NOV 25 1957

IN THE MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

HONORABLE CLAYTON W. HORN, JUDGE DEPARTMENT NO. 10

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

-vs-

SHIGEYOSHI MURAO, No. B27083 311.3 of the Penal Code

LAWRENCE FERLINGHETTI, No. B27585 311.3 of the Penal Code

Defendants.

A P P E A R A N C E S

For the People: THOMAS J. LYNCH, District Attorney
By: RALPH McINTOSH,
Deputy District Attorney

For the Defendants: J. W. EHRLICH, LAWRENCE SPEISER and ALBERT BENDICH

OPINION OF THE COURT

The defendants were charged by separate complaints with a violation of Section 311.3 of the Penal Code of the State of California. General and special demurrers were filed to the complaints and, after the complaints were amended in open court by stipulation, the demurrers were overruled. Defendants thereupon pleaded "Not Guilty" as charged and demanded a jury trial. Subsequently the defendants personally and by their respective counsel waived a jury and the causes were consolidated for trial.

The charge against the defendant Lawrence Ferlinghetti is as follows:

> "Russell Wood being duly sworn deposes and says on information and belief that the said defendant did in the City and County of San Francisco, State of California, on or about the 21st day of May A.D. 1957, commit the crime of MISDEMEANOR to-wit: Violating Section 311.3 of the Penal Code of the State of California, in that said defendant did wilfully and lewdly print, publish and sell obscene and indecent writings, papers and books, to-wit: 'Howl and other poems' and 'The Miscellaneous Man Nos. 11 & 12.'"

The charge against Shigeyoshi Murao is as follows:

> "Russell Woods being duly sworn deposes and says on information and belief that the said defendant did in the City and County of San Francisco, State of California, on or about the 21st day of MAY A.D. 1957, commit the crime of MISDEMEANOR to-wit: Violating Section 311.3 of the Penal Code of the State of California, in that said defendant did wilfully and lewdly sell, distribute and keep for sale obscene and indecent writings, papers and books, to-wit: "Howl and other poems," by Allen Ginsberg; and "The Miscellaneous Man,' Nos. 11 and 12, Spring 1957 issue."

ANALYSIS OF THE STATUTE

At the outset it is noted that the statute requires proof of criminal intent, namely, that the defendants charged did wilfully and lewdly commit the acts specified in the complaints. It should also be noted that no reference to minors is made in the said statute. The significance of that omission will be discussed later.

It must be borne in mind at all times that the prosecution has the burden of proving beyond a reasonable doubt and to a moral certainty two things; first, that the book (books) is obscene and, second, that

the defendants wilfully and lewdly committed the crime alleged.

In the case of People v. Wepple, 78 Cal. App. 2d Supp. 959 (1947), which involved a prosecution under Section 311 3, Penal Code, the Court stated:

> "Where the statute makes a specific intent an element of the offense, such intent must be proved. Of course, the proof may be, and, on the part of the prosecution in most cases, it is, circumstantial; but if so, the circumstances must be such as reasonably to justify an inference of the intent. (Citing cases.) Here the facts proved were merely that the book was in stock in the book store owned by one of the defendants and was, on request, sold by the other defendant to a police officer. The book was introduced in evidence, but it bears no marks or indications of its character on the outside, nor is its title enlightening or even suggestive on the subject. This evidence, without more, is not sufficient to show that the defendants 'lewdly' sold the book. If it appeared that the defendants knew the obscene character of the book, this would support an inference that they acted lewdly in selling it, but we find no evidence in the record to this effect.--."

It is also the rule that all crimes require wrongful intent -- unless excluded expressly or by necessary implication. (People v. Vogel, 46 Cal. 2d 798; 45 C.L.R. p. 70.)

The prosecution has advanced the theory that the word "indecent" means something less than obscene. In Commonwealth v. Isenstadt, 62 N.E. 2d 840, 844 (1945), the Court said:

> "Although in their broadest meaning the statutory words 'obscene, indecent or impure' might signify offensive to refinement, propriety and good taste, we are convinced that the Legislature did not intend by those words to set up any standard merely of taste, even if under the Constitution it could do so. Taste depends upon convention, and sometimes upon irrational taboo, It varies 'with the period, the place, and the training, environment and characteristics of persons.' Reddington v. Reddington, 317 Mass. 760, 765 59 N.E. 2d 775, 778. A penal statute requiring conformity to some current standard of propriety defined only by the statutory words quoted above would make the standard an uncertain one, shifting with every new judge or jury. It would be like a statute penalizing a citizen for failing to act in every situation in a gentlemanly manner. Such a statute would be unworkable if not unconstitutional, for in effect it would '(license) the jury to create its own standard in each case,' ex post facto. Herndon v. Lowry, 301 U.S. 242, 263, 57 S.Ct. 732, 741, 81 L.Ed 1066. Such a test must be rejected. The prohibitions of the statute are concerned with sex and sexual desire. The statute does not forbid realistically coarse scenes or vulgar words merely because they are coarse or vulgar, although such scenes or words may be considered so far as they bear upon the test already stated of the effect of the book upon its readers." (This statute includes "---or manifestly tends to corrupt the morals of youth.")

