2011

The Fortas Film Festival

Brian L. Frye

THE FORTAS FILM FESTIVAL

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INTRODUCTION

Obscenity is like a Cheshire cat. Over the years, it gradually disappeared, until nothing remained but a grin.[1] At one time, obscenity prosecutions were common. Today, they are rare. Moreover, until the 1970s, obscenity targeted art, as well as pornography. Now, obscenity prosecutions ignore art and are limited to the most extreme forms of pornography.

Why did obscenity largely disappear? Conventional wisdom holds that the philistinism of postwar obscenity law prompted reform.[2] Indeed, the embarrassing suppression of Edmund Wilson's novel *Memoirs of Hecate County* led the Court to explicitly recognize that anything with "serious literary, artistic, political, or scientific value" is not obscene.[3] So art justified the protection of sexual expression, eventually including pornography.

But conventional wisdom misses half of the story. While art justified the protection of sexual expression, pornography normalized sexual expression. When the Court tried to protect sexual art, but not pornography, it could not explain its obscenity decisions. Many people, including many of the justices, found some sexual art more offensive than pornography. The sexual art was repugnant, but the obscenity was merely distasteful. People could not understand or accept an obscenity doctrine that protected sexual art, but not pornography. In other words, obscenity is dialectical: art protects pornography and pornography protects art.

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[1] See, e.g., Amy Adler, All Porn All the Time, 31 NYU R. L. & Soc. Change 695, 695 (2007).

[2] See, e.g., Amy Adler, All Porn All the Time, 31 NYU R. L. & Soc. Change 695, 703-04 (2007).

[3] Miller v. California, 413 U.S. 15, 24 (1973). See also Doubleday & Co. v. New York, 335 U.S. 848 (1948) (affirming obscenity judgment against *Memoirs of Hecate County*).

The story of *Flaming Creatures* and the so-called "Fortas Film Festival" illustrates that dialectic. 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.[4] Senator Thurmond presented the Fortas Film Festival, showing *Flaming Creatures* and other films to several other senators and convincing them to join the filibuster.

This article uses 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, the definition of obscenity has narrowed over time. The common law defined obscenity as any expression that tends "to deprave and corrupt those whose minds are open to such immoral influences."[5] In other words, obscene meant inappropriate for children.

Unfortunately, the common law definition of obscenity permitted the suppression of art, as well as pornography, including Theodore Dreiser's *Sister Carrie*, James Joyce's *Ulysses*, and Edmund Wilson's *Memoirs of Hecate County*. Embarrassed by the suppression of art and literature, 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."[6] Justice Brennan's plurality opinion added that an expression is obscene only if it is "utterly without redeeming social importance."[7] Essentially, *Roth* held that the First Amendment protects art, but not pornography.

But the Court soon discovered that distinguishing art and pornography

[4] Jacobs v. New York, 388 U.S. 431 (1967).
[5] Regina v. Hicklin, 3 L.R.-Q.B. 360, 362-63 (1868).
[6] Roth v. United States, 354 U.S. 476, 487-89 (1957).
[7] Roth v. United States, 354 U.S. 476, 484-85 (1957).

is difficult, as both are in the eye of the beholder. As Justice Stewart famously remarked, "I know it when I see it."[8] 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."[9] Under the pandering 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."[10] 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*[11] and *Memoirs v. Massachusetts*.[12] 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."[13] By contrast, in *Memoirs*, it reversed an obscenity finding for John Cleland's *Fanny Hill, or Memoirs of*

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[8] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[9] Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring).

[10] 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").

[11] 383 U.S. 463, 475-76 (1966).

[12] 383 U.S. 413, 421 (1966).

[13] 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.

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 panderers 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."[14] 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*.[15] Fortas was horrified and used the pandering doctrine to convince Brennan to change his vote in *Memoirs*.[16]

> 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.[17]

Later, Fortas insisted that *Memoirs* and *Ginzburg* "wouldn't have happened without me. I worked every one of those guys over."[18]

However, Fortas supported the pandering test only because he worried about the Court suppressing art and literature. In principle, he rejected the obscenity doctrine, but he knew that public opinion insisted on suppressing obscenity, and accused Black and Douglas of "whoring after principle."[19]

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*

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[14] 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)

[15] 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.

[16] 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.

[17] 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).

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

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

v. New York.[20] The Court voted to reverse in *Redrup* and assigned the opinion to Fortas, who tried to reverse on the basis of the pandering test.[21] But the Court ultimately rejected Fortas's draft and decided *Redrup* on the facts in a *per curiam* opinion.[22] 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.[23]

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 obscene if "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[24] 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."[25] 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."[26] And in *Pope v. Illinois*, it held that the value test is objective, not subjective.[27] 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

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[20] Redrup v. New York, 386 U.S. 767 (1967) (per curiam).

[21] 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.

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

[23] 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).

[24] Miller v. California, 413 U.S. 15, 24 (1973).

[25] Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973).

[26] Smith v. United States, 431 U.S. 291, 305-06 (1977).

[27] 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.")

pornography is separate from the obscenity standard enunciated in *Miller*."[28] 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.[29] Through the 1970s and 80s, the government aggressively prosecuted pornography.[30] 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 genitals - the jury returned a verdict of not guilty.[31] For artists, the issue was no longer obscenity, but rather the availability of federal grants.[32]

Under President Clinton, the Department of Justice decided to stop pursuing adult obscenity and focus on child pornography.[33] As a result, federal prosecutors pursued less than 200 obscenity cases.[34] Under President George W. Bush, the Department of Justice changed its priorities and began pursuing adult obscenity as well as child pornography.[35] However, it achieved only limited success, pursuing 361 obscenity prosecutions.[36] Under President Obama, the Department of Justice de-

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[28] 458 U.S. 747, 764 (1982).

