OBSCENITY, FREEDOM, AND RESPONSIBILITY†

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I. THE EARLY YEARS

Western civilization has known both obscenity and pornography at every stage of its development. There is an abundance of material in the Old Testament on the subject of pornography in its original sense of writings about prostitutes and their patrons, and there are many references which are certainly obscene if not pornographic in the wider sense as the term is generally understood today.1

Erotic songs and poems were in a very real sense part of the fabric of early Greek culture. One need not look far for pornographic references in the works of the classical Greek writers. Euripides in his Electra and Sophocles in Oedipus Rex, for example, are much concerned with the subject of incest, while Aristophanes introduces many obscenities into his plays. Lysistrata, first produced in Athens toward the end of the long war with Sparta, is frankly sexual and abounds with pornographic illusions. In passing it may be noted that the unexpurgated book of the play was liable to seizure by the United States Customs during the first thirty years of the present century, and as late as 1955 post office lawyers advised that the work was plainly obscene and calculated to deprave the morals of the reading public.2

One of the first pornographic works to come from ancient Rome was the celebrated Ars Amatoria, written by Ovid about the time of the birth of Christ. For his authorship, Ovid suffered the punishment of banishment by Emperor Augustus although centuries later many a Renaissance humanist would hail his work as

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1. Obscenity, a Latin word, is likely derived from ob (on account of) and caenum (filth). While generally relegated to matters related to sex, or more precisely, debasement of sex and the sex instinct, it may also include exposure of the excremental. The word pornography is derived from the Greek pornographos, meaning literally "the writing of harlots." It is generally agreed, however, that the essential characteristic of pornography is its sexuality. D. H. Lawrence has defined "genuine pornography" as that which insults sex and the human spirit. D. LAWRENCE, PORNOGRAPHY AND OBSCenity 13 (1929).

2. J. PAUL & M. SCHWARTZ, FEDERAL CENSORSHIP, OBSCENITY IN THE MAIL 104 (1961),
the product of a refined enlightenment. Latin literature, notably during the Silver Age, abounds with obscenities, such as the Comedies of Plautus, The Golden Ass of Apuleius, and the Satyricon of Gaius Petronius. Probably the greatest classic of Roman pornography, the Satyricon, leaving little to the imagination, describes in considerable detail almost every known form of sexual deviation including sado-masochistic practices.

The first traces of pornography in England occur in The Exeter Book which remains one of the original sources of Anglo-Saxon literature. It consists, in the main, of an anthology of poems and riddles, doubtless of monastic composition—the manuscript having been presented to Exeter Cathedral by its first bishop, Leofric, some nine hundred years ago. Ballads of the era were as unashamed as they were ingenuous, and the court poet Chaucer mirrored few inhibitions, as a reading of The Miller's Tale will evidence.

In medieval times the Church acted as censor, but the major concern in that era was heresy, not obscenity, and medieval literature was as robust as it was uninhibited. Savonarola incinerated The Decameron in 1497, yet his zeal and fanaticism were atypical of the age; and Bocaccio was not to feel the sting of papal rebuke until 1559 when The Decameron was banned because it satirized the clergy. As a matter of fact, the Church did authorize an expurgated edition, however the references expunged were those relating to the saints and to the clergy. The obscenities remained.

Similarly in England, during Henry VIII's reign, heretical books and tracts were suppressed. Apparently the breach with Rome spelled little difference since Henry was anxious, as were his predecessors, to establish and maintain his orthodoxy and would brook no dissent. During the reigns of the Tudors, the system of censorship remained essentially religious and political. Protestant monarchs suppressed Catholic authors and Catholic books; Catholic monarchs suppressed Protestant authors and Protestant books.

4. The famous Index Librorum Prohibitorum was a fact at the close of the Council of Trent in 1563. Few publications of the modern age, considered risque by a contemporary reading public are listed in the latest edition. For example, names such as James Joyce, Henry Miller, Proust, Genet, and D. H. Lawrence are missing. Of Unamuno's total production, only The Tragic Sense of Life and The Agony of Christianity are banned; of Simone de Beauvoir's efforts, only The Second Sex and The Mandarins. Diderot's Jacques the Fatalist is listed but his Religieuse (a lurid expose of evils attendant upon placing unwilling girls in the convent) is not included. Erasmus and Bocaccio are no longer listed.
But it was Mary Tudor who found the appropriate instrument for enforcing the royal will. She incorporated the Stationers' Company, the contemporary union of the printing trade, and, except for a few isolated cases, she granted the company a monopoly of printing as well as a number of other privileges. In return for the charter, the company undertook to search out and suppress all undesirable and illegal books, all of which was accomplished through a system of licensing. During the ensuing reign of Elizabeth, the charter was renewed and a rigid censorship by means of licensing was sternly enforced. By decree, Elizabeth introduced a system of licensing books which would endure until the close of the seventeenth century.

For all the censorship, Elizabethan England delighted in coarse and robust humor. Shakespeare likely comes nearest to pure pornography in his poetry, for example his description of the seduction of the youth Adonis by the goddess Venus in *Venus and Adonis*, and the rape of Lucretia by Sextus in *The Rape of Lucrece*. The scatology of a poet like Pope would most probably be classified as obscene by the twentieth century mind, however, his contemporaries were more receptive and accepting. In an age when even the staircases of great houses were used as public privies and when chamber pots were emptied from upper windows onto the streets below, men and women were not prone to embarrassment by references to simple bodily functions.

Nonetheless, there is no evidence to indicate that the writers or other purveyors of obscenity of that day were in any sense exploiting or taking advantage of the masses. For one thing, the ribald and the bawdy were very much taken for granted and apparently there was no concerted effort made to peddle literary wares under-the-counter as we know and understand the term today. The age of commercial expectation and exploitation was still centuries removed. Furthermore, among the common people there were extremely few who could read, much less write, hence opportunities for ill-gotten financial gains from smut peddling were virtually nonexistent.

It is no wonder, then, that during the Restoration period literature and drama tended to reflect the preferences, and sometimes the immorality, of aristocratic patrons of the arts who formed a select circle around the court at Whitehall. With the Stuart Restoration in 1660 came a flavor that was decidedly French. Such plays as William Wycherley's *The Country Wife* and William Congreve's *Love for Love*, both late seventeenth century products,
abound in suggestive scenes and situations reflecting the tempers of the patrons of the arts. Even King Charles was known to write about the pleasures of love outside the bonds of matrimony.

But with the advent of the House of Orange late in the century, the pendulum swung back once again to a mood of sobriety. There developed a middle class interest in reformation of public manners and morals; and doubtless the seeds of a self-imposed censorship were sown in these times to take root during the century to follow and to achieve full expression in the Victorian conscience of a still later day.

That age of enlightenment, the eighteenth century, will forever be remembered as an age of contrasts. It was the century of Casanova, of Fielding, and of Sheridan, and it was likewise the century of Wesley and Wilberforce. Bawdy, satirical wit and frank sensuality were all conspicuously in evidence, most generally confined of course to the sanctuaries of the upper-class, namely, the nobility and the intellectual elite of the universities. Less conspicuous perhaps was a new but heady current of Puritanism which would overflow with full vigor a century later. Indeed, publication of pornography was formally and judicially declared to be a common law offense early in the eighteenth century, yet as far as we know no action was taken against the publication of John Cleland's _Fanny Hill_. For the most part, during those times at least, we may assume that obscenity and pornography escaped strenuous legal sanction except when coupled with sedition or blasphemy.

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5. Obscene libel was first recognized as a common law offense in _Curl's Case_, 2 Stra. 788 (1727). Edmund Curl (1675-1747) had published a pornographic book, _Venus in the Cloister or the Nun in her Smock_, was sentenced to pay a fine of 50 marks (about $100.00), and ordered to stand in the pillory at Charing Cross for one hour. For all that, it appears more likely that Curl was punished more for his political and religious views than for his obscenities. In any event, the offense of obscene libel became part of the common law and has never since been seriously challenged. Although Curl was condemned for publishing a pornographic book, it must be noted that no attempt was made throughout the century to prosecute authors or publishers of merit. An attempt was made to enjoin circulation of _The Monk_ by Matthew Lewis, but prosecution was not in evidence. For a scholarly presentation of the subject in broad compass see ST. JOHN-STEVAS, _Obscenity and the Law_ (1956).

6. Generally speaking, pornography circulated rather freely in England during this period. Among the more daring and successful literary ventures were _The Rambler's Magazine_, _The Bon Ton Magazine_, and Harris's _List of Covent Garden Ladies_. The last mentioned was little more than a catalogue of the principal London prostitutes, yet official action against it seems never to have been taken. In fact, it was not until 1960 that the publisher of a booklet entitled the _Ladies Directory_, resembling
With the nineteenth century came the strong and strident voice of Methodism and the Society for the Suppression of Vice. Standards no longer devolved exclusively from or through the aristocracy but were to be set and influenced by a new and growing middle class. There may have been some measure of toleration with respect to expressions of opinion in politics and religion but intolerance of free discussion about sexual relationships and immoralities was the order of the day. There was a veritable obsession with sin, especially sexual sin.

Whether the product of Evangelicalism, Benthamism, or Bowdlerism, the general feeling extant was that love of literature, and particularly the novel, might well be equated with skepticism, disbelief in God, and neglect of private prayer. Three immortal poets, Byron, Keats, and Shelley, knew almost constant reproachment for their fifth and pruriency. Lady Eastlake at-the Covent Garden lists, was successfully prosecuted in England. See generally Hyde, A HISTORY OF PORNOGRAPHY 163 (1965).

7. In 1787, King George III issued a proclamation against vice, exhorting the public to suppress all loose and licentious prints, books, and publications. William Wilberforce, the Evangelical Members of Parliament, formed the Proclamation Society to enforce the King's interdict. Several years later, in 1802, the Society for Suppression of Vice was founded and eventually absorbed the Proclamation Society. The Society was instrumental in securing passage of the Vagrancy Act of 1824 which proscribed public exhibitions of indecent prints and exacted a penalty of not less than three months hard labor. 5 Geo. 4, c. 83. Slough & McAnany, Obscenity and Constitutional Freedom, 8 St. Louis L.J. 279, 449 (1964).


9. By the dawn of the nineteenth century, the strength of Evangelical Christianity could not be questioned. The Methodists, a virile force, not only stirred up a dormant Anglican communion but vivified the Baptists, Congregationalists, and Presbyterians. Within the spirit of the strict evangelical concept, literature deserved no tolerance unless it promoted a decidedly moral purpose.

10. Benthamism attended cheek by jowl the growth of idealism in politics, and neither literature nor the arts could play a major role in the achievement of material well being. The fact that John Stuart Mill would reproach Hume for allowing himself to be enslaved by literature, without regard for the truth or utility, served to illustrate the doctrinal lack-lustre of this school of thought.

11. The term "bowdlerize" traces its origin to the efforts of the great expurgator, Thomas Bowdler (1754-1825). It was Bowdler who published The Family Shakespeare in ten volumes, an edition conspicuous for its omission of words and expressions which could not with propriety be read aloud in the family recreation period. First appearing in 1818, it was frequently reissued throughout the reign of Queen Victoria.

12. The British Critic branded Byron's Don Juan as "a narrative of degrading debauchery in doggerel rhyme." When Keats published his poem Endymion, he was accused of creating immoral images and blatant
tacked *Jane Eyre* for its “horrid taste” and “coarseness of language,” while Elizabeth Gaskell and George Elliot were under attack for showing aspects of life “better kept from sight.” *Wuthering Heights*, published in the same year as *Jane Eyre*, was criticized for dwelling upon physical acts of cruelty—acts which true taste rejects. Hardy fought his censors over the alleged immorality of *Tess of the d'Urbervilles*, and as late as 1896, his *Jude the Obscure* encountered the same sting of rejection.

By 1857, the Society for the Suppression of Vice had initiated 159 prosecutions, securing convictions in all save five cases, and the number of shops dealing in questionable literature had been drastically reduced. Within that year a legislative milestone, Lord Campbell's Act, was passed. Lord Campbell, himself, declared that the measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in a well-regulated mind.

Lord Campbell's Act created no criminal offense but did give magistrates the power to order the destruction of books and prints impurity. Shelley's *Queen Mab* incurred prosecution for blasphemy by the Society for the Suppression of Vice, and Clarke, his publisher, was imprisoned for four months.

In spite of the efforts of the Vice Society, the trade in pornography continued to flourish, particularly as an underground operation. Thus, it should never be assumed that the Victorian age was one simply of prudery and uncompromised innocence. On the contrary, it is a fact that pornography, especially pornographic writing, became an industry during this time for money circulated more freely with the advent of the Industrial Revolution, as did literature and the better things of life. With the passing of years, the illiterate became literate, and the purveyor of the indecent and the fantastic ever so gradually beheld an expanding, lucrative market. It was the Victorian era that provided some of the best samples of purely erotic pornography, for example, *The Ups and Downs of Life* by Edward Sellon and *My Secret Life* by an anonymous writer. The latter work consists of eleven volumes, the whole coming to 4,200 pages. Both books are reminiscent of the style of Frank Harris whose autobiography was banned for years in Britain and the United States.