In Commonwealth v. Gordon et al, 66 Pa.D. & C.R. p. 101 (1949) reference is made to the Penal Code section involving a similar charge the section in part reading "-- any obscene, lewd, lascivious, filthy, indecent or disgusting book--." The Court said, at page 104:

> "Section 524, for all its verbiage, is very bare. The full weight of the legislative prohibition dangles from the word 'obscene' and its synonyms. --it is not constitutionally indictable unless it takes the form of sexual impurity, i.e., 'dirt for dirt's sake' and can be traced to actual criminal behavior, either actual or demonstrably imminent."

And at page 112:

> "The words of the statute -- 'obscene, lewd, lascivious, filthy, indecent, ordisgusting' - restrict rather than broadeu the meaning of a highly penal statute. The effect of this plethora of epithets is to merge them into one prevailing meaning -- that of sexual impurity alone, and this has been universally held: (Citing cases).

This court therefore concludes that "indecent" as used in the California Code is synonomous with "obscene."

THE PEOPLE'S CASE

Russell Woods, a police officer, was called and testified in substance as follows:

On May 21, 1957, I went to the premises located at 261 Columbus Avenue in San Francisco with Officer Thomas Pages, about 6:45 p.m. That is a bookstore called the City Light Bookshop and I saw the clerk, Shigeyoshi Murao. I purchased a copy of a booklet entitled "Howl and Other Poems." That is the only purchase I made at the time. The price I paid was seventy-five cents. The only conversation I had with Mr. Murao was to ask him for a copy of "Howl" and he was the only one on the premises at the time. I read the book after I purchases it and subsequently obtained a warrant for the arrest of both defendants after I determined that Mr. Ferlinghetti was the owner of the City Lights Bookshop. (The book "Howl" was then introduced in evidence as People's One.)

Thomas F. Pages, a witness called on behalf of the People, testified substantially as follows:

I am a police officer of the City and County of San Francisco. I went to the City Lights Bookshop, 261 Columbus Avenue, on May 21, 1957, with Officer Russell Woods and purchased a book called "The Miscellaneous Man," paying one dollar and fifty cents for it. Mr. Murao sold the book to me and he was the only one on the premises at the time. Subsequently I read part of the book. (The Miscellaneous Man" was admitted as People's Number Two. For the purpose of clarity, the words "The Miscellaneous Man" appear on the back cover of the book and the front cover contains the following: "the statement of ERIKA KEITH by gil orlovitz.")

On the first page inside of "Howl" the following appears: "The Pocket Poets Series: Number Four, The City Lights Pocket Bookshop, San Francisco." And on the second page it reads: "The Pocket Poets Series is published by the City Lights Pocket Bookshop, 261 Columbus Avenue, San Francisco 11, and distributed nationally by the Paper Editions Corporation. Manufactured in the United States of America."

THE CASE AGAINST SHIGEYOSHI MURAO

It is obvious from the testimony introduced in the People's case that the burden of proof has not been sustained as to this defendant. There is no proof that the defendant knew the contents of the books, no conversation had with the defendant by either police officer regarding the nature or contents of the books, and there is nothing on the exterior of the books suggestive or indicating anything in the nature of pornographic content.

With regard to this defendant the case seems to be on all fours with the Wepplo case, which held: "This evidence, without more, is not sufficient to show that the defendant lewdly sold the book."

According to the testimony neither of the officers in question read these books before purchase, and one of them admitted that he had not read People's Two in its entirety. The prosecution has conceded that it has no case against the Defendant Murao (Rep. Tr. pp. 26-27).

THE CASE AGAINST LAWRENCE FERLINGHETTI

There is no proof that the defendant Ferlinghetti printed, kept for sale, sold or published People's Number Two, designated as "The Miscellaneous Man," and which is properly titled "the statement of ERIKA KEITH by gil orlovitz." The prosecution concedes ("--because we haven't got the facts to show that he did lewdly sell that book or have

it for the purpose of sale or even publish it."(Rep. Tr. p. 43) That it has no case against Ferlinghetti with regard to People's Number Two.

The evidence shows that People's Number One, "Howl" was published by this defendant and therefore it remains to be seen whether said book is obscene, and if so, whether this defendant wilfully and lewdly published it.

The Wepplo case states, referring to People v. Fananstein, "---that the evidence there showed defendant's knowledge of the character of the writings, etc., which he kept for sale, and that from such knowledge a lewd intent might be inferred." (Emphasis mine)

The statement is too broad unless it be qualified by the word "might." The mere fact of knowledge alone would not be sufficient. The surrounding circumstances would be important and "must be such as reasonably to justify an inference of the intent." (Wepplo, p. 965) To illustrate, some might think a book obscene; others a work of art, with sincere difference of opinion. The bookseller should not be required to elect at his peril. Unless the prosecution proved that he acted lewdly in selling it, the burden would not be met.