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

[30] See Tim Wu, How Laws Die, Slate, October 15, 2007, available at http://www.slate.com/id/2175730/entry/2175743.

[31] Isabel Wilkerson, Cincinnati Jury Acquits Museum In Mapplethorpe Obscenity Case, New York Times, October 6, 1990.

[32] See NEA v. Finley, 524 U.S. 569 (1998).

[33] 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/.

[34] 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.

[35] 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.

[36] 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-

emphasized adult obscenity and prosecutions returned to Clinton-era levels.[37] Today, pornography is ubiquitous and essentially legal.[38]

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 beautiful film, one has to defend it.[39]

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. 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."[40]

By contrast, 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.[41]

Today, *Flaming Creatures* is generally considered an artistic

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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, 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.'")

[39] Susan Sontag, A Feast For Open Eyes, The Nation, April 13, 1964, at 374.

[40] Jack Smith, Uncle Fishook 192.

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

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."[42] And a senator who saw the film exclaimed, "That film was so sick, I couldn't even get aroused."[43] *Flaming Creatures* was weird and queer and made people uncomfortable.

A. The Making of Flaming Creatures

Jack Smith made *Flaming Creatures* during the late summer and early fall of 1962.[44] 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.[45] Smith filmed *Flaming Creatures* himself, often perched on a makeshift catwalk.[46] The performers were often intoxicated and in various states of dishabille.[47] Smith finished filming in October and spent several months editing.[48] Musician and filmmaker Tony Conrad created the soundtrack, a collage of records from Smith's collection.[49] Apparently, the total cost of *Flaming Creatures* was

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[42] 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).

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

[44] 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.

[45] 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.

[46] 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, Up on the Roof, Moving Image Source, March 12, 2009, at http://www.movingimagesource.us/articles/up-on-the-roof-20090312.

[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] 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

about $300.[50]

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.[51] Jonas Mekas, the doyen of avant-garde cinema, attended the benefit and lavishly praised *Flaming Creatures* in his influential *Village Voice* column, *Movie Journal*:

> 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.[52]

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.[53] The Bleecker immediately cancelled Underground Midnights, ostensibly because it thought that the "low quality of the underground" would ruin its reputation.[54]

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.[55] 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,

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"Ali Baba and the Forty Thieves."

[50] Jonas Mekas, Movie Journal, Village Voice, March 13, 1963.

[51] 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.

[52] Jonas Mekas, Village Voice, April 18, 1963.

[53] 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.

[54] J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 37 (2001).

[55] 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.

sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."[56] 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.[57] 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 Censors Film Society."[58]

The Filmmakers' Showcase surreptitiously showed *Flaming Creatures* twice in August 1963.[59] 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!"[60] 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.[61]

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.[62] "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."[63]

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[56] 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.

[57] 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.

[58] J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 39 (2001).

[59] J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 39 (2001).

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

[61] Jonas Mekas, Movie Journal; J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of Cinemaroc 33 (2001).

[62] Midnight Film Series Tonight, Los Angeles Times, October 12, 1963, at 19.

[63] 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).

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.[64] Warhol also filmed the production of *Normal Love* and made "a little newsreel" that he titled *Jack Smith Filming Normal Love*.[65]

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 which makes us aware of the restraint of all previous film-makers.
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> 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.
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> 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.
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> 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.[66]

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*.[67] 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.[68] Eventually, Mekas climbed onto a parked car and presented

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[64] 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.

[65] Andy Warhol and Pat Hackett, Popism: The Warhol Sixties 100 (NY: Harcourt Brace, 1980)

[66] 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*.

[67] 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.

[68] J. Hoberman, On Jack Smith's Flaming Creatures and Other Secret-Flix of

Smith's award.[69]

Later that month, the notoriety of *Flaming Creatures* increased when it was censored in Belgium.[70] The Third International Film Exposition in Knokke-le-Zoute took place onboard a cruise ship named the *Casino*.[71] 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.[72] "The jury said it recognized the film's artistic qualities, but said it found it impossible to show under Belgian law."[73]

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.[74] 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.[75]

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.[76] 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.[77] 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.[78] As Mekas started to show *Flaming Creatures*, a festival employee realized what was happening and

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Cinemaroc 40 (2001). Locked Out, Award Made on Curb, 2 a.m., Variety, December 1, 1963.

[69] 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.

[70] W. German Experimental Film Wins, Los Angeles Times, January 2, 1964, at 24.

[71] Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

[72] Interview with Jonas Mekas.

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

[74] Belgians Balk N.Y. 'Creatures', Variety, January 15, 1964, at 1.

[75] 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.

[76] Interview with Jonas Mekas. Jonas Mekas, Movie Journal, January 16, 1964, at 13.

[77] Belgians Balk N.Y. 'Creatures', Variety, January 15, 1964, at 1.

