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THE DIALECTIC OF OBSCENITY

*Brian L. Frye**

INTRODUCTION

Obscenity is like a Cheshire cat. Over the years, it gradually disappeared, until nothing remained but a grin. Until the 1960s, pornography was obscene and obscenity prosecutions were relatively common. And until the 1970s, obscenity prosecutions targeted art, as well as pornography. But today, obscenity prosecutions are rare and limited to the most extreme forms of pornography.¹

So why did obscenity largely disappear? The conventional history of obscenity is doctrinal, holding that the Supreme Court's redefinition of obscenity in order to protect art inevitably required the protection of pornography as well.² In other words, art and literature were the vanguard of pornography.

But the conventional history of obscenity is incomplete. While it accounts for the development of obscenity doctrine, it cannot account for "pornography's convoluted dialectic with American history."³ As Michel

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¹ See, e.g., Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 Wash. U.L. Rev. 215, 221 (2007) ("By the 1980s, obscenity prosecutions were rare, especially in urban areas and on the coasts."). The term "obscenity" does not include child pornography, which is unprotected by the First Amendment whether or not it is technically obscene. See, e.g., *New York v. Ferber*, 458 U.S. 747, 764 (1982).

² See, e.g., Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* xii (1992) (arguing that the new definition of obscenity "was so generously fashioned to protect literature and art that it led to the freeing of hard-core pornography"); Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* 3 (2011) (arguing that "a legion of scholars has written the history of pornography and obscenity - often portrayed as a joint subset of the larger category 'censorship' - as a legalistic one, moving from episode to episode anecdotally rather than analytically in terms of the historical context").

³ Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the*

Foucault observed, the repression of sexuality produces discourses on sexuality.⁴ Accordingly, the history of obscenity must account for both regulation and demand. Censorship created pornography by distinguishing it from art, and produced a dialectic of obscenity.

The story of *Flaming Creatures* and the so-called “Fortas Film Festival” illustrates the dialectic of obscenity. When President Johnson nominated Justice Fortas to replace Chief Justice Warren in 1968, Fortas’s opponents investigated his record, hoping to justify a filibuster. Among other things, they discovered *Jacobs v. New York*, in which Fortas alone voted to reverse obscenity convictions for showing *Flaming Creatures*, an obscure art film that featured a transvestite orgy.⁵ Senator Thurmond showed *Flaming Creatures* to several senators, convinced them to join the filibuster, and blocked the Fortas nomination.

Under the dialectic of obscenity, art protected pornography and pornography protected art. Doctrinally, the protection of art required the protection of pornography. But politically, the protection of art required the protection of pornography. Art and pornography are social categories. When the Supreme Court tried to protect art, but not pornography, it failed to recognize that those categories were in flux. Art became subversive as pornography became mainstream. As a result, many people were more offended by some of the art the Court protected than the pornography it did not, and the Court found its obscenity cases increasingly difficult to justify. Eventually, it realized that only the protection of pornography could justify the protection of art.

This article uses *Flaming Creatures* and the Fortas Film Festival to explain the dialectic of obscenity. Part I provides an historical overview of the obscenity doctrine. Part II describes the making and presentation of *Flaming Creatures*. Part III chronicles the proceedings in *Jacobs v. New York*. Part IV follows the Fortas nomination. Part V shows how the Fortas Film Festival illustrates the dialectic of obscenity.

I. A BRIEF HISTORY OF OBSCENITY

A. *What is Obscenity?*

Obscenity is a category of speech that is not entitled to First Amendment protection because of its sexual content. However, while the category of obscenity still exists, the definition of obscenity has narrowed over time. Originally, the common law defined obscenity as any expression

New Right 3 (2011).

⁴ Michel Foucault, *The History of Sexuality, Volume I: An Introduction* 53 (1990).

⁵ *Jacobs v. New York*, 388 U.S. 431 (1967).

that tends “to deprave and corrupt those whose minds are open to such immoral influences.”⁶ In other words, under the common law, obscene meant inappropriate for children.

The common law obscenity test was generally understood to prohibit the depiction or description of sex, without exception for works of art and literature. Accordingly, it permitted the suppression of works like Edmund Wilson’s *Memoirs of Hecate County* and James Joyce’s *Ulysses*.⁷ Embarrassed by the philistinism of the common law obscenity test, the Court finally reformed the obscenity doctrine in *Roth v. United States*, holding that an expression is obscene only if “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁸ Justice Brennan’s plurality opinion added that an expression is obscene only if it is “utterly without redeeming social importance.”⁹ Essentially, *Roth* held that the First Amendment protects art, but not pornography.

But the Court soon discovered that distinguishing art and pornography is difficult, as both are in the eye of the beholder. As Justice Stewart famously remarked, “I know it when I see it.”¹⁰ Accordingly, the justices were obliged to review each smutty book and dirty movie. Justices Black and Douglas refused to participate, concluding that the First Amendment protects all sexual expressions.

B. The Rise & Fall of the Pandering Test

The Court was in a quandary. Under the *Roth* test, in order to identify obscenity, it had to be able to distinguish art from pornography. Fortas convinced the Court that it could solve the problem by adopting the pandering test, which imposed a *scienter* requirement on obscenity.

The pandering test was based on Chief Justice Warren’s concurring opinion in *Roth*, which held that an expression is obscene if its purveyor is “plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.”¹¹ Under the pandering

⁶ *Regina v. Hicklin*, 3 L.R.-Q.B. 360, 362-63 (1868).

⁷ *People v. Doubleday & Co.*, 71 N.Y.S.2d 736 (App.Div.1st Dep’t) (per curiam), aff’d mem., 297 N.Y. 687 (1947), aff’d by equally divided court, 335 U.S. 848 (1948) (suppression of Edmund Wilson’s *Memoirs of Hecate County*); Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U.L. REV. 215, 254 (2007) (describing suppression of James Joyce’s *Ulysses* and other literary works under the *Hicklin* standard).

⁸ *Roth v. United States*, 354 U.S. 476, 487-89 (1957).

⁹ *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

¹⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹ *Roth v. United States*, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring).

test, if “the purveyor’s sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.”¹² Essentially, the pandering test assumes that anything sold as pornography is obscene and anything sold as art is not.

The Court adopted the pandering test in a pair of cases: *Ginzberg v. United States*¹³ and *Memoirs v. Massachusetts*.¹⁴ In *Ginzberg*, the Court affirmed obscenity findings for *Eros* magazine, *Liaison* magazine, and *The Housewife’s Handbook on Selective Promiscuity*, erotic publications distributed by Ralph Ginzburg by mail order from Middlesex, Pennsylvania, because “each of these publications was created or exploited entirely on the basis of its appeal to prurient interests.”¹⁵ By contrast, in *Memoirs*, it reversed an obscenity finding for John Cleland’s *Fanny Hill, or Memoirs of a Woman of Pleasure*, an eighteenth-century erotic novel published by G.P. Putnam’s Sons, because “the mere risk that the book might be exploited by panders because it so pervasively treats sexual matters cannot alter the fact . . . that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value.”¹⁶ In other words, *Ginzberg*’s publications were sold as pornography and *Fanny Hill* was not.

Initially, the Court voted to affirm both *Ginzburg* and *Memoirs*.¹⁷ Fortas was horrified by the prospect of banning *Fanny Hill*, and used the pandering doctrine to convince Brennan to change his vote in *Memoirs*.¹⁸

¹² *Ginzberg v. United States* 383 U.S. 463, 470, 475-76 (1966) (“Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.”); See also *Memoirs v. Massachusetts*, 383 U.S. 413, 420 (1966) (Brennan, J., plurality opinion) (holding that “where the purveyor’s sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value”).

¹³ 383 U.S. 463, 475-76 (1966).

¹⁴ 383 U.S. 413, 421 (1966).

¹⁵ *Ginzberg v. United States* 383 U.S. 463, 475-76 (1966); L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. Sup. Ct. Hist. 166, 168-70 (2010). The Court emphasized that Ginzburg also sought mailing privileges in *Blue Ball* and *Intercourse*, Pennsylvania.

¹⁶ *Memoirs v. Massachusetts*, 383 U.S. 413, 421 (1966); L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. Sup. Ct. Hist. 166, 167 (2010)

¹⁷ L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. Sup. Ct. Hist. 166, 168 (2010); Laura Kalman, *Abe Fortas: A Biography* 343-44 (1990). Bruce Allen Murphy, *Fortas: The Rise and Fall of a Supreme Court Justice* 458.

¹⁸ L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. Sup. Ct. Hist. 166, 173 (2010); Laura Kalman, *Abe Fortas: A Biography* 343-44 (1990). Bruce Allen Murphy, *Fortas: The Rise and Fall of a Supreme Court Justice* 458.

I was alarmed by Brennan's vote at Conference to affirm the ban on Fanny Hill. So contrary to my principles, I went to work, suggested the 'pandering' formula to Bill (which I think is as good as any for this cess-pool problem) and came out against Ginzburg. - I guess that subconsciously I was affected by G's slimy qualities - but if I had it to do over again I'd reverse at least as to all except his publication of 'Liaison.' Well, live and learn.¹⁹

Later, Fortas insisted that *Memoirs* and *Ginzburg* "wouldn't have happened without me. I worked every one of those guys over."²⁰

However, Fortas supported the pandering test only because he worried that the Court would permit the suppression of art. In theory, he rejected the obscenity doctrine, but he knew that public opinion insisted on suppressing obscenity, and accused Black and Douglas of "whoring after principle."²¹

In any case, the pandering test never caught on. In 1966, the Court held a slew of obscenity cases, including *Jacobs*, pending its decision in *Redrup v. New York*.²² The Court voted to reverse in *Redrup* and assigned the opinion to Fortas, who circulated draft opinions reversing on the basis of the pandering test.²³ But the Court ultimately rejected Fortas's draft and decided *Redrup* on the facts in a *per curiam* opinion.²⁴ After *Redrup*, the Court disposed of the rest of its obscenity cases in the same way, including *Jacobs*. And for several years, the Court continued to decide obscenity cases on the facts in *per curiam* opinions.²⁵

C. The Miller Test

The Court finally revisited the obscenity doctrine in 1973, holding in *Miller v. California* that "prurient" and "patently offensive" material is

¹⁹ L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. Sup. Ct. Hist. 166, 173 (2010) (quoting Letter, Fortas to Douglas, April 15, 1966, Box 1368, Douglas Papers). See also Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 128 (1972); Edward de Grazia, *Freeing Literary and Artistic Expression During the Sixties: The Role of William J. Brennan, Jr.*, 13 *Cardozo L. Rev.* 103, 157 & n. 220 (1992).

²⁰ Laura Kalman, *Abe Fortas: A Biography* 344 (1990) (quoting interview with Mercedes Eichholz, Oct. 1988).

²¹ Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 129 (1972).

²² *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*).

²³ Draft opinion, *Redrup v. New York*, December 7, 1966, Fortas Papers, Box 30, Folder 680. Laura Kalman, *Abe Fortas: A Biography* 344 (1990); Bruce Allen Murphy, *Fortas: The Rise and Fall of a Supreme Court Justice* 459.

²⁴ *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*).

²⁵ See *Paris Adult Theater I v. Slaton*, 413 U.S. 39, 82 n.8 (1973) (Brennan, J. dissenting) (listing 28 cases in addition to three decided in *Redrup*).

obscene if “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”²⁶ In *Paris Adult Theater I v. Slaton*, decided the same day as *Miller*, the Court also held that the First Amendment does not protect the public exhibition of obscenity to consenting adults, explaining, “The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions.”²⁷ In theory, *Miller* provided a more objective definition of obscenity.

Gradually, the Court refined the *Miller* standard. For example, in *Smith v. United States*, it held that the value test “is particularly amenable to appellate review.”²⁸ And in *Pope v. Illinois*, it held that the value test is objective, not subjective.²⁹ In addition, the Court essentially the Court tried to make the “value” element of the obscenity test an objective, affirmative defense.

More importantly, the Court recognized that the First Amendment does not protect certain categories of sexual expression, other than obscenity. Specifically, it held in *New York v. Ferber* that the “test for child pornography is separate from the obscenity standard enunciated in *Miller*.”³⁰ However, *Miller* remains the governing standard with respect to sexual expression other than child pornography.

D. *The Aftermath of Miller*

After *Miller*, obscenity prosecutions gradually slowed to a trickle.³¹ Through the 1970s and 80s, the government aggressively prosecuted pornography.³² But it generally ignored art, and obscenity prosecutions of art were rarely successful. For example, when Ohio prosecutors pursued obscenity charges against a Cincinnati museum for showing photographs by the artist Robert Mapplethorpe - including five photographs of men in sadomasochistic poses and two images of naked children with exposed

²⁶ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁷ *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

²⁸ *Smith v. United States*, 431 U.S. 291, 305-06 (1977).

²⁹ *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (“The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”)

³⁰ 458 U.S. 747, 764 (1982).

³¹ See Amy Adler, *All Porn All the Time*, 31 NYU R. L. & Soc. Change 695, 695 (2007).

³² See Tim Wu, *How Laws Die*, Slate, October 15, 2007, available at <http://www.slate.com/id/2175730/entry/2175743>.

genitals - the jury returned a verdict of not guilty.³³ For artists, the issue was no longer obscenity prosecutions, but rather the availability of federal grants.³⁴

Under President Clinton, the Department of Justice decided to stop pursuing obscenity and focus on child pornography.³⁵ As a result, federal prosecutors pursued less than 200 obscenity cases.³⁶ Under President George W. Bush, the Department of Justice changed its priorities and began pursuing obscenity as well as child pornography.³⁷ However, it achieved only limited success, pursuing 361 obscenity prosecutions.³⁸ Under President Obama, the Department of Justice de-emphasized adult obscenity and prosecutions returned to Clinton-era levels.³⁹ Today, pornography is ubiquitous and essentially legal.⁴⁰

II. *FLAMING CREATURES*

The only thing to be regretted about the close-up of limp penises and bouncing breasts, the shots of masturbation and oral sexuality, in Jack Smith's *Flaming Creatures* is that it makes it hard simply to talk about this remarkable and

³³ Isabel Wilkerson, Cincinnati Jury Acquits Museum In Mapplethorpe Obscenity Case, *New York Times*, October 6, 1990.

³⁴ See *NEA v. Finley*, 524 U.S. 569 (1998).

³⁵ Bret Boyce, *Obscenity and Community Standards*, 33 *Yale J. Int'l L.* 299, 324 (2008); Jason Krause, *The End of the Net Porn Wars*, *ABA Journal*, February 1, 2008, available at http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/.

³⁶ Spenser S. Hsu, U.S. District judge drops porn charges against video producer John A. Stagliano, *Washington Post*, July 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html>.

³⁷ Spenser S. Hsu, U.S. District judge drops porn charges against video producer John A. Stagliano, *Washington Post*, July 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html>.

³⁸ Bret Boyce, *Obscenity and Community Standards*, 33 *Yale J. Int'l L.* 299, 324 (2008); Spenser S. Hsu, U.S. District judge drops porn charges against video producer John A. Stagliano, *Washington Post*, July 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html>.

³⁹ Spenser S. Hsu, U.S. District judge drops porn charges against video producer John A. Stagliano, *Washington Post*, July 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html>.

⁴⁰ Bret Boyce, *Obscenity and Community Standards*, 33 *Yale J. Int'l L.* 299, 303 (2008) (“As recently as the 1960s, ‘pornography’ was seen as the most extreme form of ‘obscenity.’ In current U.S. constitutional discourse, however, the terms are almost reversed, and ‘obscenity’ is treated as more extreme than ‘pornography.’”)

beautiful film, one has to defend it.⁴¹

By any measure, Jack Smith's *Flaming Creatures* is an unusual film. A 43-minute featurette, the film is a pastiche of campy costume melodramas. It consists of a series of tableaux, several of which include garishly dressed men and women with exposed genitalia engaging in a pantomime of sexual activity. Susan Sontag, an early champion of *Flaming Creatures*, offered the following description of the film:

For the record: in *Flaming Creatures*, a couple of women and a much larger number of men, most of them clad in flamboyant thrift-shop women's clothes, frolic about, pose and posture, dance with one another, enact various scenes of voluptuousness, sexual frenzy, romance, and vampirism – to the accompaniment of a soundtrack which includes some Latin pop favorites (*Siboney*, *Amapola*), rock-'n'-roll, scratchy violin playing, bullfight music, a Chinese song, the text of a wacky ad for a new brand of 'heart-shaped lipstick' being demonstrated on the screen by a host of men, some in drag and some not, and the chorale of flutey shrieks and screams which accompany the group rape of a young woman, rape happily converting itself into an orgy.⁴²

By contrast, Smith considered *Flaming Creatures* a comedy. "I started making a comedy about everything that I thought was funny. And it was funny. The first audiences were laughing from the beginning all the way through. But then that writing started – and it became a sex thing."⁴³

Today, *Flaming Creatures* is generally considered an artistic masterpiece. It strongly influenced many contemporary artists, including Andy Warhol and John Waters. It is the subject of many books and articles. And it regularly shows at art museums and in college classrooms.

