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FATHER HILL AND *FANNY HILL*: AN ACTIVIST GROUP'S CRUSADE TO REMAKE OBSCENITY LAW

STEPHEN BATES*

In 1963, a New York-based interfaith group called Operation Yorkville (OY) targeted what many scholars consider the first pornographic novel, John Cleland's *Memoirs of a Woman of Pleasure*, better known as *Fanny Hill* (1748-1749). Headed by a Jesuit priest named Morton A. Hill, OY wielded considerable influence. It formed alliances with New York Mayor Robert Wagner, Cardinal Francis Spellman, and Norman Vincent Peale. But to the organization's dismay, the courts, ultimately including the U.S. Supreme Court, held that *Fanny Hill* was not obscene. OY, which changed its name to Morality in Media in 1968, now says that the Supreme Court in the *Fanny Hill* case gave pornographers "an almost unqualified green light." This article examines this prominent organization's ultimately unsuccessful fight against pornography, including its impacts on the political system and the courts; discusses the facts and law of major prosecutions involving *Fanny Hill*, some of them instigated by OY; and analyzes the interplay of First Amendment obscenity doctrine and social mores, both of which evolved rapidly.

INTRODUCTION

In 1963, one of the nation's youngest anti-pornography organizations targeted one of the world's oldest pornographic novels. A sixteen-year-old girl entered The Bookcase on Lexington Avenue in Manhattan. A clerk sold her a copy of John Cleland's

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Memoirs of a Woman of Pleasure, better known as *Fanny Hill*,¹ in a newly published edition from the venerable and respected company G. P. Putnam's Sons. Operation Yorkville (OY), an organization founded in 1962 to protect children from pornography, had orchestrated the purchase, and OY's secretary, a Jesuit priest named Morton A. Hill, helped the girl's mother file charges. With OY's support, the case worked its way through three levels of the New York State judiciary. Meanwhile, partly at OY's instigation, district attorneys from New York's five boroughs argued that *Fanny Hill* was obscene under state law and thus could not be sold to anyone, minor or adult. That case, too, worked its way through the state courts, with OY watching and commenting, sometimes stridently.

Father Hill and OY had clout. Local officials, even New York City's mayor, paid obeisance. The organization's agenda coincided with that of city planners, most notably Robert Moses, who wanted to clean up New York City for the 1964-1965 World's Fair.² Hill and OY also formed alliances with major religious figures of the day, including Cardinal Francis J. Spellman — termed “the American Pope” by his biographer³ — and Norman Vincent Peale, the pastor who had written the enormous best-seller *The Power of Positive Thinking*.⁴ Members of Congress praised OY; indeed, one of its newsletters was reprinted in the *Congressional Record*.⁵ The organization's clout, however, did not extend to the courts. To the outrage of Father Hill and his allies, New York prosecutors lost both *Fanny Hill* cases in 1964.⁶ *Fanny Hill*, a “manual of perversion,”⁷ as OY termed it, could lawfully be sold to

1. The title by which I will refer to it here.

2. See *infra* text accompanying notes 90-96.

3. JOHN COONEY, *THE AMERICAN POPE: THE LIFE AND TIMES OF FRANCIS CARDINAL SPELLMAN* (1984).

4. NORMAN VINCENT PEALE, *THE POWER OF POSITIVE THINKING* (1952).

5. 109 CONG. REC. 10,543-45 (1963) (reprinting excerpts from an OY Bulletin dated May 24, 1963).

6. See *Larkin v. G.P. Putnam's Sons (Putnam's IV)*, 200 N.E.2d 760 (N.Y. 1964); *New York v. Bookcase, Inc. (Bookcase III)*, 201 N.E.2d 14 (N.Y. 1964).

7. *OY Founders' Statement*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr. 1964, at 1.

the state's adults and, until the legislature revised a statute voided for vagueness and overbreadth, to its minors as well. OY's efforts to establish "community standards"—one element of the obscenity test then in force⁸—had failed. Worse for OY, the U.S. Supreme Court concluded that *Fanny Hill* was not obscene in 1966.⁹

Though this marked the end of efforts to ban *Fanny Hill*, OY was only beginning. The organization, which changed its name to Morality in Media in 1968,¹⁰ continues to operate. It has achieved notable successes through the years, including obtaining two substantial—and controversial—Justice Department grants.¹¹ Father Hill served on a federal commission that called for decriminalizing obscenity; he and another member wrote a scathing dissent, which the Supreme Court cited.¹² In 1983, Hill visited the White House and met President Reagan.¹³

Many scholars and popular authors have examined the censorship efforts targeting violent comic books of the 1950s and

8. See *Roth v. United States*, 354 U.S. 476, 489 (1957) (“[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”).

9. *Memoirs v. Massachusetts*, 383 U.S. 413, 420-21 (1966).

10. Fundraising Letter from Operation Yorkville Editor (Sept. 11, 1968) (on file with author).

11. See Stephen Bates, *Outsourcing Justice? That's Obscene.*, WASH. POST, July 15, 2007, at B3 (revealing a congressional earmark awarding \$147,996 in 2005 to Morality in Media, Inc.); Everett R. Holles, *Lawyers and Scholars Score Antipornography Group*, N.Y. TIMES, Dec. 28, 1974, at 44 (noting that another grant was given to a Lutheran College operation that was said to be a “thinly concealed arm of Father Hill’s Morality in Media crusade”); Neil A. Lewis, *Federal Effort on Web Obscenity Shows Few Results*, N.Y. TIMES, Aug. 10, 2007, at A13 (discussing a grant of \$150,000 provided to retired police officers who now work for Morality in Media).

12. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 n.7, 58 (1973). See also PRESIDENT’S COMM’N ON OBSCENITY & PORNOGRAPHY, REP. OF THE COMM’N ON OBSCENITY & PORNOGRAPHY (1970) [hereinafter REP. OF COMM’N].

13. Fr. Morton A. Hill, S.J.: Defender of the Public Decencies, <http://www.moralityinmedia.org> (follow “About Us” hyperlink; then follow “About Father Morton A. Hill, Founder of Morality in Media” hyperlink) (last visited Jan. 27, 2010).

early 1960s,¹⁴ as well as the decades-long efforts to censor motion pictures.¹⁵ Other anti-“smut” organizations concentrating on paperback books and magazines have received scholarly attention: the National Organization for Decent Literature (NODL)¹⁶ and Citizens for Decent Literature (CDL),¹⁷ among others.¹⁸ But OY has been largely neglected.¹⁹ Moreover, the *Fanny Hill* battle occurred at a hinge moment in First Amendment law. In New York, several judges deemed *Fanny Hill* the very archetype of obscenity; others praised it as important literature. The Supreme Court was trying to develop a workable test for obscenity, one that lower-court judges could consistently apply, but many cases, including the *Fanny Hill* one, fractured the Court, with no majority

14. See, e.g., DAVID HAJDU, *THE TEN-CENT PLAGUE: THE GREAT COMIC-BOOK SCARE AND HOW IT CHANGED AMERICA* (2008) (discussing the debate surrounding censorship of comic books).

15. See, e.g., MOVIE CENSORSHIP AND AMERICAN CULTURE (Francis G. Couvares ed., 1996) (collection of essays exploring efforts to censor cinematic representations).

16. See, e.g., Una M. Cadegan, *Guardians of Democracy or Cultural Storm Troopers? American Catholics and the Control of Popular Media, 1934-1966*, 87 CATHOLIC HIST. REV. 252, 273 (2001) (addressing the history and role of the NODL); Thomas F. O'Connor, *The National Organization for Decent Literature: A Phase in American Catholic Censorship*, 65 LIBR. Q. 386, 390 (1995) (same).

17. See, e.g., Whitney Strub, *Perversion for Profit: Citizens for Decent Literature and the Arousal of an Antiporn Public in the 1960s*, 15 J. HIST. SEXUALITY 258 (2006).

18. See generally Kenneth C. Davis, *The Lady Goes to Court: Paperbacks and Censorship*, 11(4) PUB. RES. Q., Dec. 1995, at 9, 32 (discussing the relationship of significant cases, congressional committees, and secular and religious organizations).

19. Two exceptions are Stephen Patrick Johnson, *Staying Power: The Mainstreaming of the Hard-Core Pornographic Film Industry, 1969-1990* (2009) (unpublished Ph.D. dissertation, University of Maryland, College Park) (on file with author); and Robin Marie Gallagher, *Talking About Sex and Worrying About Children: Toward a Theory of the First Amendment – 1957 to 1989* (2004) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with author).

opinion.²⁰ This was a key moment in another sense as well. Charles Rembar, the attorney who defended *Fanny Hill* in the courts, entitled his 1968 book *The End of Obscenity*,²¹ and he was on to something. *Fanny Hill* soon seemed tame in comparison with mainstream, widely disseminated books, including best-sellers, and films, including Academy Award winners.

The saga of OY and *Fanny Hill* presents a revealing case study of the efforts and effects of an organization that aimed to reshape obscenity law in the early and mid-1960s. Further, the evolution of obscenity law in New York State during the period cannot be understood without reference to the litigation championed and sometimes choreographed by OY. This article recounts OY's crusade against *Fanny Hill* and places it in context. I discuss the founding of the organization, its targets and rhetoric, the Catholic Church and censorship, the sexual revolution in print and film during the 1950s and 1960s, the novel *Fanny Hill*, the two New York cases over the book, the Supreme Court decision, and the ongoing efforts of Morality in Media.

THE BIRTH OF OPERATION YORKVILLE

The Brooklyn-born Father Morton A. Hill, a parish priest at St. Ignatius Loyola Roman Catholic Church,²² became the public face of Operation Yorkville (OY)—“ubiquitous,” one *Operation Yorkville Newsletter* said.²³ The press began calling him “the smut priest.”²⁴ Murray Kempton wrote in *The New Republic* that “[t]o

20. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (Justice William J. Brennan Jr. announced the judgment and issued an opinion joined by Chief Justice Earl Warren and Justice Abe Fortas).

21. CHARLES REMBAR, *THE END OF OBSCENITY: THE TRIALS OF LADY CHATTERLEY, TROPIC OF CANCER, AND FANNY HILL* (1968).

22. *The Rev. Morton Hill; Led Pornography Foes*, N.Y. TIMES, Nov. 6, 1985, at D27.

23. *These Are the Men Behind OY*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1965, at 5.

24. EDWIN A. ROBERTS JR., *THE SMUT RAKERS: A REPORT IN DEPTH ON OBSCENITY AND THE CENSORS* 124 (1966).

the bureaucrats, Father Hill must be that object so foreign to Manhattan, the priest who is a Puritan.”²⁵

Today, the website of Morality in Media lauds Hill as founder.²⁶ In this account:

“Better look into this,” the Jesuit pastor suggested to the parish priest late in 1962.

“This” was a situation that had arisen in the parish elementary school, where a mother had discovered that sadomasochistic magazines were circulating among sixth grade boys.

“Looking into” the pornography traffic brought Fr. Morton A. Hill, S.J. to the White House in March of 1983. . . .

The original suggestion of the superior . . . eventuated in the mounting of a community campaign on the upper East Side of Manhattan in New York City, for which Fr. Hill recruited a Lutheran minister, Rev. Robert E. Wiltenburg, and Rabbi Julius G. Neumann.²⁷

If the Morality in Media account is accurate, the contemporaneous record suggests that Hill kept an uncharacteristically low profile during the organization’s first several months of activity. He makes no appearance in the organization’s earliest newsletters and media coverage. OY newsletters identify the founders as Rev. Wiltenburg of Immanuel Evangelical Lutheran Church, Rabbi Neumann of Congregation Zichron Moshe, and Father William T. Wood, S.J., of the Church of St. Ignatius Loyola.²⁸ (Father Wood may have been the “superior”

25. Murray Kempton, *Impurities in Yorkville: With Pornography, One Thing Leads to Another*, NEW REPUBLIC, Mar. 16, 1963, at 14.

26. Fr. Morton A. Hill, S.J., *supra* note 13.

27. *Id.*

28. *E.g.*, *OY Bulletin*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 2. Two earlier news accounts list

who asked Hill to investigate.) A *New York Times* article from October 1963 lists those three as well,²⁹ as does a 1966 book about pornography.³⁰ Hill appears in the June 1963 newsletter as the volunteer secretary of OY.³¹ He remained secretary until 1968, when the organization incorporated and he became president.³²

An *Operation Yorkville Newsletter* from 1965 provides different, though not necessarily conflicting, details of the organization's founding. In this account, two elementary school children in the fall of 1962 were found in possession of "salacious publications," which they said had been left in a manila envelope atop a trashcan next to the school.³³ The principal told her pastor about the incident, and other parents and religious leaders got involved. Pediatrician William P. Riley, president of New York CDL—a prominent national organization founded by Charles H. Keating, who would become embroiled in a savings-and-loan

Rabbi Joseph Lookstein of Congregation Kehilath Jeshurun in place of Neumann. *Operation Yorkville Finished Organizing, Ready for Action*, MANHATTAN EAST, Feb. 21, 1963, at 1, 9; *Operation Yorkville Survey Pinpoints Dealers in Smut*, MANHATTAN EAST, Mar. 7, 1963, at 1, 6. An FBI document does refer to "correspondence from Father Hill commencing in 1945 wherein he has expressed interest concerning juveniles and other social problems in his area" and adds that Father Hill in 1961 "indicated an interest in the problem of pornographic literature and asked the Bureau to furnish the names of 'big men' in the industry," so as to "attempt to have pressure put on these people by clergymen." Memorandum from A. Rosen to Belmont (Feb. 27, 1963) (on file with author). The document then states, "Father Hill was advised that our records are confidential." *Id.*

29. George Dugan, *Jesuit Begins Fast to Protest Pornography Sales to Children*, N.Y. TIMES, Oct. 28, 1963, at 24.

30. ROBERTS, *supra* note 24, at 124.

31. *OY Stalwart Volunteer Staff*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June 1963, at 3.

32. *Operation Yorkville Is Incorporated*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1968, at 4.

33. *The Hows and Whys: How an Interfaith OY Came to Be*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, NY), Feb. 1965, at 2 [hereinafter *The Hows and Whys*]. In yet another account of the organization's founding, a teacher in a parochial school found a "dirty" bubble-gum card in a student's desk. Kempton, *supra* note 25, at 13. Father Hill then helped organize the group. *Id.*

scandal in 1989—helped form a protest group.³⁴ The preceding year, Riley had testified before a congressional committee that pornographic materials are “part and parcel of the Communist movement to destroy the United States.”³⁵ He would later join the OY board.³⁶ For their part, the three listed founders of OY—Revs. Wood and Wiltenburg and Rabbi Neumann—wrote to J. Edgar Hoover: “[A]t every meeting the question comes up[:] ‘Are the communists behind pornography?’ There are many indications of communist activity in salacious literature, but we would like to see an authoritative statement from your office on this subject.”³⁷ Hoover responded that he was unable to help.³⁸ Later, in 1967, Hill told an FBI representative, according to a bureau memo, that “he believe[d] the recent widespread sale of obscene material may be part of an over-all plan of the CP [Communist Party].”³⁹

According to news coverage, one of OY’s initial projects was the Yorkville School Yard Obscenity Map, which showed the

34. *The Hows and Whys*, *supra* note 33, at 2. Operation Yorkville regularly showed CDL’s film *Perversion for Profit*. RONALD K.L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON* 240 (2002); *Operation Yorkville: Yorkville Has Seven Choices*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, NY), Jan. 10, 1963, at 8. For information on CDL, see Strub, *supra* note 17. For information on Keating, see MICHAEL BINSTEIN & CHARLES BOWDEN, *TRUST ME: CHARLES KEATING AND THE MISSING BILLIONS* (1993). CDL will be discussed further below.

35. Strub, *supra* note 17, at 272.

36. *Man of the Month: Dr. William P. Riley*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 4. See also John E. Twomey, *The Citizens’ Committee and Comic-Book Control: A Study of Extragovernmental Restraint*, 20 LAW & CONTEMP. PROBS. 621, 628-29 (1955) (pointing out that many groups had “interconnect[ed] leaderships”).

37. Letter from William T. Wood, Robert E. Wiltenburg & Julius G. Neumann, Operation Yorkville, to J. Edgar Hoover, FBI (Feb. 19, 1963) (on file with author).