[78] Interview with Jonas Mekas.

unplugged the projector.[79] 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.[80]

When the lights came back on, M. Pierre Vermeylen, 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.[81] That included *Flaming Creatures*, which he considered "pornographic and inartistic."[82] The festival Pre-Selection Committee was outraged and awarded *Flaming Creatures* a specially created *film maudit* or "cursed film" prize.[83]

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.[84] *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.[85] 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.[86] 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.[87]

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.[88] Mekas advertised a "surprise

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[79] Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

[80] Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

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

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

[83] 'Underground' Explosion, Variety, Jan. 15, 1964, at 1; Elliott Stein, Fog at Knokke, Sight & Sound, Spring 1964.

[84] Stepanie Gervis Harrington, City Puts Bomb Under Off-Beat Culture Scene, Village Voice, March 26, 1964.

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

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

[87] 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.

[88] Jerry Tallmer & Stan Koven, Cops Seize 4 In Raid on Village Film, NY Post, March

program" in the *Village Voice* and hung a sign over the door reading, "TONIGHT FLAMING SURPRISE PROGRAM."[89] Unbeknownst to Mekas, the audience included two undercover police officers from the anti-obscenity squad, Detectives Arthur Walsh and Michael O'Toole.[90]

On March 3, the Filmmakers' Showcase repeated the program.[91] Mekas re-ran the ad and re-hung the sign.[92] The undercover police officers also returned.[93] According to one of the detectives, *Flaming Creatures* "was hot enough to burn up the screen."[94] 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.[95] When Mekas heard about the bust, he rushed to the theater and demanded to be arrested as well.[96] The detectives also seized the films, the projector, and the screen.[97] However, most of the audience members got a refund.[98]

Mekas, Jacobs, Karpf, and Sims spent an uncomfortable night in prison.[99] 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.'"[100] The next day, all

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4, 1964, at 2. Jonas Mekas, Movie Journal, January 2, 1969, at 41.

[89] Mekas diary entry.

[90] 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

[91] 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.

[92] 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.

[93] 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). 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.

[94] 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). 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.

[96] Stephanie Gervis Harrington, City Sleuths Douse Flaming Creatures, The Village Voice, March 12, 1964.

[97] 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.

[98] 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.

[99] Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', The Village Voice, March 12, 1964, at 3.

[100] J. Hoberman, License for License: Underground Movies and Obscenity in the

four were arraigned, charged with showing an "indecent, lewd, and obscene film," and released without bail.[101]

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."[102] 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 with taking tickets for a lewd and obscene film.[103]

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."[104] 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.[105] Mekas wanted the police to bust *Un Chant d'Amour* because he thought it would be easier to defend than *Flaming Creatures*.[106]

The police were happy to oblige. When Mekas presented *Un Chant d' Amour* on March 7, nothing happened.[107] 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

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Sixties, in Banned in the U.S.A.: America and Film Censorship, (Steve Seid, ed. 1993), 14, 16 (quoting Ken Jacobs).

[101] Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', The Village Voice, March 12, 1964, at 3.

[102] 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).

[103] Charging Document, Criminal Court of the City of New York, March 6, 1964.

[104] 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.

[105] Un Chant d'Amour (Genet 1950), available at http://www.ubu.com/film/genet.html.

[106] "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).

[107] Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', The Village Voice, March 12, 1964, at 3.

equipment. Mekas and Cottrell spent the night in prison and were released the next day on $1,500 bail.[108]

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.[109] The License Department also cited the New Bowery Theater for showing an unlicensed film.[110] Theodora Bergery, the owner of the theater, was livid.[111] Ultimately, the License Department suspended the New Bowery Theatre's license for 30 days, and the American Theatre for Poets found a new home.[112]

Mekas also hosted private screenings of *Flaming Creatures*, hoping to gin up support.[113] 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."[114] 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.[115]

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

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[108] Mekas Gaoled Again, Genet Film Does It, Village Voice, March 19, 1964; Daily Variety, March 17, 1964.

[109] 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.

[110] Stephanie Gervis Harrington, City Sleuths Douse 'Flaming Creatures', The Village Voice, March 12, 1964, at 3.

[111] 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, at 15.

[112] City Softens Approach to Poets in Cafes, Village Voice, April 2, 1964, at 2.

[113] Mekas Risking Jail Sentence, Variety, March 18, 1964.

[114] Susan Sontag, The Nation at 375-76 (April 13, 1964).

[115] Jonas Mekas, Movie Journal, January 16, 1964, at 13

later, on April 13.[116] 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.[117] Jacobs, Mekas, Karpf, and Sims were each charged with one count of violating New York Penal Law § 1141 by showing an obscene movie.[118] All four pleaded not guilty.[119] Assistant District Attorney Harris represented the State.[120] Emile Zola Berman and David G. Trager represented the defendants.[121]

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.[122] Walsh also testified that *Flaming Creatures* was "garbage" and that it was "indecent, lewd and obscene."[123] Then, Harris presented *Flaming Creatures* to the judges, the defendants, and a few reporters.[124] The judges, "two of them munching cigars, watched impassively as the movie was shown in chambers."[125]

The defense responded that *Flaming Creatures* is not obscene because it is a work of art.[126] Berman called eleven witnesses, most of them experts,

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[116] Mekas Risking Jail Sentence, Variety, March 18, 1964.

[117] Paul Hoffman, A Movie Show–in Criminal Court, New York Post, June 3, 1964, at 16.

[118] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967).

[119] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967).

[120] Paul Hoffman, A Movie Show–in Criminal Court, New York Post, June 3, 1964, at 16.

[121] 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.

[122] Amicus Brief, Jacobs v. New York. Notes of Jonas Mekas, June 2, 1964.

