970 issue of a library periodical under the title: "The Right to Receive and Possess Pornography:

An Attorney Foresees the End of Legal Restriction."

Indeed, this libertarian attitude was even furthered by the massive documentation published that year as the *Report of the Commission on Obscenity and Pornography*. Appointed by President Johnson in 1967, the Commission had labored over three years to examine the casual relationships, if any, between allegedly obscene materials and social behavior. Its recommendations, distilled from the findings of thousands of pages authored by psychologists, social scientists, physicains, and others, were to call for the repeal of "all Federal, State, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults." Minors were not included in this extremely liberal recommendation.

Not only did President Nixon repudiate the *Report* but the Senate of the United States also voted to reject its findings and recommendations. Vice President Agnew was heard of observe: "As long as Nixon is President, Main Street will never be Smut Alley."

It is still a question whether or not this political reaction affirming the conservative tradition influenced the recent rulings of the Supreme Court concerning the obscene. The answer, perhaps, lies only within the realm of conjecture. Nonetheless, the Supreme Court in a series of five rulings handed down on June 21, 1973, *(Paris Adult Theatre I* v. *Slaton, Miller* v. *California, Kaplan* v. *California, U.S.* v. *12 200-ft. Reels of Super 8mm Film,* and *U.S.* v. *Orito)* seemingly returned to the "dark ages," at least in the commentary of one newspaperman writing for the New York *Daily News.*

The new rulings substantively altered previous high court definitions of what constituted the obscene and how purveyors of obsence matter should be treated in criminal proceedings. First, the rulings negated the concept of a nationwide standard, that is, trial jurors will be asked to apply "community" standards which they may determine themselves. "It is neither realistic nor constitutionally sound," wrote Chief Justice Burger in *Miller* v. *California,* "to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." Community standards, then, could mean those applicable to any State, territory, or locality, village, township, county, or other jurisdiction comprised within the United States. Secondly, the prosecutors of allegedly obscene works do not need to introduce expert testimony. The defense may introduce expert witnesses, but their testimony may be disregarded. In effect, the burden of proof was shifted from the prosecution to the defense. To satisfy the jury, the prosecutor need do no more than submit the allegedly obscene work to the jury, which in turn will decide, according to the standards of the "average person" of the community, whether the work is

sufficiently "serious" to merit the protection of the First Amendment.

The displacement of nationwide standards for those of local jurisdictions occurred almost at once, with the July 2nd decision of the Supreme Court of Georgia to affirm the conviction of an Albany, Ga., theatre owner for showing the film, *Carnal Knowledge*. The dissenting Justice in the Georgia case commented: "If the motion picture *Carnal Knowledge* is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm." (It should be noted here that on Dec. 10, 1973, the Supreme Court announced that it will review the Georgia conviction.)

At this writing, it is not possible to determine whether or not the Supreme Court will reverse its stand on the use of "community" standards. The context, however, of this dependence on local decision-making, inherent in the Supreme Court's June 21 decisions, should be reviewed here.

The Federal system is a tri-part amalgam, involving the legislative, executive, and judicial branches. In many ways, these three parts work independently, each contributing in its own respective way to the entire process of governance. The legislative branch thus enacts the law; the executive branch administers it; and the courts adjudicate it. If, for example, a president proposes an exploration to the moon, he may, indeed, require Congressional support in passing legislation to authorize funds for such a mission, but there is little likelihood that the Supreme Court or any lower Federal court would have to serve as a review panel of such a decision. On the other hand, the Supreme Court might be heavily involved in determining the licitness of a statute dealing with voting rights in a particular State, but its decision, however important in righting wrong or in establishing precedent, could conceivably affect neither the Congress nor the executive branch.

Occasionally, an idea or concept, however, pervades and imbues all branches of the Federal system, and the three parts work as a whole in the achievement of social progress. Within the past decade, three such ideologies have been dominant: the civil rights issue for minority groups, the reduction of poverty, and the equalization of educational opportunity for the nation's youth. In *Brown* v. *Board of Education*, the Supreme Court in one sense addressed all three issues. Its 1954 decision struck down the continuum of the so-called "separate but equal" facilities, thus declaring unconstitutional racial segregation in the public schools. Since, in effect, minority children are often the children of low-income parents, the decision in part thus opened the doors for the legislation of the sixties: the passage and administration of the Civil Rights Act of 1964, the pasage of the Economic Opportunity Act of 1964, and that of the Elementary and Secondary Act of 1965, with its program of compensatory education for the children of low-income families.

