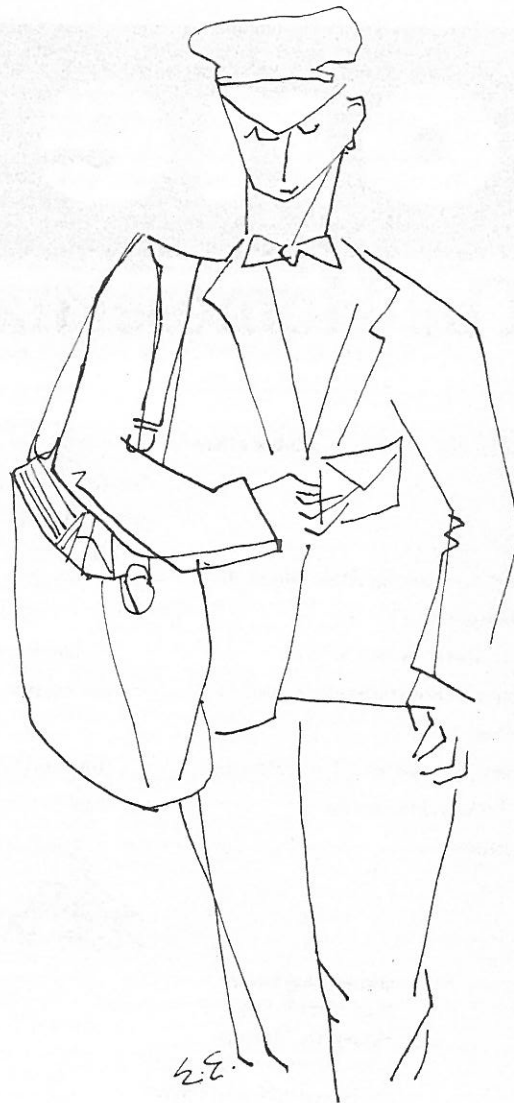


The Law of Mailable Material

by
ONE'S Legal Counsel



I have been asked by the Editors of ONE to write an article explaining the legal problems involved in screening and selection of the written material appearing in the magazine. I am happy to do this, and hope it will serve two purposes: (1) to give the readers of ONE an idea of some of the difficult behind-the-scenes problems facing ONE's Editors, and (2) to indicate to ONE's contributors the legal limits of printable material.

I. THE LAWS PERTAINING TO MAILABLE MATTER.

The use of the mails is not an absolute right. It is, rather, a privilege extended by the Government. The privilege is a broad one, as broad as the guarantee of freedom of speech in the First Amendment. Nevertheless, it has its limits, and it has long been the law that the Government can exclude from the mails any matter it deems contrary to the public welfare or morals. For example, it is illegal to send gambling tickets or abortion-producing devices through the mails.

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"You CAN'T PRINT IT!"
(COVER) October, 1954

The basic law on the subject, the United States Code section 1461, reads as follows:
"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . is declared to be nonmailable matter . . . Whoever knowingly deposits for mailing or delivery (such matter) shall be fined not more than \$5000 or imprisoned not more than five years, or both."

Thus the law not only forbids the mailing of "obscene, lewd, lascivious or filthy" matter, it makes an attempted mailing of such matter a Federal crime, with heavy penalties attendant.

This law is enforced by the Postmaster General, and by his assistant Postmasters in each city. It is the duty of each local postmaster to screen mail matter originating in his locale (although he cannot examine sealed matter without a warrant), and use his judgment and discretion in banning nonmailable matter. His judgment is regarded as conclusive, and will only be reversed by a reviewing court of law if it is clearly wrong.

In actuality, what happens is this: if the Postmaster suspects a given publication may be nonmailable, he holds up its transmission, and submits a copy of it to the office of the Solicitor-General in Washington. The Solicitor-General is, in effect, the Postmaster's attorney. The Solicitor-General renders his opinion to the Postmaster, and then the Postmaster acts accordingly, either releasing or confiscating the matter.

ONE'S readers may remember that last year, ONE'S August issue was detained by Los Angeles postal authorities for three weeks, pending a determination by Washington of its mailability. The Solicitor-General decided that ONE was mailable (or, at least, that the August issue was mailable). This, of course, was an important victory for ONE.