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14. 20 & 21 Vict. c. 83 (1857). For an accurate commentary on the developments leading to enactment of this law, see Alpert, Judicial Censorship of Obscene Literature, 52 HARP. L. REV. 40, 50-52 (1938).

15. 146 HANSARD PARL. DEBS. (3d ser.) 327 (1857). A few months after the passage of the new Obscene Publications Law, Lord Campbell was heard to exclaim that its success had been most brilliant. According to his measurement of the shape of things, Holywell Street, long defiant of law and decency, had all but capitulated. However, his boast proved to be illusory inasmuch as Holywell Street would continue for many years to be the London center of the pornographic trade. *Hyde*, supra note 3, at 170.
if, in their opinion, their publication would amount to a misde-
meanor proper to be prosecuted as such. Magistrates were further
empowered to issue warrants to the police to search suspected
premises.

A decade later, in 1868, Sir Alexander Cockburn made the
second signal contribution to the law of obscene libel when he
formulated a test of obscenity in *Regina v. Hicklin*.16 This was not
a prosecution but was an action brought under Lord Campbell’s
Act against one Henry Scott, a respected Wolverhampton metal
broker, who had sold copies of a pamphlet entitled *The Confessional
Unmasked*.17 The Watch Committee of the Borough, regarding the
book as obscene, arranged to have Scott arrested; a police officer
seized 252 copies of the pamphlet, and the case came on for trial
at the Quarter Sessions where the recorder revoked the seizure and
destruction order, holding that Scott’s purpose had not been to cor-
rupt the public morals but solely to discredit the Church of Rome.

The case was appealed to the Court of Queen’s Bench presided
over by Chief Justice Cockburn, who reversed the decision of the
recorder and restored the destruction order. In the course of his
judgment, Chief Justice Cockburn laid down what had the appear-
ance of being a simple legal test for obscenity:

I think the test of obscenity is this, whether the tendency of
the matter charged as obscenity is to deprave and corrupt
those whose minds are open to such immoral influences,
and into whose hands a publication of this sort may fall.18

The rule of *Hicklin* supplied the guiding standard for English

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17. The full title of the publication read: “The Confessional Un-
masked: shewing the depravity of the Roman Catholic Priesthood, the
iniquity of the Confessional and the questions put to females in confession.”
A second edition, expurgated and amended, was published in 1869 under
the title: “The Morality of Romish Devotion or the Confessional Un-
masked.” Scott, far from being a professional publisher, was simply a
zealot for the Protestant cause and sold his pamphlets at cost.
18. [1868] 3 Q.B. 360, 371. Chief Justice Cockburn was careful to
note that not everything that contains material that might be considered
obscene is indictable, for example, a medical or scientific treatise. But in
the instant case, Scott had sold his pamphlets indiscriminately on the
corner in an effort to prevent the public from falling into the clutches of
the Pope, when the probability was that 999 out of every thousand into
whose hands this work would fall would never be exposed to the hazard
of being converted to the Catholic religion. Scott’s pamphlet had been
put together from the writings of theologians such as Peter Dens and
Ligouri, and at least half of the material was at most controversial or
casuistic. The remaining half consisted of a conglomerate pattern of im-
pure and filthy words and ideas, and in the view of the court this served
to render the whole obscene.
and American courts for several decades. It has generally been interposed as incorporating two distinct elements: (1) the audience the publication is likely to attract; and (2) the amount of obscene matter contained within the publication. The phrases "those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall" created as a standard the publication's effect upon youth, the sensually inclined, and the pathologically unbalanced. In addition, the rule permits a publication to be censored not because it is predominantly obscene but because it contains some obscenity. Theoretically, one obscene passage would suffice.

II. A STANDARD EVOLVES

In the United States prior to the Civil War, there were few reported decisions directly concerned with obscene literature. However, this fact standing alone compels no inference that the American public and its reviewers were less censorious than their English contemporaries. The United States government first concerned itself with obscene matters as an incident to its customs powers by outlawing the importation of obscene materials.

19. This aspect of the Hicklin rule has drawn severe criticism for its attempt to apply juvenile standards in the interest of a salacious few while gravitating against the interests of an enlightened majority. The age old problem, still to be resolved, is that of preserving the inalienable rights of the larger segment of society while protecting the interests of the less fortunate and most vulnerable.

20. The rule of Hicklin endured as the law of England until passage of the Obscene Publications Act of 1959. The newer law provides that an article shall be deemed to be obscene if its effect, taken as a whole, is such as to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear it. A defendant in England may now set up a defense of literary or other merits and expert witnesses may be called to support his claims.

21. The first reported case was Commonwealth v. Holmes, 17 Mass. 336 (1821), which was decided upon jurisdictional and procedural matters. However, the court did note that "obscene libel" was a common law offense. The earliest case on record in the United States appears to be Commonwealth v. Sharpless, 2 S. & R. 91 (Pa. 1815). Jesse Sharpless was convicted in Philadelphia for displaying an obscene picture which depicted a man in an obscene, impudent, and indecent posture with a woman. The defense claimed the court lacked jurisdiction because the offense was one involving private morality which in England would be dealt with in the ecclesiastical court. Chief Justice Tilghman ruled that the offense was criminally punishable.

22. In 1851, Nathaniel Hawthorne's The Scarlet Letter was attacked as an indecent, immoral book that degraded literature and encouraged social licentiousness.

During the early decades of the republic, there was relatively little overt action taken by officers, state or federal, against obscene and pornographic works. However, an unsettled social situation occasioned by the Civil War and the swift changes wrought by a post-war economy created new climates of opinion. A blatant, crude immorality, countenanced perhaps by the frontiersman, would not be countenanced by a people who made much of revering the Bible, church, and family solidarity. It seemed only natural that a confused and aroused public should react to post-war sin in a mood to cleanse and reform.

In this age of threatened innocence, one man above all others rose with vigor to declare his contempt for what appeared to be a trend toward perdition in literature and the arts. Anthony Comstock, reared in the harsh discipline of a Connecticut Congregationalist household, carried his moral precepts with him as a volunteer in the Union Army in 1863. During an uneventful eighteen months of noncombatant duty, the young Comstock was known to pray with fervor for the deliverance of his depraved tentmates. Returning to his native New England in the post-war years, he would not only continue his supplications in behalf of the wicked and insensate, he would act as well.24

As early as 1868, Comstock, inspired by a campaign of the Young Men's Christian Association against obscene literature, had secured the arrest of two publishers. Although not a member of the Association, he offered his services as a crusader and helped form a committee for the suppression of vice which subsidized him

§ 1462 (1968) (importation or transportation of obscene matters); 18 U.S.C. § 1463 (1968) (mailing indecent matter in wrappers or envelopes).

Anyone receiving a pandering advertisement which he finds offensive has authority under recent federal legislation to request that he receive no further materials of such nature. An advertisement is considered pandering if it offers to sell material which is, in the opinion of the recipient, erotically arousing or sexually provocative. The material can be in the form of a display, classified, or editorial-style advertisement. The individual mail patron is the sole judge of whether an advertisement is offensive to him. To facilitate processing of customer complaints, the Post Office Department provides a form (POD123) whereby the customer may register protest. Children under 19 years of age may be listed in the customer request by name and age. 39 U.S.C. § 4009 (1970).

24. Following the Civil War, Comstock commenced his forty year campaign to purify American reading habits under the slogan: "Morals, Not Art or Literature." He did not openly condemn all literature and art, but he distrusted what he called "light literature" and detested weekly papers, half-a-dime magazines, lewd newspapers, lotteries, and gambling dens. In short, he was dedicated to a program of solid but rapid reform. BROUN AND LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD (1927); TRUMBULL, ANTHONY COMSTOCK, FIGHTER (1913).
in his many operations against booksellers and publishers.\textsuperscript{25} Toward the end of his life he boasted that he had convicted enough persons to fill sixty passenger train coaches of sixty passengers each and the sixty-first almost full, besides destroying 160 tons of what he considered obscene literature.

Apparently his greatest single achievement was the passage in 1873 of what is generally known as the Comstock Act.\textsuperscript{26} By the Act Congress declared that no obscene, lewd, or lascivious book, pamphlet, picture, print, or other publication of an indecent character should be carried in the mails. For the first time the law prescribed the knowing deposit of such materials in the mails. Enforcement of the law became the immediate responsibility of the Postal Inspection Service.\textsuperscript{27}

Following the example of Congress, state after state passed similar laws. The New York Society for the Suppression of Vice, with Comstock as its mentor, wielded awesome power for nearly two generations.\textsuperscript{28} In addition, Comstock was appointed a special agent for the Post Office, thus acquiring the added quantity of police power. Every editor and publisher of the day came to know, to fear, and respect this untainted Connecticut Yankee.

\textsuperscript{25} In 1873 Comstock received an appointment as special agent of the Post Office Department, and during the same period he was likewise made secretary of the New York Society for the Suppression of Vice. He would remain agent and secretary until his death in 1915, accepting no pay from the government until 1908 when he was required to accept $1,500 a year. He published two books, \textit{Frauds Exposed} (1880) and \textit{Traps for the Young} (1883), and many pamphlets, of which \textit{Morals Versus Art} (1888) is most illuminating.


\textsuperscript{27} The Postal Inspection Service is probably the oldest law enforcement agency in America. Inspectors may trace their lineage directly to Benjamin Franklin and the first colonial postal system. In 1873 the inspectors obtained their first test case, United States v. Bott, 11 Blatch, 346 (S.D.N.Y. 1873). In affirming the conviction of John Bott and John Whitehead on charges of sending an abortion-producing powder through the mail, a New York District Court held firmly that Congress had power to define contraband materials in the mail. In 1878, a unanimous United States Supreme Court, speaking through Justice Field, approved the basic principles of the act of 1873. \textit{Ex parte} Jackson, 96 U.S. 727 (1877). The Court did state clearly, however, that no law of Congress can place in the hands of postal officials the authority to invade the secrecy of letters and sealed packages. As a matter of course, postal authorities have accepted this ruling as an article of faith: the fact that first class mail shall remain private. The Comstock Act was again upheld unanimously in \textit{Ex parte} Rapier, 143 U.S. 110 (1892).

\textsuperscript{28} Many of the leading publishers of the day bowed to Comstock, submitting rather than risking the chance of prosecution. Even Baltimore's H. L. Mencken paid a visit to the Vice Society's office hoping to clear the manuscript of a book by Theodore Dreiser. The book was \textit{Sister
During the last quarter of the nineteenth century, an era reminiscent of the Comstock ideal, the courts were to prepare for a rising number of legal contests involving obscenity. The first significant American decision announcing the rule of *Hicklin* appeared in 1879 when circuit judge Samuel Blatchford, sitting in New York, wrote his long opinion in *United States v. Bennett*.29

Deboigne M. Bennett had been convicted, as a result of Comstock's efforts, for mailing an obscene booklet entitled *Cupid's Yokes*, or *The Binding Forces of Conjugal Life*. Bennett contended that Comstock had neither right nor authority to prosecute him, that the booklet as a whole was not obscene, and that he was being deprived of freedom of speech and of the press. Affirming the conviction, the court in essence upheld and preserved the *Hicklin* mandate, ruling that the matter must be regarded as obscene if it would have a tendency to suggest impure and licentious thoughts depraving and corrupting morals. Further ruling that the object with which a book was written was immaterial, the court found that obscene excerpts should be sufficient to endorse conviction.

In 1913, Mitchell Kennerley, a modest publisher with an equally modest list of titles, challenged Comstock as none of the more prestigious publishers had seen fit to do. Kennerley was indicted for mailing an allegedly obscene book entitled *Hagar Revelly*.30 Although the young, liberal Judge Hand did in fact overrule a demurrer to the indictment, he protested against the mid-Victorian ideals expressed by the orthodox rule, indicating

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29. 24 F. Cas. 1093 (No. 14571) (C.C.S.D.N.Y. 1879).
30. The book was concerned in main with the life and loves of a pleasure-seeking woman in New York City. Virtue was assailed and ultimately tarnished in this saga of loneliness, depicted with frankness and in such detail as to incur the wrath of the prosecutor.
that contemporary society should not reduce its treatment of sex to the standard of a child's library.\textsuperscript{31}

Judge Hand's personal rejection of the basic \textit{Hicklin} principle, precious as it was in the twilight of the Comstock era, would gain widespread approval within the next twenty years. Nonetheless, during the first thirty years of the new century, the role of censor was not to be underplayed. Among many great names and titles of the literary world to feel the impact of community disapproval were: John Dos Passos for his \textit{Manhattan Transfer}; Theodore Dreiser for \textit{An American Tragedy, The Genius, and Sister Carrie}; F. Scott Fitzgerald for \textit{The Beautiful and the Damned}; Arthur Train for \textit{High Winds}; Radclyffe Hall for \textit{The Well of Loneliness}; Ben Hecht for \textit{Count Bruga} and \textit{Gargoyles}; and Sinclair Lewis for \textit{Elmer Gantry}.\textsuperscript{32}

We may venture to say that the prelude to a new age began in 1930 with the case of \textit{United States v. Dennett}.\textsuperscript{33} As director of the Voluntary Parenthood League, Mrs. Mary W. Dennett not only advocated freer dissemination of birth control information but was likewise dissatisfied with the inadequacy of sex instruction books or manuals currently on the market. To fill the apparent void, she wrote a pamphlet entitled the \textit{Sex Side of Life} of which 25,000 copies were sold before the Post Office Department declared it unmailable. Arrested and indicted for mailing an obscene publication, she was convicted and fined three hundred dollars.