But in the 1960s, *Flaming Creatures* was quite polarizing. While many artists and intellectuals championed the film, most people abhorred it. One film critic described *Flaming Creatures* as a "faggoty stag-reel."⁴⁴ And a senator who saw the film exclaimed, "That film was so sick, I couldn't even get aroused."⁴⁵ *Flaming Creatures* was weird and queer and made people uncomfortable.

A. *The Making of Flaming Creatures*

⁴¹ Susan Sontag, *A Feast For Open Eyes*, *The Nation*, April 13, 1964, at 374.

⁴² Susan Sontag, *A Feast For Open Eyes*, *The Nation*, April 13, 1964, at 374.

⁴³ Jack Smith, *Uncle Fishhook* 192.

⁴⁴ J. Hoberman, *On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc* 38 (2001) (quoting Arthur Knight, *The Saturday Review*, November 2, 1963).

⁴⁵ Samuel Shaffer, *On and Off the Floor: Thirty Years as a Correspondent of Capitol Hill* 92 (1980).

Jack Smith made *Flaming Creatures* during the late summer and early fall of 1962.⁴⁶ He stole expired film from the bargain bin at Camera Barn, constructed a ramshackle set on the roof of the Windsor Theatre, and recruited a cast of friends and acquaintances.⁴⁷ Smith filmed *Flaming Creatures* himself, often perched on a makeshift catwalk.⁴⁸ The performers were often intoxicated and in various states of dishabille.⁴⁹ Smith finished filming in October and spent several months editing.⁵⁰ Musician and filmmaker Tony Conrad created the soundtrack, a collage of records from Smith's collection.⁵¹ Apparently, the total cost of *Flaming Creatures* was about \$300.⁵²

B. The Introduction of *Flaming Creatures*

During the winter of 1963, Smith showed versions of *Flaming Creatures* to his friends. He first presented it to the public on March 9, 1963, at a benefit hosted by Piero Heliczer at Jerry Jofen's loft on West 20th Street.⁵³ Jonas Mekas, the doyen of avant-garde cinema, attended the benefit and lavishly praised *Flaming Creatures* in his influential *Village Voice* column, *Movie Journal*:

⁴⁶ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 27 (2001); J. Hoberman, Up on the Roof, Moving Image Source, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>.

⁴⁷ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 27 (2001). Camera Barn was a New York retail chain that sold photographic supplies. The Windsor Theatre was a single-screen movie theater located at 412 Grand Street, New York, New York. Richard Preston rented a loft apartment over the Windsor and allowed Smith to film on the roof. The cast of *Flaming Creatures* included Mario Montez, Francis Francine, Sheila Bick, Joel Markman, Arnold Rockwood, Judith Malina, Marian Zazeela. Tony Conrad, David Gurin, Kate Heliczer, Piero Heliczer, Ray Johnson, Angus MacLise, Ed Marshall, Henry Proach, Jerry Raphael, Irving Rosenthal, Mark Schleifer, Harvey Tavel, Ronald Tavel, John Weiners and LaMonte Young.

⁴⁸ J. Hoberman, Up on the Roof, Moving Image Source, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>.

⁴⁹ J. Hoberman, Up on the Roof, Moving Image Source, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>.

⁵⁰ J. Hoberman, Up on the Roof, Moving Image Source, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>.

⁵¹ These included recordings by Béla Bartók, Kitty Kallen, Yoshiko Yamiguchi, and the Everly Brothers, as well as excerpts from the scores of "The Devil is a Woman" and "Ali Baba and the Forty Thieves."

⁵² Jonas Mekas, *Movie Journal*, *Village Voice*, March 13, 1963.

⁵³ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 32 (2001); J. Hoberman, Up on the Roof, Moving Image Source, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>. Piero Heliczer was a filmmaker, poet, and publisher of underground literature.

Jack Smith just finished a great movie, ‘Flaming Creatures’, which is so beautiful that I feel ashamed even to sit through the current Hollywood and European movies. I saw it privately, and there is little hope that Smith’s movie will ever reach the movie theatre screens. But I tell you, it is a most luxurious outpouring of imagination, of imagery, of poetry, of movie artistry – comparable only to the work of the greatest, like Von Sternberg.⁵⁴

Mekas soon proved himself wrong. On April 29, 1963, he premiered *Flaming Creatures* in his *Underground Midnights* series at the Bleecker Street Cinema, on a double bill with *Blonde Cobra*, a film by Ken Jacobs that starred Jack Smith, Jerry Sims, and Bob Fleischner.⁵⁵ The Bleecker immediately cancelled *Underground Midnights*, ostensibly because it thought that the “low quality of the underground” would ruin its reputation.⁵⁶

In fact, the Bleecker was worried about the police. New York law prohibited the public exhibition of unlicensed films, and *Flaming Creatures* was unlicensed in spades.⁵⁷ The Motion Picture Division of the New York State Education Department examined films submitted for review and issued a license, unless the film was “obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.”⁵⁸ Needless to say, the Motion Picture Division would not have licensed *Flaming Creatures*, if anyone had dared to ask.

Mekas excoriated the Bleecker for cancelling *Underground Midnights*, dubbed *Flaming Creatures* the exemplar of “Baudelairean cinema,” and founded the Filmmakers’ Showcase, a weekly film series at the Gramercy Arts Theater.⁵⁹ The Filmmakers’ Showcase attempted to avoid the license requirement by purporting to present private screenings. Rather than charge admission, Mekas cheekily requested donations to the “Love and Kisses to

⁵⁴ Jonas Mekas, *Village Voice*, April 18, 1963.

⁵⁵ J. Hoberman, *On Jack Smith’s Flaming Creatures and Other Secret-Flix of Cinemaroc* 33 (2001); J. Hoberman, *Up on the Roof*, *Moving Image Source*, March 12, 2009, at <http://www.movingimagesource.us/articles/up-on-the-roof-20090312>.

⁵⁶ J. Hoberman, *On Jack Smith’s Flaming Creatures and Other Secret-Flix of Cinemaroc* 37 (2001).

⁵⁷ New York Education Law Art. 3 Part II § 129. Richard Andress, *Film Censorship in New York State*, available at http://www.archives.nysed.gov/a/research/res_topics_film_censor.shtml.

⁵⁸ New York Education Law Art. 3 Part II § 122, 126, 129. The fee was \$3.50 per 1000 feet or fraction thereof of the original film and \$3 per print. *Id.* at § 126.

⁵⁹ J. Hoberman, *On Jack Smith’s Flaming Creatures and Other Secret-Flix of Cinemaroc* 37 (2001) (citing Jonas Mekas, *Movie Journal: The Rise of a New American Cinema* 85-86 (1972)). The Gramercy Arts Theater was located at 138 E. 27th Street, New York, NY.

Censors Film Society.”⁶⁰

The Filmmakers’ Showcase surreptitiously showed *Flaming Creatures* twice in August 1963.⁶¹ Advertisements in the *Village Voice* cryptically announced “a film praised by Allen Ginsberg, Andy Warhol, Jean-Luc Godard, Diane Di Prima, Peter Beard, John Fles, Walter Gutman, Gregory Corso, Ron Rice, Storm De Hirsch, and everybody else,” and exclaimed, “At last! An evening of Baudelairean cinema!”⁶² Mekas and Jacobs also presented an impromptu midnight screening of *Flaming Creatures* and *Blonde Cobra* – “two pieces of the impure, naughty, and ‘uncinematic’ cinema that is being made now in New York” – at the annual Flaherty Seminar in Brattleboro, Vermont.⁶³

While Mekas championed *Flaming Creatures*, others dismissed it as trash. For example, when film critic Arthur Knight saw *Flaming Creatures* in Los Angeles, he was appalled.⁶⁴ “A faggoty stag-reel, it comes as close to hardcore pornography as anything ever presented in a theater . . . Everything is shown in sickening detail, defiling at once both sex and cinema.”⁶⁵

In the meantime, Smith started a new film, titled *Normal Love*. Andy Warhol admired *Flaming Creatures* and arranged for Smith to film *Normal Love* at a house in Old Lyme, Connecticut.⁶⁶ Warhol also filmed the production of *Normal Love* and made “a little newsreel” that he titled *Jack Smith Filming Normal Love*.⁶⁷

In December 1963, Mekas’s magazine *Film Culture* gave its fifth Independent Film Award to Jack Smith for *Flaming Creatures*, stating:

In FLAMING CREATURES, Smith has graced the anarchic liberation of new American cinema with graphic and rhythmic power worthy of the best of formal cinema. He has attained for the first time in motion pictures a high level of art which is absolutely lacking in decorum; and a treatment of sex

⁶⁰ J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 39 (2001).

⁶¹ J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 39 (2001).

⁶² J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 39 (2001).

⁶³ Jonas Mekas, *Movie Journal*; J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 33 (2001).

⁶⁴ *Midnight Film Series Tonight*, Los Angeles Times, October 12, 1963, at 19.

⁶⁵ J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 38 (2001) (quoting Arthur Knight, *The Saturday Review*, November 2, 1963).

⁶⁶ Andy Warhol and Pat Hackett, *Popism: The Warhol Sixties 100* (NY: Harcourt Brace, 1980). Warhol’s friend Wynn Chamberlain rented the house from Eleanor Wood.

⁶⁷ Andy Warhol and Pat Hackett, *Popism: The Warhol Sixties 100* (NY: Harcourt Brace, 1980)

which makes us aware of the restraint of all previous film-makers.

He has shown us more clearly than anyone before how the poet's license includes all things, not only of spirit, but also of flesh; not only of dreams and of symbol, but also of solid reality. In no other art but the movies could this have so fully been done; and their capacity was realized by Smith.

He has borne us a terrible beauty in *FLAMING CREATURES*, at a time when terror and beauty are growing more apart, indeed are more and more denied. He has shocked us with the sting of mortal beauty. He has struck us with not the mere pity or curiosity of the perverse, but the glory, the pageantry of Transylvestia and the magic of Fairyland. He has lit up a part of life, although it is a part which most men scorn.

No higher single praise can be given an artist than this, that he has expressed a fresh vision of life. We cannot wish more for Jack Smith than this: that he continues to expand that vision, and make it visible to us in flickering light and shadow, and in flame.⁶⁸

Film Culture announced that it would present the award to Smith on December 7, 1963 in a midnight ceremony at the Tivoli Theater that would include a showing of *Flaming Creatures* and excerpts from *Normal Love*.⁶⁹ But when the Tivoli discovered that the films were unlicensed, it cancelled the event at the last minute, locking several hundred attendees out of the theater.⁷⁰ Eventually, Mekas climbed onto a parked car and presented Smith's award.⁷¹

Later that month, the notoriety of *Flaming Creatures* increased when it was censored in Belgium.⁷² The Third International Film Exposition in Knokke-le-Zoute took place onboard a cruise ship named the *Casino*.⁷³ Mekas was one of the nine members of the festival jury, and brought several American underground films, including *Flaming Creatures*, which the other members of the jury would not allow him to show.⁷⁴ "The jury

⁶⁸ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 39 (2001) (quoting Fifth Independent Film Award, 29 *Film Culture* 1 (1963)). The previous recipients of the award were John Cassavetes for *Shadows*, Robert Frank for *Pull My Daisy*, Ricky Leacock for *Primary*, and Stan Brakhage for *Prelude*.

⁶⁹ Fifth Independent Film Award, 29 *Film Culture* 1 (1963). 'Underground' Explosion, *Variety*, Jan. 15, 1964, at 1; Advertisement, *Village Voice*, November 28, 1963; Advertisement, *Village Voice*, December 5, 1963.

⁷⁰ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 40 (2001). Locked Out, Award Made on Curb, 2 a.m., *Variety*, December 1, 1963.

⁷¹ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 40 (2001). Locked Out, Award Made on Curb, 2 a.m., *Variety*, December 1, 1963. Advertisement of *Film Culture*, A Statement on "Flaming Creatures", [*Village Voice*?], December 12, 1963.

⁷² W. German Experimental Film Wins, *Los Angeles Times*, January 2, 1964, at 24.

⁷³ Elliott Stein, *Fog at Knokke*, *Sight & Sound*, Spring 1964.

⁷⁴ Interview with Jonas Mekas.

said it recognized the film's artistic qualities, but said it found it impossible to show under Belgian law."⁷⁵

Mekas quit the jury in protest and called on American filmmakers to withdraw their films from the festival, but the boycott failed when the festival refused to release any of the films.⁷⁶ Mekas responded by presenting midnight shows of *Flaming Creatures* in his hotel room, to an audience that included Jean-Luc Godard, Agnes Varda, and Roman Polanski.⁷⁷

Mekas also tried to sneak *Flaming Creatures* onto the festival screen. First, he replaced a reel of Stan Brakhage's film *Dog Star Man* with a copy of *Flaming Creatures*, but the projectionist noticed and stopped the film.⁷⁸ He tried again on New Year's Eve, the closing night of the festival. The festival presented Andy Warhol's film *Sleep*, and Mekas slipped a copy of *Flaming Creatures* between the reels.⁷⁹ The projectionist agreed to let Mekas show *Flaming Creatures*, but asked to be tied to a chair, in order to create the appearance that he had objected.⁸⁰ As Mekas started to show *Flaming Creatures*, a festival employee realized what was happening and unplugged the projector.⁸¹ Mekas struggled with the festival employee and called for help from "all those present who believe in the freedom of the screen," at which point the director of the festival ordered the staff to cut power to the room.⁸²

When the lights came back on, M. Pierre Vermeyleen, the Belgian Minister of Justice and the honorary head of the festival, announced that there was no censorship in Belgium, but that films containing "outrages against decency" could not be shown.⁸³ That included *Flaming Creatures*, which he considered "pornographic and inartistic."⁸⁴ The festival Pre-Selection Committee was outraged and awarded *Flaming Creatures* a specially created *film maudit* or "cursed film" prize.⁸⁵

⁷⁵ Avant-Garde Movie Seized as Obscene, New York Times, March 4, 1964, at 33.

⁷⁶ Belgians Balk N.Y. 'Creatures', Variety, January 15, 1964, at 1.

⁷⁷ Belgians Balk N.Y. 'Creatures', Variety, January 15, 1964, at 1; German Experimental Film Wins at Festival in Belgium, New York Times, January 2, 1964, at 31; Jonas Mekas, Movie Journal, January 16, 1964, at 13; Jonas Mekas, Movie Journal, January 16, 1964, at 13; J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 40 (2001). Interview with Jonas Mekas. Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

⁷⁸ Interview with Jonas Mekas. Jonas Mekas, Movie Journal, January 16, 1964, at 13.

⁷⁹ Belgians Balk N.Y. 'Creatures', Variety, January 15, 1964, at 1.

⁸⁰ Interview with Jonas Mekas.

⁸¹ Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

⁸² Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

⁸³ Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

⁸⁴ Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

⁸⁵ 'Underground' Explosion, Variety, Jan. 15, 1964, at 1; Elliott Stein, Fog at Knokke,

C. The Persecution of Flaming Creatures

In 1964, New York City stepped up enforcement of obscenity laws, trying to clean up the city in time for the World's Fair. Targets included beatnik coffeehouses, gay bars, and underground movies.⁸⁶ *Flaming Creatures* was soon caught in the dragnet.