II. WHAT IS "OBSCENE"?

The question of precisely what is "obscene, lewd, lascivious or filthy" has, as is to be expected, plagued lawyers and the courts for many years. It is obvious at once that what is "obscene" is a subjective standard which will vary from society to society, and will change within a society as times goes on. Nevertheless, we live in 20th Century America, and must, therefore, study the standards as laid down by the judges of our past 50 years.

"Obscene, lewd and lascivious" have been variously defined by the American courts as, for example, offensive to the common sense of decency and modesty of the community; as tending to suggest or arouse sexual desires or thoughts in the minds of those who might be corrupted thereby; as nasty, dirty, vulgar, indecent, morally depraving or debasing; impure; calculated to excite lustful and sensual desires in those whose minds are open to such influence; foul; disgusting; or descriptive of dissolute or unchaste acts, scenes or incidents.

It has been said further that in order to bar publication from the mails, the likelihood must be that the work will so much arouse the salacity or lusts of the reader as to outweigh any literary, scientific or other merits in that reader's hands. Note also that by "the reader" is meant the Average Reader, not the actual reader.

Examples of mailed matter which has been declared obscene, and the senders prosecuted criminally, are: a letter to a married woman, proposing a meeting for purposes of intercourse; a letter to an unmarried woman, proposing to pay her travel expense plus five dollars if she would submit to intercourse; a letter, in itself free from obscene language, but offering to sell obscene pictures; and a letter from one man to another, suggesting a meeting for homosexual acts.

It is important to note that the classics themselves are not above suspicion. A case is reported in which the Judge's charge to the jury read, in part:

"The defendant's counsel has read in the course of his argument certain passages from certain well-known authors—from Shakespeare, Sterne, Suetonius, and even from the Bible. The passages read, taken in connection with their context, may be, or may not be, obscene or indecent. You are not trying that question, nor will your verdict decide in this case whether the Bible, Shakespeare, Sterne and Suetonius must be excluded from the mails."

In this connection it is of interest to note that at various times in the past, famous classics have in fact been banned as obscene. Such authors and works as Rabelais, the Arabian Nights, Ovid's Art of Love, Boccaccio's Decameron, Confession of Rousseau, Queen Mab by Shelley, and Ulysses by James Joyce, have all been the subjects of famous lawsuits (and all ultimately declared mailable). On the other hand, certain works, such as Tropic of Capricorn, by Henry Miller, are still held nonmailable.

It may be of further interest to note that of all the material which went into one of ONE'S recent issues, the only work which needed deletion, for purposes of avoiding trouble with the law, was some poetry by Walt Whitman!

III. WHAT IS PRINTABLE IN ONE MAGAZINE?

Whether or not we like or agree with the laws of this world, we must live with them. This is an admonition attorneys frequently have to give clients. Therefore, what do these laws mean, in terms of what ONE can or cannot print?

First, while I do not want to alarm ONE'S readers, I must in frankness say there is one extreme school of legal thought which would say that ONE, merely by its existence, is illegal. That line of reasoning would run as follows: Homosexual acts are made crimes in every State of the Union. ONE is published specifically for homosexuals. Therefore, ONE is a magazine for criminals, their edification and guidance. It is, therefore, illegal.

This, however, is too extreme a view for 1954. There is no indication from any quarter that such a view will ever be taken, or could be successfully maintained in a court. It is likelier that a more moderate, sensible position will in fact prevail. This moderate view is in fact the one taken last year by the Solicitor-General.

That view is this: that a discussion of the social, economic, personal and legal problems of homosexuals, for the purposes of better understanding of and by society, is permissible; but appeals to the lusts or salacity or sexual appetites of ONE'S readers are not permissible. ONE, in other words, can appeal to the heads, but not the sexual desires, of its readers.

This view is in accord with that taken by the Church of England recently, when it announced that in its opinion, the condition of homosexuality itself was "morally neutral"; homosexual acts, however, are sinful.