[123] Amicus Brief, Jacobs v. New York.

[124] Paul Hoffman, A Movie Show–in Criminal Court, New York Post, June 3, 1964, at 16. Notes of Jonas Mekas, June 2, 1964.

[125] Paul Hoffman, A Movie Show - In Criminal Court. New York Post, June 3, 1964, at 16.

[126] 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

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.[127]

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."[128] Willard Van Dyke, a documentary filmmaker and film festival judge, would have testified about the cinematic qualities of *Flaming Creatures*.[129] 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."[130] Harris objected to all of this testimony and the court sustained his objections.[131]

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."[132] Sontag also pointed to "posters outside Times Square movie theatres that advertise war movies with sadistic atrocity pictures" as an example of pornography.[133] 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

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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).

[127] 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).

[128] Amicus Brief, Jacobs v. New York at 4.

[129] Amicus Brief, Jacobs v. New York at 5.

[130] Amicus Brief, Jacobs v. New York at 5.

[131] Amicus Brief, Jacobs v. New York at 5.

[132] Amicus Brief, Jacobs v. New York at 5.

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

court was preventing the defendants from presenting any evidence because it had already decided that *Flaming Creatures* was obscene.[134] The court denied the motion and reasserted its evidentiary rulings, Rohan continuing to dissent.[135]

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 Creatures* to his class as an illustration of the Dionysius myth.[136] 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*.[137] Allen Ginsburg, the poet, testified that he knew Jack Smith and had seen *Flaming Creatures*.[138] 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."[139] 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.[140]

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.[141] Dr. Edward Hornick and Dr. John Thompson, psychiatrists, would have testified that Flaming Creatures is a work of art.[142] Harris objected to the

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[134] Amicus Brief, Jacobs v. New York at 5.

[135] Amicus Brief, Jacobs v. New York at 5.

[136] 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.

[137] 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.

[138] Amicus Brief, Jacobs v. New York at 5.

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

[140] Amicus Brief, Jacobs v. New York at 5.

[141] Amicus Brief, Jacobs v. New York at 7.

[142] Amicus Brief, Jacobs v. New York at 7.

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.[143]

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.[144] Harris responded that artistic merit does not disprove obscenity.[145] The court denied the motion to dismiss and convicted Mekas, Jacobs, and Karpf.[146] 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.[147]

The *Un Chant d'Amour* trial was scheduled to begin on June 19, but was postponed until after the *Flaming Creatures* sentencing hearing.[148] 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.[149] 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.[150] 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."[151]

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

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[143] 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).

[144] Amicus Brief, Jacobs v. New York at 8.

[145] Amicus Brief, Jacobs v. New York at 8.

[146] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967) at 2.

[147] Paul Hoffman, A Movie Show–in Criminal Court, New York Post, June 3, 1964, at 16.

[148] Paul Hoffman, A Movie Show–in Criminal Court, New York Post, June 3, 1964, at 16.

[149] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967) at 17.

[150] Jacobs v. New York, 388 U.S. 431, 432 (1967).

[151] 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.

for showing 'Flaming Creatures.'"[152] 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."[153]

Jacobs, Mekas, and Karpf appealed their convictions, without success. Berman filed a notice of appeal in the Appellate Term of the Supreme Court, First Judicial Department, and on December 9, 1965, that court entered an order without opinion affirming the convictions below.[154] 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.[155]

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.[156]

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.[157]

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

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

[153] Amos Vogel, Flaming Creatures Cannot Carry Freedom's Torch, Village Voice, May 7, 1964,

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

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

[156] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967) at 3.

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

the arts," not as "an attempt to pander to prurient interests."[158] 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."[159] 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.[160] The motion emphasized the subject matter of the film, describing it in explicit detail:

> 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.[161]

Berman filed a reply to New York's motion to dismiss or affirm on November 30.[162] 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.[163] Berman also reiterated that Jacobs, Karpf, and Mekas were not panderers. "Not only is any evidence of commercial exploitation wholly absent here, but the opposite is established by the record."[164] 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."[165]

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[158] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967) at 12.

[159] Jurisdictional Statement, Jacobs v. State of New York, 388 U.S. 431 (1967) at 12.

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

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

[162] Appellants' Reply to Motion to Dismiss or Affirm, Jacobs v. State of New York, 388 U.S. 431 (1967) at 2-3.

[163] Appellants' Reply to Motion to Dismiss or Affirm, Jacobs v. State of New York, 388 U.S. 431 (1967) at 2-3.

[164] Appellants' Reply to Motion to Dismiss or Affirm, Jacobs v. State of New York, 388 U.S. 431 (1967) at 4.

[165] Appellants' Reply to Motion to Dismiss or Affirm, Jacobs v. State of New York, 388 U.S. 431 (1967) at 4.

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.[166] 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 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.[167]

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.[168] The National Students Association emphasized that Jacobs, Mekas, and Karpf were not panderers, but "members of a cooperative society of experimental film-makers" who showed "an avant-garde motion picture for the benefit of society."[169] 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."[170]

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*.[171] 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.[172]

The Court planned to decide the *Redrup* line of obscenity cases in

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[166] Redrup v. New York, 386 U.S. 767 (1967).

[167] Memorandum from Lewis B. Merrifield to Justice Douglas, December 13, 1966, Justice Douglas Papers, LOC.

[168] 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/.

[169] Amicus Brief, Jacobs v. New York at 3.

