

# Free Discussion v. Final Decision: Moral and Artistic Controversy and the *Tropic of Cancer* Trials\*

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Henry Miller wrote *Tropic of Cancer*<sup>1</sup> in 1933 and published it in Paris in the following year. The years between its original publication and the appearance of the Grove Press edition in 1961 provided ample opportunity for both the author and his novel to become somewhat notorious. Though the vast majority of his countrymen who knew him at all probably considered him an odd-ball Bohemian type who wrote dirty books, American and European intellectuals generally considered Miller an artist of some importance. Thus in 1961, *Tropic of Cancer* was far from unknown to its American audience, but it remained largely unread.

Shortly after publication, federal authorities announced that there would be no prosecution for the passage of *Cancer* through the mails.<sup>2</sup> Yet within a year over sixty local communities—from the stereotypically provincial to the mythically sophisticated—had commenced legal proceedings against the book. Because of their number and identity of subject matter, these trials provide a unique opportunity to investigate the actual operation of the constitutional test of obscenity established by *Roth v. United States*.<sup>3</sup>

The discussion which follows is based on an examination of the transcripts from eight trials to suppress *Tropic of Cancer*.<sup>4</sup> Since all eight were held at approximately the same time, there was no possi-

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1. *Tropic of Cancer* has been through innumerable editions and translations since the first Obelisk Press edition in 1934. Hereinafter all citations are to the Grove Press paperback edition (published Oct. 10, 1961).

2. The Post Office announced its decision to abandon attempts to prevent the passage of *Cancer* through the mails on June 13, 1961. On August 10, 1961, the Customs Bureau announced that the twenty-seven year ban that had prevented the importation of foreign editions of the book had been lifted. E. HUTCHISON, TROPIC OF CANCER ON TRIAL 59-60.

3. 354 U.S. 476 (1957).

4. Attorney General v. Book Named Tropic of Cancer (Suffolk County No. 78441, Super. Ct., Mass., Sept. 26, 1961), *rev'd* 184 N.E.2d 328 (1962), civil, non-jury trial [hereinafter cited as Mass.]; Commonwealth v. Robin (Com. Pleas Court #2, No. 3177, Nov. 21, 1961), civil, non-jury trial [hereinafter cited as Phila.]; State v. Yudkin (Cir. Ct., Montgomery County, Dec. 18, 1961), *rev'd*, 229 Md. 223, 182 A.2d 798 (1962), criminal, jury trial [hereinafter cited as Md.]; Haiman v. Morris (Cook County Super. Ct., Div. No. 61S.19718, Dec. 29, 1961), civil, non-jury trial [hereinafter cited as Chi.]; State v. Hunting-

bility of distortion from an intervening Supreme Court decision. The large number of witnesses testifying about the same book greatly aids analysis of the character of the expert testimony on which obscenity trials rely.<sup>5</sup> Moreover, the bulk of testimony made available by these trials facilitates an attempt to induce from the evidence itself the operational meaning of the theoretical constitutional norms.

Since the principal concern here is with the testimony of "expert" witnesses—those called to testify on the critical issues of "prurient interest" and "community standards"—testimony on other legal issues, such as *scienter*, is not discussed. Where the testimony of a non-expert witness assumes substantive relevance I have given it appropriate attention.

The analysis of the trial testimony that follows<sup>6</sup> demonstrates that legal regulation curtails discussion of important moral and artistic issues, that suppression forecloses one of the main thoroughfares for the changing of moral and artistic viewpoints. In short, the consequence of suppression is to foreclose the future. In this paper I will try to show that although within a given set of terms for discourse it may be possible for reasonable men to agree that a particular item is pornographic, such a possibility does not justify embodying the distinction in law.

## I.

The Supreme Court announced the basic theory of its now three-part<sup>7</sup> test for obscenity in *Roth v. United States*.<sup>8</sup> The Court held that

ton (Super. Ct., Hartford County, No. 24657, Feb. 13, 1962), criminal, non-jury trial [hereinafter cited as Conn.]; *McCauley v. Tropic of Cancer* (Milwaukee County Cir. Ct. No. 300-059, May, 1962), *rev'd*, 20 Wis. 2d 134, 121 N.W.2d 545 (1963), criminal, non-jury trial [hereinafter cited as Wis.]; *Florida v. Whelan Drug Co., Inc.* (Cir. Ct., 11th Jud. Dist. Dade County, Chancery No. 61C 11673, Apr. 9, 1962), *aff'd sub nom. Grove Press v. Florida*, 156 So. 2d 537 (1963), *rev'd sub nom. Grove Press v. Gerstein*, 378 U.S. 577 (1964), civil, jury trial [hereinafter cited as Fla.]; *People v. Fritch* (Ct. of Spec. Sess., City of Syracuse, Aug. 1, 1962), *rev'd*, 13 N.Y.2d 119, 192 N.E.2d 713 (1963), criminal, jury trial [hereinafter cited as Syr.].