Judge Augustus N. Hand, speaking for the Court of Appeals, Second Circuit, reversed Mary Dennett's conviction. While expressing an opinion that any article dealing with sex may well arouse lust under some circumstances, he forcefully indicated that the law did not prohibit everything that might arouse sex impulses. Thus, despite the fact that the court did not openly reject \textit{Hicklin},

\begin{itemize}
\item \textsuperscript{31} \textit{United States v. Kennerley}, 209 F. 119, 120-21 (1913). As a lower court judge, Learned Hand did not feel himself to be high enough in the judicial hierarchy to upset a test for obscenity that had been accepted without question for so many years.
\item \textsuperscript{32} Bookseller Donald S. Friede was prosecuted in a New York magistrate's court for selling Radclyffe Hall's \textit{The Well of Loneliness} which related the story of a lesbian but with some degree of idealization. The court discovered no moral in the book and condemned its justification of the right of the perverted to prey on a normal society. Finding the theme of the novel was antisocial and offensive to public morals, the court feared its potential to corrupt and debase members of society susceptible to its moral influence. \textit{People v. Friede}, 133 Misc. 611, 233 N.Y.S. 565 (1929). For an interesting contrast, see \textit{Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York}, 360 U.S. 684 (1959).
\item \textsuperscript{33} 39 F.2d 564 (2d Cir. 1930).
\end{itemize}
it did modify the rule (1) by holding that what might arouse sexual impulses is not to be arbitrarily condemned, and (2) by emphasizing the main effect of the pamphlet.

If Dennett marked the prelude to a new era, the celebrated Ulysses cases of 1933 and 1934 marked the realization. In the fall of 1922 five hundred copies of James Joyce's Ulysses were stopped at the port of New York by the United States Customs Office and banned on the ground that the books were obscene. In July 1926, one Samuel Roth, who was to figure prominently in litigation decades later, serialized a bowdlerized version of the novel in a magazine entitled Two Worlds Monthly. Evidently Mr. Joyce had neither authorized the serialization nor received royalties and this alleged violation of literary property drew the ire of many distinguished authors.

Among the authors who were alarmed by Roth's behavior were such notables as T.S. Eliot, Ernest Hemingway, D.H. Lawrence, and Virginia Woolf. Mr. Joyce did attempt to secure an injunction restraining Roth, but he was unable to protect his literary property because the customs ban precluded a copyright. Meanwhile, bootlegging the book became a profitable venture as it was very much in vogue to own one of the blue-paper-jacketed editions of Ulysses straight from Paris. Despite the fact that publishing or vending the book might well spell a jail sentence, Bennett Cerf of Random House arranged for a copy to be sent to the United States in such open manner that seizure and a resultant court test would be certain.

In the United States District Court for the Southern District of New York, Judge Woolsey acknowledged that many believed Joyce's characters to be poignantly preoccupied with sex. He also noted that the author's style had required him to use certain words which were generally considered dirty words. Nevertheless, he found Ulysses a sincere and honest book and concluded that criticisms of it were entirely disposed of by its rationale. Joyce, in other words, had been loyal to his technique and did not funk its necessary implications.


35. See discussion of the Roth and Alberts cases in text infra. For an account of Roth's business operations, see MAKRIS, THE SILENT INVESTIGATORS 289-99 (1959).

36. For a detailed account of the early history of Ulysses, see GORMAN, JAMES JOYCE 306-17 (1948); MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY 1-5 (1963).
According to Judge Woolsey, the audience to be considered was "the person with average sex instincts—what the French would call l'homme moyen sensuel—" hence the law would be concerned only with the normal person, not the most susceptible. Affirming the ruling of the court, the second circuit, with Judge Augustus N. Hand writing for the majority, very clearly rejected the Hicklin rule and in doing so created a viable new standard for determining the meaning of legal obscenity:

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than for their obscene content.

More than a score of years was to pass after the Ulysses litigation, before the Supreme Court, in 1957, was called upon to formulate a definitive test for the obscene. The cases in which the Court acted did not involve the imaginative and creative genius of recognized authors. Rather they did involve the economic genius of Sam Roth, publisher of erotica whose wares had included the sensual excerpts lifted from Ulysses, and of David Alberts, co-proprietor with his wife of a dreary but lucrative West Coast mail-order business dealing in filth.

III. ROTH-ALBERTS AND PROGENY

Samuel Roth, Austrian immigrant, came to the United States when he was scarcely more than ten. Reared in New York City, he

37. 5 F. Supp. at 184.
38. 72 F.2d at 708. Ulysses had discredited Hicklin, and doubtless most decisions following Ulysses substituted the new standard for the orthodox rule. This did not mean that the Post Office Department, the vice societies, and related censorial groups would cease to function; but somehow the public became alert to the fact that authors and playwrights could not always be expected to deal with nice people.

Indeed, some authors were known to specialize in tales of horror, bloodshed, and violent crime. One of the most significant cases to deal with the legality of the grim and horrible was the long-litigated cause of Murray Winters, a bookdealer in New York City. In 1940, Mr. Winters had in his shop for purposes of a sale a magazine entitled Headquarters Detective: True Cases from the Police Blotter. The publication was brought to the attention of an irate district attorney who commenced prosecution under New York's anti-sadism law, a part of the state's anti-obscenity statute. Following conviction, Winters appealed to the court of appeals
embarked upon a career of selling erotica very early in life and has sold a wide assortment of material ranging from vest pockets novelties to the near-classic. No stranger to the court room or the precinct station, Roth was almost continually on the carpet for violating local, state, and federal obscenity laws.

During the latter part of 1952 and in the early months of 1953, Roth's advertising campaigns became more daring and offensive. The Post Office Department and members of Congress were deluged with protests written by angry, concerned citizens who had received a sampling of the advertising circulars. Following a thorough investigation by postal inspectors, a federal grand jury in New York indicted him on twenty-six counts for violating the federal statute prohibiting mailing and advertising of obscene matter.

39. For many years Roth maintained a mail order business from an old loft building at 110 Lafayette Street in New York City. With a relatively small staff he created a large volume business in borderline obscenity, mainly magazines, photographs, and color slides. He operated at various times under an assortment of trade names or titles: Gargantuan Books, Gargoyle Books, Seven Sirens Press, to name several. An expert at procuring mailing lists, he indiscriminately sent advertising circulars across the country, even to schools and orphanages, and usually his advertisements were as risqué as could be without violating the clear letter of the law.

40. In 1928 he pleaded guilty to the charge of mailing obscene literature and was sentenced to jail for six months. The sentence was suspended. Two years later, for selling James Joyce's *Ulysses*, he spent sixty days in a Philadelphia jail. In 1938 he was sentenced to a federal prison for three years, and ten years later he was sentenced to two years imprisonment. One of his more sensational encounters with the Post Office Department occurred in 1948 when he sought to enjoin a New York postmaster from executing five orders excluding three publications from the mails. Four of the orders were based on fraudulent advertising, and the fifth order excluded a book entitled *Waggish Tales From The Czechs*, obscene in content, but dull by any reading standard. In Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949), the court of appeals, with some reservations as to the *Waggish Tales*, upheld the Post Office Department, stating that "within limits it perhaps is not unreasonable to stifle compositions that clearly have little excuse for being beyond their provocative obscenity and to allow those of literary distinction to survive." 172 F.2d at 789. Judge Jerome Frank, although concurring, observed that stories such as the *Waggish Tales* "are freely told at many gatherings of prominent lawyers." 172 F.2d at 796.

41. 18 U.S.C. § 1461 (1948). The twenty-sixth count was not for a direct violation of Section 1461 but rather for a conspiracy to violate that section.
In January 1956, Roth went to trial on this indictment. Counsel for the defense were permitted to offer expert testimony to prove the harmless nature of the defendant's materials. Reputable literature, including the Bible, John O'Hara's Ten North Frederick, and excerpts from Life Magazine were exhibited to the jury for the sake of comparison. The trial judge evidenced no lack of sympathy for the defense efforts, but his charge to the jury was vaguely reminiscent of the Hicklin stereotype. The jury returned with a verdict of guilty on four counts, and Roth was sentenced to serve five years in prison and to pay a five thousand dollar fine. The court of appeals, Judge Jerome Frank reluctantly concurring, affirmed the conviction.

David S. and Violet E. Stanard Alberts operated their mail-order house in Los Angeles County under the exciting name of Male Merchandise Mart. When the sheriff's deputies raided their warehouse, office, and apartment, they found booklets bearing such titles as The Prostitute and Her Lover, The Picture of Conjugal Love, Male Homosexuals Tell Their Stories, and The Love Affair of a Priest and a Nun. Hundreds of items were seized, including indecent pamphlets, bondage pictures, photographs of nude and scantily clad women, stereo slides and mailing lists.

Charged with lewdly keeping obscene materials for sale and advertising them in violation of California law, Alberts was tried without a jury in the municipal court of Beverly Hills. After a finding of guilty he was fined five hundred dollars, sentenced to sixty days, and placed on probation for two years. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

The United States Supreme Court decided the Roth and Al-

42. However, he did instruct the jury that they were to abide by the average person standard and were to judge the material as a whole, not by selected passages taken out of context.
43. Roth was found guilty on counts 10, 13, 17, and 24. Count 24 singled out one issue of a quarterly entitled American Aphrodite which contained contributions by Herbert Ernest Bates, John Cournos, Pierre Louys, Henry Miller, and other authors of popular works. Counts 10 and 17 involved advertisements for American Aphrodite, Photo and Body, and Good Times. Count 13 contained an advertisement for Good Times. Apparently the jury was convinced that American Aphrodite was obscene.
44. United States v. Roth, 237 F.2d 796 (2d Cir. 1956).
45. CAL. PENAL CODE ANN. § 311 (West 1955). Under California law, selling, distributing, or exhibiting obscene materials was a misdemeanor.
46. People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (1955). This was the highest appellate court of the state available to the defendant. CAL. CONST. art. 6 § 5.
Roth challenged the constitutionality of the federal obscenity law as being violative of the First Amendment, of due process of law, and of the reserved rights of the states and the people under the Ninth and Tenth amendments. Alberts in turn challenged the obscenity provisions of the California Penal Code as infringing upon the constitutional guarantees of freedom of speech and press protected from state action by the Fourteenth Amendment.

In sum, the petitioners' briefs, including several amicus curiae briefs, argued for application of the "clear and present danger" test. Thus, the government would have the burden of showing a probability that publications alleged to be obscene will bring about a substantive evil that Congress has a right to prevent. This argument was clearly stated in the brief filed by the American Book Publishers Council: "Neither the statute itself, nor any authoritative interpretations thereof, informs us whether it is designed to prevent in the normal reader: (1) the arousing of lewd thoughts and desires or (2) incitement to crimes and other antisocial conduct." 47

In turn, the government argued for a "balancing" test which would involve the weighing of competing interests. Additionally, the government contended that the prevention of harmful conduct incited by speech was not the sole public interest that would justify restriction of speech. Thus, certain basic factors would be weighed, one against another: the value of the kind of speech involved; the public interest served by the restriction; and the extent and form of the restriction imposed. 48 In holding that obscenity is not protected speech, the Court rejected both the petitioners' and the government's First Amendment standards.

Observing that this was the first time the question had been squarely presented to the Court, Mr. Justice Brennan, writing for the majority, found ample authority to indicate that the Court has always assumed that obscenity was not protected. 49 All ideas

49. Mr. Justice Brennan was joined by Justices Frankfurter, Burton, Clark, and Whittaker. Chief Justice Earl Warren concurred in the result, but wrote separately, asserting that the conduct of the defendants was the central issue, not the obscenity of the materials involved. Associate Justice Harlan, in another opinion, concurred in affirming Alberts's conviction but dissented in the Roth case. Associate Justices Black and Douglas dissented on the ground that freedom of expression could not be suppressed unless it was so closely brigaded with illegal action as to become an inseparable part of it.
having even the slightest redeeming social importance deserved the full protection of the guarantees, but "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 50

Actually, the Court found a way to decide the obscenity question without applying either the "clear and present danger" test or the "balancing of interests" test. Rejecting the Hicklin concept as an inadequate safeguard, Mr. Justice Brennan and the majority accepted a standard previously adopted by some American Courts. 51 The authoritative test announced was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 52

The Court perceived no significant difference between the meaning of obscenity developed in the case law and the definition offered in the American Law Institute's Model Penal Code which reads: "A Thing is obscene if, considered as a whole, its predominant appeal is to prurient interests; i.e., a shameful or morbid interest in sex, nudity or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matter." 53 It should be noted that the ALI appeared to make a strenuous effort to distinguish "a normal interest in sexual matters" from "prurient interest" which is "an exacerbated, morbid or perverted interest." 54 Whether Justice Brennan intended that "prurient interest" be so defined is not immediately clear. 55

50. 354 U.S. at 484-85. In Roth it was not clear whether lack of redeeming social value would be considered to be an independent essential element in identifying any material as obscene. In the text of Justice Brennan's majority opinion, it appeared that lack of socially redeeming value was simply the reason why obscene publications should not enjoy First Amendment protections. The matter would be clarified in later opinions. See text infra at notes 90-96.