BOOK REVIEWS AND EXPERT TESTIMONY

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

In Wepplo (p. 966) the court said:

> "It may be that some of the book reviews offered by the defendants were relevant to the question of intent. If it appears that the reviews commended the book without disclosing its true character -- as apparently some of them did -- and that the defendants had read such reviews and relied on them, having no more accurate knowledge in selling the book, these facts would tend to establish a lack of lewd intent."

In People v. Creative Age Press, 79 N.Y.S. (2) 198, the defendant published and sold a book entitled "The Gilded Hearse," which was claimed to be obscene. In holding the book not to be obscene, the court said:

> "I had previously received, over counsel's objection, a collection prepared by defendant of clippings established to have been taken from a considerable number of newspapers and periodicals of general circulation containing reviews of 'The Gilded Hearse' by literary critics for those publications.
>
> "The practice of referring to such reviews in cases of this nature has become well established. Halsey v. New York Society for Suppression of Vice, 234 N.Y. 1, 136 N.E. 219, 220; also see United States v. One Book Entitled Ulysses, 2 Cir., 72 F. 2d 705, 708; and People v. Gotham Book Mart, Inc., 158 Misc. 240, 244, 285 N.Y.S. 563, 568. Opinions of professional critics publicly disseminated in the ordinary course of their employment are proper aids to the court in weighing the author's sincerity of purpose and the literary worth of his effort. These are factors which, while not determining whether a book is obscene, are to be considered in deciding that question. See People v. Berg, 241 App. Div. 543, 544, 272 N.Y.S. 586, 587. Such expressions of opinion can be of aid to the court only to the extent that it determines it may rely on them as disinterested and well-founded."

Over the objection of the prosecution the defense produced nine expert witnesses, some of them with outstanding qualifications in the literary field. All of the defense experts agreed that "Howl" had literary merit, that it represented a sincere effort by the author to present a social picture, and that the language used was relevant to the theme. As Professor Mark Schorer put it: "Howl,' like any work

of literature, attempts and intends to make a significatn comment on or interpretation of human experience as the author knows it."

The prosecution produced two experts in rebuttal, whose qualifications were slightly less than those of the defense. One testified that "Howl" had some clarity of thought but was an imitation of Walt Whitman, and had no literary merit; the other and by far the most voluble, that it had no value at all. The court did not allow any of the experts to express an opinion on the question of obscenity because "-- if they had done so it would have been proper to exclude the opinions because this was the very issue to be decided by the jury." (People v. Wepplo, p. 963)

There is ample authority for the procedure allowed by the court. In the Roth case (237 Fed (2) 796 C of A) the court said:

> "--the judge allowed him (defendant) to produce experts, including a psychologist who stated that he could find nothing obscene at the present time. Also various novels were submitted to the jury for the sake of comparison."

Experts are used every day in court on other subjects and no reason presents itself justifying their exclusion from this type of case when their experience and knowledge can be of assistance to the court. The court also read many of the books previously held obscene, for the purpose of comparison.

BOOK TO BE CONSIDERED IN TOTO

In determining whether a book is obscene it must be construed as a whole. In Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949), the court said at page 103:

> "The particular and only charge in the indictments is that defendants possessed some or all of the books with the intent to sell them.
>
> "It should be noted at once that the wording of section 524 requires consideration of the indicted material as a whole; it does not prescribe articles or publications that merely contain obscene matter. This is now true in all jurisdictions that have dealt with the subject: the Federal courts, Swearingen v. United States, 161 U.S. 446 (1896); United States v. Ulysses, 72 F. (2d) 705 (1934); Walker v. Popenoe, 149 F. (2d) 511 (1945); Massachusetts, Commonwealth v. Isenstadt, 318 Mass. 543, (1945); New York, Halsey v. New York Society, 234 N.Y. 1,136 N.E. 219 (1932); England, Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).
>
> "It is also the rule in Pennsylvania. In Commonwealth v. New, 142 Pa. Superior Ct. 358 (1940), the court said:
>
> "We have no fault to find with the statement that in determining whether a work is obscene, it must be construed as a whole and that regard shall be had for its place in the arts.'"
>
> And at page 123:
>
> "In Commonwealth v. Mercur, 90 Pitts. L.J. 318 (1942), the court applied the 'as a whole' rule of Commonwealth v. New (142 Pa. Superior Ct. 358 (1940) and held that certain pictures appearing in a book of instruction for photographers called 'U.S.Camera 1942', did not render the volume obscene."

See also Roth v. U.S., 1 L. ed (2nd) 1498, 1509, 1510.

THE CONSTITUTIONAL QUESTIONS

The freedoms of speech and press are inherent in a nation of free people. These freedoms must be protected if we are to remain free, both individually and as a nation. The protection for this freedom is found in the First and Fourteenth Amendments to the United States Constitution, and in the Constitution of California, Art.I, sec.9,p.220, which provides in part:

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

In Gordon the court said at pages 138, 139:

"The fourteenth amendment to the Federal Constitution prohibits any State from encroaching upon freedom of speech and freedom of the press to the same extent that the first amendment prevents the Federal Congress from doing so: Pennekamp v. Florida, 328 U.S. 331 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Thornhill v. Alabama, 310 U. S. 88 (1940); Winters v. New York, 333 U.S. 507, 68 S. Ct. 665 (1948).