[170] Amicus Brief, Jacobs v. New York at 13.

[171] Conference List, January 6, 1967.

[172] Redrup v. New York,

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*.[173] 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*.[174] 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."[175]

The Court finally voted on the obscenity cases in conference on June 8, 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.[176] However, Justices White, Stewart, Harlan, Clark, and Black also voted to dismiss *Jacobs* as moot.[177]

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.[178] *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.[179] 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*."[180] 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

[173] Memorandum from John F. Davis to Justice Warren, June 2, 1967, WOD papers.
[174] Landau v. Fording, 388 U.S. 456 (1967).
[175] Note from Lewis B. Merrifield to Justice Douglas, undated, WOD papers.
[176] Appellate Docket Book, October Term 1966, No. 660, Fortas papers.
[177] Appellate Docket Book, October Term 1966, No. 660, Fortas papers.
[178] 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).
[179] Jacobs v. New York, 388 U.S. 431, 432-36 (1967).
[180] Jacobs v. New York, 388 U.S. 431, 436 (1967).

material."[181] He closed by noting that the film and the motion picture equipment would be forfeit if the Court dismissed the appeal.[182]

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."[183] Brennan applied a similar "limp dick" test, under which obscenity required an erection.[184] Under Brennan's rule, "[o]ral sex was tolerable if there was no erection."[185]

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.[186]

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."[187] 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."[188] 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."[189]

College film societies also began to present *Flaming Creatures*, and

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[181] Jacobs v. New York, 388 U.S. 431, 436-38 (1967).

[182] 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.

[183] Bob Woodward & Scott Armstrong, The Brethren 193 (1979).

[184] Bob Woodward & Scott Armstrong, The Brethren 194 (1979).

[185] Bob Woodward & Scott Armstrong, The Brethren 194 (1979).

[186] Landau v. Fording, 388 U.S. 456 (1967).

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

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

[189] Art of Light & Lunacy: The New Underground Films, Time, Feb. 17, 1967.

several were busted. On April 1, 1965, the Albuquerque police busted a presentation of *Flaming Creatures* at the University of New Mexico.[190] 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.[191] 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.[192]

Similarly, on November 9, 1966, the Austin police busted a presentation of *Flaming Creatures* at the University of Texas.[193] The show was arranged by an art student named Cynthia Smagula and sponsored by Students for a Democratic Society.[194] 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.[195]

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.[196] 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.[197] A professor had filed a complaint about the show, so Detective Lieutenant Eugene

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[190] "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.

[191] "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.

[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. Mario Montez (Rene Rivera), later became one of Andy Warhol's "superstars."

[193] 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).

[194] 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).

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

[196] 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).

[197] 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

Staudenmeier attended as well.[198] 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.[199] The audience erupted, trying to stop Staudenmeier from leaving the projection booth and chasing him out of the theater.[200] 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.[201]

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.[202] Each was charged with violating the Michigan obscenity law.[203] 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."[204] 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.[205] The obscenity trial began on December 12 and ended immediately when Mary Barkey pleaded guilty to a lesser charge.[206] On February 2, 1968, Barkey paid a $235 fine and charges against the other three defendants were dropped.[207] The Ann Arbor police kept the confiscated print of *Flaming Creatures*, which featured in the Fortas Film Festival later that year.

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[198] Alan Glenn, The Flap Over 'Flaming Creatures', Michigan Today, April 14, 2010.

[199] 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.

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

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

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

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

[204] 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.

[205] 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.

[206] 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.

[207] Alan Glenn, The Flap Over 'Flaming Creatures', Michigan Today, April 14, 2010.

IV. THE FORTAS FILM FESTIVAL

Flaming Creatures is probably the only avant-garde film ever shown in the Capitol. It 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.[208] In a separate letter sent the same day, Warren stated that he was retiring because of his age.[209] While Johnson immediately decided to nominate Fortas as Warren's replacement, he kept Warren's retirement under wraps.[210] He needed time to build support for Fortas and he wanted to ensure that Warren could withdraw his retirement if Fortas was not confirmed.[211]

However, Johnson's attempt at secrecy was remarkably unsuccessful. Rumors of Warren's retirement and Fortas's nomination began to circulate the next day.[212] 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.[213] 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.[214] 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."[215] And Republican Senator Robert P. Griffin was among the first to

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[208] 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).

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

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

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

[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 294-95 (1988).

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

[215] Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 301

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."[216]

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.[217] 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 Justice.[218] And many southern Democrats opposed Fortas because they hated his liberal politics.[219] Their weapon was delay. While Fortas had enough votes in the Senate to break a filibuster, he could not keep them for long.[220]

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.[221] 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.[222] Eastland also invited Fortas to testify at the hearings. Against his better judgment, Fortas agreed.[223]

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

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(1988). Transcript, James O. Eastland Oral History Interview I, 2/19/71, by Joe B. Frantz, Internet Copy, LBJ Library, at 13.

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

[217] White House Press Release, June 26, 1968.

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

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

[220] Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 313 (1988).

[221] Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 312 (1988)

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

[223] Laura Kalman, Abe Fortas: A Biography 337 (1990).

by withdrawing his support for the Fortas and Thornberry nominations. Johnson immediately nominated Lawrence, but the damage was done.[224]

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.[225] On July 12, Griffin testified against "cronyism" and "lame duck" nominations and alleged that Fortas had violated the separation of powers by consulting with Johnson on executive decisions.[226] Senator Ralph Yarborough also introduced Thornberry, who made a brief appearance, followed by the representatives of several fringe organizations that opposed the Fortas nomination.[227]

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."[228] These assertions were false. In fact, Fortas had recommended many candidates for public office and had pressed many policy proposals.[229] 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.[230]

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.[231] 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.[232] Thurmond intoned, "Does not that decision, Mallory - I want that word to ring in your

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

[225] 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.