38. Letter from J. Edgar Hoover, FBI, to William T. Wood, Operation Yorkville (Feb. 26, 1963) (on file with author). The FBI copy of the Hoover letter includes a typewritten annotation reading in part: “The Domestic Intelligence Division was contacted and they have no indication that the Communist Party is distributing obscene material.” *Id.*

39. Memorandum from Special Agent in Charge (SAC), New York, to Director, FBI (Jan. 5, 1967) (on file with author).

locations of schools and pornography dealers. The first map, covering newsstands and candy stores, found twenty-two news dealers selling “hard-core” pornography, seventeen selling “objectionable” material—including “men’s adventure magazines”—and sixteen “reputable” dealers.⁴⁰ A subsequent, larger survey—including dime stores, drug stores, and some bookstores—found that 82 of 109 stores were selling pornography.⁴¹ OY said, “[c]hildren not only deal at these stands, they also congregate at them socially. Many of these stands are near schools.”⁴² The results, the organization said, were “terrifying.”⁴³

Operating out of the rectory of St. Ignatius Loyola Church,⁴⁴ OY achieved early successes. A neighborhood newspaper reported, “[r]esponse to this campaign poured in from all over the metropolitan area. . . . Citywide support for Operation Yorkville is rapidly becoming apparent, with affiliated groups active in Brooklyn and the Bronx.”⁴⁵ Hundreds of people attended meetings under OY auspices.⁴⁶ The organization reported receiving word that U.S. Representative John Lindsay “is 100% behind Operation Yorkville, its aims and purposes; and as the father of several children, will do all he can to obtain needed legislation,”⁴⁷ though the OY newsletter later chided Lindsay for failing to include

40. *Operation Yorkville Survey Pinpoints Dealers in Smut*, *supra* note 28, at 1. See also Kempton, *supra* note 25, at 13; *Bulletin: Operation Yorkville Invited to Justice Department Meeting*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 26, 1963, at 2.

41. *More Dirty Books*, AMERICA, Mar. 23, 1963, at 388.

42. *Operation Yorkville Expands Survey of Smut Dealers*, MANHATTAN EAST, Mar. 14, 1963, at 1.

43. *The Hows and Whys*, *supra* note 33, at 2.

44. *OY Moves to New Quarters*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 1.

45. *Operation Yorkville Finished Organizing*, *supra* note 28, at 9.

46. See, e.g., *Operation Yorkville Survey Pinpoints Dealers in Smut*, *supra* note 28, at 1.

47. *Bulletin: Operation Yorkville Invited to Justice Department Meeting*, *supra* note 40, at 2.

obscenity among the issues in a questionnaire sent to constituents.⁴⁸ A newsletter distributed in June 1963, less than a year after the group's founding, sought funds to help "expand Operation Yorkville to Operation America."⁴⁹ The group reported that organizations in forty-six states had signaled their support of OY.⁵⁰ By September 1963 the newsletter claimed a circulation of 10,000;⁵¹ in February 1964 it claimed 15,000;⁵² and in February 1965 it claimed 20,000.⁵³

Not all developments were positive. In February 1963, Father Hill and eight other OY representatives—"clergy, business executives and housewives"—traveled to Washington and met with Justice Department and FBI officials as well as representatives from the Postal Inspector's Office and the Bureau of Customs.⁵⁴ According to an FBI memo, the group requested the meeting "to find out specifically what, if anything, the Department of Justice could or would do to help them"⁵⁵ in their cause, though the OY newsletter claimed that the Justice Department had asked for the meeting.⁵⁶ The OY representatives brought "several magazines

48. *Lindsay Questionnaire Ignores Obscenity*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June 1963, at 2.

49. *Operation Yorkville Needs Financial Aid!*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June 1963, at 1. In 1966, OY identified its ambit as New York, New Jersey, and Connecticut. *This Is Operation Yorkville*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 2.

50. 109 CONG. REC. 10, 544 (1963) (statement of Hon. Glenn Cunningham).

51. *OY Newsletter Circulation Reaches 10,000*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept. 1963, at 5.

52. *Newsletter Circulation Now 15,000*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1964, at 5.

53. *OY Special Appeal Issue: \$50,000 Needed for OY 'Drive for '65'*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1965, at 1.

54. Memorandum from A. Rosen to Belmont 1 (Mar. 1, 1963) [hereinafter Rosen to Belmont] (on file with author).

55. *Id.* at 1.

56. *Bulletin: Operation Yorkville Invited to Justice Department Meeting*, *supra* note 40, at 1.

commonly referred to as ‘girlie’ magazines,”⁵⁷ the FBI memo recounts, but an official from the Justice Department’s Criminal Division said that the materials did not qualify as obscene.⁵⁸ The OY group also brought an affidavit from a newsstand dealer saying that he had to accept pornographic materials in order to get *Time* and *Life* from his distributor.⁵⁹ A representative of the Justice Department’s Antitrust Division asked OY to gather more such affidavits, but “[i]t was the position of the group that they should not be expected to go out and get additional affidavits,” for “they were all working people and had but limited time that they could utilize in connection with their program against obscene material.”⁶⁰ The Criminal Division representative stressed that obscenity was largely a state and local issue and that “the Federal Government is somewhat limited in what it can do.”⁶¹ The FBI memo recounting the meeting concluded that the OY group “did not feel as though their visit . . . to the Department of Justice had been very fruitful and so stated.”⁶²

OY turned its attention to local authorities, where Father Hill had better luck. In July 1963, Mayor Robert F. Wagner Jr. — a former assemblyman representing Yorkville⁶³ who had

57. Rosen to Belmont, *supra* note 54, at 1.

58. *Id.* at 1-2.

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 3.

62. *Id.* When Father Hill in 1964 invited Hoover or a representative to discuss the obscenity problem at a private lunch, the FBI declined to send anyone. Although Hill was “very sincere,” an FBI memo stated, the special agent in charge of the bureau’s New York office “advise[d] that he [felt] that Father Hill [would] use the luncheon for whatever publicity he may be able to obtain.” Letter from J. Edgar Hoover, FBI, to Morton A. Hill, Operation Yorkville (Mar. 30, 1964) (on file with author). In 1965, Hill asked the FBI to help form “an organization to oppose the [American] Civil Liberties Union,” but he was told that it would be “outside the authority of the FBI as an investigative agency.” Letter from SAC, New York, to Director, FBI (Aug. 31, 1965) (on file with author).

63. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 799 (1974).

spearheaded a battle against pornography in 1960⁶⁴—told Hill, in the mayor's subsequent account, that “the city is developing a program to combat the growing distribution of hard-core pornographic material to children.”⁶⁵ The mayor agreed to a four-part plan requested by OY, which included an anti-pornography unit in the police department. Father Hill had complained that “[t]here [were] hundreds of New York City policemen who deal[t] full-time with narcotics and no one who deal[t] full-time with pornography.”⁶⁶ The plan also called for a pornographers-only court: “One criminal court judge recently confessed he was ignorant of the law in a case before him involving the sale of ‘Fanny Hill’ to a minor,” Father Hill told a reporter.⁶⁷ When Mayor Wagner failed to live up to his promises, Father Hill went on a fast, preached a sermon about it, and called the press.⁶⁸ OY co-founder Rabbi Neumann announced that he would fast too, from sunrise to sunset for a couple of days.⁶⁹ The result was a fourteen-paragraph article in *The New York Times*⁷⁰ and significant coverage in other city newspapers. “I will take only water until the Mayor redeems four pledges he made last July,” Hill told the *New York Journal-American*. “I can think of no other way to move him.”⁷¹ Mayor Wagner—“apparently nettled,” according to the *New York Daily*

64. Linda Crawford, *Report from New York: New York in Repeat of Campaign Against Smut*, CHI. TRIB., Nov. 10, 1963, at C15.

65. Philip Benjamin, *City Calls Parley on Sale of Smut*, N.Y. TIMES, Oct. 30, 1963, at 28.

66. Kempton, *supra* note 25, at 14.

67. Bob Considine, *Priest and Rabbi on Hunger Strike*, N.Y. J.-AM., Oct. 26, 1963 (on file with author).

68. Dugan, *supra* note 29, at 24. See also Crawford, *supra* note 64, at C15.

69. McCandlish Phillips, *City Opens Drive on Pornography*, N.Y. TIMES, Oct. 29, 1963, at 1.

70. Dugan, *supra* note 29, at 24. In response, Ralph Ginzburg, convicted of mailing obscene materials, announced that he would fast to protest the nation's “obscenity panic.” His stunt evidently had no effect. Phillips, *supra* note 69, at 22. The Supreme Court later upheld Ginzburg's obscenity conviction, in an opinion handed down the same day as the *Fanny Hill* one. *Ginzburg v. United States*, 383 U.S. 463 (1966).

71. Considine, *supra* note 67.

*News*⁷²—promptly announced that he would direct city officials to meet with Father Hill and “make it plain that we want and welcome his help and the help of other religious and civic leaders in rooting out this evil.”⁷³ Father Hill ended his fast after three days and held a news conference to announce his satisfaction with the mayor’s statement; this conference was reported on the front page of the *Times*.⁷⁴ The mayor subsequently met with religious leaders and city officials and pledged “to do all that is morally desirable and legally possible” to keep pornography out of the hands of children.⁷⁵ Those present included the district attorneys of the five boroughs and the police commissioner.⁷⁶ According to the OY newsletter, Manhattan District Attorney Frank Hogan praised the group’s work and said that it was helping change the mindset of some judges.⁷⁷ The mayor called it a “good meeting”; Hill called it merely “a beginning.”⁷⁸

New York Cardinal Francis J. Spellman weighed in next. In the history of American religious leaders, Spellman is unique, according to his biographer: “[H]is influence within his Church knew few boundaries. . . . What made him stand apart was the amazing power he had acquired over the years in international, national, state, and local politics.”⁷⁹ He often addressed sexual matters,⁸⁰ once charging that Americans “who piously shout ‘censorship’ if they are not permitted freely to exercise their venal, venomous, diabolical debauching of our boys and girls” represent a

72. Lee Silver & Robert McDonald, *Mayor Acts, Priest Ends Hunger Strike Over Smut*, N.Y. DAILY NEWS, Oct. 29, 1963, at 3 (on file with author).

73. Phillips, *supra* note 69, at 1. It was not the first time that Mayor Wagner had been squeezed into doing something. New York City planner Robert Moses repeatedly threatened to resign if he did not get his way, and Wagner invariably gave in. CARO, *supra* note 63, at 806.

74. Phillips, *supra* note 69, at 1.

75. Crawford, *supra* note 64, at C15.

76. *Cavanagh Named Coordinator of N.Y. Obscenity Program*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 4.

77. *Id.*

78. Crawford, *supra* note 64, at C15.

79. COONEY, *supra* note 3, at xv.

80. *Id.* at 108.

“fifth column.”⁸¹ In a commencement address at Fordham University in 1964, Cardinal Spellman denounced the city’s “powerhouse of perversion” and contended that pornographic materials were “destroying those virtues which will keep America strong.”⁸² He said, “[p]ornography scoffs at integrity, ridicules personal purity and decency, encourages brutality, injustice, irreverence, disrespect for authority and distorts a proper and correct understanding of the God-given gift of sex by exploiting self-gratification and pleasure as ends in themselves.”⁸³ The city needed a commission with the “civic and moral responsibility for taking necessary, appropriate and legal means of protecting our youth and the family life of our city from the influences of salacious literature.”⁸⁴ An account of his speech appeared as the lead item of the next *OY Newsletter*.⁸⁵ A few months later, Mayor Wagner established and chaired an unofficial Citizens Antipornography Commission.⁸⁶ OY’s psychiatric consultant, Oscar K. Diamond, was a member, along with Riley, president of the state chapter of Citizens for Decent Literature.⁸⁷ Cardinal Spellman praised the city for “acceding to our request.”⁸⁸ At an early meeting, each commission member was given a copy of *Fanny Hill*, which they

81. *Id.* at 109.

82. See Robert H. Terte, *Spellman Seeks Anti-Smut Group*, N.Y. TIMES, June 11, 1964, at 18 (quoting Cardinal Spellman).

83. *Cardinal Lashes Out at Pornography Traffic*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 3.

84. Terte, *supra* note 82, at 18.

85. *Cardinal Lashes Out at Pornography Traffic*, *supra* note 83, at 1. In 1965, the cardinal sent OY a \$1,000 contribution. *OY Receives \$1,000 Gift from Cardinal Spellman*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Mar. 1965, at 2.

86. COLLINS & SKOVER, *supra* note 34, at 243. See also Charles G. Bennett, *City’s Smut Drive Will Try Suasion*, N.Y. TIMES, Dec. 5, 1964, at 1 (discussing the Citizens Antipornography Commission’s goal of persuading the public); Clayton Knowles, *Smut Publishers Face New Attack*, N.Y. TIMES, Oct. 7, 1964, at 48 (discussing the concerns of the Citizens Antipornography Commission).

87. *Mayor Forms Citizens’ Commission*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 4.

88. COLLINS & SKOVER, *supra* note 34, at 243.

unanimously deemed obscene regardless of what any courts might say.⁸⁹

OY and Cardinal Spellman were not alone in lobbying for a crackdown on pornography. The upcoming 1964-1965 World's Fair led to additional pressure. The legendary New York City planner Robert Moses, president of the billion-dollar project, wanted a "clean" fair—female dancers, for example, could not expose navels or cleavage, and sexy posters were banned.⁹⁰ Moses also provided rent-free space to religious organizations that would establish pavilions; the Vatican, the Christian Science Church, the Church of Latter-Day Saints, Billy Graham's evangelistic organization, and others did so.⁹¹ In addition, the Vatican lent the original *Pietà* to the fair.⁹² The city had to be made more tourist friendly, too. According to one historian, Moses, Cardinal Spellman, and "various real estate interests . . . were eager to 'clean up' New York City" before the fair.⁹³ In a 1963 sermon, Msgr. Joseph A. McCaffrey said that visitors to the World's Fair ought to find "a clean Times Square," rather than one suggesting that the city "is wide open."⁹⁴ *The New York Times* in February 1964 reported a crackdown on "smut specialists." It quoted one bookstore manager as calling the crackdown "harassment" and adding: "The Mayor's

89. Bennett, *supra* note 86, at 1. See also Knowles, *supra* note 86, at 48; *Citizens' Commission Proposes Program, Submits "Minor" Statute*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr.-May 1965, at 1; *Mayor Forms Citizens' Commission*, *supra* note 87, at 1.

90. CARO, *supra* note 63, at 1086-87, 1106-07. When the fair failed to attract the crowds he had hoped for, Moses reversed these decisions. *Id.* at 1106.

91. Morris Dickstein, *From the Thirties to the Sixties: The New York World's Fair in Its Own Time*, in REMEMBERING THE FUTURE: THE NEW YORK WORLD'S FAIR FROM 1939 TO 1964, at 26 (1989).

92. *Id.* at 39.

93. STEPHEN E. KERCHER, REVEL WITH A CAUSE: LIBERAL SATIRE IN POSTWAR AMERICA 533 n.68 (2006).

94. George Dugan, *Priest Denounces Smut in Times Sq.*, N.Y. TIMES, May 6, 1963, at A32.

all worked up about the World's Fair. He wants everything tidy.”⁹⁵ A target of the anti-pornography drive was a novel published by Putnam's a year earlier, *Fanny Hill*.⁹⁶

RHETORIC, TARGETS, AND TACTICS

“Pornography is contributing to the downfall of the United States,” Operation Yorkville proclaimed in 1963, a typical example of the organization's apocalyptic rhetoric.⁹⁷ It positioned itself as moderate: OY “avoids extremes and extremists of all sorts, operating within the framework of the law.”⁹⁸ It stood for mainstream, majority values, unlike the ACLU — “an elite minority which is skillfully imposing its will upon the majority”⁹⁹ — and other

95. *Crackdown Hits Smut Specialists*, N.Y. TIMES, Feb. 26, 1964, at A39. See also COLLINS & SKOVER, *supra* note 34, at 244 (referring to New York City at the time as “a feverish hotbed of antiobscenity activity”).

96. JAMES R. PETERSEN, *THE CENTURY OF SEX* 301-02 (1999).

97. R.N. Usher-Wilson, *Community Standards*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 4. See also *The Hows and Whys*, *supra* note 33, at 3 (pornography “is driving a generation of American youth to moral decay”); *Nine Clergymen Score High Court*, N.Y. TIMES, Sept. 1, 1964, at A37 (Supreme Court decisions “cannot be accepted quietly by the American people if this nation is to survive”); *The ACLU Takes the First*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 6 (“If American society is to survive . . . then the Constitutional Curtain, which ACLU-affiliated attorneys have hung to protect pornographers from punishment, must be taken down and sent to the cleaner.”).

OY's rhetoric mirrored that of local decency organizations analyzed in LOUIS A. ZURCHER JR. & R. GEORGE KIRKPATRICK, *CITIZENS FOR DECENCY: ANTIPORNOGRAPHY CRUSADES AS STATUS DEFENSE* 114-15 (1976) (“The United States was depicted as being in a state of moral disintegration Law and order were seen as breaking down, and comparisons were drawn with the fall of other great civilizations. . . . [P]ornography was seen as causally related to the general decline of basic values in American society.”).