Let us apply these principles to the actual day-to-day problems of the magazine, in dealing with contributions. The following rules can be set forth. ONE cannot print the following:

- (1) Lonely hearts ads, seeking pen pals or meetings.
 - (2) "Cheesecake" art or photos. To readers who ask, "But how about all the girlie magazines?" I can only reply that in our society, visual stimulation of man by woman is tolerated to a far greater extent than attempted visual stimulation of man by man, for what is in law a criminal purpose.
 - (3) Descriptions of sexual acts, or the preliminaries thereto. Again here, what is permissible in heterosexual literature is not permissible in ONE's context.
 - (4) Descriptions of experiences which become too explicit. I.e., permissible: "John was my friend for a year." Not permissible: "That night we made mad love."
 - (5) Descriptions of homosexuality as a practice which the author encourages in others, or waxes too enthusiastic about.
 - (6) Fiction with too much physical contact between the characters. I.e., characters cannot rub knees, feel thighs, hold hands, soap backs, or undress before one another. (All examples taken from recent contributions).
- This is only a partial list; the only real standards are the taste, discretion, and judgment of the individual editors.
- Note also that these rules are relaxed somewhat in work dealing with homosexuality among women. Hence, the greater freedom of ONE'S February All-Woman Issue. This is merely a reflection of society's attitudes in general, based on no particular logic.

IV. CONCLUSION.

These rules may outrage some readers who desire far greater militance and frankness. They are, however, the facts of legal life. The rules here set forth have proved valid in the experience of other publishers, who have found the Postal Department to be "trigger-happy" in the area of homosexual literature. One well-known publisher of fiction has announced he will not handle work of this character any longer, the risks of publication having become too great.

ONE, also, must operate under restrictions, some of which chafe. Every word which goes into the magazine must be read by ONE'S attorney at least twice, once in its raw, manuscript form, and again in finished, printed paste-up. ONE'S revenues are sometimes limited by having to refuse to take certain advertising, which in the context in which ONE operates would prove dangerous.

The path is difficult and requires great judgment and responsibility. But if ONE, and the writers and viewpoints it represents, can become an accepted institution in American literary life (and this seems to be happening), it will have served a great and important purpose, both for its readers and for the cause of freedom of speech; for in its own way, ONE is helping to broaden the areas of free expression in this country.

Democracy



In the ideal democracy, persons govern themselves, collectively, according to certain ethical principles agreed upon among them, principles which are defined in terms of individual rights. Theoretically, democracy rejects moral codes as a means of government, and seeks instead for universal social principles, truths, and qualities which can be placed at the foundation of a political structure—principles, truths and qualities which every responsible person in society can be said to embody and express with equal force. The most famous sentence in our Declaration of Independence clearly illustrates this:—"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."

The ability of the human mind to reach into and define the basic principles of its own welfare is the cause which has led to the emergence of democracy as a social ideal during comparatively modern times. We have reached for a universal ethic to guide and regulate our behavior; and in the midst of this process, and also because of it, we have sensed that moral codes, in themselves, are too much confined to temporary or restricted conditions to furnish us with such a guide. The distinction between ethics and morals is of great importance to the future evolution of our society,

but it cannot be drawn satisfactorily within the limits of this article. For the immediate purpose, let it suffice to observe that moral codes rest upon certain limited relationships, such as "the family" or "the tribe," or upon certain limited necessities, such as those relating to physical subsistence, or to sexuality. Then, from a utilitarian and objective point of view—"the greatest good for the greatest number"—they describe certain permitted or prohibited acts pertaining to these limited relationships or necessities, and they do this in an arbitrary way, without reference to any of the subjective necessities or inclinations which are actually responsible for individual behavior. Thus, obviously, no moral code, as such, can reflect justice except imperfectly, taking "justice" to mean both an orderly and harmonious adjustment within the individual's total self, and, in the social context, our collective solicitude for all of the subjective as well as the physiological phases of individual growth and well-being. Distinguished from morality, ethics neither prescribes nor proscribes actions, per se, but defines, as rights, certain subjective conditions of individual well-being—conditions in which every human being shares identically. Then, it categorically supports any and all actions which further this well-being and, incidentally, condemns any and all actions which do not.

Because democracy is centrally concerned with describing the subjective requirements rather than the mere external conditions of individual welfare, and because it recognizes every individual as a living personification of these subjective requirements, it has elevated the individual more and more to a position of supreme importance in the social structure. Therefore we expect to find in democracy that social relationships are sustained and developed for the purpose of enhancing the liberty and the opportunity of the individual, and for

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