Such ideologies can be termed "philosophies of governance," and through the decade of the sixties, these three philosophies provided a cambium layer promoting new growth within the entire Federal System and indeed the nation itself. As President Kennedy once observed: "We are not fifty countries, we are one country of fifty states and one people. The programs which make life better for some of our people will make life better for all of our people. A rising tide lifts all boats."

Although these three ideologies still permeate the Federal system, a different conceptualization of governance is being advanced in President Nixon's administration. In his study of the 1972 campaign, Theodore White wrote: "The President is a man of very definite ideas, and of these his philosophy of decentralization is cardinal. He had run, not only in 1968 but in every campaign of his long career, against Big Government, against the concentration of power in the United States in Washington."

Running counter to the New Deal, the New Frontier, and the Great Society, all

of which envisioned the national government as the court of last resort for societal action and progress, the Nixonian philosophy of governance embraced the goal of returning power to the people. Thus, decentralization during President Nixon's administration has had many manifestations: The accelerated activity to regionalize many activities of the Federal government; the enactment of Administration-proposed legislation to further the general revenue sharing mode of administering Federal funds; the delimitation and curtailment of categorical-aid programs in favor of special revenue sharing in such specific fields as education, housing, and law enforcement; and even the enunciation of policy in such areas as public broadcasting in which local program managers were encouraged to sponsor shows of community interest as opposed to nationally produced telecasts featuring such notables as Bill Moyers or William Buckley.

Since the cardinal philosophy of President Nixon's domestic policies is decentralization, it is not altogether surprising that the Suprere Court, four of whose members are Nixon appointees (including the Chief Justice), should rule that local juries and prosecutors would know best what the community traffic will bear in terms of the obscene. Their decision was not inconsonant with their March 21, 1973 ruling in the case of *Rodriquez* v. *San Antonio* that the States were responsible in redressing the imbalance within their jurisdictions of the inequitable property tax for the support of public education, but that such a mandate did not lie wtihin the jurisdiction of the Court.

This deemphasis on Federal decisionmaking in favor of that at local and State jurisdictional levels can also be considered a philosophy of public governance, one that is currently pervasive throughout the executive branch, also affecting the judiciary, and to a lesser extent, the Congress.

This particular philosophy has greatly discomforted the American Library Association: First, because its effect has resulted in the Administration's request to terminate all categorical-aid programs involving Federal aid to libraries; and secondly, because the Court's ruling now places professional members of the Association in a quandry as to the interpretation of the obscene, and could conceivably in some cases lead to their arrest and detention.

In response to the first matter the Association launched a public relations campaign asking libraries to "dim their lights" on May 8, 1973, as a symbolic gesture against the threatened Federal budget. To the second matter the Association replied by submitting a motion to the Supreme Court to file an amicus curiae brief in support of a petition to rehear the case of *Kaplan* v. *California*. In the language of the motion, the June 21st decisions," in the opinion of the Association, permit the imposition of censorship functions on libraries and librarians which would fundamentally change their traditional role in support of intellectual freedom and would fundamentally alter the nature and content of their collections and the dissemination of such collections to the people."

The stance taken here reflects a longstanding concern by the Association that the printed word would be protected against censorship. Yet it should be noted that almost all major censorship cases affecting libraries during the fifties involved political issues, i.e., books and materials that were alleged to be pro-Communist. As far as libraries were concerned the question of obscenity entered the picture only in such cases as *Grapes of Wrath*, *Ulysses*, and *Tropic of Cancer*, works of recognized literary significance and those whose "alleged obscenity was subsequently repudiated by the courts.

In one sense, then, the Association has never really confronted the issue of hard-core pornography, because libraries do not buy it nor do they circulate it to their clienteles. *Suite 69*, the work in question in the *Kaplan* case, was graphically described by Chief Justice Burger:

> The book, *Suite 69*, has a plain cover and conatins no pictures. It is made

> up entirely of repetitive descriptions of physical, sexual contact, "clinically" explicit and offensive to the point of being nauseous; there is only the most tenuous "plot." Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every fifth, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.