51. Among other cases, the Court referred to Beauharnais v. Illinois, 343 U.S. 250 (1952); Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

52. 354 U.S. at 489. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, was rejected as unconstitutionally restrictive of the freedoms of speech and press because it might well encompass material legitimately treating of sex.

53. MODEL PENAL CODE § 207.10 (2) at 29-46 (Tent. Draft. No. 6, 1957).

54. Id. at 29.

55. One may wonder whether Justice Brennan intended the concept of "prurient interest" to incorporate what in case law was traditionally meant by "arousing sexual desires and impure thoughts." He may have intended to adopt the ALI's somewhat radical departure from that meaning. In any event, the Court's definition and the ALI concept do not re-
If the term "prurient interest" appeared vague and ambiguous to some, others soon found difficulty identifying what the Court meant by "dominant theme" or "contemporary community standards." And who, for example, might qualify as the "average person?" As might be expected the wavering voice of the skeptic would pronounce that Roth was much too ambiguous to be effective or useful. There would be others who would want to elaborate upon the relative simplicity of the Roth terminology, if for no other reason it would seem than to create a second set of definitions that would perform require fashioning a third set to make explicit the meaning of the second set.

Following Roth and Alberts, it was felt that an aid to the application of the standard for determining obscenity would be to view the problem in terms of degrees ranging from simple obscenity to pornography to gross pornography to hard-core pornography. However, the question remained: Which degree of obscenity did the Roth test proscribe? In answer, Lockhart and McClure early concluded that the concept of obscenity held by most members of the United States Supreme Court was probably that of hard-core obscenity.56 To a limited extent, at least, their predictions have been proven accurate.57

Soon after Roth, it became clear that the standard expressed therein would not be accepted as an immediately practical guide for judicial action. Until the United States Supreme Court would determine by its own independent appraisal whether allegedly objectionable material was suppressible within constitutional standards, the abstract rule of Roth would not provide a supremely workable test for implementing justice in the lower courts. On the basis of the rush of litigation that followed in the wake of Roth-Alberts, it may well be said that the decision created more questions than it settled.

57. In Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P.2d 152 (1963), the California Supreme Court ruled that the state obscenity statute proscribed only hard-core pornography, thus, Henry Miller's half-prurient, semi-literary Tropic of Cancer was upheld as possessing some social redeeming importance. Similarly, New York's highest tribunal has enshrined the phrase "hard-core" in its own case law in People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681 (1961). In Richmond, the Court of Appeals upheld the lusty magazine Gent as being not obscene.
In the October 1957 Term, the Court in a series of per curiam decisions, citing only Roth or Alberts, reversed four court of appeals decisions that had approved censorship of obscenity. Allegedly obscene material in these cases ranged from a series of pornographic scenes in a French motion picture entitled The Game of Love in the Times Film case to the pages of One-The Homosexual Magazine, the publication involved in One, Inc. v. Olesen. In the latter case, the Supreme Court cited Roth; evidently applying the Roth standard in holding that the magazine was not obscene, meaning that it did not appeal to the prurient interest of the average person.

In Sunshine Book Co. v. Summerfield, another of the four per curiam opinions decided by the Court in the wake of Roth, nudist magazines achieved stature and economic viability. The Postmaster General, the district court, and the court of appeals were all convinced that certain issues of Sunshine and Health and Sun

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Justice Stewart of the United States Supreme Court has advocated a hard-core pornography test. See, e.g., Jacobellis v. Ohio, 378 U.S. 184 (1963), wherein Justice Stewart was of the opinion that under the First and Fourteenth amendments, the criminal laws in this area are constitutionally limited to hard-core pornography.

58. Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957); One, Inc. v. Olesen, 355 U.S. 371 (1958), reversing, 241 F.2d 772 (9th Cir. 1957); Mounce v. United States, 355 U.S. 180, reversing, 247 F.2d 148 (9th Cir. 1957); Times Film Corp. v. City of Chicago, 355 U.S. 35, reversing, 244 F.2d 432 (7th Cir. 1957).

59. The court of appeals, which had rejected the film as obscene, described certain episodes of the motion picture:

[T]he thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts . . . .

[A] flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. . . . [T]he boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, with out deviation for any wholesome idea, throughout scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of their omission, emphasized. Times Film Corp. v. City of Chicago, 244 F.2d 432, 436 (1957).

60. The court of appeals had confirmed the opinion of the Post Office Department that the magazine's pretense at being scientific, historical, and critical was a sham. One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957). The opinion singled out one story in which a "young girl gives up her chance for a normal married life to live with a lesbian" and directed attention to advertisements informing the reader where homosexual literature and material could be obtained.

61. After the opening of the first "sunbathing" camps in the United States during the early 1930's several nudist cults issued privately circulated publications using photographs taken at camp. These were not porno-
were nonmailable. Possibly ruling that the Post Office Department, district court, and court of appeals had all misapplied the standards of obscenity, the Court once again terminated the controversy through the office of a complete reversal. In any event, nudity alone would not amount to obscenity, and perhaps the text itself was not in fact considered obscene.

The final of the quartet of cases decided in 1957, *Mounce v. United States*, involved a forfeiture proceeding under the custom laws against an imported collection of nudist and art-student publications. The government made a "confession of error" that the test used by the court of appeals was "materially different" from the *Roth* standard, and the Supreme Court reversed and remanded the case to the United States district court for consideration in the light of *Roth v. United States*.

Responsibility of the bookseller became a point for decision in *Smith v. California* which followed two years after *Roth*. A Los Angeles ordinance had provided that it shall be "unlawful for any person to have in his possession any obscene or indecent . . . book . . . in any place of business where ice cream, soft drinks, candy . . . magazines, books . . . are sold or kept for sale." Eleazar Smith, bookdealer, maintained a stock of several thousand new and used books, a majority of which were purchased from distributors and publishers located in New York City. A Los Angeles police officer purchased a number of magazines and a book from one of Smith's clerks and then proceeded to arrest the clerk. Smith was charged with violation of the city ordinance.

graphic, nor were they pushed for sale and profit. Now, forty years later, the nudist magazines, so-called, number in excess of one hundred and are simply girlie magazines or the equivalent. Modern publishers, having gone commercial, use pictures of professional models posed to excite prurient interest, and this inevitably sells.

62. The district court had found that nude photographs, clearly showing male and female genitalia and pubic areas, offended the community's conscience. Sunshine Book Co. v. Summerfield, 127 F. Supp. 564, 570-73 (D.D.C. 1955). When the Supreme Court removed the post office ban, foreign nudist magazines and similar pornographic material suddenly achieved prominence in this country. In 1961 the Post Office Department issued a record number of 203 mail block orders against foreign publications as compared to only two orders against domestic firms. Files of the Judicial Office, Post Office Department (fiscal year 1961).

63. Neither the district court nor the court of appeals found the text material objectionable. Accompanying photographs apparently placed too much emphasis upon the front views of nudes to pass the judicial test.

64. 355 U.S. 180 (1957).
66. Los Angeles, Calif., Code § 41.01.1.
67. The book in question was *Sweeter Than Life*, written by one Mark Tryon, and published by Vixen Press.
At trial, the defense offered the testimony of two expert witnesses: a literary critic and a clinical psychologist. The critic was to testify that *Sweeter Than Life* had literary merit, served a useful purpose, and would not appeal to the prurient interest of the average person. The psychologist would have testified that the book was acceptable, gauged by present day community standards, and that within the bounds of reasonable psychological certainty, the book would neither corrupt nor deprave its readers by arousing lascivious thoughts or lustful desires.

The testimony of both experts was excluded. Smith himself testified that he had not read *Sweeter Than Life* and furthermore had no reason to believe that the book was objectionable. His clerk testified that Smith had cautioned him against allowing anyone under the age of twenty-one to handle any magazine or book in the store. But, holding that knowledge and intent were not ingredients of the offense, the trial court found Smith guilty and sentenced him to thirty days in jail. Affirming this judgment, the Appellate Department of the Superior Court ruled that: (1) scienter was not required by the ordinance; (2) the exclusion of expert testimony was proper under the circumstances. 68

Unanimous reversal of the California decision followed in the Supreme Court, but the majority considered only one issue, namely, lack of scienter. By dispensing with any requirement of knowledge, the ordinance on its face had violated the freedom of expression guaranteed by the Constitution. 69 Some degree of scienter would be required, but the Court did not elaborate upon the requisite mental element or determine whether Smith himself had possessed sufficient knowledge in this instance. Once again it had produced an abstract ruling divorced from the color of actual fact. 70

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69. Said Justice Brennan, writing for the majority:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, he will tend to restrict the books he sells to those he has inspected... 361 U.S. at 153. Chief Justice Warren, Justices Clark, Whittaker, and Stewart joined in the majority opinion.

70. Justice Frankfurter, in a separate concurring opinion, criticized the majority for failing to give some indication of the scope and quality of scienter required. He also considered the exclusion of expert witness testimony ground for reversal, feeling strongly that the admissibility of expert opinion of contemporary community standards was a constitutional requirement of due process. 361 U.S. at 162. Justice Black and Douglas concurred in separate opinions, insisting as usual that obscenity should not be denied constitutional protection. 361 U.S. at 156, 167-69.
Obscenity when presented in blatant, concrete form is not entitled to constitutional protection. Accepting this position as true, could it be inferred that the mere advocacy of "obscene behavior"—detached from prurient portrayal—should fall within the same category? A unanimous opinion by the United States Supreme Court in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*,\(^7\) also decided in 1959, provided a firm negative response. Pursuant to state statute, the Motion Picture Division of the New York State Department of Education had directed that three scenes be cut from the French motion picture *Lady Chatterley's Lover*.\(^2\) Kingsley Pictures appealed to the Regents of the State of New York, and the regents approved the division's ruling on two grounds: (1) the deleted scenes were immoral; (2) the whole theme, presenting adultery as a desirable, acceptable, and proper pattern of behavior, was immoral.\(^3\)

The Appellate Division of the New York Supreme Court reversed the regents' ruling. However, the New York Court of Appeals in turn reversed the Appellate Division and reinstated the regents' ruling.\(^4\) The Court of Appeals in effect ruled that the state could refuse to license a motion picture that portrayed adultery as proper behavior. It was the opinion of Chief Judge Conway

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\(^7\) 360 U.S. 684 (1959).

\(^2\) The motion picture was based on the bowdlerized version of D. H. Lawrence's controversial novel. Actually, it was a very mild presentation compared to present-day standards. It merely suggested adultery. Several years later, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), Justice Brennan (this time in an opinion in which former Justice Goldberg joined) again stated that the manner of expression remained invulnerable as long as ideas were communicated. This should not mean, however, that mere advocacy as such will purify what is otherwise rancid and obscene.

\(^3\) The regents' decision was based upon a New York statute which defined an immoral picture as a film which in whole or in part "portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable, or proper patterns of behavior." N.Y. Educ. Law § 122-a (McKinney 1954).

Censorship boards, state and local, reached their zenith during the heyday of the movies in the '20's and '30's. At the turn of the half-century, only eight states could claim official boards of censors, and by 1970, Maryland could claim the sole surviving board. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), a unanimous Court ruled that motion pictures were protected by the First and Fourteenth amendments. *Burstyn* thus became a landmark in the progress of the industry toward full status as a medium of communication. It is arguable, however, that the motion picture offers a more practical medium to censor than the printed book. Scenes or parts of scenes may be deleted without destroying the entire product, whereas one may never readily snip and tear out pages of a book.

that this film had unquestionably presented adultery in a favorable light.\textsuperscript{75}

Mr. Justice Stewart, speaking for the majority of the United States Supreme Court, held part of the statute unconstitutional because it violated the First Amendment’s guarantee of freedom to advocate ideas. “What New York has done,” he wrote, “is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment’s basic guarantee is of freedom to advocate ideas.”\textsuperscript{76} Disposing of the case on abstract grounds, the majority did not even consider whether the motion picture was in fact obscene.

IV. REFINING THE STANDARD

In June 1962, some members of the Supreme Court attempted to clarify the Roth standard. Whether clarification was in fact achieved is quite another matter. \textit{MANual Enterprises v. Day}\textsuperscript{77} concerned the publication of magazines which were obviously designed for a homosexual reading-viewing audience. \textit{MANual} was one of a number of periodicals published by Herman L. Womack, long known as a professional peddler of “far-out” materials.\textsuperscript{78}

The seeds of litigation were sown on March 25, 1960, when six parcels containing 405 copies of \textit{MANual} were detained by an Alexandria, Virginia postmaster pending a ruling by his superiors as to whether the magazines were “nonmailable.” One month and three days later, the Judicial Officer of the Post Office Department,
following an evidentiary hearing, ruled that the magazines were obscene and "nonmailable." This ruling was sustained by the federal district court and the court of appeals.

Actually, the magazine contained little within its covers that would thrill many people, yet it did have considerable sales value in terms of attracting and teasing a minority audience. It consisted largely of photographs of nude or nearly-nude male models in various provocative poses, presented with the name of each model and photographer and the address of the photographer. It also contained advertisements by independent studios offering sensually provocative photographs of nude men. If the magazine had never been published or circulated, it is highly doubtful that the great majority of the reading public would have felt any pinch of deprivation.