"The principle of a free press covers distribution as well as publication: Lovell v. City of Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938).

"These guarantees occupy a preferred position under our law to such an extent that the courts, when considering whether legislation infringes upon them, neutralize the presumption usually indulged in favor of constitutionality: (citing cases)."

Gordon, pp. 139, 140, 141, 142, 143:

"Quoting from Jefferson's bill for establishing religious freedom, the Chief Justice stated:

"That to suffer the Civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty . . . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.'

"The now familiar 'clear and present danger' rule, first stated by Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47 (1918), represents a compromise between the ideas of Jefferson and those of the judges, who had in the meantime departed from the forthright views of the great statesman. Under the rule the publisher of a writing may be punished if the publication in question creates a clear and present danger that there will result from it some substantive evil which the legislature has a right to prescribe and punish. . . .

"Mr. Justice Brandeis added, in Whitney v. California, 274 U. S. 357 (1927), the idea that free speech may not be curbed where the community has the chance to answer back. He said:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so iminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom Such, in my opinion, is the commend of the Constitution.

It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

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

"It is true that subsequent to the decision of the court in the Schenck case, Justices Holmes and Brandeis fought what for a time appeared to be a losing battle. To them the 'clear and present danger' rule was a rule of the criminal law, and they applied it only to prohibit speech which incited to punishable conduct."

"The history of the Supreme Court, since its decision in Gitlow v. New York (268 U. S. 652 (1925)), has been marked by gradual progress along the path staked out by Justices Holmes and Brandeis, culminating finally in the complete acceptance of their views. (Citing cases)

"As was said in Martin v. Struthers, 319 U.S. 141 (1943):

"The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, Lovell v. Griffin (citation), and necessarily protects the right to receive it.' . . .

"In Herndon v. Lowry, 301 U. S. 242 (1937) the court said:

"'The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered.'

"In DeJongo v. Oregon, 299 U. S. 353 (1937), the court said:

"'These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.'"

Gordon, p. 144:

"The nature of the evil which the legislature has the power to guard against by enacting an obscenity statute is not clearly defined. As Jefferson saw it, the legislature was restricted to punishing criminal acts and not publications. To Holmes and Brandeis the bookseller could be punished if his relation to the criminal act was such that he could be said to have incited it. In neither view could the bookseller be punished if his books merely 'tended' to result in illegal acts and much less if his books 'tended' to

lower the moral standards of the community. But the threat must in either case be more than a mere tendency. The older cases which upheld obscenity statutes on the 'tendency' theory would appear to be invalid in the light of the more recent expressions of the Supreme Court.

"Thus the opinion of the Supreme Court in Bridges v. California, 314 U. S. 252 (1941) says (p. 273):

"In accordance with what we have said on the clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.'"

Gordon, pp. 145, 146:

"Those principles have not been applied specifically to an obscenity statute by anyrecent opinion of the United States Supreme Court, but as Mr. Justice Rutledge said orally when the 'Hecate County' case, Doubleday & Co., Inc. v. People of New York, 93 L. Ed. 37 (an obscenity case), was recently argued before the Court:

"'Before we get to the question of clear and present danger, we've got to have something which the State can forbid as dangerous. We are talking in a vacuum until we can establish that there is some occasion for the exercise of the State's power.

"'Yes, you must first ascertain the substantive evil at which the statute is aimed, and then determine whether the publication of this book constitutes a clear and present danger.'

"'It is up to the State to demonstrate that there was a danger and until they demonstrate that, plus the clarity and imminence of the danger, the constitutional prohibition would seem to apply.' (Quoted in 17 U. S. Law Week (Supreme Court Sections 3118))."

Gordon, p. 146:

"It seems impossible, in view of the late decisions under the first amendment, that the word "obscene' can any longer stand alone, lighted up only by a vague and mystic sense of impurity, unless it is interpreted by other solid factors such as clear and present danger, pornography, and divorcement from mere coarseness of vulgarity."

Gordon p. 150:

"Short of books that are sexually impure and pornographic, I can see no rational legal catalystthat can detect or define a clear and present danger inherent in a writing or that can demonstrate what result ensues from reading it. All that is relied upon, in a prosecution, is an indefinable fear for other people's moral standards -- a fear that I regard as a democratic anomaly."

Gordon, p. 154:

"These words of Jefferson should not be forgotten:

"'I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and the mendacious spirit of those who write them . . . These ordures are rapidly depraving the public taste.

"'It is, however, an evil for which there is no remedy: our liberty depends on the freedom of the press, and that cannot be limited without being lost.'"

Gordon, p. 155:

"How is it possible to say that reading a certain book is bound to make people behave in a way that is socially undesirable? And beyond a reasonable doubt, since we are dealing with a penal statute?

"We might remember the words of Macaulay:

"'We find it difficult to believe that in a world so full of temptations as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.' . . .

"The only clear and present danger to be prevented by section 524 that will satisfy both the Constitution and the current customs of our era is the commission or the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic effect."