On February 3, 1964, the Filmmakers' Showcase presented *Flaming Creatures* and rushes from *Normal Love* at the Gramercy Arts Theatre.⁸⁷ Two weeks later, its license to show films at the Gramercy Arts was terminated because it had failed to respond to a citation for showing unlicensed films.⁸⁸ Mekas moved the Filmmakers' Showcase to the New Bowery Theater, a 92-seat theater at 4 St. Marks Place that he subleased from Diane Di Prima and The American Theatre for Poets, Inc.⁸⁹

On February 25, the Filmmakers' Showcase presented *Flaming Creatures*, rushes from *Normal Love*, and Warhol's newsreel *Jack Smith Filming Normal Love* at the New Bowery.⁹⁰ Mekas advertised a "surprise program" in the *Village Voice* and hung a sign over the door reading, "TONIGHT FLAMING SURPRISE PROGRAM."⁹¹ Unbeknownst to Mekas, the audience included two undercover police officers from the anti-obscenity squad, Detectives Arthur Walsh and Michael O'Toole.⁹²

On March 3, the Filmmakers' Showcase repeated the program.⁹³ Mekas re-ran the ad and re-hung the sign.⁹⁴ The undercover police officers also returned.⁹⁵ According to one of the detectives, *Flaming Creatures* "was

Sight & Sound, Spring 1964.

⁸⁶ Stephanie Gervis Harrington, City Puts Bomb Under Off-Beat Culture Scene, *Village Voice*, March 26, 1964.

⁸⁷ J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 42 (2001).

⁸⁸ J. Hoberman and Jonathan Rosenbaum, *Midnight Movies* (1983), 59-60; Letter from Alexander E. Racolin to Jonas Mekas, Feb. 19, 1964.

⁸⁹ J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 42 (2001). Stephanie Gervis Harrington, City Sleuths Douse Flaming Creatures, *The Village Voice*, March 12, 1964.

⁹⁰ Jerry Tallmer & Stan Koven, Cops Seize 4 In Raid on Village Film, *NY Post*, March 4, 1964, at 2. Jonas Mekas, *Movie Journal*, January 2, 1969, at 41.

⁹¹ Mekas diary entry.

⁹² Jerry Tallmer & Stan Koven, Cops Seize 4 In Raid on Village Film, *NY Post*, March 4, 1964, at 2. *Jacobs v. New York*, Amicus Brief

⁹³ J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 42 (2001). Interview with Jonas Mekas. List prepared by Mekas. Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 5.

⁹⁴ Amicus Brief, *Jacobs v. State of New York*, 388 U.S. 431 (1967); Paul Meskil, Police Chill 'Flaming' Movie, *New York World Telegram*, March 4, 1964.

⁹⁵ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

hot enough to burn up the screen.”⁹⁶ About halfway through *Flaming Creatures*, they stopped the show and arrested Kenneth Jacobs, the projectionist; Florence Karpf, the ticket-seller; and Gerald Sims, the usher.⁹⁷ When Mekas heard about the bust, he rushed to the theater and demanded to be arrested as well.⁹⁸ The detectives also seized the films, the projector, and the screen.⁹⁹ However, most of the audience members got a refund.¹⁰⁰

Mekas, Jacobs, Karpf, and Sims spent an uncomfortable night in prison.¹⁰¹ According to Jacobs, it “was a bad scene, with movie-imitating killer cops, and I feared Jonas was going to bring it down on us. We were ‘fags’ and ‘weirdos’ (intellectuals) and ‘commies.’”¹⁰² The next day, all four were arraigned, charged with showing an “indecent, lewd, and obscene film,” and released without bail.¹⁰³

On March 6, Mekas, Jacobs, Karpf, and Sims were each charged with a misdemeanor violation of New York Penal Law § 1141, based on Detective Walsh’s sworn declaration that *Flaming Creatures* was “garbage . . . indecent, lewd and obscene.”¹⁰⁴ Mekas was charged with supplying and distributing a lewd and obscene film, Karpf was charged with selling tickets to and assisting in the projection of a lewd and obscene film, Jacobs was charged with exhibiting a lewd and obscene film, and Sims was charged

Amicus Brief, *Jacobs v. State of New York*, 388 U.S. 431 (1967). Avant-Garde Movie Seized as Obscene, *New York Times*, March 4, 1964, at 33; Stephanie Gervis Harrington, *City Sleuths Douse ‘Flaming Creatures’*, *Village Voice*, March 12, 1964, at 3.

⁹⁶ Paul Meskil, *Police Chill ‘Flaming’ Movie*, *New York World Telegram*, March 4, 1964.

⁹⁷ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967). Amicus Brief, *Jacobs v. State of New York*, 388 U.S. 431 (1967); Paul Meskil, *Police Chill ‘Flaming’ Movie*, *New York World Telegram*, March 4, 1964.

⁹⁸ Stephanie Gervis Harrington, *City Sleuths Douse Flaming Creatures*, *The Village Voice*, March 12, 1964.

⁹⁹ Avant-Garde Movie Seized as Obscene, *New York Times*, March 4, 1964, at 33. Paul Meskil, *Police Chill “Flaming” Movie*, *New York World Telegram*, March 4, 1964.

¹⁰⁰ J. Hoberman, *On Jack Smith’s Flaming Creatures and Other Secret-Flix of Cinemaroc 42* (2001). Avant-Garde Movie Seized as Obscene, *New York Times*, March 4, 1964, at 33. Jerry Tallmer & Stan Koven, *Cops Seize 4 In Raid on Village Film*, *NY Post*, March 4, 1964, at 2.

¹⁰¹ Stephanie Gervis Harrington, *City Sleuths Douse ‘Flaming Creatures’*, *The Village Voice*, March 12, 1964, at 3.

¹⁰² J. Hoberman, *License for License: Underground Movies and Obscenity in the Sixties*, in *Banned in the U.S.A.: America and Film Censorship*, (Steve Seid, ed. 1993), 14, 16 (quoting Ken Jacobs).

¹⁰³ Stephanie Gervis Harrington, *City Sleuths Douse ‘Flaming Creatures’*, *The Village Voice*, March 12, 1964, at 3.

¹⁰⁴ Charging Document, Criminal Court of the City of New York, March 6, 1964. Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967); *Jacobs v. State of New York*, Amicus Brief, 388 U.S. 431 (1967).

with taking tickets for a lewd and obscene film.¹⁰⁵

Mekas immediately went on the offensive, presenting Jean Genet's film *Un Chant d'Amour* at the Writers' Stage Theatre on East 4th Street as "a benefit for the *Flaming Creatures* defense fund."¹⁰⁶ Genet was a prominent French novelist, playwright, and poet, and *Un Chant d'Amour* is a 25-minute film about two imprisoned men who fall in love, which includes images of the men masturbating and a dream sequence that suggests oral sex.¹⁰⁷ Mekas wanted the police to bust *Un Chant d'Amour* because he thought it would be easier to defend than *Flaming Creatures*.¹⁰⁸

The police were happy to oblige. When Mekas presented *Un Chant d'Amour* on March 7, nothing happened.¹⁰⁹ But when he presented it again on March 13, undercover police officers John Fitzpatrick and Walter Lynch attended a midnight show. After watching the film, they paid the suggested \$2 donation. Then they arrested Mekas and his ticket-taker, French film critic Pierre Cottrell. They also seized the film and all of the projection equipment. Mekas and Cottrell spent the night in prison and were released the next day on \$1,500 bail.¹¹⁰

At that point, the city lost its patience. When the Filmmakers' Showcase presented two unlicensed Japanese films on March 17, 1964, the director of the License Department stopped the show.¹¹¹ The License Department also cited the New Bowery Theater for showing an unlicensed film.¹¹² Theodora Bergery, the owner of the theater, was livid.¹¹³

¹⁰⁵ Charging Document, Criminal Court of the City of New York, March 6, 1964.

¹⁰⁶ Mekas Risking Jail Sentence, *Variety*, March 18, 1964. Mekas Gaoled Again, Genet Film Does It, *Village Voice*, March 19, 1964; *Daily Variety*, March 17, 1964. J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 43 (2001); Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', *The Village Voice*, March 12, 1964, at 3.

¹⁰⁷ *Un Chant d'Amour* (Genet 1950), available at <http://www.ubu.com/film/genet.html>.

¹⁰⁸ "I knew that Jack's would be a difficult case to fight, with nobody really knowing who he was, and I felt that Genet – for the right or wrong reasons – would be a better case because he was a famous writer." Andy Warhol and Pat Hackett, *Popism: The Warhol Sixties* 100 (NY: Harcourt Brace, 1980); J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 43 (2001).

¹⁰⁹ Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', *The Village Voice*, March 12, 1964, at 3.

¹¹⁰ Mekas Gaoled Again, Genet Film Does It, *Village Voice*, March 19, 1964; *Daily Variety*, March 17, 1964.

¹¹¹ Nathan Adams, Vice Squad Raids Theatre 2d Time, *New York Journal-American*, March 18, 1964, at 42; Don Kirk & Dave Levin, Big Feature at the Movies – An Invasion by the Law, *New York Post*, March 18, 1964.

¹¹² Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', *The Village Voice*, March 12, 1964, at 3.

¹¹³ Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', *The Village Voice*, March 12, 1964, at 3; *Flaming Theater Rising Again*, *Village Voice*, April 30, 1964,

Ultimately, the License Department suspended the New Bowery Theatre's license for 30 days, and the American Theatre for Poets found a new home.¹¹⁴

Mekas also hosted private screenings of *Flaming Creatures*, hoping to gin up support.¹¹⁵ He met with mixed success. Susan Sontag loved *Flaming Creatures*, and published a review in the *Nation* arguing that it was "a brilliant spoof on sex."¹¹⁶ But he soon learned that audiences expecting pornography were less receptive:

One of the most shocking experiences I had was during a screening of 'Flaming Creatures' to a group of New York writers, upper-class writers who write for money, who expected to see another 'blue movie' - I had never met such violent reactions, such outbursts of uncontrolled anger. Someone was threatening to beat me up. They would have sat happily through a pornographic movie, which they were expecting to see and which the host had promised them that night - but they could not take the fantasies of Jack Smith.¹¹⁷

III. *JACOBS V. NEW YORK*

A. *Flaming Creatures in New York State Court*

The *Flaming Creatures* trial was originally scheduled to begin on April 6, 1964, and the *Un Chant d'Amour* trial was scheduled to begin a week later, on April 13.¹¹⁸ Both were postponed, and the *Flaming Creatures* trial began on June 2, before a three-judge panel of the Criminal Court of the City of New York: former mayor Vincent R. Impelliteri, Thomas E. Rohan, and Michael A. Castaldi.¹¹⁹ Jacobs, Mekas, Karpf, and Sims were each charged with one count of violating New York Penal Law § 1141 by showing an obscene movie.¹²⁰ All four pleaded not guilty.¹²¹ Assistant District Attorney Harris represented the State.¹²² Emile Zola Berman and

at 15.

¹¹⁴ City Softens Approach to Poets in Cafes, *Village Voice*, April 2, 1964, at 2.

¹¹⁵ Mekas Risking Jail Sentence, *Variety*, March 18, 1964.

¹¹⁶ Susan Sontag, *The Nation* at 375-76 (April 13, 1964).

¹¹⁷ Jonas Mekas, *Movie Journal*, January 16, 1964, at 13

¹¹⁸ Mekas Risking Jail Sentence, *Variety*, March 18, 1964.

¹¹⁹ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at

16.

¹²⁰ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

¹²¹ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

¹²² Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16.

David G. Trager represented the defendants.¹²³

The State argued that *Flaming Creatures* is obscene principally by showing the film to the court. Harris called only two witnesses: Detectives Arthur Walsh and Michael O'Toole. They testified that Hogan ordered them to bust *Flaming Creatures*, that they seized the film two days later, and that they did not obtain search or arrest warrants.¹²⁴ Walsh also testified that *Flaming Creatures* was "garbage" and that it was "indecent, lewd and obscene."¹²⁵ Then, Harris presented *Flaming Creatures* to the judges, the defendants, and a few reporters.¹²⁶ The judges, "two of them munching cigars, watched impassively as the movie was shown in chambers."¹²⁷

The defense responded that *Flaming Creatures* is not obscene because it is a work of art.¹²⁸ Berman called eleven witnesses, most of them experts, to prove it. But Harris repeatedly objected that expert testimony on artistic merit is irrelevant to obscenity, and the court sustained his objections, over Judge Rohan's dissent.¹²⁹

¹²³ Berman was a prominent tort lawyer who specialized in civil rights cases. Among many others, Berman defended Staff Sergeant Matthew McKeon, a Marine officer accused of causing the death of six recruits while drunk; Camille Cravelle, a black teenager accused of raping a white woman in Alexandria, Louisiana; and Sirhan Sirhan, accused of assassinating Senator Robert Kennedy. The Stunning Blow, *Time*, August 13, 1956. The Trial of Sergeant McKeon, *Time*, July 30, 1956. Priceless Defenders, *Time*, Jan. 17, 1969. Linda Charlton, Emile Zola Berman, 78, *Dead*; Defense Attorney for Sirhan, *New York Times*, July 5, 1981, at 14. Trager was appointed to the United States District Court for the Eastern District of New York in 1994.

Mekas's friend Jerome Hill paid Berman's legal fees. Hill was a filmmaker and an heir of railroad baron James J. Hill.

¹²⁴ Amicus Brief, *Jacobs v. New York*. Notes of Jonas Mekas, June 2, 1964.

¹²⁵ Amicus Brief, *Jacobs v. New York*.

¹²⁶ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16. Notes of Jonas Mekas, June 2, 1964.

¹²⁷ Paul Hoffman, A Movie Show - In Criminal Court. *New York Post*, June 3, 1964, at 16.

¹²⁸ Berman called eleven witnesses: Shirley Clarke, a director and film professor at Columbia University; Louis Allen, a producer; Willard Van Dyke, a producer and film festival judge; Herman Weisberg, a film professor at the City College of New York; Susan Sontag, a journalist; Allan Ginsberg, a poet; Joseph Kaster, a classics professor at the New School for Social Research; Robert Trumbull, an employee of the Film-Makers' Cooperative; Charles Levine, an audience member; Dr. Edward Hornick, a psychiatrist, and Dr. John Thompson, a psychiatrist and associate professor at the Albert Einstein School of Medicine, Yeshiva University. Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967). Amicus Brief, *Jacobs v. State of New York*, 388 U.S. 431 (1967). Berman did not call Jack Smith and did not want Smith to attend the trial. P. Adams Sitney, *Factory Inspected - Filmmaker Jack Smith*, *Artforum* (1997). J. Hoberman, *On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc* 45 (2001).

¹²⁹ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

The court excluded the testimony of Berman's first three witnesses as inadmissible. Louis Allen, a producer, would have testified that *Flaming Creatures* "was a serious, talented work of art that poetically and wittily satirized advertising, fashion, love, and society's use of sex."¹³⁰ Willard Van Dyke, a documentary filmmaker and film festival judge, would have testified about the cinematic qualities of *Flaming Creatures*.¹³¹ Herman Weinberg, a professor of film history at the City College of New York, would have testified that *Flaming Creatures* "was an aesthetic production that satirized sex and an experimental film that employed artistic technique."¹³² Harris objected to all of this testimony and the court sustained his objections.¹³³

Berman's next witness was Susan Sontag. The court admitted into evidence Sontag's review of *Flaming Creatures* and allowed her testify about the meaning of the review. Among other things, Sontag defined of the avant-garde film movement as "a small group of people who are doing experimental work that is usually just mainly followed by critics and by other artists."¹³⁴ Sontag also pointed to "posters outside Times Square movie theatres that advertise war movies with sadistic atrocity pictures" as an example of pornography.¹³⁵ However, Harris objected to Sontag's testimony that *Flaming Creatures* is a work of art and the court sustained his objection.

After Sontag testified, Berman moved for a mistrial, arguing that the court was preventing the defendants from presenting any evidence because it had already decided that *Flaming Creatures* was obscene.¹³⁶ The court denied the motion and reasserted its evidentiary rulings, Rohan continuing to dissent.¹³⁷

While the court allowed some of Berman's remaining witnesses to testify, it did not allow any of them to testify that *Flaming Creatures* is a work of art. Shirley Clarke, a filmmaker and professor at Columbia University, testified that the Film-Makers' Cooperative distributes avant-garde films, including *Flaming Creatures*. Joseph Kaster, a professor at the New School for Social Research, testified that he showed *Flaming*

Amicus Brief, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

¹³⁰ Amicus Brief, *Jacobs v. New York* at 4.

¹³¹ Amicus Brief, *Jacobs v. New York* at 5.

¹³² Amicus Brief, *Jacobs v. New York* at 5.

¹³³ Amicus Brief, *Jacobs v. New York* at 5.

¹³⁴ Amicus Brief, *Jacobs v. New York* at 5.

¹³⁵ Stephanie Gervis Harrington, *Pornography is Undefined* at Film-Critic Mekas' Trial, *Village Voice*, June 18, 1964.