5. The diversity of jurisdictions examined permits generalizations otherwise problematic due to the presence of idiosyncratic rules of evidence.

6. The trial testimony was distilled in light of previously formulated hypotheses. The possibility of observer distortion cannot be totally eliminated, but I have quoted freely from the transcripts to provide the reader with some opportunity to evaluate the reliability of the arguments and inferences I have drawn. The reader will understand that in approximately three thousand pages of testimony there is more of significance than could possibly be reproduced here.

7. In order to be deprived of constitutional protection, material dealing with sex must: (1) appeal to prurient interest, (2) go substantially beyond contemporary community standards of candor in the description or representation of such matters, and (3) be utterly without redeeming social value. See *Roth v. United States*, 354 U.S. 476

the question was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>9</sup> Though later cases appear to have liberalized this test somewhat, *Roth* remains the leading constitutional case in the obscenity area. This test is that which various state trial courts were presumably employing in the trials involving *Tropic of Cancer*.

Quite apart from the test announced, *Roth* also presented the Court's theoretical rationale for reconciling the suppression of obscenity with the first amendment. The implicit reasoning of *Roth* is that although the Constitution protects the expression of any and all ideas, obscenity does not involve the expression of ideas and is, therefore, unprotected.<sup>10</sup> The flaw in this syllogism lies within the Court's unarticulated premise that what is obscene can be considered totally lacking in ideas. This premise is false for, as demonstrated in the *Tropic of Cancer* trials, even the claim that a work is pornographic generates serious debate involving important questions of social concern.<sup>11</sup>

(1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966).

8. 354 U.S. 476 (1957).

9. *Id.* at 489.

10. All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

*Id.* at 484 (footnote omitted).

The meaning of this "double level" approach is that there are categories of utterance which by definition are not protected by the first amendment. The definition derives from elucidation of the essential purpose in protecting speech. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 484. There may be *specific instances* when ideas which receive categorical protection may lose it in favor of other vital interests, but according to *Roth* obscenity receives no categorical protection because it expresses no "ideas for the bringing about of political and social changes desired by the people." *Id.* The question whether the Court's tests are adequate to isolate the no-idea obscenity category is analytically distinct from the question whether the category is properly excluded from first amendment protection on these grounds.

The phrase "utterly without redeeming social importance" might be taken to mean that the Court was excluding obscenity from categorical protection because the "ideas" it expresses are *qualitatively* worthless. But such a characterization is in conflict with other language in the *Roth* opinion and in other first amendment cases. To be consistent with that language, the phrase "utterly without redeeming social importance" must be taken as a *quantitative* judgment about the content of pornography, *i.e.*, that obscenity contains no ideas. As I hope to show in this article, in applying either the specific *Roth* tests or any other set of criteria, the viability of the fundamental distinction is questionable.

11. Thus, with one important reservation I fully agree with Professor Kalven that "Mr. Justice Harlan thus exposed the central weakness of the [*Roth*] majority opinion:

The nature and evaluation of the arguments for the propriety of pornography involve problems of moral and artistic judgment. A particular created object may be denounced by some as harmful, sinful, revolting and trivial, while others defend it as being beneficent, holy, amusing and important. Advocates on either side of the controversy employ rhetoric and authority to assert contradictory systems of values. For example, one side may claim that pornography is not valuable because it is sinful, and argue its sinfulness from the fact that it approves of sexual relations condemned by Christian belief. In response, the opponents may proclaim that pornography is valuable because it displays and delights in the glories of the body, and argue that the human capacity for sexual pleasure is sacred.