Here then is a book, poorly written, which even in the Court's decision is identified by neither author nor publisher. It belongs to that class of so-called "trashy" works, which are sold in adult bookstores or handled elsewhere as under-the-counter purchases. Such works have been identified by attorney Stanley Fleishman as "friendless" books, those for whom legitimate defense witnesses, such as academicians, publishers, and librarians, are hard to find.

In filing its motion in the case of *Kaplan v. California*, litigation which surely involved the "friendless" book, the Association took a further step in its development of an anti-censorship policy. No existing Association policy really covers the "friendless" book. The Library Bill of Rights bears no mention of the "adult" book, bookstore, or film. The Statement on Labeling was derived from the profession's philosophical rejection of the idea of placing political, not moral, labels on materials. The great rhetorical sweep of the Freedom to Read Statement emanated from the profession's dismay at the censorial activities of the McCarthy era in which works were being proscribed for again political, not moral, reasons.

In a sense, the June rulings prompted the Association to weigh the dangers of Suite 69's clinical explicitness and nauseating offensiveness against the dangers of a threat to the fredeom to read in a democratic society. The Association's decision to request the Supreme Court for a rehearing affirmed its findings that if the dangers of the former constituted a blemish, those of the latter constituted blight.

The Association's request for a rehearing was denied by the Supreme Court on Oct. 9, 1973, and the Association now faces the unhappy prospect that in all probability State and local governments will introduce measures to reflect the Court's conservative rulings during the next legislative year. Already, some State legislatures have introduced bills calling for greater restrictions on the distribution of obscenity, and ALA's Office for Intellectual Freedom is maintaining a roster of such legislative efforts. The Freedom to Read Foundation is also trying to identify a test case which might be entered on behalf of the Association to bring once again before the high court the issues which a pro-censorship stance raises for libraries and librarians.

The introduction of restrictive legislation at State and local levels is undeniably affecting the role of the Association's chapters, the State library associations. At the national level, the position of the Association has not been inconsistent with broadly enunciated Association policy. The Intellectual Freedom Statement, adopted by Council on June 25, 1971, clearly states that "with every available legal means, we will challenge laws of governmental action restricting or prohibiting the publication of certain materials or limiting free access to such materials." By its own action on June 26, 1973, in directing the Association to petition the Supreme Court for a rehearing of its June 21st decisions, the Council opted to seek legal redress for what its members deemed restrictive and prohibitory measures against the free dissemination of ideas. By implication, the Association for the first time in its history embraced the "friendless" work, a book of no literary importance and one which will not be found in libraries.

Without the legal counsel afforded the national Association, the State Chapters, however, may not be able to finance similar judicial challenges. And the question remaining before the Association is whether or not its own anti-censorship policy, now for the first time including protection for "friendless" works, can be emulated by its Chapters. The Association has never rec-

ommended resistance to law; resistance to censorship has been only sought through legal means.

With the possibility of a spate of locally adopted obscenity statutes, the Association's own adamantine posture may be challenged. Currently there is much discussion about exemptive provisions for libraries and other educational institutions in new or amended obscenity statutes. Obviously, such exemptions will provide no protection for bookstore owners and their staffs. Yet, Article IV of the Library Bill of Rights clearly urges libraries to "cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas." At the national level, the Association asked for the rehearing of a case involving the conviction of the proprietor of an "adult" bookstore. Will such support be engendered by librarians for similiar proprietors at local levels of jurisdiction?

Then, too, there is the matter of minors. Most State and local legislatures will press for strict measures to protect the young, but amendments recently made to the Library Bill of Rights clearly preclude the denial of abridgment of an individual's right to use the totality of a library collection on the grounds of age. And what will be the utility of Association policy, which resists any challenge to library materials," save after an independent determination by a judicial officer in a court of competent jurisdiction and only after an adversary hearing," in light of the Supreme Court's new ruling that the prosecutor need only tender the book itself into evidence and call no witnesses to determine its obscenity?

There are some of the ponderables that will be assessed in the months to come. It is not without some irony that in a society which exposes even children to the most graphic depictions of violence and in which speculation can be engendered on such subjects as the death of God, that sexually explicit materials, even when vulgarized, create such judicial consternation. Certainly, the Association should remind itself that civilization has been little tested by its response to standards of propriety. As Sir John Macdonnell once observed, the test of civilization "is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. . . . In default of any other measure, may it not be suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrongdoing and desirous to right it."

His is a sensitive quotation for these troubled times; librarians would be wise to recall it.