¹³⁶ Amicus Brief, *Jacobs v. New York* at 5.

¹³⁷ Amicus Brief, *Jacobs v. New York* at 5.

Creatures to his class as an illustration of the Dionysius myth.¹³⁸ Richard Leslie Trumbull, a volunteer clerk at the Film-Makers' Cooperative, which distributed *Flaming Creatures*, testified that the defendants were arrested at a benefit screening advertised in the *Village Voice*.¹³⁹ Allen Ginsburg, the poet, testified that he knew Jack Smith and had seen *Flaming Creatures*.¹⁴⁰ Ginsburg also defined the avant-garde as "a group of people up front looking to experiment with their own consciousness, their own hearts, their own feelings, in an attempt to communicate with other human beings."¹⁴¹ Harris objected to Ginsburg's testimony that *Flaming Creatures* has "aesthetic and artistic value as well as social importance," and the court sustained the objection.¹⁴²

Harris stipulated to the testimony of Berman's remaining witnesses. Charles Levine, who attended the March 3 presentation of *Flaming Creatures*, would have testified that the audience was well behaved.¹⁴³ Dr. Edward Hornick and Dr. John Thompson, psychiatrists, would have testified that *Flaming Creatures* is a work of art.¹⁴⁴ Harris objected to the admission of this testimony and the court sustained his objection. Oddly, Berman did not call Jack Smith as a witness. Smith was quite a colorful character and Berman apparently wanted to keep him out of the courtroom.¹⁴⁵

On June 12, 1964, Berman concluded the case for the defense and moved to dismiss the complaints against all four defendants on the ground that the state failed to prove beyond a reasonable doubt that *Flaming Creatures* is obscene.¹⁴⁶ Harris responded that artistic merit does not

¹³⁸ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16. J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 45 (2001) (citing Stephanie Gervis Harrington, Pornography is Undefined at Film-Critic Mekas' Trial, *The Village Voice*, June 18, 1964, at 9); Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 4.

¹³⁹ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16. J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 45 (2001) (citing Stephanie Gervis Harrington, Pornography is Undefined at Film-Critic Mekas' Trial, *The Village Voice*, June 18, 1964, at 9); Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 4.

¹⁴⁰ Amicus Brief, *Jacobs v. New York* at 5.

¹⁴¹ Stephanie Gervis Harrington, Pornography is Undefined at Film-Critic Mekas' Trial, *Village Voice*, June 18, 1964.

¹⁴² Amicus Brief, *Jacobs v. New York* at 5.

¹⁴³ Amicus Brief, *Jacobs v. New York* at 7.

¹⁴⁴ Amicus Brief, *Jacobs v. New York* at 7.

¹⁴⁵ P. Adams Sitney, *Factory Inspected - Filmmaker Jack Smith*, *Artforum* (1997). J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 45 (2001).

¹⁴⁶ Amicus Brief, *Jacobs v. New York* at 8.

disprove obscenity.¹⁴⁷ The court denied the motion to dismiss and convicted Mekas, Jacobs, and Karpf.¹⁴⁸ The court acquitted Sims, finding that he was not responsible for presenting *Flaming Creatures* because he was hired as a ticket taker at the last minute.¹⁴⁹

The *Un Chant d'Amour* trial was scheduled to begin on June 19, but was postponed until after the *Flaming Creatures* sentencing hearing.¹⁵⁰ The sentencing hearing was held on August 7, 1964, before another three-judge panel of the Criminal Court of the City of New York: Simon Silver, Edward J. Greenfield, and Charles S. Whitman.¹⁵¹ The judges watched *Flaming Creatures* before sentencing the defendants. Jacobs and Mekas got sixty days in the city workhouse, execution of sentence suspended, and Karpf got a suspended sentence.¹⁵² When the sentences were entered, the state dismissed the charges involving *Un Chant d'Amour*, “on condition, agreed to by Mekas, that the import not be shown anywhere in New York State before all appeals from the ‘Flaming Creatures’ conviction had been finally disposed of.”¹⁵³

Crusaders against obscenity relished the victory. New York Assistant District Attorney Richard H. Kuh crowed, “Despite anguished squeals of ‘persecution of the avant-garde,’ and howls of ‘censorship’ by those who seemed to relish their kinship to martyrdom, Mekas was tried and convicted for showing ‘Flaming Creatures.’”¹⁵⁴ Even some of Mekas’s allies criticized his approach. For example, Amos Vogel complained, “it is highly debatable whether ‘Flaming Creatures’ should have been used as a test case” because “despite flashes of brilliance and moments of perverse, tortured beauty” it “remains a tragically sad film noir, replete with limp genitalia and limp art.”¹⁵⁵

Jacobs, Mekas, and Karpf appealed their convictions, without success. Berman filed a notice of appeal in the Appellate Term of the Supreme

¹⁴⁷ Amicus Brief, *Jacobs v. New York* at 8.

¹⁴⁸ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 2.

¹⁴⁹ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16.

¹⁵⁰ Paul Hoffman, A Movie Show—in Criminal Court, *New York Post*, June 3, 1964, at 16.

¹⁵¹ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 17.

¹⁵² *Jacobs v. New York*, 388 U.S. 431, 432 (1967).

¹⁵³ Richard H. Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 *Cath. Law.* 285, 292 (1964). Mekas believes that Hogan decided to drop the case against *Un Chant d'Amour* when he learned that Genet’s plays were produced on Broadway. Interview with Jonas Mekas.

¹⁵⁴ Richard H. Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 *Cath. Law.* 285, 292 (1964).

¹⁵⁵ Amos Vogel, *Flaming Creatures Cannot Carry Freedom’s Torch*, *Village Voice*, May 7, 1964,

Court, First Judicial Department, and on December 9, 1965, that court entered an order without opinion affirming the convictions below.¹⁵⁶ Berman also filed an application for leave to appeal to the Court of Appeals, and on April 15, 1966, Judge Stanley H. Fuld denied permission to appeal.¹⁵⁷

B. Flaming Creatures in the Supreme Court

Their state appeals exhausted, Jacobs, Mekas, and Karpf appealed to the United States Supreme Court. On July 13, 1966, Berman filed a notice of appeal to the Supreme Court of the United States in the Criminal Court of the City of New York, New York County, and on October 11, he filed a jurisdictional statement for *Jacobs v. New York* in the Supreme Court of the United States.¹⁵⁸

Berman's jurisdictional statement argued that New York Penal Law § 1141 violated the First Amendment as applied because: 1) it excluded expert testimony on artistic merit, educational value, social importance, prurient appeal, and community standards; 2) it prohibited the portrayal of indecent conduct; 3) it excluded evidence of the context in which a film was shown; and 4) it permitted an obscenity conviction without a finding of pandering.¹⁵⁹

Essentially, Berman argued New York Penal Law § 1141 was unconstitutional because it did not require pandering. *Flaming Creatures* was presented "in the setting of an *avant garde* group sincerely devoted to the arts," not as "an attempt to pander to prurient interests."¹⁶⁰ In other words, "we have a film the showing of which was motivated by a legitimate artistic purpose and not for the commercial exploitation of sex in cinema."¹⁶¹ This argument was calculated to appeal to Fortas, and it succeeded.

On November 11, 1966, New York filed a motion to dismiss or affirm *Jacobs*, arguing that it was moot because appellants' suspended sentences had lapsed and because the trial court properly found *Flaming Creatures* obscene.¹⁶² The motion emphasized the subject matter of the film, describing it in explicit detail:

¹⁵⁶ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 17-18.

¹⁵⁷ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 19-20.

¹⁵⁸ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 3.

¹⁵⁹ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 3-4.

¹⁶⁰ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 12.

¹⁶¹ Jurisdictional Statement, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 12.

¹⁶² Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967).

It is comprised of several separable sequences, all of them depicting some form of transvesticism or abnormal sexual behavior. One of the sequences concerns a sexual attack upon a female by four individuals, some dressed as women, with the camera focusing at times on the “victim’s” bare breast which is being violently shaken by a participant in the assault, and dwelling at other times on the subject’s uncovered pubic area which is being massaged by another attacker. In other sequences there are numerous scenes of male masturbation. Such depictions of penises and pubic regions, portrayed in the perverse manner they are here, debase both the sexual act and the human body and are clearly hard-core pornography.¹⁶³

Berman filed a reply to New York’s motion to dismiss or affirm on November 30.¹⁶⁴ He argued that *Jacobs* was not moot because the obscenity convictions injured appellants by preventing recovery of the confiscated film and equipment, limiting the availability of motion picture licenses, and staining their reputations.¹⁶⁵ Berman also reiterated that *Jacobs*, *Karpf*, and *Mekas* were not panders. “Not only is any evidence of commercial exploitation wholly absent here, but the opposite is established by the record.”¹⁶⁶ In fact, they “considered the film as well as the many other films produced by the members of Film Makers Cooperative as works of art, treated them as such and expected others to do likewise.”¹⁶⁷

Berman’s focus on pandering was quite timely because the Court was wrestling with the pandering test when he appealed *Jacobs*. In fact, Berman filed the jurisdictional statement in *Jacobs* on the day that oral arguments in *Redrup* concluded.¹⁶⁸ And the Court noticed Berman’s focus on pandering. For example, Justice Douglas’s law clerk Lewis B. Merrifield drafted a memorandum concluding that *Jacobs* should be reversed for lack of pandering:

It seems to me that a good argument can be made that Appellants cannot be convicted under the Ginzburg rule. If ‘pandering’ can be used to convict a person, it should be used to acquit as well. Many autoerotic films are considered works of art – due to their symbolism. If a film of this kind is

¹⁶³ Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 7.

¹⁶⁴ Appellants’ Reply to Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 2-3.

¹⁶⁵ Appellants’ Reply to Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 2-3.

¹⁶⁶ Appellants’ Reply to Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 4.

¹⁶⁷ Appellants’ Reply to Motion to Dismiss or Affirm, *Jacobs v. State of New York*, 388 U.S. 431 (1967) at 4.

¹⁶⁸ *Redrup v. New York*, 386 U.S. 767 (1967).

directed to a group of people who appreciate experimental, avant guard films, and exhibited by people who desire to promote film art, an inverse use of Ginzburg should protect them.¹⁶⁹

On December 9, Edward de Grazia and John R. Kramer of the National Students Association filed an amicus brief in *Jacobs*, with the consent of the parties.¹⁷⁰ The National Students Association emphasized that *Jacobs*, *Mekas*, and *Karpf* were not panders, but “members of a cooperative society of experimental film-makers” who showed “an avant-garde motion picture for the benefit of society.”¹⁷¹ And it argued that courts hearing obscenity cases must consider expert testimony on artistic and social value, in order to protect “the work whose artistic and social values are apparent only to and appreciated only by a minority on the frontiers of artistic expression and human knowledge, *i.e.*, the avant-garde.”¹⁷²

The Court expected *Redrup* to clarify obscenity doctrine by emphasizing the pandering test. So, on January 6, 1967, it held eighteen obscenity cases pending its decision in *Redrup*, including *Jacobs*.¹⁷³ But when the Court finally decided *Redrup* on May 8, 1967, it punted. Rather than clarify obscenity doctrine, it issued a *per curiam* opinion reversing on the facts.¹⁷⁴

The Court planned to decide the *Redrup* line of obscenity cases in conference on May 26, 1967. However, it was forced to postpone them again because it had not yet received the films at issue in *Jacobs v. New York* and *Schackman v. California*. The Court eventually received *Flaming Creatures* on June 2, as well as *O-7*, *O-12*, and *D-15*, the stag films at issue in *Schackman*.¹⁷⁵ Presumably, the films were shown for the Court, but there is no record of who attended. A few of the justices also saw *Un Chant d'Amour*, the film at issue in *Landau v. Fording*.¹⁷⁶ According to Stewart, “the film is not as the Cal SC described it - no scenes of sodomy etc. The worst thing was a very fleeting scene of masturbation.”¹⁷⁷

The Court finally voted on the obscenity cases in conference on June 8,

¹⁶⁹ Memorandum from Lewis B. Merrifield to Justice Douglas, December 13, 1966, Justice Douglas Papers, LOC.

¹⁷⁰ Amicus Brief, *Jacobs v. New York* at 1. The National Students Association was a liberal organization founded in 1947 at the University of Wisconsin at Madison. In 1978, it merged with the National Student Lobby and became the United States Student Association. See <http://www.usstudents.org/>.

¹⁷¹ Amicus Brief, *Jacobs v. New York* at 3.

¹⁷² Amicus Brief, *Jacobs v. New York* at 13.

¹⁷³ Conference List, January 6, 1967.

¹⁷⁴ *Redrup v. New York*,

¹⁷⁵ Memorandum from John F. Davis to Justice Warren, June 2, 1967, WOD papers.

¹⁷⁶ *Landau v. Fording*, 388 U.S. 456 (1967).

¹⁷⁷ Note from Lewis B. Merrifield to Justice Douglas, undated, WOD papers.

1967. The justices voted to reverse many of the cases. But in *Jacobs*, a majority of the justices voted to either affirm the convictions or dismiss the appeal as moot. On the merits, Justices White, Brennan, Harlan, Clarke, and Warren voted to affirm; Justices Fortas, Stewart, and Douglas voted to reverse; and Justice Black did not vote.¹⁷⁸ However, Justices White, Stewart, Harlan, Clark, and Black also voted to dismiss *Jacobs* as moot.¹⁷⁹

The Court decided the *Redrup* line of obscenity cases on June 12, 1967. Most of the cases were decided in *per curiam* opinions reversing under *Redrup* in *per curiam* opinions.¹⁸⁰ *Jacobs* was also decided in a *per curiam* opinion, but it was dismissed as moot. Brennan noted his vote to affirm and Fortas noted his vote to reverse. Warren dissented from the dismissal of *Jacobs* as moot, arguing that it allows states to insulate convictions from review by imposing short suspended sentences.¹⁸¹ Warren added that he would affirm the convictions on the merits because *Flaming Creatures* “falls outside the range of expression protected by the First Amendment according to the criteria set out in *Roth*.”¹⁸² Douglas also dissented from the dismissal of *Jacobs* as moot, arguing that denying review of obscenity convictions would cause people “to comply with what may be an invalid statute” and “steer wide and refrain from showing or selling protected material.”¹⁸³ He closed by noting that the film and the motion picture equipment would be forfeit if the Court dismissed the appeal.¹⁸⁴

While the Court ultimately dismissed *Jacobs* as moot, the vote count on the merits is strange. There should have been five votes to reverse. At the June 8 conference, Fortas, Stewart, and Douglas voted to reverse. But in theory, White and Brennan should have voted to reverse as well. White’s unwritten test for obscenity was “no erect penises, no intercourse, no oral or anal sodomy,” so “no erections and no insertions equaled no obscenity.”¹⁸⁵ Brennan applied a similar “limp dick” test, under which obscenity required

¹⁷⁸ Appellate Docket Book, October Term 1966, No. 660, Fortas papers.

¹⁷⁹ Appellate Docket Book, October Term 1966, No. 660, Fortas papers.

¹⁸⁰ See *Ratner v. California*, 388 U.S. 442 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); and *Books, Inc. v. United States*, 388 U.S. 449 (1967) (reversing under *Redrup* in *per curiam* opinion).

¹⁸¹ *Jacobs v. New York*, 388 U.S. 431, 432-36 (1967).

¹⁸² *Jacobs v. New York*, 388 U.S. 431, 436 (1967).

¹⁸³ *Jacobs v. New York*, 388 U.S. 431, 436-38 (1967).

¹⁸⁴ *Jacobs v. New York*, 388 U.S. 431, 436-38 (1967). Indeed, none of the films or equipment was ever returned. Jonas Mekas, *Movie Journal*, January 2, 1969, at 41.