The essential characteristic of the obscenity controversy is that it involves a discussion about a created object raising important questions of aesthetics and morality, questions "of political and social changes desired by [at least some of] the people."<sup>12</sup> The obscenity trial does not show, as some have claimed,<sup>13</sup> that little can be expected from this dialogue; rather, it shows that the considerable controversy engendered, because it takes place in a trial context, becomes a contest to establish the moral supremacy of one relevant public over another.<sup>14</sup> The necessary consequence of suppression is the removal of this occasion for aesthetic and moral discussion and the mooting of future discussions: in short, a negative effect on the expression of ideas.<sup>15</sup>

the difficulty in using the two-level theory where classification at the first or second level depends on a key term as vague as obscenity." Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 20. The problem with the term obscenity is that it describes an "open category" in the same way justice describes an open category. The process required to fill the category involves controversy "at the intersection of a matrix of art and a matrix of society." This intersection "generates occasions for disagreement over whether a critical object 'be' propaganda, decoration, philosophy, fetish, etc., or rather (perhaps simultaneously) a 'work of art.'" M. KADISH, REASON AND CONTROVERSY IN THE ARTS 201 (1968).

12. 354 U.S. at 484.

13. Kermode, "Obscenity" and the "Public Interest", NEW AMER. REV. #3 at 229, 244 (1968).

14. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54 (1968).

15. [E]ffort must be made to bring what we think about sex and what we say about sex and what we do about sex into some kind of realistic relationship. Indirectly, the pornographers do this. They recognize that the only sexual norm is that there is none. . . . It is to the credit of today's pornographer that intentionally or not he is the one who tells us most about the extraordinary variety of human sexual response and in his way he shows us as we are, rather like those Fun House mirrors which even as they distort and mock the human figure never cease to reflect the real thing.

Vidal, *On Pornography*, N.Y. REV. OF BOOKS, March 31, 1966, quoted in 1 EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 650 (Student Edition, 1967).

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Nor can suppression be justified in constitutional terms by granting that pornography has ideas but denying that it is speech. Falsely shouting "Fire!" in a crowded theatre is both observably dangerous and objectively false,<sup>16</sup> and is therefore not "speech" in the constitutional sense. Yet pornography, as far as we know, is not observably dangerous<sup>17</sup> and cannot be "tested" for objective truth without considering moral and aesthetic values.

A particularly serious argument for suppression has it that pornography is dangerous because it degenerates the populace to the point of destroying that minimum level of civility required for the rational disputation of ideas which the first amendment was designed to protect. By suppressing pornography a threat to this minimum level of civility is removed in the service of rational discourse.<sup>18</sup> To the extent that this is a factual claim, it remains to be shown either that there is a real danger in any scientific sense or that pornography differs from sexual advertising, for example, in terms of its moral effect and the strength of its impact.<sup>19</sup> Until such evidence is presented or persuasive reasons for thinking a difference probable are adduced, the premise is artificial.

Secondly, the argument from dangerousness would have it that we must restrict certain kinds of speech in the present in order to protect future speech. An analogous claim would be that Nazi propaganda must be suppressed because to the extent it wins adherents future disputation is endangered. Because we know from experience that this tempting claim is quite possibly true, all types of pure speech, including those dealing with sexual matters, must remain free as an article of democratic faith.

Pornography is also speech in the sense that it is part of the argument for its own propriety; to write pornography is to express an idea that pornography should be produced. The evaluation of this idea, like all issues in the identification of pornography, involves problems of moral and artistic judgment. For example, one group of trial

16. *Schenck v. United States*, 249 U.S. 47 (1919). "[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

17. H. CLOR, *OBSCENITY AND PUBLIC MORALITY*, ch. 4 (1969).

18. See *id.* at 119. See also *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in *Alberts*).

19. "I think in our society we find ourselves assailed, in a sense, daily through all means of communication, through advertisements, with a constant sexual stimulation, which, I might point out, has as great a potential for exciting prurient interests as any literary effort would." (Phila. 302)

witnesses deplored *Tropic of Cancer's* approval of perverse sexuality: "The seamy side of life must always be presented critically, as if the world should not be seamy, yes." (Phila. 253) Another group thought the book expressed either passive acceptance of the reality of human nature or positive disapproval of its perversity. (Wis. 368) Still another witness said:

[T]he whole history of literature is filled with great writers who have had to turn their attention to unpleasant instances in life. Literature itself deals with life as a whole, and from time to time obscene things have to be faced. (Mass. 250)<sup>20</sup>

The *Roth* opinion put courts in a position to decide this dispute, to decide whether a "proper" attitude toward certain modes of sexual behavior had been expressed, because the categorical difference which that opinion assumed to exist between false ideas and no ideas, evil morality and no morality, bad art and non-art, is an ephemeral one.