[226] Fortas Hearings at 41-65.

[227] Fortas Hearings at 65-97.

[228] Fortas Hearings at 103.

[229] Laura Kalman, Abe Fortas: A Biography 337 (1990).

[230] Fortas Hearings at 107-173.

[231] Fortas Hearings at 181.

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

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."[233] 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.[234] When Fortas finished testifying, Eastland closed the Fortas hearings.[235] While the papers criticized Fortas for advising Johnson, they considered it a venial sin.[236] But Fortas's opponents smelled a rat.[237] Griffin launched an investigation of Fortas's finances. Thurmond asked Eastland to reopen the Fortas hearings.[238]

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.[239] 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. 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.[240] 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.[241] Clancy pointed out that "the U.S. Supreme Court reversed 23 of 26 state and Federal obscenity

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[233] Fortas Hearings at 191.

[234] Fortas Hearings at 226-28.

[235] Fortas Hearings at 250-51.

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

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

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

[239] Fortas Hearings at 255.

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

[241] Fortas Hearings at 292.

determinations" during the October 1966 term, including twenty summary reversals, and Fortas voted to reverse in every case.[242] 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."[243]

CDL dug them up. Clancy filed as an exhibit a "summary of these cases decided by the Court and the subject matter involved."[244] He also stated that 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."[245]

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."[246]

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

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[242] Fortas Hearings at 292.

[243] Fortas Hearings at 292.

[244] Fortas Hearings at 292.

[245] 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.

[246] 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.

> enjoyment of, acts of a sexual nature.[247]

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."[248] Thurmond agreed and suggested that the obscenity cases "were reversed without any opinion to 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."[249]

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.[250] 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."[251] Nevertheless, when the hearing ended, Clancy showed *O-7* to Thurmond and about twenty reporters.[252]

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.[253]

Apparently, senators are more delicate than reporters. Before Clancy testified, McClellan, Fong, Hart, and Miller had previewed *Target Smut* and *O-7*.[254] Hart refused to defend the film.[255] Miller, Fong, and McClellan

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

[248] Fortas Hearings at 296.

[249] Fortas Hearings at 303.

[250] Fortas Hearings at 309; John Corry, Strom's Dirty Movies, Harper's Magazine, December 1968, at 30.

[251] John Corry, Strom's Dirty Movies, Harper's Magazine, December 1968, at 30.

[252] 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.

[253] John Corry, Strom's Dirty Movies, Harper's Magazine, December 1968, at 30.

[254] Fortas Hearings at 305.

[255] 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).

agreed that it was "hard-core pornography" and "something no civilized country can tolerate."[256] 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."[257] Thurmond's aides immediately started pitching *O-7* to the media, describing it as "a vulgar, filthy, subjective thing of a woman disrobing down to her transparent panties."[258]

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*.[259] When Ervin finished, Thurmond asked Christopher's opinion of the material at issue in the Court's obscenity cases.[260] 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."[261] When Thurmond asked how to suppress pornography, Christopher could not respond.[262] When the committee invited Fortas to return and discuss obscenity, he wisely declined.[263] 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.[264] 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."[265] He had seen *O-7* and "was convinced that any Senator who saw

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[256] 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).

[257] 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.

[258] The Senate: Judgment and the Justice, Time, August 2, 1968.

[259] John Corry, Strom's Dirty Movies, Harper's Magazine, December 1968, at 35.

[260] Fortas Hearings at 345-64.

[261] Fortas Hearings at 359.

[262] Fortas Hearings 359-61.

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

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

[265] Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 447

it would vote against the nomination."[266] The delay was granted. Thurmond and McClellan announced that they would spend the week showing *O-7* to the rest of the committee.[267]

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.[268]

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.'"[269] CDL also filed a copy of *O-12*, but it was essentially identical to *O-7*.

Then, the committee discovered *Flaming Creatures*.[270] 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."[271] It further described *Jacobs v. New York* as follows:

(1988).

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

[267] 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.

[268] 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/.

[269] 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/.

[270] Senators Order Up Indecent Pic to See What Fortas Digs, Variety, July 30, 1968, at 10.

[271] Fortas Hearings at 1171.

> 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 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.[272]

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 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."[273]

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.[274] On July 30, Senators Eastland, McClellan,

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[272] Fortas Hearings at 1172.

[273] Fortas Hearings at 1176.

[274] 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*

Long, Miller, and McGee and several reporters watched *Flaming Creatures* in "a small basement studio in the Capitol."[275] They were appalled by what they saw. One senator described *Flaming Creatures* as "a candid exploration of transvestitism."[276] Another senator exclaimed, "That film was so sick, I couldn't even get aroused."[277] Eastland refused to comment and McClellan "termed the film 'crude vulgarity.'"[278]

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.'[279]

According to the *Chicago Tribune*, "Even some of the strongest backers of Fortas" found *Flaming Creatures* "filthy and disgusting."[280]

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.[281] 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

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Creatures in Ann Arbor.

[275] 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.

[276] Fleshing Out the Case, Newsweek, August 12, 1968, at 28.