Gordon, p. 156:

"I hold that section 524 may not constitutionally be applied to any writing unless it is sexually impure and pornographic. It may then be applied, as an exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt. The criminal law is not, in my opinion, 'the custos morum of the King's subjects', as Regina v. Hicklin states: it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny."

In Roth v. United States (1 L ed (2nd) 1498, 1509) the court said:

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

Mr. Chief Justice Warren said at page 1513:

"Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments."

SOCIAL IDEAS

> "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 guaranties, unless excludable because they encroach upon the limited area of more important interests."
> (Roth, p. 1507)

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

presents a picture of an individual who is a specific representation of what the author conceives as a general condition.

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

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

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

THE QUESTION OF OBSCENITY

No hard and fast rule can be fixed for the determination of what is obscene, because such determination depends on the locale, the time, the mind of the community and the prevailing mores. Even the word itself has had a chameleon-like history through the past, and as Mr. Justice Cardoza said: "A word is not a crystal, transparent and unchanged. It is the skin of living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The rule laid down by the appellate department of the Superior Court (in Southern California" by People v. Wepplo is whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires". (Alberts case)

In the Roth case (New York) the jury was instructed that "The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts."

The Supreme Court in Roth v. United States attempts an oversimplification of the problem by stating that because obscenity is not protected speech and falls in the same class as libelous utterances, it is unnecessary to consider issues behind the phrase "clear and present danger." The theory creating this exemption from the protection of the Constitution, before Roth, is that an individual reading an obscene book will be seduced to anti-social conduct or induced to such conduct that perceptibly there will be created a clear and present danger to that effect.

The Supreme Court in Roth attempts to brush aside the rule with a brief statement unsupported by adequate reason or authority (1 L ed (2) p. 1503), but in cases involving free speech the same court in Yates v. United States, 77 S. Ct. 1064 (1957), which involved the Smith Act, at page 1069, stated:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals..."

And at page 1076:

> "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this court,...(citing cases). This distinction was heavily underscored in Gitlow v. People of State of New York, 268 U. S. 652, in which the statute involved was nearly identical with the one now

before us, and where the Court, despite the narrow view there taken of the First Amendment, said:

"'The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. *** It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. * * * This (Manifesto) * * * is (in) the language of direct incitement. * * *

In the dissenting opinion of Mr. Justice Black, concurred in by Mr. Justice Douglas, at page 1090:

"But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason---men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government."

It seems that free press is entitled to the same protection as free speech. And in the case of Watkins v. United States, 77 S. Ct. 1173, which involved a review by certiorari of a conviction for contempt of Congress alleged to have been committed during a hearing before a congressional investigating committee, in the dissenting opinion of Mr. Justice Black, at pages 1201-2, he stated:

"That Amendment (First Amendment) was designed to prevent attempts by law to curtail freedom of speech. Whitney v. People of State of California, 1927, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed 1095. It forbids Congress from making any law 'abridging the freedom of speech, or of the press." It guarantees Watkins' right to join any organization and make any speech that does not have an intent to incite to crime, Dennis v. United States, 1951, 341 U.S. 494."

And in the case of Sweezy v. State of New Hampshire, 77 S. Ct. 1203, which like Watkins involves a question concerning the constitutional limit of legislative inquiry, the court said at page 1212:

"Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society."

The dissenting opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan, in the Sweezy case, states at page 1218:

"'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.-----'

"I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616."

And again at page 1220:

"While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.

But in Gordon, p. 132:

"It has been said that the matter charged, to be obscene, must 'suggest impure or libidinous thoughts', must 'invite to lewd and lascivious practices and conduct', must be offensive to chastity', must 'incite dissolute acts', must 'create a desire for gratification of animal passions', must 'encourage unlawful indulgences of lust', must 'attempt to satisfy the morbid appetite of the salacious', must 'pander to the prurient taste.' (Citing cases)

"In Walker v. Popenoe, 149 F. (2d) 511 (1945), it was held:

"The effect of the publication on the ordinary reader is what counts. The Statute does not intend that we shall "reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few"'. (Emphasis mine)

"This test, however, should not be left to stand alone, for there is another element of equal importance--the tenor of the times and the change in social acceptance of what is inherently decent. This element is clearly set forth in United States v. Kennerley, 209 Fed. 119 (D.C., N. Y., 1913)."

Gordon, p. 136:

"From all of these cases the modern rule is that obscenity is measured by the erotic allurement upon the average modern reader; that the erotic allurement of a book is measured by whether it is sexually impure--i.e., pornographic, 'dirt for dirt's sake', a calculated incitement to sexual desire--or whether it reveals an effort to reflect life, including its dirt, with reasonable accuracy and balance; and that mere coarseness or vulgarity is not obscenity."

Gordon, p. 151:

"Sexual impurity in literature (pornography, as some of the cases call it) I define as any writing whose dominant purpose and effect is erotic allurement--that is to say, a calculated and effective incitement to sexual desire. It is the effect that counts, more than the purpose, and no indictment can stand unless it can be shown. This definition is in accord with the cases that have restricted the meaning of obscenity and its synonyms to that of sexual impurity, and with those cases that have made erotic allurement the test of its effect.