¹⁸⁵ Bob Woodward & Scott Armstrong, *The Brethren* 193 (1979).

an erection.¹⁸⁶ Under Brennan's rule, "[o]ral sex was tolerable if there was no erection."¹⁸⁷

Flaming Creatures is replete with limp dicks and conspicuously lacks erections and intercourse. Nevertheless, both White and Brennan found it obscene. Perhaps they were disturbed by its unfamiliar form and homosexual content. Notably, they also voted to affirm the *Un Chant d'Amour* conviction in *Landau v. Fording*, with Justices Black, Douglas, Stewart, and Fortas voting to reverse.¹⁸⁸

C. *The Continuing Prosecution of Flaming Creatures*

As *Jacobs* wended its way through the courts, the notoriety of *Flaming Creatures* increased. In 1966, Vincent Canby of the New York Times described it as "a film record of a transvestite orgy."¹⁸⁹ The following year, Rosalyn Regelson offered the more charitable assessment that "Jack Smith's still-banned 'Flaming Creatures' depicts the exotic 'pageantry of Transvestia and the magic of Fairyland' as the Film Culture award puts it, in phantasmagoric terms."¹⁹⁰ But *Time* dismissively concluded, "Jack Smith's *Flaming Creatures*, an incredibly tedious parody of a sexploitation feature, demonstrates how easy it is to fall asleep in the middle of an hour-long transvestite orgy."¹⁹¹

College film societies also began to present *Flaming Creatures*, and several were busted. On April 1, 1965, the Albuquerque police busted a presentation of *Flaming Creatures* at the University of New Mexico.¹⁹² Municipal Judge James Malone watched the film and concluded that it was obscene, but the city attorney declined to prosecute because the people who showed it did not intend to promote pornography.¹⁹³ Apparently, a student named Bill Dodd had rented *Flaming Creatures* sight-unseen because its star Mario Montez was an alumnus of the University of New Mexico.¹⁹⁴

¹⁸⁶ Bob Woodward & Scott Armstrong, *The Brethren* 194 (1979).

¹⁸⁷ Bob Woodward & Scott Armstrong, *The Brethren* 194 (1979).

¹⁸⁸ *Landau v. Fording*, 388 U.S. 456 (1967).

¹⁸⁹ Vincent Canby, *Underground Movies Find Showcase on 41st St.*, *New York Times*, January 7, 1966, at 21.

¹⁹⁰ Rosalyn Regelson, *Where Are 'The Chelsea Girls' Taking Us?*, *New York Times*, Sept. 24, 1967, at 131..

¹⁹¹ *Art of Light & Lunacy: The New Underground Films*, *Time*, Feb. 17, 1967.

¹⁹² "Pop Art" Film Sponsored By Rights Group Here Is Confiscated by Police, *Albuquerque Journal*, April 2, 1965. *Variety*, *Albuquerque Axes Avant-Garde Film About 'Third Sex'*, *Variety*, April 7, 1965.

¹⁹³ "Pop Art" Film Sponsored By Rights Group Here Is Confiscated by Police, *Albuquerque Journal*, April 2, 1965. *Variety*, *Albuquerque Axes Avant-Garde Film About 'Third Sex'*, *Variety*, April 7, 1965.

¹⁹⁴ "Pop Art" Film Sponsored By Rights Group Here Is Confiscated by Police,

Similarly, on November 9, 1966, the Austin police busted a presentation of *Flaming Creatures* at the University of Texas.¹⁹⁵ The show was arranged by an art student named Cynthia Smagula and sponsored by Students for a Democratic Society.¹⁹⁶ Smagula cancelled the show when the police arrived in order to avoid arrest, even though the police said they did not intend to arrest anyone.¹⁹⁷

Most notably, on January 18, 1967, the Ann Arbor police busted a presentation of *Sins of the Fleshapoids* and *Flaming Creatures* at the University of Michigan.¹⁹⁸ About 600 people attended the show, which was arranged by Mary E. Barkey, hosted by the University of Michigan Cinema Guild and sponsored by Students for a Democratic Society.¹⁹⁹ A professor had filed a complaint about the show, so Detective Lieutenant Eugene Staudenmeier attended as well.²⁰⁰ Staudenmeier ignored *Sins of the Fleshapoids*, which lacked explicit sexual content, but seized *Flaming Creatures* about seven or eight minutes after it began, tucking the film under his coat and trying to leave the theater.²⁰¹ The audience erupted, trying to stop Staudenmeier from leaving the projection booth and chasing him out of the theater.²⁰² About 100 students protested the seizure of *Flaming Creatures*, demonstrating in front of the police department and staging a four-hour sit-in at city hall.²⁰³

Albuquerque Journal, April 2, 1965. Variety, Albuquerque Axes Avant-Garde Film About 'Third Sex', Variety, April 7, 1965. Mario Montez (Rene Rivera), later became one of Andy Warhol's "superstars."

¹⁹⁵ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 46 (2001) (citing Film Showing Cancelled After Police Enter "Y," The Daily Texan, November 10, 1966 at 1).

¹⁹⁶ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 46 (2001) (citing Film Showing Cancelled After Police Enter "Y," The Daily Texan, November 10, 1966 at 1).

¹⁹⁷ Renee Fendrich, Film Showing Canceled After Police Enter 'Y', The Daily Texan, November 10, 1966 (Austin, Texas).

¹⁹⁸ J. Hoberman, On Jack Smith's *Flaming Creatures* and Other Secret-Flix of Cinemaroc 46 (2001). Transvestite 'Flaming Creatures' Pic Raided; Campus Auspices Vs. Cops, [newspaper?], January 25, 1967. *Sins of the Fleshapoids* (Mike Kuchar 1965).

¹⁹⁹ Paul Krassner, Flicks and Kicks: 2, Cavalier at 25 (196?). Underground Film Is Seized At U. of Michigan Showing, New York Times, January 20, 1967, at 25; Guys in Drag ('Flaming Creatures') Involve Campus Legal Pundits, Variety, April 5, 1967, at 20. Transvestite 'Flaming Creatures' Pic Raided; Campus Auspices Vs. Cops, [newspaper?], January 25, 1967

²⁰⁰ Alan Glenn, The Flap Over 'Flaming Creatures', Michigan Today, April 14, 2010.

²⁰¹ Underground Film Is Seized At U. of Michigan Showing, New York Times, January 20, 1967, at 25. Film Screening Asked in Inquiry Over Fortas, Los Angeles Times, July 28, 1968, at E6 (watched 14 minutes); Alan Glenn, The Flap Over 'Flaming Creatures', Michigan Today, April 14, 2010.

²⁰² Alan Glenn, The Flap Over 'Flaming Creatures', Michigan Today, April 14, 2010.

²⁰³ Paul Krassner, Flicks and Kicks: 2, Cavalier at 25 (196?).

The next day, the police arrested four members of the Cinema Guild: Ellen P. Frank, Mary E. Barkey, Elliot S. Cohen, and Hubert L. Cohen, the faculty adviser.²⁰⁴ Each was charged with violating the Michigan obscenity law.²⁰⁵ Municipal Judge S. J. Elden released the defendants without bail, but described *Flaming Creatures* as “a smutty purveyance of filth” that “borders on the razor’s edge of hard-core pornography” and “would sexually arouse and excite transvestites and homosexuals.”²⁰⁶ The defendants responded by moving to suppress the evidence and filing a civil rights claim in federal court, requesting an injunction against the seizure of art films and \$15,000 damages.²⁰⁷ The obscenity trial began on December 12 and ended immediately when Mary Barkey pleaded guilty to a lesser charge.²⁰⁸ On February 2, 1968, Barkey paid a \$235 fine and charges against the other three defendants were dropped.²⁰⁹ The Ann Arbor police kept the confiscated print of *Flaming Creatures*, which featured in the Fortas Film Festival later that year.

IV. THE FORTAS FILM FESTIVAL

Flaming Creatures is probably the only avant-garde film ever shown in the Capitol, and is certainly the only avant-garde film to have prevented a Supreme Court confirmation. When Johnson nominated Fortas to replace Warren as Chief Justice, Fortas’s opponents had to justify a filibuster. *Flaming Creatures* was their ace in the hole.

On June 13, 1968, Warren informed Johnson of his intention to retire and sent a resignation letter stating, “I hereby advise you of my intention to retire as Chief Justice of the United States, effective at your pleasure.”²¹⁰ In

²⁰⁴ Transvestite ‘Flaming Creatures’ Pic Raided; Campus Auspices Vs. Cops, [newspaper?], January 25, 1967. Paul Krassner, *Flicks and Kicks*: 2, Cavalier at 25 (196?).

²⁰⁵ Paul Krassner, *Flicks and Kicks*: 2, Cavalier at 25 (196?). Transvestite ‘Flaming Creatures’ Pic Raided; Campus Auspices Vs. Cops, [newspaper?], January 25, 1967.

²⁰⁶ J. Hoberman, On Jack Smith’s *Flaming Creatures* and Other Secret-Flix of Cinemaroc 47 (2001) (quoting Municipal Judge Says *Flaming Creatures* Obscene, *The Ann Arbor News*, September 1, 1967 at 15). Alan Glenn, The Flap Over ‘Flaming Creatures’, *Michigan Today*, April 14, 2010.

²⁰⁷ Transvestite ‘Flaming Creatures’ Pic Raided; Campus Auspices Vs. Cops, [newspaper?], January 25, 1967. Paul Krassner, *Flicks and Kicks*: 2, Cavalier at 25 (196?). *Guys in Drag* (‘Flaming Creatures’) Involve Campus Legal Pundits, *Variety*, April 5, 1967, at 20.

²⁰⁸ Film Screening Asked in Inquiry Over Fortas, *Los Angeles Times*, July 28, 1968, at E6. Alan Glenn, The Flap Over ‘Flaming Creatures’, *Michigan Today*, April 14, 2010.

²⁰⁹ Alan Glenn, The Flap Over ‘Flaming Creatures’, *Michigan Today*, April 14, 2010.

²¹⁰ Letter from Warren to LBJ, June 13, 1968, available at <http://www.presidentialtimeline.org/html/record.php?id=1338>. Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 270-73 (1988).

a separate letter sent the same day, Warren stated that he was retiring because of his age.²¹¹ While Johnson immediately decided to nominate Fortas as Warren's replacement, he kept Warren's retirement under wraps.²¹² He needed time to build support for Fortas and he wanted to ensure that Warren could withdraw his retirement if Fortas was not confirmed.²¹³

However, Johnson's attempt at secrecy was remarkably unsuccessful. Rumors of Warren's retirement and Fortas's nomination began to circulate the next day.²¹⁴ Johnson knew that Fortas needed support from Republicans and southern Democrats, so he quickly started lining up votes, beginning with Republican Senator Everett Dirksen, the powerful minority leader.²¹⁵ When Johnson decided to nominate Judge Homer Thornberry as Fortas's replacement, Senator Richard Russell, the leader of the southern Democrats, agreed to support both nominees.²¹⁶ But Senator James O. Eastland, the Chairman of the Judiciary Committee, was adamantly opposed to Fortas. Fatefully, he did agree to let the nomination out of committee, "At my own time."²¹⁷ And Republican Senator Robert P. Griffin was among the first to come out publicly against the Fortas nomination. Johnson had announced that he would not seek a second term, and Griffin argued that the Senate should refuse to confirm any nomination made by a "lame-duck President."²¹⁸

Finally, on June 26, 1968, Johnson announced his acceptance of Warren's retirement, "effective at such time as a successor is qualified," and nominated Fortas and Thornberry.²¹⁹ The battle lines were already drawn. Many Republicans opposed Fortas because they expected Nixon to win the upcoming presidential election and wanted him to appoint the new Chief

²¹¹ Letter from Warren to LBJ, June 13, 1968, available at <http://www.presidentialtimeline.org/html/record.php?id=1339>.

²¹² Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 273 (1988).

²¹³ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 273 (1988).

²¹⁴ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 273 (1988).

²¹⁵ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 294-95 (1988).

²¹⁶ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 300 (1988).

²¹⁷ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 301 (1988). Transcript, James O. Eastland Oral History Interview I, 2/19/71, by Joe B. Frantz, Internet Copy, LBJ Library, at 13.

²¹⁸ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 282 (1988).

²¹⁹ White House Press Release, June 26, 1968.

Justice.²²⁰ And many southern Democrats opposed Fortas because they hated his liberal politics.²²¹ Their weapon was delay. While Fortas had enough votes in the Senate to break a filibuster, he could not keep them for long.²²²

A. *The Fortas-Thornberry Hearings*

When the Senate Judiciary Committee met on July 27 to discuss the Fortas and Thornberry nominations, Senator Sam Ervin stalled by suggesting that Johnson's conditional acceptance of Warren's retirement meant that no vacancy existed.²²³ The committee discussed this issue for several days before scheduling hearings on the nominations to begin on July 11. Eastland invited Attorney General Ramsay Clark to testify on the vacancy issue at the hearings.²²⁴ Eastland also invited Fortas to testify at the hearings. Against his better judgment, Fortas agreed.²²⁵

On July 1, the Fortas nomination suffered a crippling blow when Russell withdrew his support. Russell had recommended Alexander Lawrence for a district court vacancy and Johnson was stalling the nomination because Attorney General Clark opposed it. Russell retaliated by withdrawing his support for the Fortas and Thornberry nominations. Johnson immediately nominated Lawrence, but the damage was done.²²⁶

The committee hearings began on July 11 with Attorney General Clark's testimony on whether the conditional acceptance of Warren's retirement created a vacancy on the Court.²²⁷ On July 12, Griffin testified

²²⁰ Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 154 (1972).

²²¹ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 310 (1988).

²²² Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 313 (1988). For an excellent contemporary account of the Fortas nomination see Hugh Jones, *The Defeat of the Nomination of Abe Fortas as Chief Justice of the United States*, unpublished Ph.D. dissertation, Johns Hopkins University, 1976.

²²³ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 312 (1988).

²²⁴ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 312 (1988).

²²⁵ Laura Kalman, *Abe Fortas: A Biography* 337 (1990).

²²⁶ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 328-59 (1988).

²²⁷ *Hearings Before the Committee on the Judiciary United States Senate Ninetieth Congress Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the Supreme Court of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, July 11, 12, 16, 17, 18, 19, 20, 22, and 23, 1968*, U.S. Government Printing Office, Washington 1968 ("Fortas Hearings"), at 8-39.

against “cronyism” and “lame duck” nominations and alleged that Fortas had violated the separation of powers by consulting with Johnson on executive decisions.²²⁸ Senator Ralph Yarborough also introduced Thornberry, who made a brief appearance, followed by the representatives of several fringe organizations that opposed the Fortas nomination.²²⁹

Fortas first appeared before the committee on July 16. Eastland and Senator John L. McClellan asked him whether he had consulted with Johnson on executive decisions after he was appointed to the Supreme Court. Fortas admitted that he had, but insisted that he had not “recommended anybody for any public position” or “initiated any suggestions or any proposal.”²³⁰ These assertions were false. In fact, Fortas had recommended many candidates for public office and had pressed many policy proposals.²³¹ Ervin spent the rest of the day and the following day asking Fortas an interminable series of questions about his judicial philosophy and the decisions of the Warren Court, to which Fortas gave carefully vague replies.²³²

On July 18, Senator Strom Thurmond stepped up to the plate and started swinging. For hours, Thurmond barraged Fortas with questions about various Supreme Court decisions, which Fortas refused to answer on constitutional grounds.²³³ The climax of Thurmond’s attack came when Fortas refused to answer questions about *Mallory v. United States*, a 1957 case in which the Supreme Court unanimously reversed a rape conviction because the defendant was held too long before arraignment.²³⁴ Thurmond intoned, “Does not that decision, Mallory - I want that word to ring in your ears - Mallory - the man happened to have been from my State, incidentally - shackle law enforcement? Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality.”²³⁵ Suddenly, Thurmond became Fortas’s leading opponent.

Thurmond continued to question Fortas on the morning of July 19, before yielding the floor to McClellan, who returned to Fortas’s role in the Johnson administration. Fortas admitted to discussing political issues with his friends, but denied passing messages for Johnson or consulting on legislation.²³⁶ When Fortas finished testifying, Eastland closed the Fortas

²²⁸ Fortas Hearings at 41-65.

²²⁹ Fortas Hearings at 65-97.

²³⁰ Fortas Hearings at 103.

²³¹ Laura Kalman, *Abe Fortas: A Biography* 337 (1990).

²³² Fortas Hearings at 107-173.

²³³ Fortas Hearings at 181.

²³⁴ Fortas Hearings at 191-92; *Mallory v. United States*, 354 U. S. 449 (1957).

²³⁵ Fortas Hearings at 191.

²³⁶ Fortas Hearings at 226-28.

hearings.²³⁷ While the papers criticized Fortas for advising Johnson, they considered it a venial sin.²³⁸ But Fortas's opponents smelled a rat.²³⁹ Griffin launched an investigation of Fortas's finances. Thurmond asked Eastland to reopen the Fortas hearings.²⁴⁰

The Thornberry hearings opened on July 20 to an empty house, with only four committee members present. Eastland began by announcing that he was reopening the Fortas hearings because he had promised to allow "Liberty Lobby and another group" to testify.²⁴¹ Liberty Lobby was an anti-Semitic conservative organization, which opposed Fortas because he was a liberal Jew. The other group Eastland referred to was Citizens for Decent Literature ("CDL"), a nonprofit organization that opposed pornography.²⁴² When Thornberry finished testifying on July 21, he went home, already sure the nomination was dead.