98. *The Hows and Whys*, *supra* note 33, at 2.

99. *More Power on Fifth Avenue Than on the Potomac?*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 5. The Catholic magazine *Ave Maria* similarly denounced elites who reflexively opposed religious efforts to oppose objectionable literature as “intellectuals, sophisticates, night-life people.” Cadegan, *supra* note 16, at 273.

“boobellectuals.”¹⁰⁰ The courts might have trouble defining obscenity—Judge Curtis Bok of Philadelphia famously wrote, “[t]o come to grips with the question of obscenity is like coming to grips with a greased pig”¹⁰¹—but OY found the task easy: “Obscene material is simply the imaginative projection by word or picture of an obscene action. An obscene action is a sexual action which would make those engaged in it subject to arrest if it were to be performed in public.”¹⁰² And the organization insisted that it was not calling for censorship. “Operation Yorkville is as much opposed to censorship, prior restraint, as [the] ACLU,” a 1963 newsletter declared.¹⁰³ When invited to participate in a radio debate on censorship, OY declined: “We are violently opposed to censorship.”¹⁰⁴ It advanced several arguments here: that censorship means prior restraint rather than the sort of after-the-fact punishment that OY favored;¹⁰⁵ that it lobbied for enforcement of existing laws rather than enactment of new ones¹⁰⁶ (which was not altogether true);¹⁰⁷ that obscenity law of the era depended on community standards and OY simply sought to help articulate

100. Charles F. A. Gallagher, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), May 1964, at 8.

101. HOWARD WHITMAN, THE SEX AGE 55 (1962).

102. *R R Radio: How to Listen*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), April 1966, at 3. *But see* Rev. William T. Wood, *The Aims & Purposes of OY*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr. 1964, at 4 (“OY in no way attempts to solve the difficult, admittedly delicate problem of defining what is obscene or what is obscenity. OY fully endorses the spirit of the legislators of New York State and Section 484-h of the State Penal Law.”).

103. *1963-64 City Wide Parental Civil-Right Campaign Plan*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept. 1963, at 7.

104. *OY Turns Down “Censor” Role*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr. 1964, at 4.

105. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 7.

106. *WCBS-TV and a Generous 2 Min.*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 4, 8.

107. *See, e.g., A Look at the Legal*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June 1963, at 2 (calling for the legislature to enact new obscenity legislation).

them;¹⁰⁸ that censorship was limited to, or at least significant only with regard to, statements of “political or religious convictions”;¹⁰⁹ and that “the question is not censorship, but control as in libel laws.”¹¹⁰ The organization also charged that pornographers were the true censors, in that they excluded moral material from their publications.¹¹¹

“Law enforcement officers, on the whole, do a good job but their efforts are frustrated by the courts who wrongly and foolishly interpret this corruption as being demanded by current community standards,” said one newsletter.¹¹² The judiciary came in for frequent criticism. “[T]he ivory-tower members of the judiciary are either unable or unwilling to recognize the difference between freedom and license.”¹¹³ OY referred to the Supreme Court as “Presumptuous Framers of an American Moral Code”¹¹⁴ who were

108. *Operation Yorkville Statement of Policy*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb.-Mar. 1966, at 2. Cf. ZURCHER & KIRKPATRICK, *supra* note 97, at 115 (pornography opponents believed that they must “take action which would result in informing local merchants and law-enforcement officials about the ‘real’ level of community standards”).

109. *Operation Yorkville: Yorkville Has Seven Choices*, *supra* note 34, at 1.

110. *More Power on Fifth Avenue Than on the Potomac?*, *supra* note 99, at 5. The National Organization for Decent Literature and the Legion of Decency, both sponsored by the Catholic Church, likewise insisted that they were not censorship organizations. Cadegan, *supra* note 16, at 271-73.

111. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 7.

112. *Reverend Usher-Wilson Writes to President Johnson Urging Action*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 3. Cf. ZURCHER & KIRKPATRICK, *supra* note 97, at 115 (“It was agreed that local government and law-enforcement officials were unable to do anything about the problem of pornography because their hands had been tied by ineffective laws and by Supreme Court decisions favorable to ‘smut peddlers.’”).

113. *The Cardinal and the Court*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 5.

114. *The Supreme Court*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 1.

“nurturing degeneracy.”¹¹⁵ The nation was being subjected to nothing less than “government by the judiciary.”¹¹⁶ Though OY praised judges who ruled against pornographic materials—“Operation Yorkville believes that Judge Samuel Hofstadter should head the list of . . . great judges who have spoken out forcefully”¹¹⁷—it more often had occasion to scold judges who ruled the other way. “Court of Appeals Again Rules for Filth,” declared the front page of one publication.¹¹⁸ Another chided the “progressively more permissive” Supreme Court, which “is preoccupied with interpreting the First Amendment, passing over the fact that the First Amendment is there to protect the *community*. The Court, up to this point, has not considered the damage this material does the *community*.”¹¹⁹ OY urged members to write to the state’s chief justice—the newsletter gave his home address—to complain about one obscenity ruling,¹²⁰ and recommended that members who received pornographic materials by mail forward them to Justice William J. Brennan Jr.¹²¹

OY concentrated its efforts and its rhetoric on protecting minors.¹²² Father Hill claimed that 75 to 90 percent of pornography

115. Howard Moody, *Toward a New Definition of Obscenity*, CHRISTIANITY & CRISIS, Jan. 25, 1965, at 285.

116. *The Supreme Court*, *supra* note 114, at 1 (all upper-case in original).

117. *Judge Samuel Hofstadter Dissents in New York Dealer-Scienter Case*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov.-Dec. 1964, at 8 (internal quotation marks omitted).

118. *Court of Appeals Again Rules for Filth*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June-July 1964, at 1.

119. *What Is Operation Yorkville?* (n.d.), at 4, in Gordon McLendon Papers, Southwest Collection, Box 17, Folder 23, Texas Tech University (emphasis in original).

120. *Operation Richmond, Staten Island, Under Way with 2 Big Meetings*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), June 1963, at 1.

121. *Tell It to the Judge*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov.-Dec. 1964, at 5.

122. *Cf.* ZURCHER & KIRKPATRICK, *supra* note 97, at 114 (“Young people in particular were cited as being vulnerable to the influence of liberal propaganda, and the obligation to protect them against such messages was stressed.”).

reaches children.¹²³ “A child can be led to perversion by a single page of a long book, or a single picture in a book of pictures,” he told a reporter.¹²⁴ He analogized to the Supreme Court’s recent school prayer case brought by Madalyn Murray:

Don’t forget that the high court . . . defended the right of the atheistic mother involved to determine what her child reads. It clarified, developed and protected the natural and inalienable parental rights to educate children, and thus defined the parental right as a civil right.

Thus, obscenity distribution, in violation of parental wishes, now becomes . . . a violation of a civil right.¹²⁵

At times the organization seemed to be using children as a pretext for a society-wide ban.¹²⁶ One newsletter spoke of OY’s “number one target” as “the complete and immediate destruction of the two billion dollar cesspool publications racket that is perverting an entire generation of American children.”¹²⁷ As to the rights of adults, it said little.¹²⁸ This silence was in contrast to

123. ROBERTS, *supra* note 24, at 125. Hill may have gotten this figure from Citizens for Decent Literature’s film *Perversion for Profit*. Strub, *supra* note 17, at 258.

124. Considine, *supra* note 67.

125. *Id.* (discussing *Sch. Dist. of Abington Twp. v. Schmepp*, 374 U.S. 203 (1963)).

126. *Cf.* John Fischer, *The Harm Good People Do* (1956), reprinted in *THE FIRST FREEDOM: LIBERTY AND JUSTICE IN THE WORLD OF BOOKS AND READING* 139 (Robert B. Downs ed., 1960) (one organization “states that its list is ‘not intended as a restrictive list for adults’ — though it does not explain how adults could purchase the books if merchants have been persuaded not to stock them”).

127. 1963-64 *City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 6. The \$2 billion figure may have come from Charles Keating of Citizens for Decent Literature, who admitted that he made it up. ROBERTS, *supra* note 24, at 116-17. *Cf.* ZURCHER & KIRKPATRICK, *supra* note 97, at 114 (“The prevalence of pornography . . . was seen to be . . . a tool of ruthless profiteers who did not care about the nation and its young people.”).

128. One exception was an OY newsletter citing with approval the fact that theaters showing the profanity-laced film *Who’s Afraid of Virginia*

statements of the city's deputy mayor, Edward F. Cavanagh Jr., executive chairman of the Mayor's Citizens Antipornography Commission. "It's one thing to allow adults to buy smut," he said of a state law in 1963. "This law is clear in its respect of adult rights. It is confined to minors. We are not out to trample on civil liberties. We are not book burners."¹²⁹

OY was a nonsectarian organization but decidedly not a secular one.¹³⁰ In its first year, OY talked of "cesspool publications" as including material that "teaches open defiance of the Ten Commandments of God," and added: "Thus, the cesspool publication is the antithesis of all the great books and all classical literature – the opposite, too, of Sacred Scripture which, for all the evil it presents, is nevertheless a book which one kisses after reading."¹³¹ Pornography, further, was "being aimed at youth with

Woolf? featured signs warning: "No person under 18 will be admitted unless accompanied by a parent." *Variable Approach*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 2.

129. Benjamin, *supra* note 65. See also Bennett, *supra* note 86. Perhaps surprisingly, William F. Buckley's *National Review* drew the same line, arguing that pornography ought to be kept from children but "[o]ur own notion is that to attempt to draw the line for adults is a practical impossibility, and that therefore it is better to go the way of permissiveness, than the way of Comstock." *Operation Yorkville*, NAT'L REV., Dec. 14, 1965, at 1148.

130. Despite its interfaith board, one Morality in Media website now features sectarian references, including the following:

In His death on the cross, Jesus gave the world the perfect model of what true love is. Simply put, true love means giving, not taking. How different that is from the concept of "love" in much of our pop culture. Would a rapper give up anything, let alone his life, for his "bitch" or his "ho"?

Ed Hynes, *A View from Riverside Drive*, MORALITY IN MEDIA CURRENT NEWS, Oct. 2006, <http://www.obscuritycrimes.org/news/vfrd1006.php>. See also Rev. McLean Cummings, *Heroic Chastity: Conquering Sexual Sins*, MORALITY IN MEDIA HELP FOR PORN VICTIMS AND ADDICTS, Aug. 2006, <http://www.obscuritycrimes.org/HeroicChastity.php> ("Along with children, the poor, the sick, and unbelievers, Jesus and His Church have a particular predilection for sinners.").

131. 1963-64 *City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 6.

the resultant erosion of their faith in God and belief in His law.”¹³² Father Hill sometimes signed OY letters “Your Servant in Our Lord, Morton A. Hill, S.J.”¹³³

OY targeted “salacious magazines of six types: female form, homosexual, pseudo-scientific sex (excellent by medical prescription if truly scientific), men’s adventure, nudist, and the latest—but by no means the least dangerous—teenage love magazines.”¹³⁴ It sometimes opposed sacrilege—“in itself . . . obscene”¹³⁵—as well as violence,¹³⁶ offensive song lyrics,¹³⁷ and “the glorification of drug usage.”¹³⁸ Exposure to “cesspool publications”

132. *Operation Yorkville Statement of Policy*, *supra* note 108, at 2. See also *Man of the Month: Chief Justice Earl Warren*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 6 (“In finding that the Constitution was intended as a guarantee for the dissemination of filth, and a device to deprive the public of the right to protect itself against vile and corrupt publications, the ‘under God’ foundations of the United States were implied to be irrelevant.”); *R R Radio: How to Listen*, *supra* note 102, at 7 (“[S]mut is smut; it is discernible by anyone who knows the Ten Commandments.”); *The Law We Live By*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1964, at 5 (quoting OY co-founder Julius G. Neumann as calling the Ten Commandments “the highest moral law”); *This Is Operation Yorkville*, *supra* note 49, at 2 (“Operation Yorkville, with the vast majority of Americans, believes that the recognition of an absolute God-given standard of morality, as enunciated in the Ten Commandments, is essential to our national life.”); cf. ZURCHER & KIRKPATRICK, *supra* note 97, at 114 (“Belief in God was explicitly stated to be not only exemplary, but based in the very roots of America and patriotism.”).

133. Letter from Morton A. Hill to J. Edgar Hoover (Aug. 3, 1966) (on file with author).

134. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 6. One OY newsletter quoted Dr. Frederic Wertham on the evils of violent comic books, but this was never a major target for the organization. *The Problem: Incitement to Crime, Perversion*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), May 1964, at 5.

135. Letter from SAC, New York, to Director, FBI (Jan. 6, 1967) (on file with author).

136. *Definition and Difficulty*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov.-Dec. 1964, at 4.

137. *Bill to Curb Disc Smut*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Mar. 1968, at 2.

138. George Gent, *Media Assailed for Using Bad News*, N.Y. TIMES, Sept. 18, 1968, at 94.

would lead to “1. Perversion: first an idea, then experimentation, then fixation. 2. Atheism: The seed planted, the action taken, the child will begin to rebel against all authority. 3. Violence: Rebellion against authority will eventuate in: crime, sex crime, narcotics using.”¹³⁹ The category of perversion seemed to include masturbation. The organization said that some psychiatrists, by arguing that “all males, men and boys, masturbate,” were “advis[ing] evil conduct.”¹⁴⁰ It listed as other effects of pornography the formation of “high school sex clubs,”¹⁴¹ “an expanding teenage homosexual population,”¹⁴² “[j]uvenile crime, venereal disease, teenage pregnancies,”¹⁴³ disruption of a child’s “psychosexual development,”¹⁴⁴ “introversion,”¹⁴⁵ bad citizenship,¹⁴⁶ and even murder.¹⁴⁷ As to the absence of proof connecting pornography to these problems, Father Hill said, “men have

139. *No Two Ways About It! Obscenity Thrust at Your Children is a Violation of Your Parental-Civil Right*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 3.

140. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 7.

141. Charles Roland, *Priest Urges Parents to Demand Rocky Sign Ban on Smutty Books*, N.Y. J.-AM., May 20, 1965 (on file with author).

142. *Force and Counterforce to Fight the Filth Traffic Among Youth*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1965, at 7.

143. *The Hows and Whys*, *supra* note 33, at 3.

144. Ann Hank Ford, *Children and Pornography*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Mar. 1968, at 2.

145. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 6.

146. *Leading Clergy Hail Decisions*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), May 1966, at 5.

147. *See Letter from a Mother*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), May 1967, at 6; *Link? Trigger?*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1967, at 2; *cf. ZURCHER & KIRKPATRICK*, *supra* note 97, at 114 (“The use of pornographic material was associated, causally or correlatively, with venereal disease, drug usage, sex crimes of all sorts, the failure of marriages, juvenile delinquency, failure in school, loss of religion, disrespect for authority, parent-child difficulties, arson, theft, purse-snatching, mugging, and murder.”).

certitudes on many things without *explicit* proof, these certitudes resting on *implicit* proof.”¹⁴⁸

OY employed a variety of methods. It stressed the importance of informing and mobilizing the public.¹⁴⁹ “Community standards is an empty phrase indeed if there is no *expression* of those standards.”¹⁵⁰ OY urged members to send letters, postcards, and telegrams to news outlets, political officials, judges, Supreme Court Justices, the President, and the First Lady.¹⁵¹ Although an early newsletter advocated boycotts,¹⁵² OY generally avoided the topic and sometimes counseled against it: “O.Y. is not a boycott group or a vigilante committee,” said one newsletter.¹⁵³ OY did

148. “*Proof*” Is Unnecessary Says OY Secretary, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr. 1966, at 2 (emphasis in original); cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (“From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions.”).

149. *Why OY?*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 3.

150. *Prosecutors or People?*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Oct. 1966, at 5.

151. See, e.g., *OY Target of the Month: Mrs. Lyndon B. Johnson*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov. 1967, at 3; *OY Target of the Month: Police and Prosecutors*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Feb. 1967, at 6.

152. *Neighborhood Technique*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 6.