"This excludes from pornography medical or educational writings, whether in technical or layman's language and whether used only in schools or generally distributed, whose dominant purpose and effect is exegetical and instructional rather than enticing. It leaves room for interpretation of individual books, for as long as censorship is considered necessary, it is as impossible as it is inadvisable to find a self-executing formula."

The court in Gordon, p. 125, discussing a rule which is not the law today, said:

"This is the now famous rule of the case (Regina v. Hicklin, L.R. 3 Q.B. 360 (1868)):

"'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'

"Strictly applied, this rule renders any book unsafe, since a moron could pervert to some sexual

fantasy to which his mind is open the listings in a seed catalogue. Not even the Bible would be exempt; Annie Besant once compiled a list of 150 passages in Scripture that might fairly be considered obscene--it is enough to cite the story of Lot and his daughters, Genesis 19, 30-38. Portions of Shakespeare would also be offensive and of Chaucer, to say nothing of Aristophanes, Juvenal, Ovid, Swift, Defoe, Fielding, Smollett, Rousseau, Maupassant, Voltaire, Balzac, Baudelaire, Rabelais, Swinburne, Shelley, Byron, Boccaccio, Marguerite de Naverre, Hardy, Shaw, Whitman, and a host more."

ROTH CASE

In the Roth Case no question of obscenity was involved or considered by the court. The sole question was whether obscenity as such was protected by the constitution and the court held it was not. In the appeals involved the material was obviously pornographic, it was advertised and sold as such. The Supreme Court attempts to lump together the various rules on obscenity by stating, at page 1508:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."

Then qualifies by adding:

> "The portrayal of sex, e.g., in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (Emphasis mine)

The following instruction, given in the Alberts case, was cited with approval in Roth, at page 1510:

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

Mr. Chief Justice Warren, concurring in the result in the Roth case, stated:

> "I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied . . . .

"The line dividing the salacious or pornographic from literature or science is not straight and unwavering . . . .

"The personal element in these cases is seen most strongly in the requirement of scienter. Under the California law, the prohibited activity must be done 'wilfully and lewdly.'"

Mr. Justice Harlan, concurring in the result in No. 61 (Alberts), and dissenting in No. 582 (Roth):

"Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes, In California the book must have a 'tendency to deprave or corrupt readers'; under the federal statute it must tend'to stir sexual impulses and lead to sexually impure thoughts.' The two statutes do not seem to me to present the same problems. Yet the court compounds confusion when it superimposes on these two statutory definitions a third, drawn fromt he American Law Institute's Model Penal Code, Tentative Draft No. 6: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest.' The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the 'deprave and corrupt' and 'sexual thoughts' tests: . . . .

"On the other hand, "appeal to prurient interest" refers to qualities of the material itself; the capacity to attract individuals eager for a forbidden look. . ."

"If, therefore, the latter is the correct standard, as my Brother Brennan elsewhere intimates, then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

"The question in this case (Alberts) is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a 'tendency to deprave or corrupt readers by exciting lascivious thoughts or arousing lustful desire! . . .

"What then is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words can 'deprave or corrupt' the reader -- that words can incite to anti-social or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. . . . It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce to a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. . . .

"It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt a reader.' I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader. . . . (Emphasis mine)

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting:

"When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States . . ..

"By these standards punishment is inflicted for thoughts provoked, not for overt acts, not anti-social conduct. This test cannot be squared with out decisions under the First Amendment. Even the ill-starred Dennis case conceded that speech to be punishable must have some relation to action which could be penalized by government. . . .

"'Congress shall make no law . . . abridging the freedom of speech, or of the press.' Certainly that standard would not be an acceptable one if religion, economics, politics, or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned? . . .

"Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment Under that test, juries can censor, suppress and punish what they don't like, provided the matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. . . .

"Government should be concerned with anti social conduct, not with utterances. Thus if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience, By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed. . . .

"Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. (Citing cases) As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lust ful desire. The list of books that judges or juries can place in that category is endless.

"I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."

COARSE AND VULGAR LANGUAGE

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

In Common wealth v. Gordon, the court said, at page 109:

"'God's Little Acre' was the subject of People v. Viking Press, Inc., 147 N.Y. Misc 813 (1933). In the course of his opinion Magistrate Greenspan said:

"'The Courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manuer just indicated, its effect would be to prevent altogether the realistic portrayal in literature of a large and important field of life . . . The Court may not require the author to put refined language into the mouths of primitive people.'

"Magistrate Strong held "End as a Man' not obscene in People v. Vanguard Press, 192 N.Y. Misc. 127 (1949), and observed:

"'The speech of the characters must be considered in relation to its setting and the theme of the story. It seems clear that use of foul language will not of itself bring a novel or play within the condemnation of the statute.'

As I have indicated above, all but one of these books are profoundly tragic, and that one has its normal quota of frustration and despair. No one could envy or wish to emulate the characters that move so desolately through these pages. Far from inciting to lewd or lecherous desires, which are sensorially pleasurable, these books leave one either with a sense of horror or of pity for the degradation of mankind. The effect upon the normal reader, 'l'homme moyen sensuel' (there is no such deft precision in English), would be anything but what the vice hunters fear it might be. We are so fearful for other people's morals; they so seldom have the courage of our own convictions."