The trial testimony I have examined represents a dispute primarily between critic and clergy,<sup>21</sup> art and morals, and diverse conceptions of the proper relationship between the two. The antagonists begin from different reference points and offer discrete moral and artistic criteria. However, the mere fact of a controversy over a book between clergymen and critics has significance. Since men of intelligence do not generally disagree over nothing, one would suppose that some question of perceived social importance is at issue. It is difficult to conclude that a book which generates such a serious dispute presents or represents no ideas, is nothing. Yet if the Court in *Roth* did not make the assumption that pornography contains no ideas, the holding of that case establishes the principle that ideas may be suppressed if they are objectionable—a conclusion seemingly at odds with the lan-

20. Chekhov once wrote that a writer is not a confectioner, a beautician, or an entertainer. He is a man who has entered into a contract with his conscience and his sense of duty, and however much he may hate it, he must overcome his fastidiousness and soil his imagination with the dirt of life . . . . A writer must be as objective as a chemist. He must renounce every subjective attitude to life and realize that dunghills play a very honorable part in the landscape and that vicious passions are as much a part of life as virtuous ones. Quoted in Simmons, *Tolstoy and Chekhov*, 8 MIDWAY No. 4, 91, 101 (1968).

21. Of the sixty-two expert witnesses who testified in the eight *Tropic of Cancer* trials I examined, 75 per cent (47) fell into four professional groups: clergymen (10), literary critics (24), psychologists and psychiatrists (7), and librarians (6). Literary critics comprise more than half the total expert witnesses appearing in the eight trials. In terms of their orientation the two groups appeared in the following pattern: 2 of the clergy testifying were for the book while 8 were against it, 21 of the critics testifying were for the book while 3 were against it,

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guage of the opinion and with the entire history of first amendment doctrine.

Whether any particular work is "serious" or has no ideas initially poses a problem of construction;<sup>22</sup> a work of a given structure and theme is not the "same" book characterized by someone else as being altogether without structure or theme. It is incorrect to say that pornography may be identified independent of the construction put upon it. The claim that an object is pornographic implies a definite construction of the object in question,<sup>23</sup> one which says: "Read this book as a series of sexual exchanges because it contains nothing else of interest." On the opening pages of *Tropic of Cancer*, Miller states: "This is not a book. This is libel, slander, defamation of character."<sup>24</sup> One judge read this statement as a clear repudiation of any pretense to literary value. (Phila. 4) Obviously, it could also be read to mean that this is not "official art" (Syr. 287-88), art as the dry, lifeless expression of disembodied sentiment and abstract ideas. (Phila. 100) This is new art (Conn. 192-93), art with flesh and blood (Mass. 67-69), art that hides neither filth nor honest joy. When the construction question becomes legally relevant, open discussion must give way to the necessity of a decision—one or more constructions must be rejected and another accepted with the finality of law.

The assumption that pornography can be identified without judging the quality of ideas also ignores the interdependent functions of "telling" and "showing" in the transmission of ideas.<sup>25</sup> One could argue intellectually, for example, that adultery is not only moral but conducive to general happiness and well being. But the same point may be made by showing the joys of adultery through the happy presentation of adulterous sexual exchanges. It is possible to claim that the former is an acceptable presentation while the latter is not only by making an assumption of moral propriety or by prescribing rules for the doing of art—both of which are within the realm of ideas. In neither case can it be said that no ideas are involved; the distinction is that in the latter case the point is made through emotional

22. Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP. PROB. 544, 546 (1955). For an expanded discussion see M. KADISH, *REASON AND CONTROVERSY TO THE ARTS* 47 *passim* (1968).

23. See note 11 *supra*.

24. H. MILLER, *TROPIC OF CANCER* 1 (1961).

25. W. BOOTH, *THE RHETORIC OF FICTION* 397 (paperback ed., 1962): "But what is needed is not any simple restoration of previous models, but a repudiation of all arbitrary distinctions among 'pure form,' 'moral content,' and the rhetorical means of realizing for the reader the union of form and matter."

("showing") rather than intellectual ("telling") appeal (Conn. 241,243).