153. *Our Community Standards*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Apr. 1963, at 3. One newsletter featured an article by a Fordham University Law School professor who recommended “the private withdrawal of patronage” from businesses selling pornographic materials so as to “bring appropriate pressure to bear.” Unlike other articles in the early OY newsletters, this one featured a disclaimer: “The views expressed here are solely those of the writer, and are not necessarily those of the Operation Yorkville Executive Committee.” Charles E. Rice, *The Question of “Selective Patronage,”* OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov.-Dec. 1964, at 6. Another newsletter quoted, without comment, Cardinal Spellman as advocating that citizens “refuse to support dealers who traffic in pornography.” *Cardinal Renews Attack on Filth*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 7. Another OY publication, however, recommended creating a map of dealers in pornographic literature, “not . . . for any organized pressure of any sort, but merely to present a graphic

sometimes take direct action, though. In an act of civil disobedience, Father Hill burst in on a meeting of Simon & Schuster's board of directors to protest the publishing house's sexually explicit novel *Passion Flower Hotel*.¹⁵⁴ And, as in a major *Fanny Hill* case, Hill sometimes helped provoke prosecutions.

THE CATHOLIC CHURCH AND CENSORSHIP

It is no surprise that an anti-pornography organization, albeit interfaith, would be led by a Catholic priest. Historian Whitney Strub writes, “[B]y the 1930s the public face of censorship had taken a distinctly Catholic image.”¹⁵⁵ In 1932, the Catholic bishops passed a resolution instructing Catholics to eschew “‘immoral’ books.”¹⁵⁶ The following year, the Catholic magazine *America* published two articles by Jesuit priest Francis Talbot

picture of how much filth is flooding your area.” Operation Yorkville, *A Concrete Plan for Womens [sic] Clubs to Fight the Traffic in Pornography Among Children*, Mar. 22, 1965 (emphasis in original) (obtained by the Conference of Catholic Bishops and on file with author).

154. ROBERTS, *supra* note 24, at 124-25.

155. Strub, *supra* note 17, at 263. The church's censorship, of course, dates back much further. Pope Paul IV in 1559 launched the *Index Librorum Prohibitorum*—the *Index of Forbidden Books*—which survived until Vatican II. See generally Francis J. Connell, *Censorship and the Prohibition of Books in Catholic Church Law*, 54 COLUM. L. REV. 699 (1954); Tom Heneghan, *Secrets Behind the Forbidden Books*, AMERICA, Feb. 7, 2005, available at http://www.americamagazine.org/content/article.cfm?article_id=3998; NAT'L FED'N OF CATHOLIC COLLEGE STUDENTS, A STUDY GUIDE TO THE *INDEX LIBRORIUM PROHIBITORIUM* AND THE CENSORSHIP REGULATIONS (1957).

The Catholic Church, it should be noted, was hardly alone. John Calvin burned the books of Michael Servetus, who himself was burned at the stake. “Protestants may have demanded religious freedom, yet they were extremely reluctant to grant similar freedom to a dissenter. They insisted that censorship of the strictest kind be practiced.” ALFRED P. KLAUSLER, CENSORSHIP, OBSCENITY, AND SEX 20 (1967).

156. GREGORY D. BLACK, THE CATHOLIC CRUSADE AGAINST THE MOVIES, 1940-1975, at 18 (1998).

condemning “smut.”¹⁵⁷ (*America* later praised Operation Yorkville in 1963.)¹⁵⁸

A committee of bishops founded the National Organization for Decent Literature (NODL) in late 1938.¹⁵⁹ They believed that pornographers aimed “to weaken morality and thereby destroy religion and subvert the social order.”¹⁶⁰ Like OY, though with less success, NODL made a point of framing itself as a non-Catholic organization by involving people of other faiths as much as possible.¹⁶¹ Accordingly, it aimed to ban indecent material altogether, not merely to keep Catholics away from it.¹⁶² Also like OY, NODL sometimes maintained that its only goal was to protect children.¹⁶³ The group issued a monthly list of forbidden publications, which featured from 100 to 200 magazines as well as some 300 paperback books and several dozen comic books.¹⁶⁴ NODL encouraged people not merely to avoid reading the objectionable material, but to boycott stores that sold it as well.¹⁶⁵ NODL sometimes worked with law enforcement entities, such as the Post Office Department in the 1940s and a Michigan prosecutor in the 1950s.¹⁶⁶ The group’s code of 1956 forbade publications that glamorized crime; demeaned lawful authority; used blasphemous or profane language; “[p]ortray[ed] sex facts offensively”; “[f]eature[d] indecent, lewd or suggestive photographs or

157. See Francis Talbot, *Smut!*, AMERICA, Feb. 11, 1933, at 461; Francis Talbot, *More on Smut*, AMERICA, Feb. 25, 1933, at 500.

158. See *More Dirty Books*, AMERICA, Mar. 23, 1963, at 388; *Of Prurient Interest*, AMERICA, Apr. 13, 1963, at 482.

159. O’Connor, *supra* note 16, at 390. It changed its name to the National Office for Decent Literature in 1955. *Id.* at 393.

160. *Id.* at 390.

161. Cadegan, *supra* note 16, at 262. See also PAUL BLANSHARD, *THE RIGHT TO READ: THE BATTLE AGAINST CENSORSHIP* 190 (1955).

162. O’Connor, *supra* note 16, at 391.

163. JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 245 (1961).

164. O’Connor, *supra* note 16, at 394-95, 398-401.

165. *Id.* at 396. NODL and the Legion of Decency both avoided use of the term “boycott.” Cadegan, *supra* note 16, at 280.

166. O’Connor, *supra* note 16, at 397. See also BLANSHARD, *supra* note 161, at 189.

illustrations”;¹⁶⁷ or featured “offensive” advertisements, including ads for correspondence schools that taught drawing, because the students often were assigned to sketch nudes.¹⁶⁸ In the 1950s, NODL listed as “objectionable” such works as Ernest Hemingway’s *To Have and Have Not*, William Faulkner’s *Sanctuary*, Norman Mailer’s *Barbary Shore*, J.D. Salinger’s *Catcher in the Rye*, William Styron’s *Lie Down in Darkness*, and Richard Wright’s *Native Son*.¹⁶⁹ After NODL closed at the end of 1969, church leaders recommended that concerned Catholics work with Citizens for Decent Literature or, as Operation Yorkville was known by then, Morality in Media.¹⁷⁰

Better known than NODL was the Catholic Church’s Legion of Decency. From 1934 to the late 1960s, the organization rated every Hollywood film.¹⁷¹ Though the Legion nominally reviewed films only for Catholics,¹⁷² its effects were widespread. Historian Gregory D. Black writes, “[t]he Legion of Decency’s goal was that no one, Catholic or non-Catholic, see a condemned film.”¹⁷³ Many producers would negotiate changes with the Legion

167. O’Connor, *supra* note 16, at 400.

168. Cadegan, *supra* note 16, at 260.

169. American Civil Liberties Union, *Statement on Censorship Activity by Private Organizations and the National Organization for Decent Literature* (1957), in *THE FIRST FREEDOM: LIBERTY AND JUSTICE IN THE WORLD OF BOOKS AND READING* 137 (Robert B. Downs ed., 1960).

170. O’Connor, *supra* note 16, at 408-409.

171. BLACK, *supra* note 156, at 1. See also GREGORY D. BLACK, *HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES* (1994) (describing the Catholic movement on movie censorship); PAUL W. FACEY, *THE LEGION OF DECENCY: A SOCIOLOGICAL ANALYSIS OF THE EMERGENCE AND DEVELOPMENT OF A SOCIAL PRESSURE GROUP* (1974) (describing the sociological forces behind the Legion of Decency); JAMES M. SKINNER, *THE CROSS AND THE CINEMA: THE LEGION OF DECENCY AND THE NATIONAL CATHOLIC OFFICE FOR MOTION PICTURES, 1933-1970* (1993) (describing the relationship between Catholicism and movie ratings); FRANK WALSH, *SIN AND CENSORSHIP: THE CATHOLIC CHURCH AND THE MOTION PICTURE INDUSTRY* (1996) (describing the Catholic Church’s involvement in the movie industry).

172. *Protestant-Catholic Conflict*, TIME, Mar. 25, 1957, at 86.

173. BLACK, *supra* note 156, at 240.

in order to avoid a bad rating.¹⁷⁴ Some films could not even get financing without the Legion's script approval.¹⁷⁵ Moreover, the Legion often collaborated with the industry's Production Code Administration, an entity that *did* have explicit censorship powers. From the early 1930s to the early 1950s the Administration was headed by Joseph Breen, a former journalist and longtime Catholic activist.¹⁷⁶

First as bishop and then as cardinal, Francis Spellman frequently denounced films.¹⁷⁷ *Two-Faced Woman* (1941), he said, represented "a danger to public morality and, for Catholics, an occasion for sin."¹⁷⁸ *Forever Amber* (1947) was "a glorification of immorality and licentiousness."¹⁷⁹ When Spellman condemned *The Miracle* (1948) and urged Catholics to boycott theaters that showed the film, some 200 protesters from Catholic organizations, including the Catholic War Veterans, marched outside the Paris Theater, shouting at theatergoers, "[d]on't enter that cesspool!" and "[t]his is a Communist picture!"¹⁸⁰ *The Miracle*, Cardinal Spellman charged, aimed to "demoralize Americans so that the minions of Moscow might enslave this land of liberty"; indeed, "Satan alone would dare

174. *Id.* at 240.

175. *Id.* at 203.

176. *Id.* at 2-5, 12. On Breen, see generally THOMAS DOHERTY, *HOLLYWOOD'S CENSOR: JOSEPH I. BREEN AND THE PRODUCTION CODE ADMINISTRATION* 144 (2007). Note, though, Black's observation:

It would be wrong . . . to imply that only the Catholic church wanted movies censored. Moral guardians of all religious and political stripes had long feared that movies, more than any other form of communication or entertainment, had the ability to change radically the moral and political beliefs of their audience.

BLACK, *supra* note 156, at 6.

177. Cardinal Spellman, "for reasons that are unclear," did not strongly support NODL. O'Connor, *supra* note 16, at 396.

178. DOHERTY, *supra* note 176, at 144.

179. BLACK, *supra* note 156, at 61.

180. Garth Jowett, "A Significant Medium for the Communication of Ideas": *The Miracle Decision and the Decline of Motion Picture Censorship, 1952-1968*, in *MOVIE CENSORSHIP AND AMERICAN CULTURE* 263 (Francis G. Couvares ed., 1966).

such perversion.”¹⁸¹ (For its part, the Soviet Union denounced the film as “pro-Catholic propaganda.”)¹⁸² Spellman often condemned films without having seen them.¹⁸³ Rhetorically, he asked, “[m]ust you have an illness to know what it is?”¹⁸⁴

Finally, mention should be made of Citizens for Decent Literature (CDL), which, though not a Catholic organization, was founded by Catholic layman Charles Keating. By one account, Keating created the organization at a Jesuit retreat in 1956.¹⁸⁵ Like OY, CDL maintained that it opposed censorship—obscenity, it reasoned, lay outside the First Amendment, so prohibiting it could not be censorship.¹⁸⁶ Though CDL’s national office opposed boycotts, many local affiliates engaged in them.¹⁸⁷ Like William Riley, head of the New York CDL, Keating deemed pornography “part of the Communist conspiracy.”¹⁸⁸ Faith undergirded Keating’s opposition to pornography:

For those who believe in God, in His absolute supremacy as the Creator and Lawgiver of life, in the dignity and destiny which He has conferred upon the human person, in the moral code that governs sexual activity—for those who believe in these ‘things,’ no argument against pornography should be necessary.¹⁸⁹

181. COONEY, *supra* note 3, at 201.

182. BLACK, *supra* note 156, at 96.

183. COONEY, *supra* note 3, at 109.

184. *Id.* at 202.

185. BINSTEIN & BOWDEN, *supra* note 34, at 87. *See also* Strub, *supra* note 17, at 265.

186. Strub, *supra* note 17, at 267, 270.

187. *Id.* at 267, 274.

188. BINSTEIN & BOWDEN, *supra* note 34, at 87.

189. REP. OF COMM’N, *supra* note 12, at 582 (report of Charles H. Keating).

SEX AND THE SIXTIES

Operation Yorkville began operating in a time of sexual tumult. Hugh Hefner launched *Playboy* in 1953.¹⁹⁰ The same year, Alfred Kinsey's *Sexual Behavior in the Human Female* appeared.¹⁹¹ In 1956, a tangled tale of sex called *Peyton Place* was published; it went on to become the best-selling novel ever,¹⁹² "not so much a book as an event."¹⁹³ Vladimir Nabokov's highbrow saga of pedophilia, *Lolita*, followed in 1958; it rose to the third spot on the national best-seller list.¹⁹⁴ Envelope-pushing Grove Press published the first American unexpurgated edition of *Lady Chatterley's Lover* in 1958, which became the number-five best-seller.¹⁹⁵ In 1960, the first *Playboy* Club opened¹⁹⁶ and the Food and Drug Administration approved Enovid, the first birth-control pill.¹⁹⁷ Grove Press's 1961 paperback of Henry Miller's *Tropic of Cancer* remained a best-seller for two years.¹⁹⁸ Helen Gurley Brown published *Sex and the Single Girl* in 1962.¹⁹⁹

Yet counterforces—like OY—were at work. The Post Office tried unsuccessfully to ban *Playboy*, *Lady Chatterley's Lover*, and *Tropic of Cancer*.²⁰⁰ Billy Graham said of *Sexual Behavior in the Human Female*, "[i]t is impossible to estimate the damage this book will do to the already deteriorating morals of America."²⁰¹ A citizens' commission in Rhode Island effectively banned *Peyton*

190. DAVID HALBERSTAM, *THE FIFTIES* 571 (1993).

191. *Id.* at 280.

192. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974*, at 359 (1996).

193. HALBERSTAM, *supra* note 190, at 579.

194. PATTERSON, *supra* note 192, at 359.

195. *Id.*

196. PETERSEN, *supra* note 96, at 264.

197. *Id.* at 276.

198. *Id.* at 300.

199. *Id.* at 273.

200. JOHN E. SEMONCHE, *CENSORING SEX: A HISTORICAL JOURNEY THROUGH AMERICAN MEDIA* 36-41 (2007). The Supreme Court later held that *Tropic of Cancer* was not obscene. *Grove Press v. Gerstein*, 378 U.S. 577 (1964) (per curiam).

201. HALBERSTAM, *supra* note 190, at 280.

Place for years.²⁰² Nineteen cities and two states banned *Tropic of Cancer*.²⁰³ In 1961, Estelle Griswold, executive director of Connecticut's Planned Parenthood League, was arrested, along with Charles Lee Buxton, a Yale Medical School professor who worked at Planned Parenthood's New Haven office. They were convicted of dispensing contraceptive advice to married couples (the Supreme Court overturned their convictions in 1965).²⁰⁴ Also in 1961, the University of Illinois "fired an assistant professor of biology for saying, in a letter to the school newspaper, that premarital intercourse led to better marriages."²⁰⁵ *The New York Times*, notwithstanding its vigorous support for the First Amendment rights of newspapers, came out against pornographers in 1966: "The public clearly has the right through the enforcement of laws to curb this 'sordid business of pandering.' . . . [T]he pornographic racketeers have cause to worry; and their defeat is society's gain."²⁰⁶

Historian William L. O'Neill provides an overview:

Easy divorce, relatively free access to contraceptives, and tolerated promiscuity were all well established by the 1920's. Insofar as the Kinsey and other reports are historically reliable, there had been little change since then in the rate of sexual deviance. What had changed was the attitude of many people toward it. In the 1960's deviance was not so much tolerated as applauded in many quarters. Before, college students having an affair used

202. SEMONCHE, *supra* note 200, at 39.

203. PETERSEN, *supra* note 96, at 300.

204. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also* PETERSEN, *supra* note 96, at 298.

205. WILLIAM L. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S* 213 (1971).

206. *The Obscenity Cases*, N.Y. TIMES, Mar. 24, 1966, at L38. The *Times* was not unique. *See* JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* 281 (1980) (arguing that the mainstream press has championed its own rights but disregarded or supported threats to the rights of non-mainstream groups).

discretion. Later they were more likely to live together in well-advertised nonmarital bliss. Similarly, adults were not much more promiscuous in the sixties than in the forties or fifties, but they were more disposed to proclaim the merits of extra-marital sexuality. The sexualization of everyday life moved on.²⁰⁷

And OY fought it.

FANNY HILL

Memoirs of a Woman of Pleasure was published in two parts, in November 1748 and February 1749.²⁰⁸ John Cleland, an attorney and self-described “writer for Bread,” composed the novel while in debtors’ prison.²⁰⁹ He said he based it on a story he had heard some eighteen years earlier. “This I never dreamt of preparing for the Press, till being under confinement in the Fleet [Prison], at my leisure hours, I altered, added to, transposed, and in short new-cast” the tale.²¹⁰ Cleland’s biographer speculates that “Fanny Hill” may have been slang for the female pudendum.²¹¹

Some seven months after the second volume appeared, Cleland was charged with publishing an immoral work, a prosecution evidently precipitated by bishops.²¹² He argued that the bishops’ “out-of-time Zeal” would only “powerfully contribute to the notoriety” of “a Book, whose sale is exhausted, and dying every day.”²¹³ He also maintained that an episode in the book, “the Story of the Flagellant,” was based on “a Divine of the Church of England,” and that the book had sold especially well among

207. O’NEILL, *supra* note 205, at 268.

208. Peter Sabor, *From Sexual Liberation to Gender Trouble: Reading Memoirs of a Woman of Pleasure from the 1960s to the 1990s*, 33 EIGHTEENTH-CENTURY STUD. 561, 561 (2000).