On July 22, the Senate Judiciary Committee heard the testimony of W.B. Hicks, Jr. of Liberty Lobby and James J. Clancy and Charles Keating of CDL.²⁴³ The committee ignored Hicks, but CDL got its attention. CDL argued that Fortas was soft on obscenity and brought a pile of examples to prove it. According to Clancy, Fortas's "judicial philosophy" on obscenity was not "spread on the record" because Fortas had joined many summary reversals of obscenity convictions.²⁴⁴ Clancy pointed out that "the U.S. Supreme Court reversed 23 of 26 state and Federal obscenity determinations" during the October 1966 term, including twenty summary reversals, and Fortas voted to reverse in every case.²⁴⁵ The summary reversals did not "discuss the facts or conduct of the case and the reasoning involved," so "the materials and facts involved in these cases are very effectively 'buried' in the records of the Court below."²⁴⁶

CDL dug them up. Clancy filed as an exhibit a "summary of these cases decided by the Court and the subject matter involved."²⁴⁷ He also stated that

²³⁷ Fortas Hearings at 250-51.

²³⁸ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 433 (1988).

²³⁹ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 433 (1988).

²⁴⁰ Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 439-40 (1988).

²⁴¹ Fortas Hearings at 255.

²⁴² For a detailed account of CDL's activities, see Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* 80-115 (2011).

²⁴³ Fortas Hearings at 291. Citizens for Decent Literature began as Catholics for Decent Literature and eventually became Citizens for Decency through Law

²⁴⁴ Fortas Hearings at 292.

²⁴⁵ Fortas Hearings at 292.

²⁴⁶ Fortas Hearings at 292.

²⁴⁷ Fortas Hearings at 292.

CDL had created *Target Smut*, “a 35-millimeter slide film documentary of the October 1966 term decisions” that “traces the history of the 26 cases from their origin in the trial court, up to the final decision of the U.S. Supreme Court and shows pictorially the materials involved.”²⁴⁸

Clancy emphasized that “[w]ithout an understanding of the material that the Court is passing on, the Court’s judgments lose much of their significance.” He then used one of those judgments to illustrate Justice Fortas’s philosophy of obscenity:

A more precise understanding of [Fortas’s] philosophy in the obscenity area can be gained from a consideration of his vote in *Schackman v. California* decided in June of 1967. In that case, three striptease films entitled ‘O-7,’ ‘O-12,’ and ‘D-15’ were ruled hard-core pornography by Federal District Judge Hauk, a Los Angeles jury and the California appellate system. Those determinations were reversed in the U.S. Supreme Court by a 5-4 decision, with Justice Fortas casting the deciding vote. This judgment is representative of his actions in the other cases.²⁴⁹

Clancy filed a copy of *O-7* as an exhibit and quoted Judge Hauk’s description of the film:

The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible . . . At one time the model pulls her panties down so that the pubic hair is exposed to view . . . the focus of the camera is emphasized on the pubic and rectal region, and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature.²⁵⁰

Clancy claimed that *Schackman* caused a porn explosion because “the 1966 term reversals were the causative factor which brought about, subsequent to June 1967, a release of the greatest deluge of hard-core pornography ever witnessed by any nation.”²⁵¹ Thurmond agreed and suggested that the obscenity cases “were reversed without any opinion to

²⁴⁸ Fortas Hearings at 293; Edward de Grazia, *Girls Lean Back Everywhere* 538. Apparently, *Target Smut* was a “filmstrip with recorded narration” which “singled out” Warren and Fortas “as being particularly tolerant of pornography.” Pornography Panel Hold Meeting Open to Public, *The Palm Beach Post*, November 13, 1968, at 2.

²⁴⁹ Fortas Hearings at 294. In an unpublished letter to Edward Bennett Williams, Fortas stated that *Schackman* had nothing to do with obscenity and that the Court actually reversed based on a Fourth Amendment violation. See Murphy at 459-60; Kalman at 344. This explanation of *Schackman* is unconvincing because the majority explicitly reversed under *Redrup v. New York*, 386 U.S. 767 (1967), an obscenity case.

²⁵⁰ Fortas Hearing at 295 (quoting *Schackman v. Arnebergh*, 258 F. Supp 983, 991 (C.D. Ca. 1966))

²⁵¹ Fortas Hearings at 296.

discuss the facts and conduct of the case and the reasoning involved” because the Court was “ashamed of the decisions, and ashamed to write in detail their reasoning.”²⁵²

Thurmond was determined to share the facts of those obscenity cases with the committee and the press. When the committee declined Clancy’s offer to show *Target Smut* and *O-7*, Thurmond asked him to show *O-7* after the hearing ended.²⁵³ Some found Thurmond’s request distasteful. Hart remarked, “I confess it is almost obscene to sit around here and anticipate we are going to look at dirty movies,” and a *New York Times* reporter “suggested that they think of it not as a witch hunt but as a bitch hunt.”²⁵⁴ Nevertheless, when the hearing ended, Clancy showed *O-7* to Thurmond and about twenty reporters.²⁵⁵

While Thurmond insisted that *O-7* “shocked Washington’s hardened press corps,” some of the reporters disagreed:

Mostly, the press corps giggled. For one thing, there was no screen in the room, and *O-7* was shown on a wooden panel, which made the girl in scanties look as if she were molting. For another, many of the reporters made rude jokes to one another.²⁵⁶

Apparently, senators have more delicate sensibilities than reporters. Before Clancy testified, McClellan, Fong, Hart, and Miller had previewed *Target Smut* and *O-7*.²⁵⁷ Hart refused to defend the film.²⁵⁸ Miller, Fong, and McClellan agreed that it was “hard-core pornography” and “something no civilized country can tolerate.”²⁵⁹ It became clear that Clancy would have another opportunity to share *O-7* with the committee when Fong added, “All the members are anxious to see it, and I think they should.”²⁶⁰ Thurmond’s aides immediately started pitching *O-7* to the media, describing it as “a vulgar, filthy, subjective thing of a woman disrobing

²⁵² Fortas Hearings at 303.

²⁵³ Fortas Hearings at 309; John Corry, *Strom’s Dirty Movies*, Harper’s Magazine, December 1968, at 30.

²⁵⁴ John Corry, *Strom’s Dirty Movies*, Harper’s Magazine, December 1968, at 30.

²⁵⁵ John Corry, *Strom’s Dirty Movies*, Harper’s Magazine, December 1968, at 30; Fred P. Graham, *Senate Panel Bids Officials Explain Pro-Fortas Memo*, *New York Times*, July 23, 1968, at 1.

²⁵⁶ John Corry, *Strom’s Dirty Movies*, Harper’s Magazine, December 1968, at 30.

²⁵⁷ Fortas Hearings at 305.

²⁵⁸ *Girlie Movie*, *Los Angeles Times*, July 26, 1968, at 1; *Stag Film Issue*, *Los Angeles Times*, July 28, 1968, at K4; 114 Cong. Rec. 23488 (1968).

²⁵⁹ *Girlie Movie*, *Los Angeles Times*, July 26, 1968, at 1; *Stag Film Issue*, *Los Angeles Times*, July 28, 1968, at K4; 114 Cong. Rec. 23488 (1968).

²⁶⁰ *Stag Film Issue*, *Los Angeles Times*, July 28, 1968, at K4; John Chadwick, *Stripper May Perform in Our Lofty Senate*, *Chicago’s American*, July 25, 1968.

down to her transparent panties.”²⁶¹

The hearings ended on July 23, with the testimony of Deputy Attorney General Warren Christopher. While Ervin asked Christopher about Fortas’s judicial opinions, Thurmond ostentatiously studied a nudist magazine titled *Nudie-Fax*.²⁶² When Ervin finished, Thurmond asked Christopher’s opinion of the material at issue in the Court’s obscenity cases.²⁶³ Christopher professed ignorance. Thurmond gave Christopher another nudist magazine titled *Weekend Jaybird* and stated that he had “sent a member of my staff today down the street just to see if material of the kind you have there was available in the city in which you live.”²⁶⁴ When Thurmond asked how to suppress pornography, Christopher could not respond.²⁶⁵ When the committee invited Fortas to return and discuss obscenity, he wisely declined.²⁶⁶ Fortas’s opponents had discovered their theme.

B. The Return of Flaming Creatures

When the hearing ended, Fortas still had enough votes for cloture, so his opponents had to keep the nomination bottled up in committee.²⁶⁷ Luckily for them, procedure was on their side. On July 24, Hart made a motion to vote on the Fortas and Thornberry nominations. In response, McClellan requested a mandatory one-week delay, stating that he “wanted to know a good deal more about the obscenity film before a decision was made on Fortas.”²⁶⁸ He had seen *O-7* and “was convinced that any Senator who saw it would vote against the nomination.”²⁶⁹ The delay was granted. Thurmond and McClellan announced that they would spend the week showing *O-7* to the rest of the committee.²⁷⁰

²⁶¹ The Senate: Judgment and the Justice, Time, August 2, 1968.

²⁶² John Corry, Strom’s Dirty Movies, Harper’s Magazine, December 1968, at 35.

²⁶³ Fortas Hearings at 345-64.

²⁶⁴ Fortas Hearings at 359.

²⁶⁵ Fortas Hearings 359-61.

²⁶⁶ Robert C. Albright, Senators Set Action on Fortas, Washington Post, September 11, 1968, at A1.

²⁶⁷ Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 447 (1988).

²⁶⁸ Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 447 (1988).

²⁶⁹ Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 447 (1988).

²⁷⁰ Papers of LBJ, Files Pertaining to Fortas & Thornberry, Box 7, Additional Material Not Included in WHCF 7/3/68-8/31/68, Memo from Larry Temple to LBJ, July 24, 1968. Papers of LBJ, Files Pertaining to Fortas & Thornberry, Box 3, Chron File 10/1/68-12/20/68, Memo from Warren Christopher to Larry Temple, December 20, 1968.

Fortas's opponents quickly realized that O-7 provided the perfect excuse for voting against the Fortas nomination. As Senator Smathers explained to Johnson:

So, here it is, Fortas is lined up having voted for this circulation, or the allowance of the circulation of this thing, pornographic movie. So what happened is a lot of guys that don't want to be recorded as for, that are looking for some reason to be against him . . . I've seen a number of fellows who have been talking about it—a number of senators are talking about it: "You know, God, I can't be for a fella that let this kind of literature out on the newsstand, and be showing it." As usual, they are making a lot of exaggerated statements in connection with it—such as, that it was being shown in public movies, and it's your mother and your sister and your daughters, and everybody to go see this damn thing.²⁷¹

However, Fortas's opponents knew that they needed more ammunition. While O-7 was obviously pornographic, it was actually pretty tame - a silent striptease, with no sexual intercourse. According to Smathers, when Hart saw the film, "he didn't think it was so bad, although when he told me that, 'I've seen many just like that, and I'm sure most every fella just has, everyone belonging to sort of a man's club.'"²⁷² CDL also filed a copy of O-12, but it was essentially identical to O-7.

Then, the committee discovered *Flaming Creatures*.²⁷³ CDL's summary of the obscenity cases decided by the Supreme Court during the October 1966 term referred to *Flaming Creatures* and *Un Chant d'Amour* as "two homemade 16mm. so-called 'underground' films."²⁷⁴ It further described *Jacobs v. New York* as follows:

In the New York case, Jacobs and Mekas were convicted by a 3-judge trial court in New York County for exhibiting the film 'Flaming Creatures' in violation of the state obscenity statute. The home-made film, produced by Jack Smith, has gained a notorious reputation for its homosexual content. The 40-minute film presents five unrelated, badly filmed sequences, which are studded with sexual symbolisms. Amapola and other recordings are heard as background music. Included in the first sequence of 17 minutes is a mass rape scene involving two females and many males, which lasts for 7 minutes, showing the female pubic area, the male penis, males massaging the female vagina and breasts, cunnilingus, masturbation of the male organ, and other

²⁷¹ Phone call between George Smathers and LBJ, June 25, 1968, Ref. No. 13218, available at <http://kc-johnson.com/the-fortas-nomination-through-lbjs-eyes/>.

²⁷² Phone call between George Smathers and LBJ, June 25, 1968, Ref. No. 13218, available at <http://kc-johnson.com/the-fortas-nomination-through-lbjs-eyes/>.

²⁷³ Senators Order Up Indecent Pic to See What Fortas Digs, *Variety*, July 30, 1968, at 10.

²⁷⁴ Fortas Hearings at 1171.

sexual symbolisms. The second sequence which lasts approximately three minutes shows lesbian activity between two women. The third sequence, about 7 minutes in duration shows homosexual acts between a man dressed as a female, who emerges from a casket, and other males, including masturbation of the visible male organ. The fourth and fifth scenes show homosexuals dancing together and other disconnected erotic activity, such as massaging the female breasts and group sexual activity. Jacobs and Mekas were found guilty by the trial court and sentenced to 60 days in the New York City workhouse, but execution of the sentence was suspended. The Appellate Court in New York refused to reverse the conviction.²⁷⁵

CDL went on to explain the Court's disposition of the case:

In *New York v. Jacobs*, the Court refused to render a judgment on the homemade 16mm. film 'Flaming Creatures', which depicted a 7-minute rape scene and other sexual deviate acts. . . . While the Court voted the underground film 'Un Chant d'Amour' obscene 5-4, the same majority of five was unable to get together on a lower grade film, 'Flaming Creatures', which depicted a 7-minute rape scene, acts of oral intercourse, fondling of the female vagina and breasts, masturbation of the visual penis, and the like, some of which were suggested, but never shown in the film, 'Un Chant d'Amour'. The Court held the issues in that case 'moot', to avoid a decision."²⁷⁶

CDL's description of *Flaming Creatures* must have caught Eastland's eye because one of his aides located a copy of the film in Michigan and brought it to Washington.²⁷⁷ On July 30, Senators Eastland, McClellan, Long, Miller, and McGee and several reporters watched *Flaming Creatures* in "a small basement studio in the Capitol."²⁷⁸ They were appalled by what they saw. One senator described *Flaming Creatures* as "a candid exploration of transvestitism."²⁷⁹ Another senator exclaimed, "That film

²⁷⁵ Fortas Hearings at 1172.

²⁷⁶ Fortas Hearings at 1176.

²⁷⁷ On January 18, 1967, Lieutenant Eugene Staudenmaier of the Ann Arbor police department busted a University of Michigan Cinema Guild screening of *Flaming Creatures* and confiscated the film. At Eastland's request, Assistant Washtenaw County Prosecutor Thomas F. Shea and Staudenmaier brought the film to Washington and presented it to the committee. *Film Screening Asked in Inquiry Over Fortas*, Los Angeles Times, July 28, 1968, at E6; Nadine Cohodas, Senate Committee May See *Flaming Creatures*, The Michigan Daily, July 30, 1968, at 1 (stating that Ann Arbor police chief Walter Krasny and Staudenmaier took *Flaming Creatures* to Washington). Senator Griffin of Michigan, Fortas's most vocal opponent in the Senate, probably helped Eastland locate *Flaming Creatures* in Ann Arbor.

²⁷⁸ Morton Mintz, Griffin Says 40 Ready to Block Vote on Fortas, Washington Post, July 31, 1968, at A7. Senators View Contested Film in Fortas Case, The Michigan Daily, July 31, 1968, at 1.

²⁷⁹ *Fleshing Out the Case*, Newsweek, August 12, 1968, at 28.

was so sick, I couldn't even get aroused."²⁸⁰ Eastland refused to comment and McClellan "termed the film 'crude vulgarity.'"²⁸¹

The next day, Long described his reaction to *Flaming Creatures* on the Senate floor:

I have never before seen things like that. We said, 'Let us just take a look and see what Judge Fortas is trying to do.' And when I saw it, I said, 'I am not going back. I have seen one Fortas film - I have seen enough.'²⁸²

According to the *Chicago Tribune*, "Even some of the strongest backers of Fortas" found *Flaming Creatures* "filthy and disgusting."²⁸³

Fortas's opponents smelled blood. CDL announced its intention to send copies of *O-7*, *O-12*, and *Flaming Creatures* "to women's groups and civic clubs."²⁸⁴ And Thurmond focused his considerable energy on sharing the films with his colleagues. Suddenly, dirty movies were Fortas's biggest problem.