Nonetheless, the United States Supreme Court opted for free circulation. As officially chronicled in the printed opinions of the Court, the opinion of Justice Harlan appears first, the position traditionally reserved for the views of the majority. However, in the interest of accuracy, it would appear that Justice Harlan spoke for only two Justices, despite the fact that his opinion has been deemed by some to be the holding of the Court.

Justice Harlan found the magazines, on the basis of independent examination, dismally unpleasant, uncouth and tawdry, but also found that they were not obscene. He asserted that Roth did not establish a single test for determining whether challenged material is obscene and that therefore the court of appeals was

79. The administrative findings were as follows: (1) the magazines were not physical culture or body building magazines but composed primarily, if not exclusively, for homosexuals; (2) they would appeal to the prurient interest of homosexuals but would be of no interest to normal individuals; (3) the magazines were read by homosexuals and possibly by a few adolescent males, but the ordinary male adult would not purchase them.


82. What would be required—hard-core pornography or something less? Justice Harlan made no commitments. Social redeeming importance was not considered. Discussion of opportunities for reckless commercial exploitation of a susceptible target audience was likewise lacking.

83. The Roth test is generally stated as: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. at 489.
mistaken in determining that Roth made "prurient interest appeal" the sole test of obscenity. According to his thesis, one would have to find that these magazines were so offensive on their face as to affront current community standards of decency. Thus, obscenity under the federal statute would require proof of not one, but two distinct elements: (1) prurient interest appeal; and (2) patent offensiveness.  

The opinion considered two other problems: (1) the relevant community by whose standards of decency materials were to be judged; and (2) the publisher's liability for materials advertised in his publication. Justice Harlan concluded that the relevant community must be the nation and that standards of decency should be national, not local. With regard to advertising, he noted that while some of the advertisers were purveying what could be regarded as hard-core pornography, there was no proof that the petitioners had knowledge of this. Therefore, the requirements of scienter applicable to criminal proceedings would also apply with full force in Post Office civil proceedings.

84. 370 U.S. at 486. It is interesting to observe that Justice Harlan made definite reference only to the federal statute. He noted that "[t]he words of § 1461, 'obscene, lewd, lascivious, indecent, filthy, or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores." Id. at 482. He found support for this requirement in the wording of the American Law Institute's Model Penal Code § 251. 4(1) (Proposed Official Draft May 4, 1962) which states: "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters."

Stressing the importance of "patent offensiveness," Justice Harlan noted that even among acknowledged masterpieces, one might find dominant themes appealing to the prurient interest. He commented:

To consider that the 'obscenity' exception in 'the area of constitutionally protected speech or press,' Roth does not require any determination as to the patent offensiveness vel non of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art.

370 U.S. at 487.

85. Womack had been informed by the Post Office Department that several of his advertisers were being prosecuted, but there was no evidence that any of the advertising copy or material had been shown to him. In as much as advertising accounts for a substantial share of the income derived from a publishing venture, it would appear reasonable to assume that Womack, who had an eye for profit, would have had some visual perception of the advertising he accepted in the process. Assertions to the contrary practically compel an inference that Womack did not know what was going on profit-wise, and this inference is as startling as it is unconvincing.

86. Justice Clark contributed what might well be termed a penetrating dissent. Sparing few words, he wrote:

While those in the majority like ancient Gaul are split into three
According to Justice Harlan, the Roth decision had established the "patent offensiveness" concept no less than the "prurient interest" concept. Nonetheless, his opinion fails to reveal just where in the Roth case this particular explanation can be found. He found support in the wording of the Model Penal Code which declared that the test for obscenity is whether the predominant appeal is to prurient interest and whether that appeal goes substantially beyond contemporary limits of candor; but it is by no means clear that "going substantially beyond contemporary limits of candor" is anything more than the vague equivalent of "patent offensiveness." 87

It is the opinion of this writer that addition of the "patent offensiveness" requirement simply creates problems of interpretation and solves nothing. For one thing, it is entirely possible that an object will be so shocking and so repelling to the individual that erotic stimulation will be minimal if not nonexistent. Yet it is just as possible that the pull of pruriency might be present in the material's appeal to a morbid curiosity. An analogus case would be the attraction of some experience at a gruesome accident or public execution where repulsion and attraction are commingled.

Where the appeal, then, is made through a person's morbid curiosity in the sexual, the element of offense is much more likely to predominate than it would in cases where the appeal is to a more or less direct erotic response. 88 Conversely, where the appeal to pruriency, to the erotic senses, is high, we may envisage parts, the ultimate holding of the Court today, despite the clear congressional mandate . . . requires the United States Post Office to be the world's largest disseminator of smut and Grand In- former of the names and places where obscene material may be obtained. 370 U.S. at 519.

87. See text at note 53. Admittedly, the ALI definition contains two tests, however, Justice Brennan in Roth had referred to "prurient interests" in terms of a single test, speaking of "lust" or "lustful thoughts." In addition, it is by no means clear that the second ALI requirement can be equated with "patent offensiveness." A representation may go substantially beyond customary limits of candor without bordering on hard-core pornography. Nowhere does it appear the ALI has accepted a hard-core pornography standard. See Model Penal Code § 207.10 (2) at 32 (Tent. Draft. No. 6, 1957).

88. On the other hand, a high degree of offensiveness does not of itself eliminate the factor of prurient interest appeal. The average adult who reads a book which treats of deviate sex in the extreme, to name necrophilia as an example, will most certainly be repelled by the theme and text; yet appeal to prurient interest cannot be negated unless we assume that the average person is immune to morbid suggestion. In the great majority of cases, an absolute assumption of this order is unwarranted.
situations where elements of actual personal repulsion are low. The interest in stag movies, viewed by many adult males, provides a case in point. The suggestive theme of a blue movie stirs up and arouses and is attractive in the sense of offering erotic stimulation. This appeal may be only momentary but it is still present, and just as momentary perhaps is that lack of personal revulsion. The latter may appear an hour later or the morning after, but while the lure of prurience persists, it scarcely exists as a compelling factor. If these facts be true, could it be claimed that stag movies are never obscene because an essential element—offensiveness—is lacking?89

In Roth it will be recalled that Justice Brennan spoke of redeeming social value, but he did not explicitly describe such as an element of the definition of obscenity. However, in Jacobellis v. Ohio,90 decided in 1964, Justice Brennan ruled that lack of redeeming social value was an independent essential element in identifying any material as obscene. Nor would there be any weighing or balancing of social redeeming worth or value against elements of prurient appeal. Jacobellis decreed that materials shall be held to possess redeeming qualities when ever they are found to contain any advocacy of any ideas of any kind of degree of literary merit. Thus, apparently the Court will apply only the most minimal standards for the determination of intellectual or artistic worth.91

It became clear, then, that attempts at enforcement of obscenity laws are required to run the gauntlet of three separate tests: 1) pruriency; 2) patent offensiveness; and 3) utter lack of social

89. It is further arguable that the requirement of “patent offensiveness to the community as a whole” is not an additional standard for the identification of the obscene but merely an inherent requirement for a law which prohibits the dissemination of obscene materials to everyone in the relevant community. Therefore, had the postal ban been applied only to homosexuals within the community (and assuming that identification of the distributees was possible) the case would have presented the interesting issue of the target audience and variable obscenity. In that event, imposition of a “patent offensiveness” requirement would appear to be superfluous. Professor John Cornelius Hayes has ably presented this thesis in Hayes, Obscenity: The Intractable Legal Problem, 15 Cath. Law 5 (1969).

90. 378 U.S. 184 (1964). Jacobellis reversed, six to three, the conviction of a Cleveland motion picture theatre manager for advertising and exhibiting Les Amants, a French film that revealed the story of a married woman’s affairs with her regular paramour and her more recent lover. The film contained an explicit love scene in the last reel, but what preceded that was more conventional and pedestrian. Granted, the picture was advertised as the most daring, the most sensuous love story ever told.

91. Whether the hard-core test had become the legal litmus by which obscenity was to be tested was still debatable. Nevertheless, Justice
redeeming value. With few exceptions, for a work to be adjudged or declared obscene, it must be shown that all three elements or defects exist, which means that much of what is highly distasteful to most people will be granted the benefit of First Amendment protection.

Perhaps it is unfortunate that the Brennan-Goldberg opinion made so much of the phrase "utterly without redeeming social importance," because if material is of such low caste, it would scarcely require a discerning legal mind, or for that matter, any mind of consequence, to determine its inherent worth to society. Furthermore, to say that a work of obvious pornographic content suddenly becomes salvageable because it includes an isolated reference to some socially redeeming subject—such as the importance of motherhood or the significance of civil liberties—is to assert an absurdity.

Yet a work of this genre must be granted constitutional protection since it is not utterly devoid of socially redeeming values. No longer can we balance literary values against salaciousness, nor can we weigh the obvious public interest involved on both sides of the obscenity issue. Nor does the very solid factor of public morality seem to figure in the balance. It will be recalled that half a century earlier, Judge Learned Hand, while rejecting the Hicklin principle, introduced the "present day community conscience" standard in an effort to give social interests other than morality some weight in the legal scales. He wisely noted that

Stewart, concurring, was of the opinion that under the First and Fourteenth amendments criminal laws in this area are limited to hard-core pornography. Chief Justice Warren and Justice Clark, dissenting, could not agree, primarily on the basis that no one can define hard-core pornography with any greater clarity than one can define obscenity.

92. Jacobellis reiterated the proposition that motion pictures along with books, magazines, and other writings are within the constitutional mantle of protected free speech. Beyond that, the Justices disagreed upon just about everything. The decision was announced by two Justices. There were four concurring opinions, nearly all embodying different approaches to the issues, and there were two dissents. Justices Black and Douglas, as expected, advocated the abandonment of all forms of censorship. Justice Stewart pressed for a hard-core pornography test, and Justice White, with so many views to choose from, simply chose to concur in the judgment. Chief Justice Warren and Justice Harlan dissenting, pointedly indicated that the Court's decisions had failed to provide lower courts and legislatures with the necessary guidance.

93. Since MANual, it would appear that the Court has declined to consider how the legitimate claims of free expression and the legitimate claims of public morality can be reconciled and harmonized. Neglecting to focus attention upon the responsibilities of publisher, producer, vendor, or reader-viewer, each successive decision has proceeded as if its sole concern were to extend greater freedoms and greater protections to more cate-
there would be many who would misuse legal privilege as a cover for lewdness but observed that such conduct would pose a question of fact for judicial resolution. Since *Jacobellis* there seems to be too little left to resolve.

Twenty-one months later, in *Memoirs v. Massachusetts*, the Court reaffirmed the *Jacobellis* principle and the usage of the phrase “utterly without redeeming social importance.” And once again the balancing test was relegated to limbo. *Memoirs* involved a Massachusetts adjudication that John Cleland’s pornographic classic *Fanny Hill* was still obscene. In reversing the Supreme Judicial Court, Justice Brennan said:

The Supreme Judicial Court erred in holding that a book need not be “unqualifiedly worthless before it can be deemed obscene.” A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

V. THE EXPLOITERS

In all of America’s metropolitan centers there are publishers
and booksellers who specialize in hawking books, magazines, and photographs that appeal to the immature, the deviate, and the thrill-seeker. According to James J. Clancy, a former assistant district attorney of Los Angeles County, about 60 percent of the pornographic magazines and paperbacks that circulate in the United States are published by California firms.97

In the New York area, Edward Mishkin, among numerous sex exploiters, has long held front rank position as a publisher, seller, and distributor of sex and sado-masochistic literature. With a partner, he was known to operate at least three Times Square bookshops, including Kingsley Books,98 and as far back as the mid-fifties he allegedly grossed in excess of $1,500,000.00 annually from the

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97. Sanford E. Aday of Fresno has been one of the most successful producers of pornographic materials on the West Coast. Records show that, operating under several firm names, he produced 826,840 volumes featuring lurid sex in one five-month period. Indicted numerous times, he and his associates were convicted in a United States district court in Grand Rapids, Michigan, in 1963, under a law which permits prosecution of a publisher wherever his products are sold. The offenses charged arose from the delivery into Michigan by mail and common carrier of allegedly obscene books, including one entitled Sex Life of a Cop. The indictment charged that eight books were obscene, but the jury disagreed as to all but Sex Life. United States v. West Coast News Co., 228 F. Supp. 171 (W.D. Mich. 1964).

Sex Life was a paper back replete with a cover picture picturing a woman (wife of the mayor of the town) trying unsuccessfully to hide her nakedness behind the grotesque underwear-clad figure of the town's chief of police, both having been interrupted in their lovers' lane dalliance by two of the town's dedicated police officers. As might be expected, the latter pair were the heroes of the narrative. Affirming conviction, the court of appeals viewed the story as moving from one sexual experience to another, quite faithful to the advertising on the book-jacket. The appellate court could not believe that the First Amendment's guarantee of freedom of expression could be elasticized so as to embrace this literary product despite the fact that experts had testified with respect to its social values. United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966). In a per curiam opinion, without benefit of explanation, the United States Supreme Court reversed. Aday v. United States, 388 U.S. 447 (1967). Aday was one among many cases decided on a per curiam basis, see text at note 115 infra.

98. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), did not involve criminal proceedings but concerned New York's then new injunction statute. Any warning to Mishkin that might have been implicit in that action apparently went unheeded. Having discerned the profit-making attributes of the sado-masochistic pornography traffic, while enjoying comparative immunity from legal sanction, Mishkin continued to ply his trade and prosper.
By late 1965, according to the National Office of Decent Literature, Mishkin-type books were hitting the market at the rate of two hundred new titles a month. Indeed, these figures are conservative by present day standards; and meanwhile, flimsily edited magazines for the homosexual trade rose to new heights of success, both in terms of audience appeal and profit. Would that the serious literary effort, replete with socially redeeming value, could fare half as well.

Prior to his 1960 arrest, some seventeen thousand booklets had been seized. Trial testimony to follow proved that this was but a sample of Mishkin's activity. For example, Kenneth Johnson, a writer, testified that Mishkin had asked him to write four books with a strong lesbian theme. Mishkin had wanted him to deal very graphically with the implementation of wheels on the female body, of the darkening flesh under flagellation. Another writer, Leotha Hackshaw, testified that Mishkin wanted a book in which there were lesbian themes, that sex had to be very strong, rough and clearly spelled out. In other words, she could not be subtle but had to be blunt and to the point. There would have to be scenes in which women made love to women and men made love to men—sex in an abnormal and irregular fashion. Many of Mishkin books were written and submitted within a week's time with the author's pay running the gamut from $37 to $300 per book. The printer's charge for the crude black and white offset work would range from fifteen to forty cents a copy. Booklets would then be marked for sale at five, ten, or even fifteen dollars apiece. At this rate profit was inevitable.

The National Office of Decent Literature, popularly known as NODL, was founded in 1938 by the United States Roman Catholic Bishops to deal with matters relating to morality in literature. The principal function of the office has been to review and to evaluate magazines, comic books, and paperback books, especially those intended for young people. Its first national office was located in Fort Wayne, Indiana, but was moved to Chicago in 1955. In a press release dated early in January 1970, Bishop Joseph L. Bernardin, General Secretary of the United States Catholic Conference, announced the transfer of the NODL office from Chicago to Washington, D.C. In effect, NODL will be defunct as an independent operating organization, however, an organizational study is being conducted concerning the redistribution of its programs and operations among existing USCC offices.

A recent Kansas decision, State v. A Quantity of Copies of Books, 197 Kan. 306, 416 P.2d 703 (1966), reflects some of the unique problems faced by local authorities with respect to the regulation and control of pornographic items published for a quick sell. In all, eleven paperback books were involved, obviously mass produced, exactly 190 pages in length, replete with strong sex, and repeated references to perverted practices. Titles such as *Sin Hooked, Lust Hungry, Fleshpot,* and *Shame Market* were indicative of the socially unredeeming contents compiled solely for prurient appeal. The Supreme Court of Kansas concluded that the dominant theme of the material taken as a whole appealed to the prurient sexual interest of the average person; that the material was patently offensive; that it affronted contemporary community standards; and further found little difficulty in concluding that the material was utterly without social redeeming importance. In a per curiam opinion, the United States Supreme Court reversed on the basis of Redrup v. New York, 386 U.S. 767 (1967) (see note 115 infra), again without benefit of explanation. A Quan-
In contrast with Mishkin was publisher Ralph Ginzburg, whose publications included *Eros*, an artfully packaged quarterly on sex attracting deviate and intelligentsia alike. Admittedly, Ginzburg's products were slick, verging almost upon elegance when compared with the typical slapdash Mishkin effort. Yet, while Ginzburg had carefully studied the obscenity decisions and was confident that his operations were within the law, he overreached when he resorted to advertising his product. Prurience may have been bad enough in and of itself, but emphasizing prurience, vividly exploiting prurience, proved to be his undoing. Mailing *Eros* from New York City was one thing; but mailing *Eros* from Blue Ball, Pennsylvania or Middlesex, New Jersey was quite another.

Late in December, 1959, New York City police raided one of Mishkin's stores where they confiscated 201 copies of 25 different books. Other raids at other Mishkin stores were to follow, all culminating in obscenity charges and conviction. The New York Supreme Court, Appellate Division, affirmed the trial court as to its findings on the obscenity counts, and the Court of Appeals of New York affirmed the judgment and order of the Appellate Division.

In 1963, the Justice Department charged Ralph Ginzburg with twenty-eight counts of mailing obscene matter. The trial which took place in a Philadelphia United States district court involved three different Ginzburg publications: *Eros*, *Liaison* (a biweekly newsletter of current events on matters of sex); and *The Housewife's Handbook on Selective Promiscuity* (a Tucson woman's autobiography covering her sexual activities from age three to thirty-six). Sentenced on all counts, Ginzburg appealed to the court of appeals which affirmed the sentence.

On a spring day in 1966, the United States Supreme Court, in

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Memoirs, decided that Fanny Hill was not obscene but affirmed the convictions of both Mishkin and Ginzburg. Justice Brennan wrote the prevailing opinions in all these cases. Noting that there were fifty books involved in Mishkin, Justice Brennan declared that all were cheaply prepared "pulps" bearing an imprinted sales price several thousand per cent above costs. Mishkin had argued that some of the books dealing with various deviant sex practices, such as flagellation, fetishism and lesbianism did not satisfy the prurient-appeal requirement because they would not appeal to the prurient interests of the "average person."

Justice Brennan rejected this latter argument, largely on the basis of the concept of variable obscenity. In his opinion, the evidence had fully established that these books were specifically conceived and marketed for special groups. Additionally, he saw no merit in the Mishkin contention that there was insufficient

107. Fortunately, in both Mishkin and Ginzburg, the Court was able to muster bare majorities, five Justices supporting the prevailing opinions. It will be recalled that such was not the case in Memoirs, the Tropic of Cancer cases, or in Manual Enterprises. In each of these cases there was a multiplicity of opinions but none speaking for a judicial majority.
108. Justice Brennan wrote:

When the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.
The reference to the 'average' or 'normal' person in Roth does not foreclose this holding. 383 U.S. at 508.
109. More than a decade ago, Lockhart and McClure advocated, in this writer's opinion successfully advocated, the concept of variable obscenity. Variable obscenity by its very nature permits protection of adolescents and the sexually immature in general from material which is directed primarily to them for the purpose of satisfying, in erotic fantasy, their hunger for sexual knowledge and experience, deviate or otherwise. At the same time it protects the primary audience of sexually mature adults from undue deprivation. Lockhart and McClure, Censorship of Obscenity, 45 Minn. L. Rev. 5, 77-88 (1960). By employing a variable standard, we can declare that material may be obscene when directed to an audience comprised of susceptible individuals and not obscene when directed to the general public. Acceptance of such a standard of necessity flows from the realization that a considerable portion of communication media is not prepared, published, and distributed for general consumption. Slough and McAnany, Obscenity and Constitutional Freedom, 8 St. Louis L.J. 279, 461-66, 504-10 (1964).

Employment of a variable standard also makes it possible to reach the panderer who advertises and pushes the non-obscene as though it were obscene. On the other hand, this writer prefers to rely upon legislation which explicitly outlaws advertising appeals of this nature. The Model Penal Code, as an example, contains a specific prohibition aimed at sugges-
proof of scienter. Quite apparently Mishkin had been up to his ears in the rankest forms of pornography for many years, and the Court would scarcely be expected to buy this point of view. And just as evidently, Justice Brennan appeared to have agreed with the New York courts that Mishkin's materials were strictly “hard-core.”\(^\text{110}\)

Ralph Ginzburg was quite another problem. It should be recalled that Chief Justice Warren, concurring in Roth, had remarked that in judging obscenity, the materials “draw color and character” from the “context” in which they are seen. Assuming that a wholly different result might be reached in a different setting, he reasoned that “the conduct of the defendant is the central issue, not the obscenity of a book or picture.”\(^\text{111}\) The Chief Justice gave no hint as to the constitutional standard he might apply; however, he voted to affirm the convictions of Roth and Alberts, observing that both defendants “were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.”\(^\text{112}\)

In his \textit{Ginzburg} opinion, Justice Brennan (joined by the Chief Justice and Justices Clark, White, and Fortas) upheld the conviction of Ralph Ginzburg for circulating materials for which the judgment of obscenity was admittedly doubtful. Writing for the majority, he said:

In the cases in which this Court has decided obscenity questions since Roth, it had regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity.\(\ldots\) [\text{W}]e view the publications against a background of competitive advertising. \textit{Model Penal Code} § 251.4 (2) (e), (3) (a). The Code also employs the variable obscenity concept in part, since section 251.4 (1) provides that “appeal” shall be judged with reference to the susceptibilities of children or other susceptible audience when it appears that the material is designed for and directed to such an audience.

110. In People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681 (1961), the court of appeals, adopting a “hard-core” standard, held, in a four to three decision, that although an issue of \textit{Gent Magazine} pandered to and commercialized upon man's taste for the bawdy, it was not in fact obscene.

111. 354 U.S. at 495.

112. Id. at 496.
commercial exploitation of erotica solely for the sake of their prurient appeal.\textsuperscript{113}

Basically, then Ralph Ginzburg, treading on the thinnest of ice, was guilty because he persuaded his reader-viewer to look for titillation, not for saving intellectual content. The circumstances of presentation and dissemination were decidedly relevant in determining the impact of social importance. Thus, the purveyor's sole emphasis on the sexually provocative aspects of his publications was in a very real sense—not in the least fictional or contrived—decisive in the determination of obscenity. In this context, threats to First Amendment freedoms were at best illusory. Lack of responsibility on the part of the actor, in relation to the purchasing public, became very much a hard reality.\textsuperscript{114}

Prior to Ginzburg it was assumed that the decisive legal criteria were those concerning the nature of the materials in question. Much attention was focused upon the salacity of the product, whether it was simply obscene, grossly obscene, pornographic, or hard-hard-core in content. More often than not, comparisons were as tedious as they were unrealistic. Granted, the opinion in Ginzburg did not effect a clean break from prior commitments; it did not stand for an express disengagement from the more or less unworkable prescriptions of Roth, Manual Enterprises, Jacobellis, and Memoirs.\textsuperscript{115} But, at the very least, it did move toward a plan of legal control which would concern itself more and more with

\textsuperscript{113} 383 U.S. at 465-66.

\textsuperscript{114} The Ginzburg decision did not hold that pandering in itself was an offense against the relevant obscenity statute. Its explicit ruling simply stated that in close cases, evidence of pandering may be probative with respect to the nature of the material in question. Thus, when material is highly erotic in content but some doubt remains about the degree of its prurience, evidence that the purveyor had deliberately and heavily emphasized the prurient appeal may well be decisive.

\textsuperscript{115} That the Court had not abandoned its previous commitments became clear following consideration of some of its later rulings. In May, 1967, in Redrup v. New York, 386 U.S. 767 (1967), the Court handed down a brief per curiam opinion reversing judgments in three cases. In none of these cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. In none was there suggestion of assault upon individual privacy and in none was there evidence of the sort of "pandering" which the Court found significant in Ginzburg. The publications were not hard-core pornography and they were not obscene under the coalescing three elements which figured so prominently in Memoirs. Failing to reassess or to explain the impact of prior decisions, the opinion did manage to point to the fact that Ginzburg did not extend the scope of obscenity regulation to include any materials previously held to be uncensorable.

Following the path in Redrup, in June, 1967, the Court reversed thirteen convictions in obscenity prosecutions: Keney v. New York, 388 U.S.
the conduct of the actor-purveyor. If the decision accomplishes nothing else, it does pave the way for an increasingly intelligent emphasis upon the behavior of the profit-seeker and a decreasing concern with the nature of the lustful content of the offending product. It would appear that reckless commercial exploitation, particularly of the unsuspecting and the impressionable, might well become the target for future judicial supervision.\footnote{116}

Ginsberg \textit{v. New York\textsuperscript{117}} decided two years later, presented an ideal test of the “variable obscenity problem,” as well as pointing up some of the difficulties encountered in establishing scienter. Sam Ginsberg, a candy store-stationery-shop-luncheonette owner in Bellmore, New York, was charged and convicted of selling \textit{Sir, Man to Man}, and \textit{Escapade} to a sixteen-year old boy on two occasions. There was conflicting testimony on how familiar Ginsberg was with the boy and on the boy’s age. The boy, Richard Corey, testified that he had made previous purchases from Gins-

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Following the May and June decisions, a rush of articles and comments were published nationwide, many openly criticizing the Court for its permissive attitude toward sex and obscenity regulation. The fact that many decisions had been announced \textit{sans} opinion, \textit{sans} established guidelines, was frequently emphasized. As an example, see Michener, \textit{The Weapons We Need to Fight Pornography}, \textit{The Reader's Digest}, Dec. 1968, at 1.