Nevertheless, it has been argued that pornography lacks ideas just because it involves only this appeal to the emotions.<sup>26</sup> If society allows Bertrand Russell's moral claims but suppresses pornography, it must believe that an intellectual tract has little impact on human behavior, but that pornography, in bypassing the intellect, is dangerous because it is more likely to be effective. Placing aside the point that this principle would constitutionally protect only ineffective speech, the claim that pornography presents the debasement and dehumanization of man *and* that it involves no ideas is a contradiction. Surely the debasement of man is a serious moral idea, and not all men agree that a given sort of activity is dehumanizing.<sup>27</sup> To the extent that pornography makes a claim—by showing, not telling—that reducing human beings into objects for manipulation is good or fun, it is within the realm of ideas.<sup>28</sup>

Can it be said that pornography expresses opinions regarding the activities it depicts? Where there is an "implied author" who comments on the action in some appropriate way, there is no doubt that some opinion is being expressed,<sup>29</sup> though "finding" the author or deciphering his view may present serious difficulty.<sup>30</sup> Where there is

26. See Clor, *supra* note 17, at 121.

27. *But see, e.g.:*

I would say it [obscenity] was a presentation of sex in a totally abnormal situation which is not the purpose for which it was created, and not the way it becomes beautiful, but becomes degraded, and becomes a low form of human expression, which I think is unrelated to our real cultural evaluation.

(Chi. 835)

28. See Sontag, *The Pornographic Imagination*, 34 *PARTISAN REV.* 181 (1967).

29. W. BOOTH, *THE RHETORIC OF FICTION* 71 (1962).

[I]t is clear that the picture the reader gets of this presence [of the implied author] is one of the author's most important effects . . . Just as one's personal letters imply different versions of oneself, depending on the differing relationships with each correspondent and the purpose of each letter, so the writer sets himself out with a different air depending on the needs of particular works.

*Id.* at 75.

*Compare* Conn. 138 (comments by presiding judge):

I think I understand what you are trying to convey, Dr. Powell, and as I say, what was in the court's mind, after reading the book, I couldn't quite determine whether it was an autobiography or a novel; and I think you made the statement that Henry Miller was trying to get a message across that he was outraged. Well, if he was outraged and he wrote a novel, that's one thing. If he was outraged and then went out and did the things that he describes that were done by the narrator in that book, then it might be a different situation.

30. However, one still has recourse to the psychological claim that every "author" seeks acceptance and justification for his impulses by creating an audience to share his fantasies. See E. KRIS, *PSYCHOANALYTIC EXPLORATIONS IN ART* 38, 60 (1952). See also S. SONTAG, *AGAINST INTERPRETATION* 229 (1967):

I'm not denying that there are certain events about which it is necessary to take a position [in a work of art]. An extreme instance of a work of art dealing with such events is *The Deputy*. All I am saying is that there are some elements of life—above all sexual pleasure—about which it isn't necessary to have a position.



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arguably no such view expressed, the issue becomes whether the work presents a proper occasion for artistic controversy.<sup>31</sup> A genuine dispute over whether a particular work provides a proper occasion for artistic controversy or is only sexual propaganda<sup>32</sup> remains a dispute in the realm of ideas.

Even if the work does not generate critical dispute, the publication may raise a moral issue independent of that created by the author's moral views. As one witness put it, the issue is respectability. (Phila. 258) Social acquiescence in the distribution of pornography, it is claimed, implies at least that the depictions are socially tolerable.<sup>33</sup> The

31. M. KADISH, *REASON AND CONTROVERSY IN THE ARTS 197-98* (1968). A proper occasion for artistic controversy arises only when both formal and nonformal properties are attributed to the presented object. The controversy arises "at the intersection."

32. I use the term "sexual propaganda" here to describe a proposed category of created objects. The proposal is based on the following analysis.

(1) Like propaganda in general, sexual propaganda seeks an audience which will imaginatively participate in and approve of the experiences being depicted. The underlying need of the sexual propagandist, like the propagandist in general, is for unity, agreement, assurance that the propagandist is not alone in his desire for a particular type of experience or in his fear of a particular "enemy." By committing his private fantasies to paper, by capturing sexual activity on film, the sexual propagandist is temporarily able to quiet his fear of being alone. Within sexual propaganda there is never any conflict—everybody desires and is responsive to everybody else because rejection from any source is intolerable.

(2) Sexual propaganda must necessarily be a commercial enterprise. The sexual propagandist needs a *willing* audience. Suspicion of relative audience indifference arises whenever the product is cheap. The sexual propagandist seeks the largest possible market at the highest price the traffic will bear in order to maximize his psychic gain.

(3) The sexual propagandist must convince himself before he can begin to convince others. Thus there is no artistic distancing in sexual propaganda, no irony or wit, for these mechanisms require some self-consciousness on the part of the author, some control and an objective view of his own actions.