C. In and Out of Committee

The committee failed to make a quorum before the August recess, so the Fortas nomination was postponed until September. Thurmond spent the recess hammering away at Fortas's record on obscenity, claiming, "The effect of the Fortas decisions has been to unleash a floodtide of pornography across the country. Those who exploit youth and human weakness now have no fear of conviction, and openly distribute and sell the grossest materials."²⁸⁵

On September 4, the committee failed once again to make a quorum.²⁸⁶ Eastland "was unable to say when he would attempt to have another

²⁸⁰ Samuel Shaffer, *On and Off the Floor: Thirty Years as a Correspondent on Capitol Hill* 92 (1980).

²⁸¹ Morton Mintz, Griffin Says 40 Ready to Block Vote on Fortas, *Washington Post*, July 31, 1968, at A7; Senators View Contested Film in Fortas Case, *The Michigan Daily*, July 31, 1968, at 1.

²⁸² 114 Congressional Record 24701 (1968).

²⁸³ 114 Cong. Rec. 25551 (1968).

²⁸⁴ *Fleshing Out the Case*, *Newsweek*, August 12, 1968, at 28. Transcript, James O. Eastland Oral History Interview I, 2/19/71, by Joe B. Frantz, Internet Copy, LBJ Library ("I know that there is a church organization that brought down some films that the court had legalized and saying, 'Here look at it,' and they had threatened to buy several thousand--have several thousand copies made and give them to Parent Teachers' Associations.").

²⁸⁵ Philip Dodd, Raps Fortas' Court Votes on Obscenity, *Chicago Tribune*, August 6, 1968, at 2.

²⁸⁶ Fortas Nomination Stalls Again; Quorum Lacking in Senate Panel, *New York Times*, September 5, 1968, at 34.

meeting” and confirmed that he would vote against reporting the nomination to the Senate and against confirmation, if necessary.²⁸⁷ McClellan added that *O-7*, *O-12*, and *Flaming Creatures* “ought to be shown at a committee hearing and made a part of the record” before the committee acted on the Fortas nomination, calling them “degrading.”²⁸⁸

Thurmond took the opportunity to approach “colleagues who are on the fence to invite them to private showings” of the films:

[L]ast week, the reruns began. And since then in the Senate recording studio and in darkened Senate offices, the films have been shown more than a dozen times.

The films are entitled ‘O-7,’ ‘O-12,’ ‘D-15,’ and ‘Flaming Creatures.’ The first three, from a California case, are shown together, in descending order of pornography, that is, going from bad strip tease to worse. ‘Flaming Creatures,’ an underground film which displays some attempt at sexistentialist art, was seized in Ann Arbor, Mich., where it was being privately shown.

In the dim Senate offices, as the rather unattractive long-legged young ladies in their altogether pranced and posed on the flickering screens, Senate aides and newsmen chortled and made wisecracks. But not the distinguished gentlemen of the Senate. Those who have viewed the films have sat stonily silent, with appalled expressions on their faces.

A single private showing of the film this week, one Fortas opponent claimed, converted two senators - Milton Young, R-N.D., and Mark Hatfield, R-Ore., a liberal. Neither senator would comment on the claim.

Griffin said the three numbered films are clearly within the bounds of obscenity. And one of his aides cracked: ‘If you want to find a socially redeeming feature in the films, you can say they provided work for the models, the photographer and the film developer.’

Fortas supporters say the case involving ‘Flaming Creatures,’ which includes a scrambled montage of a rape scene not unlike the one in the hit ‘Rosemary’s Baby,’ was overturned because the court ruled the film was illegally seized. But opponents of Fortas point out that he said he would have protected the right to show the film.²⁸⁹

About 20 senators saw the films.²⁹⁰ The committee soon added all three films to the record.²⁹¹ Mansfield and Dirksen publicly warned Johnson that

²⁸⁷ Fortas Nomination Stalls Again; Quorum Lacking in Senate Panel, New York Times, September 5, 1968, at 34.

²⁸⁸ Fortas Nomination Stalls Again; Quorum Lacking in Senate Panel, New York Times, September 5, 1968, at 34.

²⁸⁹ Saul Friedman, 4 Films: ‘The End’ for Fortas?, St. Petersburg Times, September 12, 1968, at 1.

²⁹⁰ Saul Friedman, 4 Films: ‘The End’ for Fortas?, St. Petersburg Times, September 12, 1968, at 1.

²⁹¹ Marjorie Hunter, Senate Panel Asks Fortas to Return, New York Times, September 11, 1968, at 20.

opposition to the Fortas nomination was “hardening.”²⁹² Privately, they explained that “floor debate on pornography will be dirty, that Thurmond smells blood now . . . and that the movies were what the opposition needed to make their positions jell.”²⁹³

Fortas’s supporters realized that his position on obscenity was a problem, and tried to respond to Thurmond’s attacks. Attorney General Ramsey Clark complained that the “obscenity cases issue is itself obscene” and that Thurmond’s film shows were “outrageous.”²⁹⁴ And Dean O’Meara of Notre Dame Law School wrote an open letter defending Fortas’s record on obscenity, insisting that the attacks were “unfair, misleading and dangerous” because *Schackman* and *Jacobs* were *per curiam* opinions and Fortas did not “issue a separate statement of his own views” in either case.²⁹⁵ O’Meara claimed that the cases presented “unique” issues, explaining that *Schackman* “involved a ‘peep-show’ of a filmed burlesque performance not unlike those presented fairly widely in burlesque houses throughout the country” and *Jacobs* “involved a nearly private screening of what we are told was a seriously intended, if unconventional, art film, and the show was not advertised in any way to the public at large,” and repeating the canard that *Schackman* “presented the question of illegal police seizure.”²⁹⁶ Notably, O’Meara also correctly attributed the Court’s adoption of the pandering test to Fortas and argued that it “broke the impasse which had developed over the obscenity issue in the years before his appointment.”²⁹⁷ While O’Meara’s letter appeared in many newspapers and was printed in the *Congressional Record*, it was already too late.

On September 11, Eastland reluctantly agreed to schedule a vote on the Fortas nomination.²⁹⁸ Thurmond insisted on additional hearings before the

²⁹² Willard Edwards, Seek End of Fortas Fight, Chicago Tribune, September 24, 1968, at 1.

²⁹³ Papers of LBJ, Files Pertaining to Fortas & Thornberry, Box 3, Chron File 9-16/68-9/30/68, Memo from Mike Manatos to LBJ, September 16, 1968.

²⁹⁴ Papers of LBJ, Files Pertaining to Fortas & Thornberry, Box 3, Chron File 9/3/68-9/14/68, Attorney General Clark Speech, September 13, 1968; Benjamin Welles, Clark Declares Foes of Fortas Play Politics and Oppose Rights, New York Times, September 14, 1968, at 17.

²⁹⁵ 114 Cong. Rec. 26699 (1968); Joseph O’Meara, Obscenity Issue and Fortas, Washington Post, September 11, 1968, at A18; Joseph O’Meara, Another Opinion: Fortas and Obscenity, New York Times, September 15, 1968, at E15.

²⁹⁶ 114 Cong. Rec. 26699 (1968); Joseph O’Meara, Another Opinion: Fortas and Obscenity, New York Times, September 15, 1968, at E15.

²⁹⁷ 114 Cong. Rec. 26699 (1968); Joseph O’Meara, Another Opinion: Fortas and Obscenity, New York Times, September 15, 1968, at E15.

²⁹⁸ Robert C. Albright, Senators Set Action on Fortas, Washington Post, September 11, 1968, at A1; Philip Dodd, Senators May Invite Fortas to Talk Again, September 11, 1968, B10; Robert C. Albright, Committee to Vote on Fortas, Washington Post, September 12,

vote and Eastland invited Fortas to appear “at his convenience” to discuss “certain films and cases involving the issue of obscenity.”²⁹⁹ The committee also asked several people to testify about Fortas’s role in the Johnson administration.³⁰⁰ Thurmond was determined to ensure that the hearing focused on pornography, so he asked Sergeant Donald Shaidell of the Los Angeles Police Department, the arresting officer in *Schackman*, to testify about the seizure of *O-7*, *O-12*, and *D-15*.³⁰¹ Thurmond specified that Shaidell “will bring new films with him.”³⁰²

Fortas declined the committee’s invitation to testify, as did everyone asked to discuss his role in the Johnson administration.³⁰³ So on the morning of September 13, the hearing opened with the testimony of Dean B.J. Tennery of American University Law School, who answered questions about a class that Fortas had conducted over the summer.³⁰⁴ But the committee’s attention returned to pornography when Shaidell testified that afternoon. Shaidell told the committee that California “was being flooded with filthy movies and books” because *Schackman* had left its obscenity laws “in a state of chaos.”³⁰⁵

As promised, Shaidell also brought a new film: *Un Chant d’Amour*, described rather primly as “an half-hour film depicting incidents between

1968, at A1; Philip Dodd, Senate Judiciary Committee Votes Tuesday on Abe Fortas, Chicago Tribune, September 12, 1968, at D8.

²⁹⁹ Robert C. Albright, Senators Set Action on Fortas, Washington Post, September 11, 1968, at A1; Philip Dodd, Senators May Invite Fortas to Talk Again, September 11, 1968, B10; Robert C. Albright, Committee to Vote on Fortas, Washington Post, September 12, 1968, at A1; Philip Dodd, Senate Judiciary Committee Votes Tuesday on Abe Fortas, Chicago Tribune, September 12, 1968, at D8.

³⁰⁰ Robert C. Albright, Committee to Vote on Fortas, Washington Post, September 12, 1968, at A1; Philip Dodd, Senate Judiciary Committee Votes Tuesday on Abe Fortas, Chicago Tribune, September 12, 1968, at D8 (stating that the committee invited Senator Gordon Allott and Secretary of Defense Clark Clifford, and subpoenaed Undersecretary of the Treasury Joseph W. Barr, White House legislative assistant W. DeVier Pierson, former White House assistant Richard Goodwin, and New York Magazine writer Daniel Yergin).

³⁰¹ Robert C. Albright, New Hearing on Fortas Case to Start Today, Washington Post, September 13, 1968, at A9.

³⁰² Robert C. Albright, New Hearing on Fortas Case to Start Today, Washington Post, September 13, 1968, at A9.

³⁰³ Letter from Abe Fortas to Senator Eastland, September 13, 1968, Fortas Papers Box 95, Folder 1908. Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Washington Post, September 14, 1968, at A1; Fred P. Graham, 2 Johnson Aides Refuse to Testify on Fortas Issue, New York Times, September 17, 1968, at 1.

³⁰⁴ Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Washington Post, September 14, 1968, at A1; Robert L. Jackson, \$15,000 Lecturing Fee Paid to Fortas, Senate Panel Told, Los Angeles Times, September 14, 1968, at 1; Philip Dodd, Fortas \$15,000 Job Told, Chicago Tribune, September 14, 1968, at A1.

³⁰⁵ Philip Dodd, Fortas \$15,000 Job Told, Chicago Tribune, September 14, 1968, at A1.

penitentiary inmates.”³⁰⁶ Once again, Hart objected to watching the film, for the same reason. “It is almost obscene for us to sit around here and contemplate that we are going to look at dirty movies.”³⁰⁷ But after some debate, the committee agreed to a private screening of *Un Chant d’Amour*, which it had not yet seen.³⁰⁸ The committee noted that Fortas “was one of four members of the court who said they would have reversed the California courts and cleared the movie legally.”³⁰⁹

Finally, on September 17, the committee approved the Fortas nomination by an 11 to 6 vote.³¹⁰ But Eastland observed, “I do not think Mr. Fortas will be confirmed by the Senate,” and Thurmond promised a filibuster.³¹¹ Hart angrily replied that it would be “a miserable precedent,” the first filibuster of a Supreme Court nomination.³¹² And Dirksen made a short-lived proposal to strip federal jurisdiction over obscenity cases, ostensibly “in an effort to take some of the steam” out of the obscenity issue.³¹³

D. The Filibuster

Thurmond was undeterred by such criticism, and responded by firing up

³⁰⁶ Lyle Denniston, *Justice Gives No Reason for His Decision*, Washington Star, September 14, 1968; Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Washington Post, September 14, 1968, at A1; Robert L. Jackson, \$15,000 Lecturing Fee Paid to Fortas, Senate Panel Told, Los Angeles Times, September 14, 1968, at 1; Philip Dodd, Fortas \$15,000 Job Told, Chicago Tribune, September 14, 1968, at A1.

³⁰⁷ Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Washington Post, September 14, 1968, at A1.

³⁰⁸ Lyle Denniston, *Justice Gives No Reason for His Decision*, Washington Star, September 14, 1968; Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Washington Post, September 14, 1968, at A1; Robert L. Jackson, \$15,000 Lecturing Fee Paid to Fortas, Senate Panel Told, Los Angeles Times, September 14, 1968, at 1; Philip Dodd, Fortas \$15,000 Job Told, Chicago Tribune, September 14, 1968, at A1. Shaidell busted many underground films, including Kenneth Anger’s *Fireworks*, and may have been the arresting officer in *Landau v. Fording*. Whitney Strub, *The Clearly Obscene and the Queerly Obscene: Heteronormativity and Obscenity in Cold War Los Angeles*, 60 *American Quarterly* 373 (2008)

³⁰⁹ Lyle Denniston, *Justice Gives No Reason for His Decision*, Washington Star, September 14, 1968.

³¹⁰ Philip Dodd, Fortas Wins Senate Unit O.K., 11 to 6, Chicago Tribune, September 18, 1968, at 1.

³¹¹ Philip Dodd, Fortas Wins Senate Unit O.K., 11 to 6, Chicago Tribune, September 18, 1968, at 1.

³¹² Philip Dodd, Fortas Wins Senate Unit O.K., 11 to 6, Chicago Tribune, September 18, 1968, at 1.

³¹³ Richard L. Lyons, Dirksen Anti-Obscenity Amendment Could Trigger New Assault on Court, Washington Post, September 18, 1968, at A3; Fred P. Graham, 2 Johnson Aides Refuse to Testify on Fortas Issue, New York Times, September 17, 1968, at 1.

his movie projector once again:

Day after day last week, Thurmond buttonholed his colleagues to watch the films in darkened Senate offices. One aide of Richard Nixon called it ‘the Fortas Film Festival.’ The Senators were not titillated but shocked, and they left the showings in a grim mood. The screenings apparently swayed some votes away from Fortas. Senators know that middle-class opposition to pornography is rising, and the subject—like the Supreme Court itself—has become a symbol of what is wrong in the U.S.³¹⁴

The media lampooned the Fortas Film Festival, referring to Thurmond as “the gentleman Torquemada from South Carolina.”³¹⁵ An Oliphant cartoon showed a group of senators leering at movie screen.³¹⁶ And a Herblock cartoon pictured “Strom Thurmond - U.S. Obscenator” in an office full of pin-ups, whispering to passerby, “Psst – Want to see some dirty pictures?”³¹⁷ The *New York Times* complained that the Fortas hearings were “dominated by Senator Thurmond of South Carolina, whose gutter-level assault on Justice Fortas is based on movies the Senator has been showing Congressmen behind the scenes.”³¹⁸ Even the *Wall Street Journal* objected, “Senator Thurmond was unnecessarily discourteous to Mr. Fortas. Pornography is not one of the nation’s truly burning issues, and showing stag films is not our idea of how to run the world’s greatest deliberative body.”³¹⁹

Nevertheless, Thurmond’s strategy was working. “Evidently the showing of the movies has become the nub of the effort to recruit new members for the anti-Fortas Senate group, and turn it into a majority rather than a filibustering one-third-plus minority.”³²⁰ Public pressure on obscenity was intense as “[l]etters poured in . . . from persons aroused about the high court’s obscenity rulings.”³²¹

Fortas was now “Mr. Obscenity,” and his supporters were on the defensive.³²² Hart complained that the Fortas Film Festival had “soiled” public perception of the Senate, giving the impression that Senators “have

³¹⁴ The Congress: The Fortas Film Festival, *Time*, September 20, 1968.

³¹⁵ The Congress: The Fortas Film Festival, *Time*, September 20, 1968.

³¹⁶ *Newsweek*, August 12, 1968, at 29.

³¹⁷ *Washington Post*, September 15, 1968, at B6.

³¹⁸ The Fortas Nomination, *New York Times*, Sept 14, 1968, at 30.