116. Within the fabric of the \textit{Model Penal Code}, the target is not the “sin of obscenity” as such but primarily a disapproved form of economic activity—commercial exploitation of the widespread weakness for titillation by pornography. \textit{Model Penal Code} § 251.4(2), (3). Quite properly, the clearest target for official action is the publisher, the producer, the mail-order specialist, the fellow who thrives upon the public appetite for salacity. All too frequently the prosecutor hits at the person who is least offensive, who generates little income in the process: the bookseller, the theatre owner, the theatre manager. Therefore, it behooves the prosecuting officer, when able, to select wisely the type of object he seeks to suppress or control. Chief Justice Warren long urged that the emphasis be placed upon control of the pornographer, rather than upon materials, and upon pandering, rather than upon bookselling. This program of action would appear to be increasingly influential in Court thinking. Magrath, \textit{The Obscenity Cases: Grapes of Roth}, 1966 Sup. Ct. Rev. 7, 32 n. 126.

berg, making a point of his age on at least one occasion. Ginsberg, to the contrary, denied acquaintance, indicating that his estimate of Corey's age by inspection would have been anywhere between fifteen and eighteen. Both sides recalled that the boy's mother had, sometime earlier, reprimanded Ginsberg over sales to a then fifteen-year old.118

Affirming the conviction, the United States Supreme Court upheld a New York statute which prohibited the sale to persons under seventeen years of age of materials depicting "nudity," "sexual conduct," "sexual excitement," or "sado-masochistic abuse."119 Writing for the majority, Justice Brennan observed that the authority of the state over the conduct of children is broader than its authority over adults under similar circumstances. Implicit throughout his opinion was the idea that the "girly" picture magazines at issue in this case would not be obscene for adults, and that their sale to adults could not be prohibited.120

The Brennan opinion contains two arguments in support of obscenity prohibitions limited to the protection of children. One argument concerns the rights and claims of parents; the other concerns the special interest of the state in the welfare of the young and impressionable. As stated by Justice Brennan:

[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society . . . . The legislature could properly conclude that parents and others, teachers for example,

119. N.Y. Penal Law § 484-h (Penal Law of 1909, App. McKinney 1967). Ginsberg did not contend that New York was without power to draw the line at age seventeen. Rather, he asserted the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or sell material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insisted that the denial to minors under 17 of access to material condemned by section 484-h, insofar as that material was not obscene for persons 17 years of age or older, constituted an unconstitutional deprivation of protected liberty. See 390 U.S. at 636.
120. It should be quite clear by now that magazines such as Playboy will be declared legally safe for adult consumption. Basically, magazines of this type do not stop at being risqué but attempt to educate as well. They speak to those who really want to know what it means to be a man and more importantly a male of the cool and unruffled variety. Successful financially but not elegant, racy but not pornographic, Playboy is to obscenity what heartburn is to coronary thrombosis. Would-be competitors such as Dude, Cavalier, and Nuggett, to name a few, are at best crude carbon copies which suffer disgrace for no other reason than the fact that their appeal is to an even lower mentality.
who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. 121

Basically, then, Mr. Justice Brennan simply declared that New York had adjusted the definition of obscenity to the empirical realities of the target audience. He was not able to find as a matter of established fact that obscenity was harmful to the young, impressionable mind, but he concluded: "We do not demand of legislatures 'scientifically certain criteria of legislation' . . . . We therefore cannot say that § 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm." 122 In other words, Justice Brennan appeared to be reluctant to go much beyond the affirmation that the legislature's view of the situation was not irrational. 123

Although most of the significant cases decided by the Supreme Court in recent years have dealt with obscenity in print—either magazines or books, the newly-found "Hollywood Freedom" may lead to additional constitutional litigation in the area of films where

121. 390 U.S. at 639. That the state has an independent interest in the well-being of its youth is squarely bottomed in the New York Court of Appeals decision, Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75, 218 N.E.2d 668, 671 (1966).

122. 390 U.S. at 642-43. With regard to scienter, Justice Brennan observed that a reading of New York's general obscenity statute clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. Only calculated purveyance of filth should be proscribed. 390 U.S. at 644.

123. The limits of "variable obscenity" firmly established in Ginsberg remained to be spelled out explicitly in Justice Marshall's decision in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, decided with Ginsberg on April 22, 1968. Appellants exhibited and distributed a motion picture entitled Viva Maria which, pursuant to a city ordinance, the Motion Picture Classification Board of Dallas has classified as "not suitable for young persons." Delivering the opinion of the Court, Justice Marshall declared the ordinance violative of the First and Fourteenth Amendments in that it was unconstitutionally vague. The ordinance, observed Justice Marshall, lacked narrowly drawn, reasonable and definite standards for the officials to follow. The mere fact that a particular regulation was adopted for the salutary protection of children was not considered an excuse for vagueness. 390 U.S. at 689.

On May 27, 1968, The Court in Rabeck v. New York, 391 U.S. 462, in a per curiam opinion expressing the views of six members, on authority of Interstate, held that section 484-i of the New York Penal Code was impermissibly vague. This particular section, which had already been repealed, prohibited the sale of certain materials to minors. The Court ruled that a particular regulation of expression, otherwise unconstitutionally vague, is not saved solely because it was adopted for the salutary purpose of protecting children. Justice Harlan, who dissented in Interstate, considered striking down a dead-letter law a fruitless judicial act.
the problems created by the exploitation of obscenity are even more accentuated. Speaking in terms of reckless commercial exploitation, scarcely anyone can match the monetarily successful efforts of a celebrated few among the ranks of modern movie producers. Most celebrated within the circle of the latter-day art-oriented parvenu is Barney Rosset, “Grove Press” Rossett, who delights in gnawing away at the props of middle class morality. Having changed the rules of the publishing game by securing the right to print Lady Chatterley’s Lover, Rosset dipped deeper into the filth trade with the Marquis de Sade’s 120 Days of Sodom, replete with 799 pages of bizarre scatology. Successful in that venture, he proceeded, as might well be expected, to pollute the very shrine of American culture by projecting the meat-rack obscenities of I Am Curious (Yellow) upon the ever-widening motion picture screen. If Barney Rosset fails to make $3 to $4 million dollars from Curious alone, he has missed one of many chances in a lifetime.124

I Am Curious reflects the ambiguous story of a young girl named Lena who seems to be forever trying to work out her own relationship to an assortment of real-life political, social, and economic problems: the possibility of a classless society uppermost; the policy and practice of nonviolence; and the acceptance of the Franco regime in Spain. A passionate preoccupation with the last of these problems seems never to be explained or justified, but injection of that precise situation may have enhanced the social importance of the dominant theme of the film portrayal.

Oddly enough, the scenario laboriously preaches of the virtues of nonviolence and the evils of the Vietnam encounter; but Lena, for all her opposition to chauvinistic persuasion, persistently upbraids her “old man” for having chickened out on the Spanish Civil War. Apparently the killing and maiming of fascists, monarchists, and clergy-ridden republicans did not figure as violence in her new world order. As if to focus upon this paternal ineptitude, the camera completes the circle by allowing the audience to view one of father’s more uncomely habits, namely urinating in the family sink.

124. I Am Curious (Yellow) was produced by Sandrew, a Swedish studio, and directed by Vilgot Sjoman, a protégé of Ingmar Bergman. It has been reported that Rosset obtained American distribution rights for a mere $25,000. Life Magazine, August 29, 1969, at 49, 50. In addition, Grove Press has published its scenario in book form, including more than 250 illustrations. Rosset firmly believes that this is an age of exploration and quite apparently in terms of cash receipts, his brand of exploration makes Lewis and Clark look like amateurs.
Real sex enters the theme when Lena is introduced to a young man named Borje whom her father has brought home from a picture frame shop. Mutual and undisguised physical attraction follows instantly. Within minutes, boy and girl have shed their pants and boy has literally lifted girl against the wall. From that moment forward, with isolated moments of relief dedicated to serious discussion, the viewer is subjected to the spectre of sexual intercourse performed in all conceivable positions and circumstances: on the floor, in a tree, in the water, on a balustrade within sight of a guard patrolling the Royal Palace. Apparently the last of these scenes presents a modicum of social importance, because the actors are nearly clothed except for the fact that Lena has shed her panties. Furthermore, some attention is afforded the Puritan ethic since the guard registers a measure of embarrassment by swallowing nervously. His adam's apple visibly bobs, unaccustomed as he is to this manner or mode of public display.\footnote{125}

\textit{I Am Curious} has been either banned or accepted in a number of jurisdictions, but the first legal pronouncement of national concern emanated from the prestigious Second Circuit. In \textit{United States v. A Motion Picture Film},\footnote{126} the Court of Appeals, Circuit Judges Hays and Friendly voting for reversal, reversed a federal district court decision declaring the film obscene. Making consistent references to \textit{Memoirs} and its three standard requirements, Judge Hays could not find that the dominant theme of the material taken as a whole appealed to a prurient interest in sex. Of the contention that the production did strives to present ideas artistically, he could not admit that the film was utterly without social value.\footnote{127} Almost contorting the meaning of relevance, he

\begin{footnotesize}
\begin{enumerate}
\item[125] Although the sex is basically heterosexual—which is another redeeming feature—the participants indulge in acts of fellatio and cunnilingus, acts which undoubtedly enhance box office as well as prurient appeal. The usual parts of the human anatomy—both male and female—are perpetually flopping and dangling, lending a note of realism to each romantic endeavor. Quite evidently, little effort has been expended in fostering audience imagination.
\item[126] 404 F.2d 196 (2d Cir. 1968).
\item[127] A recent Arizona case, Barbone v. Superior Court, 11 Ariz. App. 152, 462 F.2d 845 (1969), questions the relevancy of \textit{Memoirs} relative to the social redeeming importance requirement. Concluding that there was no clear majority opinion in \textit{Memoirs}, the state court of appeals adhered to the premise that the Roth progeny had not altered the Roth-approved definition of obscenity. A similar contention was postulated in Cain v. Commonwealth, 437 S.W.2d 769 (Ky. 1969). The latter case is presently being appealed to the United States Supreme Court. 38 U.S.L.W. 3095 (1970).
\end{enumerate}
\end{footnotesize}
saw the sexual activity as part of an artistic whole, united with and related to the story and the characters presented. He thought it unnecessary to pass upon the question of patent offensiveness.

Judge Friendly concurred, although less enthusiastically, admitting that a truly pornographic film would not be rescued by the inclusion of a few verses of the Psalms. Proceeding further he warned that importers, distributors, and exhibitors of this type of film must realize that Ginsberg would preclude exhibition of their efforts to minors; and that advertising and promotion must not be calculated to capitalize on extensive portrayals of nudity and sexual activity.

Chief Judge Lombard, dissenting, failed to see how the sexual aspects of the film could arise from a plot which he considered nonexistent. He visioned no conceivable relevance between fellatio and cunnilingus and social value except sheer box office appeal. He emphatically noted that because of the nature of the medium (the motion picture) sexual scenes may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine. In sum, the entire public, not children alone, should be protected against exploitation for profit.

By way of contrast, in an appeal from the Circuit Court of Baltimore City, the Court of Appeals of Maryland found that the dominant theme of Curious did appeal to prurient interest in sex; that it was patently offensive; and that it was utterly without socially redeeming importance. In fairness to the film, the court did observe that there are times when the love scenes are introduced with some grace, however, this did not explain away the obvious fact that the overriding theme was sex per se. Nor did the court find any meaningful nexus between the strained, contrived social implications and the various loves of Lena, the

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a film professor, and a novelist, testified with reference to the film's redeeming social values. They discussed, among other things, the nature of reality, the beliefs and commitments of the young, the goals of the New Left, the generation gap, the nature of politics, and above all, the importance of political responsibility.

Judge Friendly's Second Circuit opinion reflected upon the fact that Justice Brennan, in Memoirs, wrote only for three justices, but he indicated that it was plain that three other members of the Court would have opted for an even more permissive standard. Furthermore, on the basis of Judge Hays' appraisal of the artistry of I Am Curious, it would appear that anything simply labeled a work of art would have to be utterly—but utterly—without social redeeming value as a condition precedent to calling forth official sanction.

heroine, which figured at 23 by latest count. Thus, on the whole, the total film effort presented more of a framework than a plot.129

VI. SUMMATION

It has long been felt that society is concerned with the relations of men and the just regulation of common dealings which men undertake. But apart from these interests of common concern, the state should allow the individual freedom to act as he chooses. Thus, it is contended by some, that the state is not the guardian of morals, and what individuals choose to do in private is of no concern to the state. It follows then, from that argument, that sexual morality is a private affair of conscience, and the state is by nature excluded.130 The fundamental assumption in the libertarian creed is that obscenity for normal adults has no direct social consequence but only moral significance.131 It is submitted that this belief disregards the total nature of obscenity.

129. As the public is acutely aware, Barney Rosset and I Am Curious are not atypical of modern theatrical fare. Michael Butler, producer and father of the Hair tribe, has spawned a musical oddity that might well become the most ubiquitous piece of dramaturgy since Uncle Tom's Cabin. Outstripping most of its sex-tease predecessors, both literally and financially, it has become a perennial cause celebre, while profitably catering to barbarian appetites.

Not to be outdistanced in terms of the lively and unmentionable is Jacques Levy's Oh! Calcutta! (the title is based on an unfunny French pun), which openly demonstrates that love has undoubtedly become a cheap commodity. As evidence of its financial success, top prices for Oh! Calcutta! climbed from $6.50 to $15.00 during opening month, only to be hiked to $25.00 within a matter of weeks, which represents the highest tariff ever charged for an off-Broadway show. Levy, a clinical psychologist by profession, abandoned the Menninger Clinic of Topeka and apparently has plunged into show business full time. It appears likely that most of the ventures of the type outlined will blossom unhampered by official censure. New York City's restrained police force has acted against only one play (Che!) and one movie (Muthers) since 1964.