209. WILLIAM H. EPSTEIN, JOHN CLELAND: IMAGES OF A LIFE 67, 85 (1974).

210. *Id.* at 68.

211. *Id.* at 71.

212. *Id.* at 75-76.

213. *Id.*

clergymen.²¹⁴ No surviving records indicate how, or whether, Cleland was punished.²¹⁵

Widely considered the first pornographic novel²¹⁶ and “the exemplar of what was obscene,”²¹⁷ *Fanny Hill* circulated widely in the United States during the nineteenth century.²¹⁸ Prosecutions were sporadic. An 1821 case in Massachusetts upheld the conviction of a man for selling an illustrated edition of the novel; it is, according to Justice William O. Douglas, “generally regarded as the first recorded suppression of a literary work in this country on grounds of obscenity.”²¹⁹ Joseph Bonfanti was prosecuted in New York City in 1824 for selling “a certain wicked, nasty, bawdy and obscene libel entitled ‘Memoirs of a woman of pleasure’ in which . . . are contained . . . divers wicked, false, feigned, lewd, impious, impure, gross, bawdy and obscene matters . . . to the high displeasure of Almighty God.”²²⁰ In the 1840s, New York City authorities twice arrested a boy for selling *Fanny Hill* and similar books to wealthy tourists.²²¹ The book remained widely available after the Civil War. An 1870 catalog of erotic literature, called “fancy books,” referred to *Fanny Hill* as “*the Fancy Book*, having never been surpassed in the splendor of its illustrations, or the style in which it was written.”²²² In 1892, a writer in Topeka, Kansas, reported, “Only recently I bought some Fanny Hill books. . . . Any

214. *Id.* at 76.

215. *Id.* at 82.

216. E.g., Annamarie Jagose, “*Critical Extasy*”: *Orgasm and Sensibility in Memoirs of a Woman of Pleasure*, 32 SIGNS: J. WOMEN CULTURE AND SOC’Y 459, 459 (2007).

217. SEMONCHE, *supra* note 200, at 41.

218. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 23 (2001).

219. *Memoirs v. Massachusetts*, 383 U.S. 413, 425 n.1 (1966) (Douglas, J., concurring) (citing *Commonwealth v. Holmes*, 17 Mass. 336 (1821)).

220. DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK 36 (2009).

221. *Id.* at 145.

222. *Id.* at 97.

body can freely buy such literature. It is on sale in every large city.”²²³

In the 1950s and 1960s, Grove Press published *Lady Chatterley’s Lover*, *Tropic of Cancer*, and William Burroughs’s *Naked Lunch*, which “emboldened old-line publishers to become more adventurous.”²²⁴ One of the emboldened publishing houses was G.P. Putnam’s Sons, which quietly featured *Memoirs of a Woman of Pleasure* in its spring 1963 catalog.²²⁵ Putnam’s initially planned to market *Memoirs* as “A Literary Curiosity,” which its attorney Charles Rembar argued was too tepid and too trepid; at his urging, the publishing house changed the jacket to read “The Classic Novel About Fanny Hill.”²²⁶ The first printing was 30,000 copies.²²⁷ Justice Douglas later wrote that “an unusually large number of orders were placed by universities and libraries,” and “the Library of Congress requested the right to translate the book into Braille.”²²⁸ *Publisher’s Weekly* noted that the Customs Office banned the book as obscene, and added, “[a]ll in all, the stage would seem to be set for quite a publishing furor.”²²⁹

FANNY HILL AND NEW YORK ADULTS

The corporation counsel of New York City, Leo A. Larkin, and the district attorneys of the five boroughs went to court alleging that *Fanny Hill* was, in the language of the statute, “obscene, lewd, lascivious, filthy, indecent or disgusting,” and seeking a civil

223. Ed. W. Chamberlain, *Mistaken Friendship*. LUCIFER THE LIGHT-BEARER, Dec. 2, 1892, at 2 (emphasis in original). The periodical was written for freethinkers, hence the eccentric name. See SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* 155 (2004).

224. SEMONCHE, *supra* note 200, at 41.

225. *Tips*, PUB.’S WKLY., Mar. 11, 1963, at 42.

226. REMBAR, *supra* note 21, at 224.

227. “*Fanny Hill*” Ruling Will Be Appealed, N.Y. TIMES, Aug. 30, 1963, at 19.

228. *Memoirs v. Massachusetts*, 383 U.S. 413, 425-26 (1966) (Douglas, J., concurring).

229. *Tips*, *supra* note 225, at 42. Around this time, the Customs Office also confiscated *Lady Chatterley’s Lover*, *Tropic of Cancer*, and *The Kama Sutra*. ROBERTS, *supra* note 24, at 76.

injunction against its further publication, distribution, or sale.²³⁰ “Such a display of unanimity in a field marked by difference of opinion could hardly fail to impress a court,” wrote Rembar, who represented Putnam’s.²³¹ The murky and subjective nature of obscenity law can be gauged by *Fanny Hill*’s trek through the New York courts: the book was ruled obscene in a proceeding for a preliminary injunction, not obscene at trial, obscene on appeal, and not obscene on further appeal.²³² The novel, observed a writer in *Christianity and Crisis* magazine, has been “banned and unbanned with disarming regularity.”²³³

The case began before Justice Charles Marks, whom prosecutors asked for a temporary injunction against sale of the book. One challenge, Rembar later wrote, was that *Fanny Hill* fell into the category of sexually stimulating obscenity rather than arguably repulsive obscenity, such as *Ulysses* and *Tropic of Cancer*: “[F]rom the point of view of those who contrived the anti-obscenity

230. *Larkin v. G.P. Putnam’s Sons (Putnam’s II)*, 242 N.Y.S.2d 746, 748 (Sup. Ct. 1963) (quoting N.Y. CRIM. PROC. LAW § 22-a(1)), *rev’d*, 247 N.Y.S.2d 275 (App. Div. 1964), *rev’d*, 200 N.E.2d 760 (N.Y. 1964). Section 22-a purportedly provided “an alternative to criminal prosecution—an enforcement device that would not send anybody to jail unless he went ahead and sold the book despite the injunction.” REMBAR, *supra* note 21, at 227. The provision’s constitutionality was upheld by the U.S. Supreme Court. *Kingsley Books v. Brown*, 354 U.S. 445 (1957).

231. REMBAR, *supra* note 21, at 233.

232. *Larkin v. G.P. Putnam’s Sons (Putnam’s I)*, 243 N.Y.S.2d 145 (Sup. Ct. 1963); *Putnam’s II*, 242 N.Y.S.2d 746; *Larkin v. G.P. Putnam’s Sons (Putnam’s III)*, 247 N.Y.S.2d 275 (App. Div. 1964); *Larkin v. G.P. Putnam’s Sons (Putnam’s IV)*, 200 N.E.2d 760 (N.Y. 1964). The Supreme Court had already addressed the possibility of varying jury verdicts in obscenity cases (the New York trials were bench trials):

It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.

Roth v. United States, 354 U.S. 476, 492 n.30 (1957).

233. Moody, *supra* note 115, at 284.

laws . . . the worst thing you can do is make sex look good. *Fanny Hill* did this more than anything else the courts had considered.”²³⁴

The Supreme Court laid down the applicable test in *Roth v. United States*²³⁵ and *Manual Enterprises v. Day*.²³⁶ Writing for the Court in *Roth*, Justice Brennan explained that obscenity falls outside the protection of the First Amendment,²³⁷ for it is “utterly without redeeming social importance.”²³⁸ All of the states at the time of ratification of the Constitution “made either blasphemy or profanity, or both, statutory crimes.”²³⁹ The Court approved a test adopted by some courts: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”²⁴⁰ In a

234. REMBAR, *supra* note 21, at 223-24.

235. 354 U.S. 476 (1957).

236. 370 U.S. 478 (1962).

237. 354 U.S. at 485.

238. *Id.* at 484. Some courts—including New York courts in the *Fanny Hill* litigation—treated lack of social importance as an element of the obscenity test. See, e.g., *Larkin v. G.P. Putnam’s Sons (Putnam’s II)*, 242 N.Y.S.2d 746, 748 (Sup. Ct. 1963) (identifying lack of social importance as an element of the obscenity test), *rev’d*, 247 N.Y.S.2d 275 (App. Div. 1964), *rev’d*, 200 N.E.2d 760 (N.Y. 1964). *Roth*, however, treated it as a description of obscenity in general. A Supreme Court plurality made lack of social value a part of the obscenity test in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the *Fanny Hill* case, discussed below. 354 U.S. at 485.

239. *Roth*, 354 U.S. at 482. In the words of one critic,

the Court’s use of history was so casual as to be alarming in terms of what other propositions might be proved by the same technique. Is it clear, for example, that blasphemy can constitutionally be made a crime today? And what would the Court say to an argument along the same lines appealing to the Sedition Act of 1798 as justification for the truly liberty-defeating crime of seditious libel?

Harry Kalven Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9 (1960).

240. *Roth*, 354 U.S. at 489. The Court did not indicate which level of community standards, national or local, ought to apply. It did say that it “perceive[d] no significant difference” between the case law definition of obscenity and that given by the American Law Institute (“ALI”), namely: “A thing is obscene if, considered as a whole, its predominant appeal is to prurient

footnote, the Court cited a Webster's definition of "prurient": "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."²⁴¹ Harry Kalven Jr. commented, "[t]he obscene, then, is that which appeals to an interest in the obscene."²⁴²

The *Manual Enterprises* Court split, with no opinion commanding a majority.²⁴³ Announcing the opinion of the court, Justice John Marshall Harlan, joined by Justice Potter Stewart, added an element to the *Roth* test: "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecenty.'"²⁴⁴ This, Justice Harlan suggested—not altogether convincingly—had been implicit in *Roth*; material that appeals to prurient interest is per se offensive.²⁴⁵

interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)). The ALI definition goes on to add a second element to the test: "beyond customary limits of candor." *Id.*

241. *Id.* at 487 n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabr., 2d ed. 1949)).

242. Kalven, *supra* note 239, at 15. See also William F. Eich, *From Ulysses to Portnoy: A Pornography Primer*, 53 MARQ. L. REV. 155, 156 (1970) (referring to "the development of a non-definition").

243. See *Manual Enter. v. Day* 370 U.S. 478 (1962). Justice John Marshall Harlan, joined by Justice Potter Stewart, announced the decision of the court. Justice Hugo L. Black concurred in the result without an opinion. Justice Brennan filed an opinion concurring in the result, joined by Chief Justice Warren and Justice Douglas. Justice Tom Clark dissented. Justices Felix Frankfurter and Byron R. White did not participate. *Id.*

244. *Id.* at 482. Justice Harlan—like Justice Brennan in *Roth*—turned to the dictionary. He cited Webster's first definition (and others) of "obscene": "Offensive to taste; foul; loathsome; disgusting." *Id.* at 483 n.4 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabr., 2d ed. 1956)).

245. *Id.* at 487 ("The Court [in *Roth*] . . . was at pains to point out that not all portrayals of sex could be reached by obscenity laws but only those treating that subject 'in a manner appealing to prurient interest.' That, of course, was but a compendious way of embracing in the obscenity standard . . . the concept of patent offensiveness . . .") (citations omitted)).

Justice Harlan also wrote that the relevant community for evaluating obscenity under the federal statute is national:

We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.²⁴⁶

Using the tests from *Roth* and from the Harlan opinion in *Manual Enterprises*, Justice Marks held *Fanny Hill* to be obscene and issued the injunction on July 24, 1963.²⁴⁷ The court applied the Supreme Court tests as they had been applied in *New York v. Fritch*, a New York Court of Appeals case.²⁴⁸ Having “read the book and . . . carefully and painstakingly read the papers in support of and in opposition to this application,” the judge reached “the conclusion that ‘John Cleland’s *Memoirs of a Woman of Pleasure*’ is obscene within the meaning of section 22-a of the Code of Criminal Procedure.”²⁴⁹ The judge wrote:

246. *Id.* at 488. Two justices later argued that a national standard ought to apply, in one of the many obscenity cases in which the Court fractured into multiple opinions. See *Jacobellis v. Ohio*, 378 U.S. 184, 193 (1964) (“We do not see how any ‘local’ definition of the ‘community’ could properly be employed in delineating the area of expression that is protected by the Federal Constitution.”). The Court held later, however, that *local* community standards must be applied in obscenity cases. *Miller v. California*, 413 U.S. 15, 32 (1973). “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Id.*

247. *Larkin v. G.P. Putnam’s Sons (Putnam’s I)*, 243 N.Y.S.2d 145 (Sup. Ct. 1963) (citing *New York v. Fritch* 192 N.E.2d 713 (N.Y. 1973)); accord Alfred E. Clark, ‘*Fanny Hill*’ Held Obscene by Court, N.Y. TIMES, July 25, 1963, at 23.

248. *Putnam’s I*, 243 N.Y.S.2d at 147. See generally *Fritch*, 192 N.E.2d 713 (holding Henry Miller’s *Tropic of Cancer* obscene). In a different case, the U.S. Supreme Court later held that *Tropic of Cancer* was not obscene. *Grove Press v. Gerstein*, 378 U.S. 577 (1964) (per curiam).

249. *Putnam’s I*, 243 N.Y.S.2d at 146.

The book describes in detail instances of lesbianism, female masturbation, the deflowering of a virgin, the seduction of a male virgin, the flagellation of male by female and female by male, and other aberrant acts as well as more than twenty acts of sexual intercourse between male and female, some of which are committed in the open presence of numerous other persons and some of which are instances of voyeurism.²⁵⁰

In light of all of this, he found “that the book [was] patently offensive and utterly without any social value.”²⁵¹ Justice Marks quoted another case thusly: “Chief Judge Desmond . . . quotes with approval . . . that ‘For a book to be prohibited it is necessary that from its whole tenor the author’s intention is evident of teaching the reader about sins of impurity and arousing him to libidinousness.’”²⁵² Justice Marks did not see fit to mention that Chief Judge Desmond was quoting an “eminent moral theologian,” Hieronymus Noldin, who, like Father Hill, was a Jesuit.²⁵³ As for statements that Rembar had submitted from literary critics—including Max Lerner, Louis Untermeyer, and Norman Podhoretz,²⁵⁴ who later observed that “in order to defend freedom of expression, one must always be exaggerating the literary merits of any piece of erotica that happens to get published”²⁵⁵—Justice Marks said, “[t]he opinions of authors and critics no matter how distinguished they may be cannot be substituted for those of the

250. *Id.* at 147.

251. *Id.* at 148.

252. *Id.* (quoting *New York v. Richmond County News, Inc.*, 175 N.E.2d 681, 687 (N.Y. 1961) (Desmond, C.J., concurring)).

253. See *Richmond County News*, 175 N.E.2d at 687 (Desmond, C.J., concurring).

254. Harry Gilroy, *Critics Disagree on ‘Fanny Hill,’* N.Y. TIMES, July 17, 1963, at 29.

255. Moody, *supra* note 115, at 287. See also Thomas Robischon, *A Day in Court with the Literary Critic*, 6 MASS. REV. 101, 102 (1964) (“[T]he desire to defend a book will lead a critic to call it great when he might not otherwise do so.”).

average person in a contemporary community.”²⁵⁶ Further, the critics were wrong in saying that the novel reveals details of everyday life in eighteenth-century England, for “[t]he morals of the mass of the English people of the mid-18th Century cannot be judged by the narrative of sex and immorality of a minute few.”²⁵⁷ In any event, “[n]either the quality of the writing nor the so-called literary worth of the book prevents the book from being adjudged obscene.”²⁵⁸

The case proceeded to trial before Justice Arthur G. Klein, a former member of the House of Representatives who had served on the court since 1956.²⁵⁹ The city sought a permanent injunction. Several critics testified at trial, including John Hollander, who said that the madam in the story represents “a ‘self-made entrepreneur in the early days of capitalism’”;²⁶⁰ and Louis Untermeyer, who, “speak[ing] now as a writer, as a craftsman,” declared the novel “an enviable piece of work.”²⁶¹ A month after Justice Marks issued the preliminary injunction, on August 23, 1963, Justice Klein concluded that the book was not obscene.²⁶² “Since no two books are exactly alike, each book must be separately judged and from an examination of the leading cases on the subject, it is apparent that there exists no automatically controlling precedent.”²⁶³ Justice Klein said that a book must meet four standards in order to be

256. *Putnam's I*, 243 N.Y.S.2d at 148. *But see* *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring) (calling for the use of expert witnesses to help establish community standards); *id.* at 172 (Harlan, J., concurring in part and dissenting in part) (same); *cf.* *Kalven*, *supra* note 239, at 40 (stating that under the Frankfurter-Harlan approach, “*Life* and the *Saturday Evening Post* will be called upon to rescue *Playboy* and *Esquire*”).