Gordon, p. 113:

"'The test for obscenity most frequently laid down seems to be whether the writing would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires.'

"The statute is therefore directed only at sexual impurity and not at blasphemy or coarse and vulgar behavior of any other kind. The word in common use for the purpose of such statute is 'obscenity'."

Gordon, p. 114:

"---the familiar four-letter words that are so often associated with sexual impurity. These are, almost without exception, of honest Anglo-Saxon ancestry, and were not invented for purely scatological effect. The one, for example, that is used to denote the sexual act is an old agricultural word meaning 'to plant' and was at one time a wholly respectable member of the English vocabulary. The distinction between a word of decent etymological history and one of smut alone is important; it shows that fashions in language change as expectably as do the concepts of what language connotes. It is the old business of semantics again, the difference between word and concept.

"But there is another distinction. The decisions that I shall cite have sliced off vulgarity from obscenity. This has had the effect of making a clear division between the words of the bathroom and those of the bedroom; the former can no longer be regarded as obscene, since they have no erotic allurement, and the latter may be so regarded, depending on the circumstances of their use. This reduces the number of potentially offensive words sharply."

Gordon, p. 122:

"In Commonwealth v. Dowling, 14 Pa. C.C. 607 (1894): 'The law does not undertake to punish bad English, vulgarity, or bad taste, and no matter how

objectionable the jury may consider the papers referred to on those grounds, they have no right to convict on account of them.'"

Gordon, p. 133:

"The modern test was applied in People v. Wendling, 258 N. Y. 451 (1932) which involved the dramatization of the song 'Frankie and Johnnie'. In holding that the courts are not censors of morals and manners, Judge Pound said:

"'The language of the play is coarse, vulgar and profane; the plot cheap and tawdry. As a dramatic composition it serves to degrade the stage where vice is thought by some to lose "half its evil by losing all its grossness." "That it is indecent from every consideration of propriety is entirely clear" (People v. Eastman, 188 N. Y. 478, 480), but the Court is not a censor of plays and does not attempt to regulate manners. One may call a spade a spade without offending decency, although modesty may be shocked thereby. (People v. Muller, 96 N. Y. 408, 411). The question is not whether the scene is laid in a low dive where refined people are not found or whether the language is that of the bar room rather than the parlor. The question is whether the tendency of the play is to excite lustful and lecherous desire.'"

In People v. Creative Age Press, 79 N.Y. S. (2) 198, the court said:

"Unquestionably the characters generally are a shoddy lot . . . . Their language is coarse and vulgar. They make occasional references to sexual contacts that are sophomoric and nasty. These references are, however, wholly incidental and are not descriptive. They are minor phrases and sentences serving in aid of characterization. Such incidental language does not of itself bring a literary work within the terms of the statute. Halsey v. New York Society for Suppression of Vice, supra; People v. Wendling 258 N. Y. 451, 180 N. E. 169, 81 A.L.R. 799; People v. Viking Press, supra (147 Misc. 813, 264 NYS 534).

"To determine whether a book falls within the condemnation of the statute, an evaluation must be made of the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior. See People v. Berg, supra. Various factors should be borne in mind when applying the judicially accepted standards used in measuring that effect. Among others, these factors include the theme of the book, the degree of sincerity of purpose evident in it, its literary worth, the channels used in its distribution, contemporary attitudes toward the literary treatment of sexual behavior and the types of readers (particularly with respect to age and intellectual development) reasonably to be expected to secure it for perusal.

"Giving due consideration to these various factors, I cannot find by any prevailing judicial standard that 'The Gilded Hearse" would have a sexually demoralizing effect upon its readers . . . .

"One of the chief character's business associates is obviously homosexual but no direct reference is made to his sexual contacts. Nowhere does the book 'invite to vice or voluptuousness' (People v. Wendling, supra), nor would it tend 'to excite lustful and lecherous desires' (People v. Eastman, 188 N.Y. 478, 81 N.E. 459, 460, 11 Ann. Cas. 302). I find that this book is not obscene or otherwise within the condemnation of the statute."

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

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

In United States v. Roth, 237 F(2) 796 (U.S. Court of Appeals), a footnote to the concurring opinion of JudgeFrank is of interest:

> "The very argument advanced to sustain the statute's validity, so far as it oondemns the obscene goes to show the invalidity of the statute so far as it condemns 'filth,' if 'filth' means that which renders sexual desires 'disgusting.' For if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, antisocially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial -- and thus not the subject of valid legislation which punishes the mailing of 'filthy' matter. ---"

Judge Frank further states:

"Effect of 'obscenity' on adult conduct"

"To date there exist, I think, no thorough-going studies by competent persons which justify the conclusion that normal adults' reading or seeing of the 'obscene' probably induces anti-social conduct. Such competent studies as have been made do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity' represents a ponderable causal factor in sexually deviant behavior. "Although the whole subject of obscenity censorship hinges upon the unproved assumption that "obscene" literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior.' (Lockhart and McClure, Obscenity and The Courts, 20 L. & Contemp. P. (1955) 587, 595.) What little competent research has been done, points definitely in a direction precisely opposite to that assumption.