Obviously the new theatre has developed a poetry and rhythm all its own. In times past, theatre was a form of amusement at the very least, a distraction. Today, it has become increasingly evident that motivations and lofty messages can be discarded. More often than not, the performing arts have become a medium for the emphatic portrayal of humanity's most perverse moods and modes. The mute nude has become a substitute for talent and artistic expression. We might expect that Michelangelo Antonioni's controversial Zabriskie Point, filmed in Death Valley, will symbolize the vitality of the new experiment.


131. Maurice Girodias, founder-editor of Olympia Press and noted libertarian, adheres to the belief that pornography and obscenity do not exist in reality. In his estimation, the reality of today is represented by something like Oh! Calcutta! which, to him, is a form of art at a popular
Closely related to the undiluted libertarian persuasion is the premise that obscenity does not cause demonstrable socially detrimental effects. As a verity, there is little systematic empirical research pointing to the proven fact that obscenity is a significant factor in causing overt sexual misconduct deviating from sane community standards. It would be extremely difficult, if not impossible, to prove that consumption of the pornographic will give immediate rise to a similarly immediate rise in anti-social conduct. Only the extremely naive, for example, could be convinced that the reading and viewing of obscenity might trigger an impulse to commit sodomy or rape.

On the other hand, bypassing obscenity as an immediate cause of anti-social acts, it is most certainly arguable that obscenity's overall effect lies in the deterioration of society's moral fabric. The immediate effect on individuals lies not in the consummation of offensive violence but in a loosening of personal restraints which in turn leads to a disruption of what we might label the stable personality. Loss of concern for the meaning of an unselfishly motivated love, rising divorce rates, abortions, and juvenile arrogance are but samples of the wages of unregulated sex, a sex-norm detached from sharing and responsibility. Obscenity in no way undertakes the instruction of people in sexual matters. Smut preaches no doctrine.132

Just as the state may protect individuals from physical aggression, so it may prevent psychic aggression in laws which prohibit criminal libel, blasphemy, open lewdness, and racial intolerance. Without reference to moral standards and judgments, the law would tend to become little more than a compendium of convenient rules for the protection of life and property and the prevention of violence. Most emphatically, obscenity is an aggression against the psychic investment which individuals have in the accepted norm of sexual behavior. Not only is it a social norm level through which people will enjoy eroticism in a completely free manner. TIME MAGAZINE, July 11, 1969, at 64. See also Girodias, More Heat Than Light, in TO DEPRAVE AND CORRUPT (Chandos ed.) 127 (1962).

132. Much has been written concerning the effects of obscenity and pornography upon the human kind. See, for example, Jahoda, THE IMPACT OF LITERATURE: A PSYCHOLOGICAL DISCUSSION OF SOME ASSUMPTIONS IN THE CENSORSHIP DEBATE (1954); LONDON & CAPRIO, SEXUAL DEVIATIONS (1950); MEAD, MALE AND FEMALE, 163-245 (1949); Sorokin, THE AMERICAN SEX REVOLUTION (1956); Wertham, SEDUCTION OF THE INNOCENT (1953). Less intensive discussions may be found in Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 MINN. L. REV. 1009, 1036 (1962); Schwartz, Moral Offenses and the Model Penal Code, 63 COLUM. L. REV. 669, 671-73 (1963).
but frequently enough it will have strong ethical reinforcements. The obscene book or movie can cause distress that will be a serious loss to the personal tranquillity of individuals. Involved here too is the interest society has in preserving the sexual standard upon which its existence rests.\textsuperscript{133}

It is sometimes difficult to discern upon what rational grounds the Court has so subordinated the claims of public morality to the claims of free expression. It seems every bit as difficult to understand why First Amendment freedoms have been afforded the status of an article of faith without accenting those measures of responsibility which makes these freedoms endure. Considering the genius of the original Brennan rationalization, it becomes even more difficult to understand why the Court has considered the evils of censorship so much greater than the evils of an unrestrained addiction to perverted sexuality. Why, for example, should genuine creativity be submerged by criteria which permit the ultimate in terms of salacious expression for profit's sake?

Much has been said and much has been written within the framework of legal opinions concerning the evolution of contemporary community standards. We may well ask ourselves how community standards have become "contemporary" so quickly. In a very real sense, community standards, due to mass media intrusions, have become national as opposed to local in essence and character. If one were to rely solely upon the veracity of the voices of mass media, one would perforce conclude that Americans in general are indulging in "an orgy of open-mindedness." Curiously enough, these voices and the voices of the expert witnesses who espouse the ultimate in freedom of expression have failed to account for the preferences of many, many individuals who are without benefit of expression and above all, without power to retaliate.

Admittedly, American public opinion is something less than unified on many issues, including the issue of censorship. A reader or viewer of the mass media and quality news journals may obtain the impression that censorship laws are rejected by all. Yet

\textsuperscript{133} Constant exposure to literary and visual productions which over-emphasize the carnal and brutal reduce love to raw sex and blatantly expose intimacies which have long been thought sacred and private, must eventually result in an erosion of moral and ethical standards. Furthermore, the so-called argument that exposure to this material does not affect the personality, or conduct for that matter, amounts to a practical denial of the whole profitable enterprise of commercial advertising which we know to be quite effective in persuading people to buy.
a Gallup poll, not necessarily infallible, found that 58 per cent of
the sample (constituting more than 75 per cent of those with an
opinion) thought our anti-obscenity laws insufficiently strict. Ap-
proximately 4 per cent favored less regulation. One in six was
satisfied with existing regulation. In all standard groups, a clear
majority favored stricter controls.\textsuperscript{184}

Readily apparent, then, is the fact that most people bear in
silence the insult of sex selling cars, bath soaps, and deodorants;
of naked bodies on the jackets of relatively good books; of special
offers via the mails for "unretouched" photos at exorbitant prices.
They act on their attitudes by ignoring the salacious leer, by switch-
ing off TV, by turning to another page of the magazine. In other
words, most Americans are putting up with the gruel of contem-
porary community standards while certain spokesmen among them
assert their increasing capacity and tolerance for the bawdy and
the lustful.

Undeniably fortunate is the fact that the Court has upheld
those laws designed specifically to safeguard juveniles from the
perils that beset their elders. Nonetheless, it has not seemed evi-
dent that laws confined to the protection of adolescents can ade-
quately protect them in the absence of any restrictions upon the
adult world. In a society, saturated with worship of freedom sans
recognition of responsibility, a society in which anything goes for
adults, it seems almost futile to fashion laws limiting access of the
young to sex-appealing literature and motion pictures. Equally
futile, if not absurd, is the premise that parents can exercise
judicious control over the moral choices of their children, par-
ticularly when one considers the pull and haul of the desire among
youth to conform to the popular theme. Very likely our judges
have not recognized the ability of youth to organize in union
strength, a factor which labor might well contemplate for future
consideration.

While asserting that the public is relatively voiceless in the
matter of directing the dimension or the quality of contemporary
artistic effort, one must not assume that abdication is the sole al-
ternative. The effect of concerted, but intelligent, private action

\textsuperscript{184}. See \textit{Gallup Political Index} 20 (October 1965). A recent Gal-
lup poll reveals that of every 100 adults interviewed, 85 favor stricter
state and local laws dealing with obscene literature sent through the
mails and 76 of every 100 objected to the types of magazines and other
publications available at news-stands. However, only 50 per cent contacted
indicated a willingness to join a neighborhood group or similar organiza-
tion to protest the sale of objectionable materials at newsstands. (Feb-
uary 1970.)
and private group influence cannot be underestimated, much less overlooked. Aware of the fact that an informed public can raise an articulate voice with regard to matters of general moral concern, a number of organizations have been formed, some of these operating on a national scale.

*Citizens for Decent Literature*, familiarly known as CDL, is likely one of the most aggressive and most competently staffed among the national groups. Founded by Charles H. Keating, Jr., a lawyer who also serves as a member of the President's Commission on Obscenity and Pornography, CDL publishes an informative bi-monthly newsletter entitled *The National Decency Reporter*. Through the *Reporter* the CDL supplies current information, including reports on film production, and, also, CDL legal counsel are available for advice and assistance in the prosecution of cases of serious concern.\(^{135}\)

*Morality in Media*, based in New York City, whose mission is similar in scope to that of CDL, publishes a newsletter eight times yearly. Reverend Morton A. Hill, S.J., one of several founders and currently president of the organization, also serves as a member of the President's Commission on Obscenity and Pornography.\(^{136}\) *Operation Moral Upgrade*, which operates from Los Angeles, publishes a variety of bulletins and circulars aimed at keeping its readers posted on latest legislative efforts and motion picture releases.\(^{137}\)

As long ago as 1930, the Motion Picture Association of America (MPAA) adopted production code, deriving more from practical than from philosophical considerations, which prohibited the kind of content which has consistently caused trouble for the industry. Following many revisions, the Association in 1966 voted unanimously to adopt a new production code which is, in essence, a voluntary film rating system. Jack J. Valenti, the Association's president, and Louis Nizer, the Association's general counsel, announced

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135. Organized in Cincinnati during the late fifties, CDL has recently moved its national office to 5670 Wilshire Boulevard, Suite 1680, Los Angeles, Calif. 90036.

136. *Morality in Media* headquarters are located at 1256 Lexington Avenue, New York, N.Y. 10028. Basically an interfaith movement, the organization was founded during the early sixties under the name "Operation Yorkville."

137. *Operation Moral Upgrade*, located at 656 Siena Way, Los Angeles, California 90024, is non-partisan, non-profit, and non-sectarian. In general it acts as a clearing house for information concerning violations of moral standards, particularly in the field of entertainment. Mrs. Van C. Newkirk is founder-president.
the action of the MPAA boards; however, at the same time Valenti stressed that the Association is opposed to censorship and statutory film classification. It is not the responsibility of the Code and Rating Administration to judge the artistic, aesthetic, or entertainment quality of a movie; nonetheless the board, in adopting ten general standards, announced that exploitation of illicit sex in films will not be justified. While MPAA ratings may exert some measure of control over domestic film productions, the Association exerts little if any effective control over the salacity of imported productions.\textsuperscript{138}

Self-censorship of television programming is a relatively new phenomenon. In the era of "live-live" television, the medium was frequently jarred by blue jokes and double entendres. Now that most products are taped (live-on-tape is the euphemism), one is frequently aware of the bloop—the noise made when the erase head of the tape recorder censors out the audio portion of the picture. Each network, in one fashion or another, acts as its own guardian of the public morality, attempting to underplay deviate scenes and violence. Sponsors continue to have some say about what can and what can't be shown, though their authority is noticeably curtailed compared to the days when shows were frequently sponsored by one company.

It can readily be discerned that a sane system of control of the flow of obscenity, whether control be through private auspices or public sanction, can diminish the worst of that we call utterly salacious. To be sure, the libertarian who is forever a victim of the "you-can't-tell-me-what-to-do syndrome," will snipe at all efforts in this direction be they ever so rational. To the libertarian, censorship is something akin to, if not worse than, sin. But in this age, when it is popular to "label" almost anything and everything, out of deference to reason we might well abandon the terms "cen-

\textsuperscript{138} The rating symbols employed by MPAA are: G (suggested for general audiences); GP (parental guidance and discretion suggested); R (restricted, meaning that persons under 16 are not admitted unless accompanied by a parent or adult guardian); and X (persons under 16 not admitted). In certain areas, age restrictions may be higher. Film companies that do not choose to voluntarily submit a film for rating by the Code and Rating Administration self-apply an X rating to that film. Inasmuch as the MPAA, itself, undertakes no enforcement measures, the ratings are enforced voluntarily by the manager in each motion picture theatre. By and large the rating system has worked fairly well, but one major source of complaint seems to derive from the fact that the producers themselves are releasing far too few G pictures that appeal to discerning audiences. Lamentably, too many producers have assumed that most viewers possess a Beverly Hillbilly mentality.
No thinking individual, be he liberal or conservative, wants to "censor" the worthy art-form or work product of his fellow man.

Simultaneously, however, one cannot deny that society has the right, and indeed the duty, to "control" those who overreach sanely drawn bounds of propriety. Without regard to the personal needs of the individual or of the group, the commercial pusher markets his wares on the basis of the personal weaknesses of his contemporaries. It is far too simplistic to say that the individual can control his own appetite by avoiding the reading of the salacious book or by refraining from attending the salacious motion picture, or that he can counsel his children against reading or viewing the unmentionable. The incidence of narcotic addiction is proof positive of the relative inability of the parent to successfully dictate to the preferences of the child, much less control the reins of his choice.

Only organized society can insulate its members against the harms wrought by reckless commercial exploitation. That many of us exploit our neighbors in every conceivable manner cannot be denied, but when conduct of the exploiter evidences a reckless lack of concern for the well-being of his fellows, it is high time to adopt meaningful legal measures aimed at protecting the many among us who lack resources to retaliate. To assert that regulation and control will inhibit and destroy the art-form of the exploiter is akin to whistling in the wind. On the contrary, if the literary and theatrical arts are to be reduced to the standards of the exploiter, the incentive and the ability of the truly creative artist to publish and excel will inevitably be suppressed.