257. *Putnam's I*, 243 N.Y.S.2d at 149.

258. *Id.* at 148.

259. *Justice Arthur G. Klein Is Dead; Loser in 1966 Surrogate's Race*, N.Y. TIMES, Feb. 22, 1968, at 31.

260. ‘*Fanny Hill*’ *Book Defended as Art*, N.Y. TIMES, Aug. 21, 1963, at 35.

261. REMBAR, *supra* note 21, at 264.

262. *Larkin v. G.P. Putnam's Sons (Putnam's II)*, 242 N.Y.S.2d 746 (Sup. Ct. 1963), *rev'd*, 247 N.Y.S.2d 275 (App. Div. 1964), *rev'd*, 200 N.E.2d 760 (N.Y. 1964).

263. *Id.* at 748.

judged obscene: it must lack social value, appeal to prurient interest, be patently offensive, and constitute hard-core pornography.²⁶⁴ The last factor came from a New York Court of Appeals case.²⁶⁵

While the standards or tests are clearly defined, their application presents considerable difficulty; witness, for example, the case involving Henry Miller's "Tropic of [Cancer.]" This book has been held obscene in the 9th Circuit Federal Court of Appeals, in the State of Connecticut, and in the State of Pennsylvania, while at the same time it has been held to be not obscene by the courts of Massachusetts, Wisconsin and Illinois. On July 2, 1963, the highest court of the State of California declared the book not obscene; yet within 10 days after the seven members of that court had unanimously rendered their judgment, the highest court of our State in a four to three decision, declared the book to be obscene.²⁶⁶

Fanny Hill, the court noted, contains "numerous descriptions of the sex act and certain aberrations thereof . . . [but] not one single obscene word."²⁶⁷ Unlike Justice Marks, Justice Klein found the expert witnesses persuasive. "[A]ll highly qualified and eminent in their field," they "were of the unanimous opinion that the book had great literary merit"; by contrast, "[p]laintiffs did not produce a single literary expert to rebut the foregoing

264. *Id.* at 748-49.

265. See *New York v. Richmond County News, Inc.*, 175 N.E.2d 681, 687 (N.Y. 1961) (Desmond, C.J., concurring). The Appellate Division later referred to the test as "more stringent" than that set forth in *Roth*. *Larkin v. G.P. Putnam's Sons (Putnam's III)*, 247 N.Y.S.2d 275, 276 (App. Div. 1964), *rev'd*, 200 N.E.2d 760 (N.Y. 1964).

266. *Putnam's II*, 242 N.Y.S.2d at 749-50 (citations omitted).

267. *Id.* at 750.

testimony.”²⁶⁸ (Somewhat contrary to his ruling, the judge later said of the novel, “I thought it was junk, but not obscene junk.”²⁶⁹) Justice Klein concluded that the work had social value as “an historical novel of literary value” and that taken as a whole, “and not just those portions thereof which appeal to the salacious page-turner,” it did not appeal to the prurient interest.²⁷⁰ As for community standards, the court took “judicial notice of the fact that many books in circulation today contain much offensive language,”²⁷¹ and added:

If the standards of the community are to be gauged by what it is permitted to read in its daily newspapers, then Fanny Hill’s experiences contain little more than what the community has already encountered on the front pages of many of its newspapers in the reporting of the recent “Profumo”²⁷² and other sensational cases involving sex. . . . The book can in no manner whatsoever be characterized as “patently offensive” when examined in the light of *current* community standards.²⁷³

268. *Id.* The plaintiffs had presented as rebuttal witnesses three clergymen and a social worker. REMBAR, *supra* note 21, at 283. According to Rembar, “[t]hese were not the three clergymen who were involved in Operation Yorkville. [The prosecutor] apparently felt that the Operation group would not make as good an impression as those he called. . . . The witnesses were intelligent, reasonable men; he ran no risk that their statements would be dismissed as zealotry.” *Id.*

269. REMBAR, *supra* note 21, at 297.

270. *Putnam’s II*, 242 N.Y.S.2d at 751 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

271. *Id.* at 751.

272. British Minister of War John Profumo “had been sharing a girlfriend with (among others) an attaché at the Soviet embassy.” PETER CLARKE, *HOPE AND GLORY: BRITAIN 1900-1990*, 281 (1996). OY had complained about the heavy news coverage of the case. *1963-64 City Wide Parental Civil-Right Campaign Plan*, *supra* note 103, at 7. Rembar later mentioned the episode in arguing the *Fanny Hill* case before the Supreme Court. REMBAR, *supra* note 21, at 459.

273. *Putnam’s II*, 242 N.Y.S.2d at 751-52.

The judge went on to say, “were Fanny to be transposed from her mid-eighteenth century Georgian surroundings to our present-day society, she might conceivably encounter many things which would cause her to blush.”²⁷⁴ In sum, “[t]he community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.”²⁷⁵ And as for the New York Court of Appeals test, “[w]ere the book ‘hard-core pornography’, ‘dirt for dirt’s sake’ or ‘dirt for money’s sake’, it is extremely doubtful that it would have existed these many years”²⁷⁶—certainly a debatable point, given the enduring appetite for pornographic works.

Operation Yorkville responded heatedly. Justice Klein’s decision represented “an affront to the community,”²⁷⁷ which “is composed largely of citizens of taste who object vehemently to being asked to, or having their children being asked to, swallow filth” and “who object vehemently to having their standards placed, by a member of the judiciary, on a level with the cesspool from which filth emanates.”²⁷⁸ The judge had “given obscenity peddlers much to be grateful for.”²⁷⁹ Indeed, “[i]t is impossible to estimate the harm done by Judge Klein’s decision.”²⁸⁰

The city appealed the ruling. Seymour B. Quel of the Corporation Counsel’s office said at oral argument, “no one relishes the job of attempting to act as a censor but at times it

274. *Id.* at 753.

275. *Id.* at 751-52 (quoting *Smith v. California*, 361 U.S. 147, 171 (1959)).

276. *Id.* at 752.

277. *Court Rules “Fanny Hill” Obscene*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Mar. 1964, at 5. Criticism came from the bench as well: “To balance the book, ‘Fannie [sic] Hill,’ against the recent Profumo case . . . is taking an invalid position, I believe. The latter was a current report of news, albeit sensational news. The book is just a succession of sex acts. . . . They contain only clinical descriptions, thumbing noses at accepted communal normality—yes, even by today’s loosened standards.” *New York v. Hay*, 245 N.Y.S.2d 705, 715 (Crim. Ct. 1963), *modified*, 258 N.Y.S.2d 238 (App. Term 1965).

278. *Judge Klein—May We Introduce the Community*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept. 1963, at 2.

279. *Judge Klein Rules “Fanny Hill” Not Obscene*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept. 1963, at 3.

280. *OY Founders’ Statement*, *supra* note 7, at 1.

becomes necessary.”²⁸¹ By a vote of three to two, the Appellate Division ruled the book obscene and enjoined Putnam’s from distributing it.²⁸² In a one-paragraph opinion, the court said,

In our opinion, the book, as a whole, does treat “. . . sex in a manner appealing to prurient interest” . . . and does meet the more stringent “hard-core pornography” test essential to a finding of obscenity under our state statutes. This book is essentially an uninterrupted series of minutely detailed descriptions of sexual adventures—many of them abnormal and involving acts of perversion—with nothing more. . . . Nor is this book less obscene by reason of its having been well written or the absence of patently offensive words. Despite these “redeeming” features—and this book needs more for its ultimate redemption—we conclude that it is “obscene”. If the laws governing such material are to have any meaning at all, this book must fall within their proscriptions.²⁸³

The two dissenting judges noted the expert witnesses who had attested to the book’s literary qualities and said that the book was “entitled to the benefit of the doubt in the application of a censorship statute under constitutional standards.”²⁸⁴ OY praised the majority opinion and denounced the dissent as “a flagrant violation of the parental-civil right to educate. It is tantamount to saying that the community should subsidize perversion and violence for its children in the interest of ‘freedom’ to publish anything.”²⁸⁵

281. *City Again Asks Ban on “Fanny Hill” Sale*, N.Y. TIMES, Jan. 23, 1964, at 63.

282. *Larkin v. G.P. Putnam’s Sons (Putnam’s III)*, 247 N.Y.S.2d 275 (App. Div. 1964), *rev’d*, 200 N.E.2d 760 (N.Y. 1964).

283. *Id.* at 276-77 (citations omitted).

284. *Id.* at 277 (Breitel, J., joined by Botein, J., dissenting).

285. *OY Founders’ Statement*, *supra* note 7, at 2.

On July 10, 1964, the state's highest court, the Court of Appeals, ruled four to three that the book was not obscene.²⁸⁶ Writing for the court, Justice Francis Bergan²⁸⁷ listed cases reaching different outcomes—*Roth* and *Manual Enterprises* from the U.S. Supreme Court, and *Richmond County News* and *Fritch* from the New York Court of Appeals—and observed, oddly, that judicial tests were untrustworthy: “[T]he experience of the profession demonstrates that definitions are unsafe vehicles in obscenity cases.”²⁸⁸ The court proceeded to acknowledge “the large measure of judicial subjectivity inherent in the process” while noting that “the decisions are not whimsical and haphazard judicial choices, but resulted in each case from earnestly searching out the significant constitutional issues.”²⁸⁹ The court added:

From a comparative study of the decisions the Bar must be able to form an intelligent professional judgment to predict, as well as it can, future judicial action in obscenity cases and advise those who would print books accordingly. And in this field, as in others, it is an essential judicial function to provide a reasonable measure of reckonability.

This may be helped along, perhaps, by placing a burden on the censor to bring himself within an area in which the exercise of his powers is constitutionally permissible and by resolving all

286. *Larkin v. G.P. Putnam's Sons (Putnam's IV)*, 200 N.E.2d 760 (N.Y. 1964).

287. For the first names of Court of Appeals judges during this period, see Daniel C. Kramer & Robert Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, 8 PUBLIUS 75, 81-82, 84 (1978).

288. *Putnam's IV*, 200 N.E.2d at 761. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

289. *Putnam's IV*, 200 N.E.2d at 762.

doubtful cases in favor of the freedom to print.²⁹⁰

Fanny Hill, the court concluded, “seems to fall within the area of permissible publications” in light of precedents since 1956: “It has a slight literary value and it affords some insight into the life and manners of mid-18th Century London. It is unlikely ‘Fanny Hill’ can have any adverse effect on the sophisticated values of our century.”²⁹¹ The court noted as significant the fact that the United States Supreme Court had held Henry Miller’s *Tropic of Cancer* not to be obscene, contrary to the state court’s holding in *Fritch*.²⁹²

Dissenting, Chief Judge Charles S. Desmond complained that “[t]he court’s reasons for reversal are as unclear as its description of the book is inadequate.”²⁹³ He observed that the book “has been cited throughout the world as the very prototype and archetype of obscenity.”²⁹⁴ Given the state of the law, “pornography no matter how gross . . . is immune and safe so long as critics praise its writing style and discover ‘social significance’, whatever that may mean.”²⁹⁵ He made clear that his beef was not solely with the majority, but also with the U.S. Supreme Court:

It is today’s fashion to find literary values in any sexy writing and to ridicule as blue-nosed prying Puritans and enemies of art and literature all those who try to preserve a modicum of public decency in our society. And into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth either on the theory of “prevailing community standards” or on a finding of literary merit or social values.²⁹⁶

290. *Id.*

291. *Id.* at 763.

292. *Id.*

293. *Id.* at 764 (Desmond, C.J., dissenting).

294. *Id.* at 763.

295. *Id.* at 764.

296. *Id.* (citation omitted).

The judge added, "I refuse to believe that all this can continue to be the law. I predict that the wheel will turn and the pendulum swing back. Some time and somehow we will return to the historical meaning of 'Freedom of the Press.'"²⁹⁷ Judge John F. Scileppi filed a dissenting opinion as well. He termed *Fanny Hill* "one of the foulest, sexually immoral, debasing, lewd and obscene books ever published, either in this country or abroad," and said that it "reek[ed] with disgusting descriptions of natural and unnatural sexual experiences of a prostitute, so dealt with as to portray those baser instincts normally to be found in the animal kingdom."²⁹⁸ He too predicted that the pendulum would swing: "This . . . incredible result . . . cannot long stand, for an aroused public is sure to bring about a change in the attitude that 'anything goes' in the area of printed material and motion picture productions."²⁹⁹ For the time being, though, "[i]f this classic example of pornography is not obscene, then I doubt if any written matter can ever be found to be obscene."³⁰⁰

OY agreed. The organization issued a news release declaring that "[n]othing is obscene in the State of New York."³⁰¹ John Sullivan, a lieutenant in the Legal Bureau of the New York City Police Department, referred to the courts' varying conclusions about *Fanny Hill* and asked a reporter, "[s]o where does this leave the poor cop on the street?"³⁰² And the president of Putnam's said that sales of the novel nationwide had increased tenfold since New York City began trying to ban it.³⁰³

297. *Id.* at 765.

298. *Id.* (Scileppi, J., dissenting).

299. *Id.*

300. *Id.*

301. News Release, Operation Yorkville 1 (July 31, 1964) (on file with author).

302. ROBERTS, *supra* note 24, at 90.

303. 3-2 *Appeal Ruling Bars "Fanny Hill,"* N.Y. TIMES, Feb. 28, 1964, at 31.

FANNY HILL AND NEW YORK MINORS

The Bookcase on Lexington Avenue³⁰⁴ posted a sign in its window boasting that *Fanny Hill* "is now, in the new era of Publishing and Reader Freedom, at last available. . . . We feel that with the publication of this book almost all of the barriers are now down, and it is happening in our time."³⁰⁵ Not quite all of the barriers. On September 4, 1963, sixteen-year-old Kathleen Keegan entered the store, picked up a copy of *Fanny Hill*, and paid \$6.24.³⁰⁶ Her mother then filed a criminal complaint against the store. The owner, Irwin Weisfeld, and the clerk who had sold the book, John Downs, both were charged with violating Section 484-h of the state penal code.³⁰⁷ Although the Operation Yorkville newsletter said that Keegan had acted only at her mother's instigation,³⁰⁸ news accounts present a different story. Citing the mother, *The New York Times* reported that OY had collaborated with the Keegans from the start.³⁰⁹ *Time* also reported that the girl "had bought a copy of the book . . . at the suggestion of Operation Yorkville. . . ."³¹⁰

304. *2 Guilty in Sale of "Fanny Hill"; Judges Find Selling Novel to a Minor Is Illegal*, N.Y. TIMES, Nov. 15, 1963, at 24 [hereinafter *2 Guilty*].

305. *New York v. Bookcase, Inc. (Bookcase I)*, 244 N.Y.S.2d 297, 299 (Crim. Ct. 1963), *aff'd*, 247 N.Y.S.2d 470 (App. Term 1964), *rev'd*, 201 N.E.2d 14 (N.Y. 1964); *Owner, Clerk Convicted in 'Fanny' Sale to Minor*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 1 (displaying a photograph of the "sign which appeared in the window of the Bookcase . . . the day after Judge Arthur Klein declared 'Fanny Hill' not obscene").

306. *Bookcase I*, 244 N.Y.S.2d at 299.

307. *Id.* at 298.

308. *Woman of the Week: Mrs. Mary Keegan*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept. 1963, at 5.

309. *See 2 Guilty*, *supra* note 304 ("Mrs. Keegan said that her daughter had gone into the bookshop at the suggestion of members of Operation Yorkville . . .").