"Alpert reports (See Alpert, Judicial Censorship and The Press, 52 Harv.L.Rev. (1938) 40, 72.) that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually, they answered thus: 218 said 'Man'; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied 'that the source of their information came from books, not one specified a "dirty" book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's Rise of the Dutch Republic.' Macaulay, replying to the advocates of the suppression of obscene books, said: 'We find it difficult to believe that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes or Juvanal, will be vicious by reading them.' . . . .

"The obscenity statute and the reputable press"

"Let it be assumed, for the sake of the argument that contemplation of published matter dealing with sex has a significant impact on children's conduct. On that assumption, we cannot overlook the fact that our most reputable newspapers and periodicals carry advertisements and photographs displaying women in what decidedly are sexually alluring postures, and at times emphasizing the importance of sex appeal. That women are there shown scantily clad, increases 'the mystery and allure of the bodies that are hidden,' writes an eminent psychiatrist. 'A leg covered by a silk stocking is much more attractive than a naked one; a bosom pushed into shape by a brassiere is more alluring than the pendant realities.' (Myerson,

Speaking of Man (1950) 92.) Either, then, the statute must be sternly applied to prevent the mailing of many reputable newspapers and periodicals containing such ads and photographs, or else we must acknowledge that they have created a cultural atmosphere for children in which, at a maximum, only the most trifling additional effect can be imputed to children's perusal of the kind of matter mailed by the defendant."

THE PUBLIC AS GUARDIANS

In Gordon, at page 118, the court said:

> "I cannot be convinced that the deep drives and appetites of life are very much different from what they have always been, or that censorship has ever had any effect on them, except as the law's police power to preserve the peace in censorship. I believe that the consensus of preference today is for disclosure and not stealth, for frankness and not hypocrisy, and for public and not secret distribution. That in itself is a moral code.
>
> "It is my opinion that frank disclosure cannot legally be censored, even as an exercise of the police power, unless it is sexually impure and pornographic, as I shall define those words. They furnish the only possible test for obscenity and its effect."

While the publishing and distribution of "smut" or "hard core pornography" is without any social importance and obscene by present-day standards, and should be punished for the good of the community, since there is no straight and unwavering line to act as a guide, censorship by government should be held in tight reign. To act otherwise would destroy our freedoms of free speech and press. Even religion can be censored by the medium of taxation. The best method of censorship is by the people as self-guardians of public opinion and not by government.

In Roth (U. S. Court of Appeals), Judge Clark said:

> "Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as 'guardians' of the people, telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous. Governmental guardianship is repugnant to the basic tenet of our democracy; According to our ideals our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent. When our governmental officials act towards our citizens on the thesis that 'Papa knows best what's good for you,' they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature.
>
> "So have sagacious men often insisted. Milton, in his Areopagitica, denounced such paternalism: 'We censure them for a giddy, vicious and unguided people, in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a licensor.' 'We both consider the people as our children,' wrote Jefferson to Dupont de Nemours, 'but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-government.' Tocqueville sagely remarked: 'No form or combination of social policy has yet been devised to make an energetic people of a community of pusillanimous and enfeebled citizens.' 'Man,' warned Goethe, 'is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him.' Said Carl Becker, 'Self-government, and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compulsion. This heavy responsibility is the price of freedom.' The 'great art,' according to Milton, 'lies to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work.' So we come back, once more, to Jefferson's

advice: The only completely democratic way to control publications which arouse mere thoughts or feelings is through non-governmental censorship by public opinion."

CONCLUSION

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

1. If the material has the slightest redeeming social importance it is not obscene because it is protected by the First and Fourteenth Amendments of the United States Constitution, and the California Constitution.

2. If it does not have the slightest redeeming social importance it may be obscene.

3. The test ofobscenity in California is that the material must have a tendency to deprave or corrupt readers by exciting lascivious thoughts or arousing lustful desire to the point that it presents a clear and present danger of inciting to anti-social or immoral action.

4. The book or material must be judged as a whole by its effect on the average adult in the community.

5. If the material is objectionable only because of coarse and vulgar language which is not erotic or aphrodisiac in character it is not obscene.

6. Scienter must be proved.

7. Book reviews may be received in evidence if properly authenicated.

8. Evidence of expert witnesses in the literary field is proper.

9. Comparison of the material with other similar material previously adjudicated is proper.

10. The people owe a duty to themselves and to each other to preserve and protect their constitutional freedoms from any encroachment by government unless it appears that the allowable limits of such protection have been breached, and then to take only such action as will heal the breach.

11. Quoting Mr. Justice Douglas again: "I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."

12. In considering material claimed to be obscene it is well to remember the motto: "Honi soit qui mal y pense."
(Evil to him who evil thinks.")

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

The defendants are found not guilty, thus making it unnecessary to rule upon the People's motion to dismiss as to defendant Murao. Defendants are discharged and bail exonerated.

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