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

[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] 114 Congressional Record 24701 (1968).

[280] 114 Cong. Rec. 25551 (1968).

[281] 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.").

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."[282]

On September 4, the committee failed once again to make a quorum.[283] Eastland "was unable to say when he would attempt to have another meeting" and confirmed that he would vote against reporting the nomination to the Senate and against confirmation, if necessary.[284] 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."[285]

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

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[282] Philip Dodd, Raps Fortas' Court Votes on Obscenity, Chicago Tribune, August 6, 1968, at 2.

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

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

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

protected the right to show the film.[286]

About 20 senators saw the films.[287] The committee soon added all three films to the record.[288] Mansfield and Dirksen publicly warned Johnson that opposition to the Fortas nomination was "hardening."[289] 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."[290]

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."[291] 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.[292] 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."[293] 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

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[286] Saul Friedman, 4 Films: 'The End' for Fortas?, St. Petersburg Times, September 12, 1968, at 1.

[287] Saul Friedman, 4 Films: 'The End' for Fortas?, St. Petersburg Times, September 12, 1968, at 1.

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

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

[290] 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.

[291] 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.

[292] 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.

[293] 114 Cong. Rec. 26699 (1968); Joseph O'Meara, Another Opinion: Fortas and Obscenity, New York Times, September 15, 1968, at E15.

his appointment."[294] 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.[295] Thurmond insisted on additional hearings before the vote and Eastland invited Fortas to appear "at his convenience" to discuss "certain films and cases involving the issue of obscenity."[296] The committee also asked several people to testify about Fortas's role in the Johnson administration.[297] 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*.[298] Thurmond specified that Shaidell "will bring new films with him."[299]

Fortas declined the committee's invitation to testify, as did everyone asked to discuss his role in the Johnson administration.[300] 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.[301] But the

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[294] 114 Cong. Rec. 26699 (1968); Joseph O'Meara, Another Opinion: Fortas and Obscenity, New York Times, September 15, 1968, at E15.

[295] 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.

[296] 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.

[297] 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).

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

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

[300] 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.

[301] 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

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."[302]

As promised, Shaidell also brought a new film: *Un Chant d'Amour*, described rather primly as "an half-hour film depicting incidents between penitentiary inmates."[303] 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."[304] But after some debate, the committee agreed to a private screening of *Un Chant d'Amour*, which it had not yet seen.[305] 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."[306]

Finally, on September 17, the committee approved the Fortas nomination by an 11 to 6 vote.[307] But Eastland observed, "I do not think Mr. Fortas will be confirmed by the Senate," and Thurmond promised a filibuster.[308] Hart angrily replied that it would be "a miserable precedent," the first filibuster of a Supreme Court nomination.[309] And Dirksen made a short-lived proposal to strip federal jurisdiction over obscenity cases,

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$15,000 Job Told, Chicago Tribune, September 14, 1968, at A1.

[302] Philip Dodd, Fortas $15,000 Job Told, Chicago Tribune, September 14, 1968, at A1.

[303] 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.

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

[305] 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)

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

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

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

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

ostensibly "in an effort to take some of the steam" out of the obscenity issue.[310]

D. The Filibuster

Thurmond was undeterred by such criticism, and responded by firing up 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.[311]

The media lampooned the Fortas Film Festival, referring to Thurmond as "the gentleman Torquemada from South Carolina."[312] An Oliphant cartoon showed a group of senators leering at movie screen.[313] 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?"[314] 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."[315] 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."[316]

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."[317] Public pressure on

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[310] 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.

[311] The Congress: The Fortas Film Festival, Time, September 20, 1968.

[312] The Congress: The Fortas Film Festival, Time, September 20, 1968.

[313] Newsweek, August 12, 1968, at 29.

[314] Washington Post, September 15, 1968, at B6.

[315] The Fortas Nomination, New York Times, Sept 14, 1968, at 30.

[316] In Re Justice Fortas, Wall Street Journal, September 11, 1968, at 18.

[317] Max Lerner, Cutting Fortas' Head May Give U.S. Pain in the Neck, Los Angeles Times, September 20, 1968, at A5.

obscenity was intense as "[l]etters poured in . . . from persons aroused about the high court's obscenity rulings."[318]

Fortas was now "Mr. Obscenity," and his supporters were on the defensive.[319] Hart complained that the Fortas Film Festival had "soiled" public perception of the Senate, giving the impression that Senators "have been slipping into innumerable private showings" of obscene films.[320] 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."[321]

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." [322] But minority reports from Fortas's opponents rejected the majority's conclusions and continued to hammer away at Fortas's record.[323] 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.[324] "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."[325] Even Fortas's supporters conceded that confirmation was increasingly unlikely.[326]

On September 25, the Senate debate on the Fortas nomination opened and the filibuster began.[327] Fortas's opponents took the floor and

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[318] John P. MacKenzie, Johnson Withdraws Fortas Nomination, October 3, 1968, at A1.

[319] Marquis Childs, Nixon Role Urged In the Fortas Case, Washington Post, September 13, 1968, at A16.

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

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

[322] 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.

[323] 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.

[324] Fortas Hearings Part II at 27-28.

[325] Fortas Hearings Part II at 27-28.

[326] 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.

[327] Fred P. Graham, Critics of Fortas Begin Filibuster, Citing 'Propriety', New York Times, September 26, 1968, at 1.