310. *A Clearly-Worded Law*, TIME, Nov. 22, 1963, at 87. On the role of OY, compare *Bookcase v. Broderick (Broderick I)*, 267 N.Y.S.2d 410, 412 (Sup. Ct. 1965) (Hill in an affidavit denies instigating any prosecutions, but "states that, in the past, he has explained to a great many people the evils which result from the sale of such material to youngsters, and that he has

New York applied one statute to the sale of obscene material to adults and another to its sale to minors. The Supreme Court in *Butler v. Michigan*³¹¹ struck down a Michigan statute that made it illegal to sell materials that “manifestly tend[] to the corruption of the morals of youth.”³¹² The Court said:

The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.³¹³

Butler led to what came to be known as the “variable obscenity” doctrine—the notion that materials may be obscene as to minors but not as to adults. The New York section provided:

A person who willfully or knowingly sells, lends, gives away, shows, advertises for sale or distributes commercially to any person under the age of eighteen (18) years . . . any . . . book, “pocketbook,” pamphlet or magazine the cover or content of which exploits, is devoted to or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd,

informed people that one avenue of combating those evils is by way of prosecution. As a result of this, evidently, the prosecution in the *Keegan* case was instituted.”), with *New York v. Tannenbaum*, 220 N.E.2d 783, 785 (N.Y. 1966) (stating that a seventeen-year-old purchased adult magazines “at the instigation of Operation Yorkville”), *rev’d on rehearing*, 244 N.E.2d 269 (N.Y. 1968).

311. 352 U.S. 380 (1957).

312. *Id.* at 381 (quoting Mich. Penal Code § 343).

313. *Id.* at 383. The Court later upheld a revised version of New York’s section 484-h and concluded that variable obscenity is constitutionally permissible. *Ginsberg v. New York*, 390 U.S. 629 (1968). *See also* *Kramer & Riga*, *supra* note 287, at 85-86 (discussing relationship between *Ginsberg* and *Bookcase v. Broderick*).

lascivious, filthy, indecent or disgusting or which consists of pictures of nude or partially de-nuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use shall be guilty of a misdemeanor.³¹⁴

Originally enacted in 1955, the statute rested atop legislative findings:

[T]he publication, sale and distribution to minors of comic books devoted to crime, sex, horror, terror, brutality and violence, and of "pocket books," photographs, pamphlets, magazines and pornographic films devoted to the presentation and exploitation of illicit sex, lust, passion, depravity, violence, brutality, nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.³¹⁵

In signing the legislation, Governor Averell Harriman had said, "[t]he constitutionality of some aspects of this bill has been questioned by some, and strongly affirmed by others. In view of the conditions with which we are trying to cope, it seems to me that such questions should be left to the courts for determination."³¹⁶

OY urged its members to attend the trial in order to "impress the presiding judge with the interest of the community in

314. *New York v. Bookcase, Inc. (Bookcase I)*, 244 N.Y.S.2d 297, 298-99 (Crim. Ct. 1963) (quoting N.Y. PENAL LAW § 484-h), *aff'd*, 247 N.Y.S.2d 470 (App. Term 1964), *rev'd*, 201 N.E.2d 14 (N.Y. 1964).

315. *Id.* at 303 (quoting N.Y. PENAL LAW § 540).

316. *New York v. Bookcase, Inc. (Bookcase III)*, 201 N.E.2d 14, 16 (N.Y. 1964) (quoting GOVERNOR AVERELL HARRIMAN, PUBLIC PAPERS 282 (1955)).

the case.”³¹⁷ Weisfeld argued in court that the law violated the First Amendment.³¹⁸ The three-judge panel rejected the argument and convicted Weisfeld and Downs.³¹⁹ The court began by determining whether the book fell under the proscriptions of the law. “It was due to our judicial duty rather than to idle curiosity that we read this book,” Justice Benjamin Gassman wrote for the court.³²⁰ He added,

The conclusion reached after reading the book is that almost every page of it provokes lustful and lecherous thoughts, stimulating the baser instincts of mankind. . . . While it is true that the book is well written, such fact does not condone its indecency. Filth, even if wrapped in the finest packaging, is still filth.³²¹

Consequently, the court found “that the book in question comes completely under the condemnation of Section 484-h.”³²² The court next addressed Weisfeld’s argument that 484-h was unconstitutional:

The court cannot close its eyes to the grave problem of juvenile delinquency and to some of the causes that brought it about. . . . The State, without violating the Federal Constitution, may provide that certain literature which may not, perhaps, affect the adult and more mature minds should not be sold to adolescents or minors of immature minds.³²³

Judge Gassman went on to quote a study by the New York Academy of Medicine Committee on Public Health, concluding that “the reported increase in sales of salacious literature to

317. *Come to the Trial of Cesspool Dealer, OPERATION YORKVILLE NEWSL.* (Operation Yorkville, New York, N.Y.), Sept. 1963, at 5.

318. “*Fanny Hill*” *Seller Attacks State Law*, N.Y. TIMES, Oct. 25, 1963, at 28.

319. 2 *Guilty*, *supra* note 304.

320. *Bookcase I*, 244 N.Y.S.2d at 300.

321. *Id.*

322. *Id.* at 301.

323. *Id.*

adolescents is one of a number of social ills reflecting a breakdown in the home and an inadequate environment.”³²⁴ The court distinguished the statute held unconstitutional in *Butler v. Michigan*, where stores were forbidden to sell even to adults materials that were unsafe for children.³²⁵ It further observed that another provision of New York law “prohibits the tattooing of a child under sixteen years of age. We hold that it is just as important to protect a minor against an impression which salacious literature may make upon his mind as it is to protect him against an impression made upon his body by means of tattooing with indelible ink.”³²⁶

Father Hill told *The New York Times*,

Today’s decision . . . is a ray of hope that the corruption of youth in our land will be speedily halted and a fair warning to cesspool publishers and dealers that our youth is protected by law.

This decision is a recognition that the policy of “anything goes” is not the community standard of the United States. By this decision one basic objective of Operation Yorkville has been attained.³²⁷

The *Operation Yorkville Newsletter* named Gassman its “Man of the Month,” praising him as “astute and learned” and urging readers to write to the judge and “[t]ell him you think his decision has gone a long way to help safeguard the youth of America from perversion.”³²⁸ Weisfeld was sentenced to thirty days; the clerk, John Downs, to ten.³²⁹ The New York County

324. *Id.* at 302 (quoting N.Y. ACAD. OF MED. COMM. ON PUB. HEALTH, STATEMENT ON SALACIOUS LITERATURE (n.d.)).

325. *Id.*

326. *Id.* at 303. Another judge filed a concurring opinion, noting that some utterances are excluded from First Amendment protection and concluding that the statute was constitutional. *Id.* at 304 (Silver, P.J., concurring).

327. 2 *Guilty*, *supra* note 304.

328. *Man of the Month: Judge Benjamin Gassman*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Dec. 1963, at 5.

329. “Fanny Hill” Sale Brings Jail Term, N.Y. TIMES, Dec. 21, 1963, at 20.

Supreme Court affirmed the convictions, which appeared as the lead item in the next *Operation Yorkville Newsletter*.³³⁰

But the state's highest court reversed the convictions. By a four-three vote, the Court of Appeals held the statute unconstitutionally vague and overbroad on July 10, 1964 – the same day that the court held that *Fanny Hill* was not obscene and could lawfully be published and sold to adults.³³¹ Writing for the court, Judge John Van Voorhis began by noting that a predecessor provision of the state code had been ruled unconstitutional by the U.S. Supreme Court in *Winters v. New York*.³³² The statute at issue in *Winters* prohibited the sales of books and magazines consisting principally of accounts of crime; the New York court had construed it as limited to such stories “so massed as to become vehicles for inciting violent and depraved crimes.”³³³ The U.S. Supreme Court struck down the law because “an honest distributor of publications could [not] know when he might be held to have ignored such a prohibition. Collection of tales of war horrors, otherwise unexceptionable, might well be found to be ‘massed’ so as to become ‘vehicles for inciting violent and depraved crimes.’”³³⁴ In response, the New York legislature passed two bills, both vetoed by Governor Thomas Dewey as unconstitutional under *Winters*.³³⁵ Governor Harriman signed what became section 484-h with the statement, quoted earlier, that the courts ought to determine the constitutional questions.³³⁶ Judge Van Voorhis wrote in the *New York v. Bookcase* decision, “[t]his court is now called upon to cope with one of the more important of these questions.”³³⁷

The court noted that the provision of the statute under which the defendants had been convicted aimed “to prevent or limit

330. “Fanny” Conviction Upheld by NY Supreme Court, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Mar. 1964, at 1.

331. *New York v. Bookcase, Inc. (Bookcase III)*, 201 N.E.2d 14 (N.Y. 1964).

332. *Id.* at 15 (citing *Winters v. New York*, 333 U.S. 507 (1948)).

333. *Id.* (quoting *New York v. Winters*, 63 N.E.2d 98, 100 (N.Y. 1945)).

334. *Winters*, 333 U.S. at 520.

335. *Bookcase III*, 201 N.E.2d at 15-16.

336. *Id.* at 16.

337. *Id.*

publications or pictures coming before the eyes of the young which are principally based upon the theme of sexual conduct that is contrary to the mores of society," regardless of whether such material is "presented in a salacious manner."³³⁸ The court added that the statute must mean that "the subject of illicit sex or sexual immorality is not to be brought before the young by pictures or writings—scientific, fictional or otherwise which are devoted principally thereto."³³⁹ Such a statute, which would allow the depiction of sex between a married couple but not between an unmarried couple, would be unconstitutional as applied to adults.³⁴⁰ "The question remains whether the constitutionality . . . is saved by the circumstance that it relates only to minors under 18 years of age."³⁴¹ The court noted that a legislative committee originally recommended a provision that would prohibit making available to a minor material "which, *for a minor*, is obscene, lewd, lascivious, filthy, indecent or disgusting," but the legislature had not adopted the language.³⁴² Rather than concentrating on material that was obscene for minors, it had focused on material depicting sexual immorality. Consequently, "[w]e do not have before us to decide whether 'Fanny [Hill,'] having been held to be not obscene for adults, would be obscene for children."³⁴³ Section 484-h as written, the court concluded, was void for vagueness and overbreadth:

These words ["illicit sex or sexual immorality"] are either too vague to apprise possible defendants of what they mean, or, if they are to be interpreted as referring exclusively to extra-marital sex or sexual perversion, then they would forbid all publications or pictures mainly devoted to those subjects. . . . The Oedipus legend in classic Greek drama would be forbidden because it is principally devoted to

338. *Id.* at 17.

339. *Id.*

340. *See id.*

341. *Id.*

342. *Id.* at 18.

343. *Id.*

incest, the Tristan and Isolde legend and Hawthorne's "Scarlet Letter" would be illicit reading for the young because [they are] principally made up of adultery, Bernard Shaw's "Mrs. Warren's Profession" would be outlawed for obvious reasons, as well as all writings dealing with homosexuality. Such a list could be extended almost indefinitely.³⁴⁴

In dissent, Judge Adrian Burke accused the majority of using the vagueness doctrine as "an infinitely plastic deus ex machina for the circumvention of legislative purpose. . . . After this display of self-induced puzzlement, there is hardly a statute on the books that is proof against the resourcefulness of the judicial mind."³⁴⁵ *Fanny Hill* was "the international archetype of banned pornography for over 200 years."³⁴⁶ Given the legislative findings, Judge Burke could not "understand how anyone . . . could possibly conclude that [the provisions] refer to the works of Shaw, Hawthorne, the Tristan and Isolde legend, or other literature. . . . It is plain that the law aims at books and magazines containing provocative pictures and writings that amount to 'word pictures' of illicit sex."³⁴⁷ On the importance of distinguishing children from adults, the judge quoted Mill's *On Liberty*:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.³⁴⁸

The judge concluded:

Equally with Humpty Dumpty in "Through the Looking [Glass,]" this court has the power to

344. *Id.* at 18-19.

345. *Id.* at 20 (Burke, J., dissenting).

346. *Id.* at 19.

347. *Id.* at 20.

348. *Id.* at 22 (quoting JOHN STUART MILL, ON LIBERTY).

make words mean just what it wants them to mean, neither more nor less. And despite the temporizing language in the court's opinion, I doubt whether all the king's horses and all the king's men can put this statute back together again. The juvenile market has been made safe for "Fanny Hill" et al.³⁴⁹

A second dissenter, Judge John F. Scileppi—who also dissented in the case over whether *Fanny Hill* was obscene—accused the majority of acting as "superlegislators" and of "read[ing] into the Constitution their own theories of psychology and criminology."³⁵⁰

OY responded to the *Bookcase* ruling (and the *Putnam's* ruling on *Fanny Hill* and adults) with the newsletter headline, *N.Y. Law-Less in Obscenity*.³⁵¹ The court, with a "chaotic stroke[] . . . of its pseudo-liberal brush,"³⁵² had reached a "shocking, absurd and incredible" result that "granted complete license to the unscrupulous."³⁵³ The ruling has "left our children completely vulnerable to the poison dispensed by those who traffic in pornography for profit."³⁵⁴ OY deemed the reference to *Scarlet Letter* "incredible," for the novel "*nowhere describes* the illicit sex act, and the adulterous affair is portrayed in its proper perspective as contrary to the mores of a society."³⁵⁵ The newsletter also quoted Cardinal Spellman as urging people "to join with me in a plea to those judges who have weakened America's efforts to protect its youth, to reconsider their responsibilities to Almighty God and to our country."³⁵⁶ The Cardinal asked New Yorkers to

349. *Id.*

350. *Id.* at 23 (Scileppi, J., dissenting).

351. OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 1.

352. *Id.*

353. *OY Founders Attack New York Decisions*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Sept.-Oct. 1964, at 2.

354. *Id.*

355. News Release, *supra* note 301, at 3.

356. *Cardinal Renews Attack on Filth*, *supra* note 153, at 7.

refuse to support dealers who traffic in pornography. This is not a welcome method these days, but this approach may be the only weapon the interpreters of the law have left to us, and perhaps the only language some people understand. . . . The purveyors of filth will be dealt a stunning and maybe even a fatal blow.³⁵⁷

Notwithstanding its usual anti-boycott stance, OY did not dissent from the Cardinal's statement.

The Bookcase litigation was not yet over. The state revised 484-h in 1965 in two provisions, 484-h and 484-i, each with its own standards.³⁵⁸ The Bookcase in late 1965 sought a declaratory judgment that sections 484-h and 484-i were invalid and an injunction barring their enforcement against the store, as well as an injunction against "one Rev. Morton A. Hill, who, it is alleged, earlier caused a prosecution to be initiated against the plaintiffs, which has since been dismissed and who now threatens, upon information and belief, to initiate further criminal proceedings against these plaintiffs."³⁵⁹ The Bookcase proposed to continue selling *Fanny Hill* to minors and wanted judicial authorization to proceed.³⁶⁰ Hill responded that he had not instituted any prosecutions but had told people how they might do so.³⁶¹ He further argued that the plaintiffs were seeking to infringe upon his freedom of speech; the court agreed and refused to enjoin him.³⁶² The court denied the injunction against enforcement of the statute as well, but allowed the suit over the provisions' constitutionality to continue.³⁶³ The Bookcase argued only that the Constitution forbade variable obscenity standards depending on age; it did not

357. *Id.*

358. *Bookcase, Inc. v. Broderick (Broderick II)*, 267 N.Y.S.2d 415, 416 (Sup. Ct. 1966), *aff'd*, 218 N.E.2d 668 (N.Y. 1966).

359. *Bookcase, Inc. v. Broderick (Broderick I)*, 267 N.Y.S.2d 410, 412 (Sup. Ct. 1965) (citations omitted).

360. *Broderick II*, 267 N.Y.S.2d at 417.

361. *Broderick I*, 267 N.Y.S.2d at 412.

362. *Id.* at 412-13.

363. *Id.* at 414.

argue vagueness or overbreadth.³⁶⁴ The court ultimately rejected the argument.³⁶⁵ The Bookcase appealed and lost again.³⁶⁶

FANNY HILL IN THE SUPREME COURT

As of 1938, Leo M. Alpert could write that “[f]or some untoward reason trenching upon the sociologist’s domain, all the obscene literature cases come from two states, Massachusetts and New York.”³⁶⁷ Though other states produced cases during the 1950s and early 1960s, it remains striking that *Fanny Hill* was the subject of a series of New York court opinions between 1963 and 1966, followed by the Supreme Court’s decision in a Massachusetts case in 1966.

Massachusetts ruled the book obscene in April 1965.³⁶⁸ The United States Supreme Court granted certiorari. At oral argument of the *Fanny Hill* case and two other obscenity cases in December, the justices expressed concern that they would have to read the novel and the dozens of other books and periodicals at issue. Chief Justice Earl Warren said that “this Court doesn’t want . . . to read all the prurient material in the country to determine if it has social value,”³⁶⁹ and Justice Hugo L. Black said, “[t]he problem still arises whether this Court can do all this censorship and do anything else.”³⁷⁰ Representing Putnam’s, Charles Rembar told the justices that they need not read *Fanny Hill*, though “we urge you to read

364. *Broderick II*, 267 N.Y.S.2d at 417-18. Cf. *New York v. Tannenbaum*, 220 N.E.2d 783, 785 (N.Y. 1966) (arguing overbreadth unsuccessfully).