³¹⁹ *In Re Justice Fortas*, *Wall Street Journal*, September 11, 1968, at 18.

³²⁰ Max Lerner, Cutting Fortas’ Head May Give U.S. Pain in the Neck, *Los Angeles Times*, September 20, 1968, at A5.

³²¹ John P. MacKenzie, Johnson Withdraws Fortas Nomination, October 3, 1968, at A1.

³²² Marquis Childs, Nixon Role Urged In the Fortas Case, *Washington Post*, September 13, 1968, at A16.

been slipping into innumerable private showings” of obscene films.³²³ And he insisted, “Those who hold up reels of film as an indictment of the Supreme Court should, in fairness, point out that the Supreme Court never commented on the content of those films.”³²⁴

The committee report on Fortas recommended confirmation, warned that a filibuster would set “a dangerous precedent” and urged senators to “shun support of such an ignoble venture.”³²⁵ But minority reports from Fortas’s opponents rejected the majority’s conclusions and continued to hammer away at Fortas’s record.³²⁶ McClelland singled out *Flaming Creatures*, emphasizing that it “comprised of several separable sequences, all of them depicting some form of transvesticism or abnormal sexual behavior” and that Fortas was the only vote to reverse.³²⁷ “Apparently Mr. Justice Fortas felt that the film had some social value, did not go beyond customary limits of candor in representing sexual matters, and that the average person would not consider it as appealing to a prurient interest.”³²⁸ Even Fortas’s supporters conceded that confirmation was increasingly unlikely.³²⁹

On September 25, the Senate debate on the Fortas nomination opened and the filibuster began.³³⁰ Fortas’s opponents took the floor and ponderously repeated every criticism they had already levied against Fortas, reserving special attention for his record on obscenity. McClellan singled out *Flaming Creatures* as a particularly disturbing example of a film protected by Fortas. “One film that came out in New York is called ‘Flaming Creatures.’ And, brother, that is an understatement. It makes one sick to look at it. It is despicable. Depraved acts are displayed in the film.”³³¹ Thurmond also used *Flaming Creatures* to illustrate Fortas’s

³²³ Robert C. Albright, Fortas Foe Decries Hint of Bigotry, Washington Post, September 21, 1968, at A1.

³²⁴ Ervin Call Fortas Nomination Blow to Senate Role, New York Times, September 21, 1968, at 15.

³²⁵ Fortas Backers Call Filibuster Plan Ignoble, Los Angeles Times, September 22, 1968, at D7; Senate Panel’s Report Hails Fortas, Decries Filibuster Plan, Washington Post, September 22, 1968, at A9.

³²⁶ Fortas Backers Call Filibuster Plan Ignoble, Los Angeles Times, September 22, 1968, at D7; Senate Panel’s Report Hails Fortas, Decries Filibuster Plan, Washington Post, September 22, 1968, at A9.

³²⁷ Fortas Hearings Part II at 27-28.

³²⁸ Fortas Hearings Part II at 27-28.

³²⁹ Fred P. Graham, The Stakes Are Large in the Fortas Dispute, New York Times, September 22, 1968, at 187; Clouded Prospects for Fortas, Los Angeles Times, September 22, 1968, at 14.

³³⁰ Fred P. Graham, Critics of Fortas Begin Filibuster, Citing ‘Propriety’, New York Times, September 26, 1968, at 1.

³³¹ 114 Cong. Rec. 28561 (1968).

extreme position on obscenity, insisting that “it is evident from reading Chief Justice Warren’s dissent and from the descriptions of the film by Senators who have seen it, that the Court as well as most citizens would agree that ‘Flaming Creatures’ is obscene.”³³² He continued, “I think it is very significant to note that Justice Fortas stated in this case that he would have reversed the lower court’s decision.”³³³

The filibuster was still going strong on when Dirksen announced on September 27 that he would not vote for cloture.³³⁴ Without Dirksen’s support, the nomination was doomed. When the Senate took a cloture vote on October 1, the count was 45 in favor and 43 against - 14 votes short of the two-thirds majority needed.³³⁵

At Fortas’ request, Johnson withdrew the nomination the following day.³³⁶ Fortas’s opponents had won. And they owed their hard-fought victory to smut.³³⁷ Lausche spoke for many of his colleagues when he explained that he had voted against cloture because “a Court majority including Mr. Fortas ‘approved’ the showing of ‘dirty’ movies in obscenity cases.”³³⁸ As Eastland later observed, “I think there is one thing that hurt Fortas, hurt him very badly, and that was the pornography decisions.”³³⁹

E. The Aftermath

Fortas returned to the Supreme Court in October 1968 as an associate justice, not as chief justice. Then, on May 9, 1969, William Lambert

³³² 114 Cong. Rec. 28775 (1968).

³³³ 114 Cong. Rec. 28775 (1968).

³³⁴ Fred P. Graham, Fortas Receives Critical Setback as Dirksen Shifts, *New York Times*, September 28, 1968, at 1.

³³⁵ Fred P. Graham, Senate Bars Move to End Filibuster by Fortas Critics, *New York Times*, Oct 2, 1968, at 1; Senate Rejects Ending Fortas Filibuster; Next Moves Appears to Be Up to President, *Wall Street Journal*, October 2, 1968, at 3.

³³⁶ John P. MacKenzie, Johnson Withdraws Fortas Nomination, October 3, 1968, at A1; Transcript, Abe Fortas Oral History Interview, 8/14/1969. by Joe B. Frantz, Internet Copy, LBJ Library, at 26.

³³⁷ The films used in the Fortas Film Festival should have been deposited in the National Archives as exhibits to the record, but they disappeared. While *Flaming Creatures* and *Un Chant d’Amour* are readily available today, no known copies of *O-7*, *O-12*, *D-15*, and *Target Smut* exist. After the hearings ended, Hugh E. Jones saw the films in a filing cabinet in the office of Senator Eastland’s legislative aide.

³³⁸ Senate Rejects Ending Fortas Filibuster; Next Moves Appears to Be Up to President, *Wall Street Journal*, October 2, 1968, at 3.

³³⁹ Transcript, James O. Eastland Oral History Interview I, 2/19/71, by Joe B. Frantz, Internet Copy, LBJ Library. “This was a big thing, that he was responsible for so much of the pornography, so called. That was something, and then of course the income thing. Well, the income thing came later.” Transcript, Arthur Krim Oral History Interview IV, 11/9/82, by Michael L. Gillette, Internet Copy, LBJ Library.

published an article in *Life*, alleging that Fortas had recused himself from a criminal appeal because he had a secret financial relationship with the defendant.³⁴⁰ Lambert revealed that Fortas had accepted \$20,000 from the Wolfson Family Foundation for work on “educational and civil rights projects,” only to return the money after Louis Wolfson “had been twice indicted on federal criminal charges” for securities fraud.³⁴¹ Fortas denied the allegations, but the Justice Department soon discovered that Wolfson had actually agreed to pay Fortas \$20,000 every year for the rest of Fortas’s life and that of his wife.³⁴² Faced with this damning evidence, Fortas resigned on May 14, 1969.

In the meantime, *Flaming Creatures* began to reach new audiences, some of which were more receptive than others. When Yale Law School staged a reprise of the Fortas Film Festival, one student described *Flaming Creatures* as “a harmless, stupid stag movie.”³⁴³ A belated review in *Variety* was also quite dismissive:

Assembled in 1963, Jack Smith’s transvestivision excess, ‘Flaming Creatures,’ clumsily portrays sexual deviations, while pointing up not only the grossness of the physical contacts but the sadness of the emotional-mental conflicts. Homohouses might profit on a quick turn, but six-year-old film, reputedly cutoff in several U.S. cities because of offensive nature, isn’t so much obscene as grotesque. Poor quality of lensing, remarkable imbalance of sound-over music, and seedy orgy add up to a naïve, curiously sad film.³⁴⁴

Flaming Creatures remained a target of occasional obscenity raids for several years.³⁴⁵ But the taint of obscenity gradually faded, as pornographic films became increasingly explicit. “Ironically, the content of *Flaming Creatures* pales, or more appropriately blushes compared to the likes of *Behind the Green Door*, *The Devil in Miss Jones*, and *Deep Throat* – all of

³⁴⁰ William Lambert, Fortas of the Supreme Court: A Question of Ethics, May 9, 1969, at 33.

³⁴¹ William Lambert, Fortas of the Supreme Court: A Question of Ethics, May 9, 1969, at 33.

³⁴² Bruce Allen Murphy, Fortas: The Rise and Fall of a Supreme Court Justice 563.

³⁴³ Fortas Film Fest, *Variety*, November 5, 1968, at 7. Yale Law School Holds ‘Fortas Film Festival,’ *New York Times*, November 5, 1968, at 40. Jody Adams, I, a Yale Coed, *The Harvard Crimson*, December 2, 1968, available at <http://www.thecrimson.com/article/1968/12/2/i-a-yale-coed-pwe-dont/>.

³⁴⁴ *Flaming Creatures*, *Variety*, June 11, 1969, at 38.

³⁴⁵ See, e.g., Thomas J. Fleming, Hesburgh of Notre Dame, *New York Times*, May 11, 1969, at SM56; 4 Policemen Run Like 4 Horsemen, *The Milwaukee Journal*, February 8, 1969, at 6; ‘Nude’ News at NDU, *The Windsor Star*, February 8, 1969, at 42 (stating that accidental screening of *Flaming Creatures* caused the University of Notre Dame to cancel conference on pornography and censorship).

which have been shown on campus this semester.”³⁴⁶ Eventually, *Flaming Creatures* was widely recognized as an exceptional work of art. Today, it is the subject of many books, many more museum exhibitions, and countless presentations at movie theaters and colleges across the country and around the world.

IV. *FLAMING CREATURES* AND THE DIALECTIC OF OBSCENITY

Why did obscenity disappear and how did it happen? The Supreme Court redefined obscenity in order to protect art, but soon held that the First Amendment protected pornography as well. According to the conventional history of obscenity, this outcome was inevitable, or at least implied by First Amendment doctrine. As Brennan ruefully observed, “the concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms.”³⁴⁷ Art and obscenity are in the eye of the beholder, so the obscenity doctrine necessarily reduces to “I know it when I see it.”

But the conventional history of obscenity is incomplete, because it does not account for the dialectic of obscenity. While the obscenity doctrine is manifestly arbitrary and illogical, “[t]he life of the law has not been logic: it has been experience.”³⁴⁸ The Court tried to distinguish between art and pornography, despite the incoherence of the obscenity doctrine. Most notably, it adopted the pandering test, which theoretically demanded the conclusion that stag films are obscene, but *Flaming Creatures* is not.

Obscenity did not disappear because the obscenity doctrine was incoherent. It disappeared because the Court realized that it could not protect art unless it protected pornography as well. That is the dialectic of obscenity. Doctrinally, the protection of art required the protection of pornography because the distinction is necessarily viewpoint-based. Politically, the protection of pornography enabled the protection of art by establishing that certain categories of sexual expression are protected speech. Together, these opposing principles gradually ratcheted open the gates of obscenity.

The story of *Flaming Creatures* and the Fortas Film Festival illustrates the dialectic of obscenity. The Court adopted the pandering test in order to distinguish between art and pornography. But it was not prepared for the

³⁴⁶ Gordon Atcheson, Memory of 1967 ‘Flaming Creatures’ Bust Still Lingers, *The Michigan Daily*, May 22, 1974, at 3.

³⁴⁷ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973).

³⁴⁸ Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

result. Fortas applied the pandering test and concluded that *Flaming Creatures* was a work of art, not pornography. The other justices disagreed. They realized that the pandering test was unworkable when they saw that it meant protecting disturbing and socially unacceptable art and suppressing distasteful but socially acceptable pornography. They could stomach *O-7*, but not *Flaming Creatures*. Rejecting the pandering test allowed them to protect *O-7* and suppress *Flaming Creatures*, at least temporarily. But ironically, the protection of *O-7* ultimately required the protection of *Flaming Creatures*. If the First Amendment protected nudity in a stag film, it had to protect nudity in *Flaming Creatures* as well.

The subtext of the Fortas Film Festival was that the senators were titillated by *O-7* and shocked by *Flaming Creatures*. When Fortas's opponents saw *O-7*, they knew that smut could justify a filibuster. Many of them surely found the film distasteful, but they watched it anyway. Notably, they were able to describe the contents of the film in great detail when they criticized Fortas for voting that it was not obscene.

By contrast, the senators were horrified by *Flaming Creatures*. Many refused to watch the whole film and none could bring themselves to describe it in any detail. Recall the anonymous senator's comment, "That film was so sick, I couldn't even get aroused."³⁴⁹ Tellingly, when Detective Shaidell testified in the second round of Fortas hearings, he brought *Un Chant d'Amour*, rather than another stag film. Fortas's opponents understood *O-7*, even if they rejected it, but they could not understand *Flaming Creatures* and *Un Chant d'Amour*, and were shaken by them.

Of course, the justices and the senators alike were reacting primarily to the homosexual content of *Flaming Creatures* and *Un Chant d'Amour*, not their formal aesthetic qualities. While they avowedly disapproved of the depiction of naked women in *O-7*, *O-12*, and *D-15*, they were shocked or disgusted by the suggestion of gay sex in *Un Chant d'Amour* and the polymorphous perversity of *Flaming Creatures*. And the contours of the obscenity doctrine have tracked those feelings. Works that depict minority sexual preferences are especially vulnerable to obscenity charges because juries and judges tend to find the depiction of minority sexual preferences more offensive than the depiction of majority sexual preferences.³⁵⁰ As a

³⁴⁹ Samuel Shaffer, *On and Off the Floor: Thirty Years as a Correspondent of Capitol Hill* 92 (1980).

³⁵⁰ Bret Boyce, *Obscenity and Community Standards*, 33 *Yale J. Int'l L.* 299, 358-59 (2008) ("Materials that 'depict such deviations as sado-masochism, fetishism, and homosexuality' satisfy the 'prurient interest' prong if they appeal to the prurient interest of members of the 'deviant' group. But the 'patent offensiveness' of such material is still judged by the standards of the community as a whole. In other words, it is obscene if it 'turns on' a 'deviant,' but 'grosses out' a 'normal' person. Obviously, such a test is a recipe for the repression of sexual minorities.");

result, the obscenity doctrine has historically discriminated against the depiction of gay and lesbian sex.³⁵¹ Indeed, as obscenity prosecutions of artists petered out, the last few targeted works with gay content, prominently including Robert Mapplethorpe.³⁵²

Nevertheless, the fact remains that in the 1960s, almost everyone assumed that *Flaming Creatures* was obscene, but today almost everyone would assume that it is not. Nothing in the text of the obscenity doctrine required that change of heart. Nor does it reflect a reassessment of the artistic merit of the film. On the contrary, it is the function of a *de facto* loosening of the obscenity doctrine in order to protect the depiction of a much wider range of sexual conduct. When the obscenity doctrine only protected the depiction of sexual conduct in artistic works, it was easy for courts to dismiss claims that *Flaming Creatures* is a work of art. But as the obscenity doctrine gradually came to protect the depiction of sexual conduct in frankly pornographic works, it became impossible to justify the suppression of *Flaming Creatures*. By eliminating the need to judge the artistic merits of a work accused of obscenity, the obscenity doctrine finally enabled courts to effectively protect art, albeit at the expense of their ability to prohibit pornography.³⁵³ Perhaps we owe a debt of gratitude to the army of nameless and numberless pornographers who inadvertently helped protect the peculiar vision of *Flaming Creatures*.

CONCLUSION

The conventional history of obscenity holds that art protects pornography. The story of *Flaming Creatures* and the Fortas Film Festival suggests that pornography also protects art. This relationship expresses the dialectic of obscenity.

³⁵¹ Elizabeth Glazer, *When Obscenity Discriminates*, 102 Nw. U. L. Rev. 1379, 1385 (2008) (“The collateral effect of failing to distinguish gay and lesbian content from obscenity has been an implicit yet pervasive sanctioning of the censoring of gay content.”).

³⁵² See, e.g., Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 Vand. L. Rev. 1073, 1092 (1994) (arguing that “the courts often deny First Amendment protection to artists who address homosexual issues”).

³⁵³ See, e.g., Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L.J. 1359, 1360 (1990) (arguing that “the two basic goals of obscenity law—protecting art while controlling obscenity—lie in a state of irreconcilable conflict due to the nature of contemporary art”).