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."[328] Thurmond also used *Flaming Creatures* to illustrate Fortas's 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."[329] 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."[330]

The filibuster was still going strong on when Dirksen announced on September 27 that he would not vote for cloture.[331] 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.[332]

At Fortas' request, Johnson withdrew the nomination the following day.[333] Fortas's opponents had won. And they owed their hard-fought victory to smut. 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."[334] As Eastland later observed, "I think there is one thing that hurt Fortas, hurt him very badly, and that was the pornography decisions."[335]

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[328] 114 Cong. Rec. 28561 (1968).

[329] 114 Cong. Rec. 28775 (1968).

[330] 114 Cong. Rec. 28775 (1968).

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

[332] 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.

[333] 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.

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

[335] 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.

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 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.[336] 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.[337] 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.[338] 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."[339] 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.[340]

Flaming Creatures remained a target of occasional obscenity raids for several years.[341] But the taint of obscenity gradually faded, as pornographic

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

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

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

[339] 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/.

[340] Flaming Creatures, Variety, June 11, 1969, at 38.

[341] *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).

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 which have been shown on campus this semester."[342] 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

The obscenity doctrine expresses the conventional wisdom that the First Amendment actually protects art, and protects pornography only by extension.[343] But *Flaming Creatures* and the Fortas Film Festival suggest that obscenity is dialectical. The obscenity doctrine provides the thesis: art protects pornography, by justifying the protection of sexual expression. *Flaming Creatures* and the Fortas Film Festival provide the antithesis: pornography protects art, by normalizing sexual expression. The history of obscenity law provides the synthesis: art and pornography protect each other. In other words, art transgresses and pornography reifies.

The story of *Flaming Creatures* and the Fortas Film Festival illustrates the dialectic of obscenity. Some people saw *Flaming Creatures* as a work of art and others did not. Jack Smith intended *Flaming Creatures* as art. Jacobs, Mekas, and Karpf showed *Flaming Creatures*, believing that it was art. And Fortas voted that *Flaming Creatures* was not obscene, finding that it was art. And yet, the police busted *Flaming Creatures*, believing that it was obscene. A majority of the Court voted that *Flaming Creatures* was obscene. And Thurmond showed *Flaming Creatures* to several senators, certain they would find it obscene. In retrospect, *Flaming Creatures* is

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[342] Gordon Atcheson, Memory of 1967 'Flaming Creatures' Bust Still Lingers, The Michigan Daily, May 22, 1974, at 3.

[343] See, e.g., Paris Adult Theater I v. Slaton, 413 U.S. 39, 63 (1973) ("If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior?"). Attorney General's Commission on Pornography, Part 4, Chapter 6, First Amendment Considerations (1986), available at http://www.porn-report.com/406-first-ammendment-and-pornography.htm ("If the material, as a whole, conveys a literary, artistic, political, or scientific idea or message, it possesses the requisite value. If it appears that the publisher of the material has tried to redeem or "dress up" otherwise obscene matter, sold and distributed for its obscene contents rather than for its ideas or message, then the value is not serious.").

obviously a work of art entitled to protection, but in practice it was not protected until pornography had normalized its content by making sexual expression familiar and commonplace.

The Court adopted the pandering test in order to distinguish between art and pornography. But it was not prepared for the result. Fortas conscientiously applied the pandering test and determined that *Flaming Creatures* was art, not pornography. The other justices disagreed. They realized that the pandering test was unworkable when they saw that it meant protecting disturbing and unpopular sexual art and suppressing distasteful but common pornography. They could accept *O-7*, but they could not accept *Flaming Creatures*. Rejecting the pandering test left them free to protect *O-7* and suppress *Flaming Creatures*. Ironically, the acceptance of *O-7* inevitably led to the acceptance of *Flaming Creatures*. By normalizing sexual expression, films like *O-7* protected films like *Flaming Creatures*.

Likewise, 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. More importantly, they were able to describe the contents of the film, even as they criticized Fortas for voting that it was not obscene. By contrast, *Flaming Creatures* horrified them. 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."[344] 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 could understand O-7, even if they didn't accept it, but they could not understand *Flaming Creatures* and the like. But when the public accepted O-7, it was hard to justify suppressing *Flaming Creatures*.

Of course, objections to *Flaming Creatures* and *Un Chant d'Amour* depended at least in part on the homosexual themes and content of the films. It is no secret that obscenity law has historically discriminated against sexual minorities, especially homosexuals.[345] The expression of minority sexual preferences tends to be suppressed more vigorously than the expression of majority sexual preferences because communities generally find minority sexual preferences more offensive than majority sexual preferences.[346]

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

[345] 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.").

[346] Bret Boyce, Obscenity and Community Standards, 33 Yale J. Int'l L. 299, 358-59

But the social dynamic that promotes discrimination against the expression of minority sexual preferences also promotes discrimination against sexual art. Art generally appeals to minority preferences and sexual art is no exception. While the strangeness of *Flaming Creatures* probably should have identified it to the Court as a work of art entitled to First Amendment protection, in practice it had the opposite effect. Instead, the artistic vision expressed by *Flaming Creatures* disturbed both the Court and the Senate. It was indeed a *film maudit*, misunderstood and reviled. Forty years later, it's finally getting its due. Perhaps we owe a debt of gratitude to the army of nameless and numberless pornographers who helped protect the peculiar vision of *Flaming Creatures*.

CONCLUSION

Conventional wisdom 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, under which art transgresses the norm and pornography normalizes transgression.

(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.");