365. *Broderick II*, 267 N.Y.S.2d at 418.

366. *Bookcase, Inc. v. Broderick (Broderick III)*, 218 N.E.2d 668 (N.Y. 1966). *But see Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding section 484-h). Cf. *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam) (holding 484-i unconstitutionally vague).

367. Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 53 (1938).

368. ‘*Fanny Hill*’ Ruled Obscene, N.Y. TIMES, Apr. 23, 1965, at L24.

369. Fred P. Graham, *How to Avoid Reading Spicy Books: Court Gets Advice in Obscenity Cases*, N.Y. TIMES, Dec. 8, 1965, at L31.

370. *Court Sees Trend to Make It Censor*, N.Y. TIMES, Dec. 9, 1965, at L28.

the book — we think it’s a good book.”³⁷¹ The reason, Rembar said, was the testimony from literary scholars at the trial in Massachusetts.³⁷² The Court could simply defer to the expert witnesses.³⁷³

The Court released the three obscenity decisions on March 21, 1966. Two of them upheld convictions. *Mishkin v. New York*³⁷⁴ held that publications could satisfy the prurient-interest test even though they appealed to “a clearly defined deviant sexual group” — including flagellants, fetishists, and lesbians — rather than an ordinary person.³⁷⁵ *Ginzburg v. United States*³⁷⁶ emphasized the manner in which material was marketed: “Where an exploitation of interests in titillation by pornography is shown . . . such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.”³⁷⁷

By a vote of six to three, however, the Court concluded that *Fanny Hill* was not obscene.³⁷⁸ In the plurality opinion, Justice Brennan stressed that a work could qualify as obscenity only if it

371. REMBAR, *supra* note 21, at 453.

372. *Id.* at 455.

373. *Id.* at 453-54.

374. 383 U.S. 502, 508 (1966).

375. *Id.* at 508.

376. 383 U.S. 463 (1966).

377. *Id.* at 475-76. The new “pandering” doctrine appeared significant at the time. *The New York Times* reported that it had “revived the near-moribund state and Federal anti-pornography laws” and that “[l]egal experts agreed . . . that the novel concept . . . was likely to result in massive prosecutions across the country.” Sidney E. Zion, *The Ginzburg Decision*, N.Y. TIMES, Mar. 24, 1966, at L31. “In the aftermath of the ruling, smut dealers in Times Square panicked, hastily removing all titles dealing with SM, fetishism, and homosexuality.” JOHN HEIDENRY, WHAT WILD ECSTASY: THE RISE AND FALL OF THE SEXUAL REVOLUTION 83 (1997). In truth, *Ginzburg* had little effect on obscenity law. EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 512 (1992).

378. *Memoirs v. Massachusetts*, 383 U.S. 413, 413-14 (1966). Edward de Grazia points out that the Court punished the two pornographers but not the mainstream publishing house. DE GRAZIA, *supra* note 377, at 500.

were “utterly without redeeming social value.”³⁷⁹ Applying the *Ginzburg* doctrine, Justice Brennan said that the advertising and promotion of the work might prove relevant in establishing a lack of redeeming social value: “[W]here the purveyor’s sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value.”³⁸⁰ Because the Massachusetts court had discerned “a modicum of literary and historical value,” however, the doctrine did not apply to *Fanny Hill*.³⁸¹ Cleland’s novel was not obscene. Dissenting, Justice Tom C. Clark declared *Fanny Hill* “nothing but a harlot,”³⁸² and maintained that the test of “utterly without redeeming social value” in practice “gives the smut artist free rein to carry on his dirty business.”³⁸³ Justice Byron R. White similarly said that the test would immunize “obscene material, however far beyond customary limits of candor, . . . if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way.”³⁸⁴

OY issued a statement signed by religious leaders, including Cardinal Spellman and Norman Vincent Peale,³⁸⁵ praising the *Mishkin* and *Ginzburg* decisions—“the resounding cry of the great

379. *Memoirs*, 383 U.S. at 419. Justice Brennan, writing for himself and Justice Arthur Goldberg, had earlier proposed this test. See *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). Brennan had initially planned to vote that *Fanny Hill* was obscene, but Justice Fortas persuaded him not to do so. LUCAS POWE, *THE WARREN COURT AND AMERICAN POLITICS* 344 (2000).

380. *Memoirs*, 383 U.S. at 420.

381. *Id.* at 421.

382. *Id.* at 448 (Clark, J., dissenting).

383. *Id.* at 441.

384. *Id.* at 461 (White, J., dissenting).

385. Justice Douglas had puckishly appended to his *Fanny Hill* opinion an address by Rev. John R. Graham of the First Universalist Church of Denver, who compared the philosophies set forth in *Fanny Hill* and Peale’s *Sin, Sex, and Self-Control*, and judged the former work superior. *Memoirs*, 383 U.S. at 433-41 (Douglas, J., concurring in the judgment).

A few months later, Peale joined the OY board of directors. *Join Operation Yorkville Board*, OPERATION YORKVILLE NEWSL. (Operation Yorkville, New York, N.Y.), Nov. 1966, at 1. See generally CAROL V. R. GEORGE, *GOD’S SALESMAN: NORMAN VINCENT PEALE AND THE POWER OF POSITIVE THINKING* (1993).

majority of the American people has been heard”³⁸⁶ – and gently criticizing the *Fanny Hill* one:

It is disappointing . . . that in a third decision on the same day, the Court in declaring a book not obscene, ruled that the presence of “social value” in allegedly obscene material is an independent test of obscenity. It is our hope that in the future the Court will reconsider its rule that material of this sort is protected if it contains a mere “modicum” of so-called redeeming “social value.”³⁸⁷

“People found *Fanny Hill* obscene 200 years ago,” Father Hill told a reporter after the Supreme Court decision, “and they are finding it obscene today.”³⁸⁸

Morality in Media’s website now highlights the ruling as a singularly deleterious development in the history of obscenity law:

[T]he United States Supreme Court handed down its *Fanny Hill* decision which was to give the pornographers an almost unqualified green light to move their wares. Three justices held that a work must be “utterly without redeeming social value” to be declared obscene. Under such a test, nothing would be obscene. But, even though the specious test was not a decision of the Court majority, but only of three justices, the pornographers’ defenders took it, ran with it, and convinced lower courts time after time to declare not obscene material that was becoming increasingly depraved.³⁸⁹

386. Irving Spiegel, *Clergymen Hail Obscenity Bans*, N.Y. TIMES, May 2, 1966, at L30. Edward de Grazia observes that anti-pornography groups in general approved the Court’s decisions, but they overlooked the fact that the *Fanny Hill* case was far more important than *Ginzburg* or *Mishkin* in doctrinal terms. DE GRAZIA, *supra* note 377, at 512.

387. *Leading Clergy Hail Decisions*, *supra* note 146, at 5.

388. ROBERTS, *supra* note 24, at 125.

389. Fr. Morton A. Hill, S.J., *supra* note 13; *see also* REP. OF THE COMM’N, *supra* note 12, at 412-13 (“NO MAJORITY OF THE U.S.

According to Edward de Grazia, the *Fanny Hill* ruling was a watershed, but for a different reason. Though the ruling rested on socially redeeming value, lower courts often deemed materials constitutionally protected if their appeal to prurient interest was no greater than that of *Fanny Hill*—a high threshold.³⁹⁰ Either way, the failure of Father Hill's crusade against *Fanny Hill* represented a major setback for OY.

CONCLUSION: OPERATION YORKVILLE V. THE SIXTIES

“It makes no sense to speak of pornography as something that simply exists outside of a constituting discourse,” writes Jonathan Elmer.³⁹¹ He adds:

Pornography is, rather, the designation of certain forms of sexual representation as beyond the pale; it is the persistent limit-case of acceptable discourse. “Pornography,” in other words, is a term used by moral discourse to structure itself: wherever pornography is found

SUPREME COURT has ever accepted the proposition that ‘utterly without redeeming social value’ is a ‘test’ for obscenity”. *Memoirs* “was the opinion only of three justices” and thus “not the law of the land.”).

390. DE GRAZIA, *supra* note 377, at 497. See also BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 195 (1979) (after the *Fanny Hill* case, “[p]ornographers . . . took to citing medical reports or throwing in lines from Shakespeare to protect the product”). Seven years later, in 1973, the Supreme Court rejected the *Fanny Hill* test and imposed the obscenity test, still applicable, that excludes material with “serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added). See *id.* at 23 (“no Member of the Court today supports the *Memoirs* formulation”); see generally Herald Price Fahringer & Michael J. Brown, *The Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731 (1974) (outlining the fall of the “utterly without redeeming social value” test of *Memoirs* in favor of the “serious literary, artistic, political, or scientific value” test of *Miller* and others).

391. Jonathan Elmer, *The Exciting Conflict: The Rhetoric of Pornography and Anti-Pornography*, 8 CULTURAL CRITIQUE 45, 46 (1987-1988).

to be, there the line will be drawn
(provisionally) to exclude it.³⁹²

That line shifted fast from the late 1950s to the early 1970s.³⁹³ *Fanny Hill*, a “manual of perversion” to Operation Yorkville in 1964, soon seemed tame.³⁹⁴

As early as 1965, while the *Fanny Hill* cases were under way, *Time* said that a modern-day John Cleland “would have to work hard, very hard, to keep up with the competition. For just about anything is printable in the U.S. today.”³⁹⁵ The same year, the Legion of Decency closed down. Rev. Thomas F. Little, its executive director, said he looked forward to a retirement with “the stations of the cross, not looking at Gina Lollabrigida.”³⁹⁶ And the first bare breasts appeared in a mainstream American movie: *The Pawnbroker*.³⁹⁷ In 1966, Michael Antonioni’s *BlowUp* showed a fleeting shot of pubic hair,³⁹⁸ and William Masters and Virginia Johnson published *Human Sexual Response*, which sold more than 300,000 copies.³⁹⁹ In 1967, *Hair* was performed off-Broadway (the following year on Broadway), with full nudity⁴⁰⁰; and the film *I Am Curious (Yellow)*—target of unsuccessful censorship efforts by the Customs Service, and banned in Boston⁴⁰¹—“showed an unabashedly nude Lena Nyman casually stroking Börje Ahlstedt’s postcoital penis.”⁴⁰² In 1968, *Couples*, a novel with rampant sex and, unlike *Fanny Hill*, with four-letter words, became a best-seller

392. *Id.*

393. The shift was also fast in the Supreme Court. *See* *New York v. Ferber*, 458 U.S. 747, 754 (1982) (stating that “*Roth* was followed by 15 years during which this Court struggled with ‘the intractable obscenity problem,’” a time of “considerable vacillation over the proper definition of obscenity” (citation omitted)).

394. *OY Founders’ Statement*, *supra* note 7.

395. *The New Pornography*, *TIME*, Apr. 16, 1965, at 28.

396. PETERSEN, *supra* note 96, at 307.

397. HEIDENRY, *supra* note 377, at 52.

398. PETERSEN, *supra* note 96, at 308.

399. HEIDENRY, *supra* note 377, at 33.

400. PETERSEN, *supra* note 96, at 263.

401. SEMONCHE, *supra* note 200, at 129.

402. PETERSEN, *supra* note 96, at 308.

and landed its author, John Updike, on *Time*'s cover.⁴⁰³ In 1969, Philip Roth's onanism-sodden *Portnoy's Complaint* became a best-seller;⁴⁰⁴ and United Artists released the X-rated film *Midnight Cowboy*, which won the Academy Award for Best Picture. Three years later, in 1972, *Deep Throat* became not just a hit but an above-board pop-culture reference, with articles about "porno chic" and jokes on the *Tonight Show*⁴⁰⁵—less than a decade after the *Fanny Hill* prosecutions began. The legal and cultural landscapes had changed with lightning speed.

At the outset, in the early and mid-1960s, OY spoke loudly. The organization allied with Cardinal Spellman and Norman Vincent Peale (though not with the Justice Department), forced the mayor into action, and helped bring about prosecutions. Its ire was immoderate even as some of its tactics were relatively moderate: it generally avoided calls for boycotts, unlike CDL chapters and NODL; and it connected pornography to a vast number of social ills, but—unlike CDL New York leader (and OY board member) William Riley as well as Cardinal Spellman—did not declare it the outgrowth of a communist plot, despite suspicions that it was precisely that. Yet whether moderate or extremist, whether justifiably concerned or unduly prudish, OY was on the wrong side of history. It won political battles—Father Hill's fast, for example—but lost judicial ones, and it was the judicial ones that counted. Obscenity law became a creation of the courts, not mayors and legislators, and the courts rapidly liberalized that law. Public opinion slowly followed. Pornography was a salient issue during much of the 1960s, 1970s, and 1980s. It no longer is.

Today, OY, known as Morality in Media, denounces Internet pornography,⁴⁰⁶ pornographic movies available for viewing

403. *View from the Catacombs*, TIME, April 26, 1968, at 66-72.

404. HEIDENRY, *supra* note 377, at 67.

405. JOE BOB BRIGGS, PROFOUNDLY DISTURBING: SHOCKING MOVIES THAT CHANGED HISTORY 141 (2003).

406. See, e.g., News Release, Morality in Media. In Refusing to Review a Lower Court Decision Invalidating the Child Online Protection Act (COPA), U.S. Supreme Court Did Nation a Disservice (Jan. 28, 2009), available at <http://obscenitycrimes.org/FinalCOPADecision.php>.

in hotel rooms,⁴⁰⁷ and the public display of *Cosmopolitan*.⁴⁰⁸ Contrary to its ambiguous stance in the 1960s, the organization now unabashedly seeks to keep pornography away from adults as well as children.⁴⁰⁹ Robert Peters, president of the organization, argues that pornographic materials undermine marriage, foment rape, and lead to terrorism by fostering the image of a sex-obsessed West.⁴¹⁰ The organization continues to denounce the courts—“a judicial oligarchy accountable to no one.”⁴¹¹ If, as the Supreme Court has held,⁴¹² the Constitution protects gay sex, Peters wonders what lies ahead: “A right to bugger farm animals?”⁴¹³ Operating with its second federal grant, Morality in Media polices pornographic websites and urges the Justice Department to prosecute operators of potentially obscene sites.⁴¹⁴ Now, however, its recommendations are largely ignored.⁴¹⁵ Prosecutors—even the federal ones whose agency helps fund Morality in Media’s work—no longer listen. Nor do cardinals, mayors, or best-selling religious authors. Times and

407. Letter from Robert Peters, President, Morality in Media, to J. W. “Bill” Marriott, Jr., Chairman and CEO, Marriott International (Jan. 11, 2008), available at http://www.moralityinmedia.org/Letter-to-BillMarriott-PayPorn_Jan2008.pdf.

408. Patty Knap, Former Director of Public Affairs, Morality in Media, MIM Campaign to Shield Children from Prurient Magazine Covers at Supermarket Checkout Counters, <http://www.moralityinmedia.org/index.htm?prurientMagazines/badCosmo2.htm> (last visited Feb. 28, 2010). Before OY was a year old, ironically, *Cosmopolitan* published an article contending that pornography “is as subversive as Communism.” Marie Torre, *A Woman Looks at the Girly-Girly Magazines*, COSMOPOLITAN, May 1963, at 42.

409. See, e.g., Mary Anne Layden, *If Pornography Made Us Healthy, We Would Be Healthy by Now* (Apr. 1999), available at <http://www.obscenitycrimes.org/laydenhealthy.php> (arguing that the “sex industry” is damaging to adult men and women).

410. Robert Peters, *The 2008 Presidential Election and Its Impact on Enforcement of Federal Obscenity Laws*, OBSCENITY L. BULL. (Morality in Media, New York, N.Y.), Sept. 9, 2008, at 1-3, available at <http://www.moralityinmedia.org/nolc/olb/LB-sept-oct08.pdf>.

411. Robert Peters, *Once Again, U.S. Supreme Court Thinks It Knows Better Than Congress*, 10 NEXUS: J. OPINION 5, 17 (2005).

412. *Lawrence v. Texas*, 539 U.S. 558 (2003).

413. Bates, *supra* note 11.

414. *Id.*

415. Lewis, *supra* note 11.

mores have changed, but Morality in Media remains stuck in the past. A victim of what it calls “the hellish sexual revolution,”⁴¹⁶ Morality in Media fights losing battles, wields scant clout, and, increasingly, talks only to itself.

416. News Release, Morality in Media, “Kinsey” is an Effort to Rehabilitate a “Father” of the Hellish Sexual Revolution Who Has Been Discredited, says MIM President (Nov. 8, 2004), *available at* <http://www.obscenitycrimes.org/news/KinseyHellish.php>.