What I am suggesting is only the beginning of a portrait of the dynamics of sexual propaganda. I am suggesting that when textual analysis gives rise to these inferences one would be justified in *proposing* that the material be regarded as propaganda of the sexual type. One can do no more than offer a proposal, for it is always possible that someone else will propose a different view. On first reading, I would have proposed that *Story of O* be regarded as sexual propaganda, but after reading a recent essay by Susan Sontag I am no longer secure in that judgment. S. Sontag, *The Pornographic Imagination*, 34 *PARTISAN REVIEW* 181 (Spring, 1967). Had the book been suppressed as a consequence of my view, we would never have had the benefit of Miss Sontag's opinion. This is what freedom of speech is all about.

33. The issue of respectability complicates the effort to justify specially regulating material available to young people. The complications are factual rather than theoretical. If pornography is available only to adults, what sort of "message" is being conveyed to youth? Would special regulation nevertheless have the minimal beneficial effect of removing from youthful experience representations of behavior with which he might identify during this period of particular susceptibility?

General pornography legislation may unambiguously convey societal (and parental) disapproval of the modes of behavior depicted in pornography, but special legislation can only convey the message that certain items require maturity for safe handling—like drinking or driving a car. The implication of this differential standard is that a clear message of disapproval can only be conveyed by general prohibition, which logically means that to achieve the goal set by the respectability argument adults may only have access to what is safe for youth. Cf. *Butler v. Michigan*, 352 U.S. 380 (1957). If this alternative is rejected, the respectability rationale cannot be used to support special legislation aimed at youth. *But cf. Ginsberg v. New York*, 390 U.S. 629 (1968).

alleged danger lies in the possibility that in time the offensive depictions may become accepted as a norm of behavior.<sup>34</sup>

The issue is, indeed, respectability—competing claims not only as to what is acceptable expression but also as to what is acceptable behavior. When the movie version of *Gone with the Wind* first appeared, Clark Gable's famous exit line, "I don't give a damn," aroused considerable objection. Today nothing short of "Fuck you, Scarlett," could have a similar effect. Perhaps the distance traveled between "damn" and "fuck" is lamentable,<sup>35</sup> but the point is that the first amendment postulated a willingness to take chances with the future development of society by relying on the free exchange of ideas. Insofar as the debate

Special legislation can be supported, however, by the claim that some material may be harmful if introduced at an early stage of development. The potential harm lies in the possibility that youth will accept deviant sexuality before they are mature enough to exercise sound judgment. Society expresses its disapproval of certain modes of behavior by preventing young people from identifying with these modes of behavior during their period of particular susceptibility. Compare N. HOLLAND, *THE DYNAMICS OF THE LITERARY RESPONSE* 334 (1968):

[F]rom a purely psychological point of view, it seems unlikely [that reading results in a permanent change in character], for we know that character is formed largely in the oedipal and pre-oedipal stages. By the time we get round to reading books, we bring to them a rather firmly structured personality. On the other hand, we have all seen adolescents become, for a month or two, Hamlet or Raskolnikov or Julien Sorel under the influence of some reading experience. In effect, there is a change of character for a period much longer than just the reading itself. But this is precisely the task of adolescence in human development: to achieve an identity separate from the family unit by trying out a variety of identities. The adolescent can just as well imitate a teacher or a peer or a movie star as a literary character. In other words, the possible character changes a particular book might evoke in an adolescent *have more to do with his adolescence than the nature of the literary experience.* (Emphasis supplied.) See also Gaylin, *Book Review*, 77 *YALE L.J.* 579, 592-93 (1968).

34. See Kermode, "Obscenity" and the "Public Interest," *NEW AMER. REV.* #3 at 229, 240 (1968). See also Bakan, *Eros and Knowledge*, 5 *CHICAGO TODAY*, #2 at 48, 51 (Summer, 1968): The most important factor uniting eros and knowledge, a factor which evokes the strong reaction against them both, is that they both entail the generation of new forms. They both contain intrinsic revolutionary potential. Thus, the taboos against both of them are part of a more general condition in which that which prevails opposes that which would prevail in the future.

35. Compare:

Either we've got a very much psychologically upset people who are looking for vicarious satisfaction from the multitude of volumes that are available—I hate to believe that we are as sick as that in this country. If we are, then let's not worry so much about all this international problem that's taking place. We'll fall just like Rome fell, from within, rather than from without.

(Wis. 109); with:

I think as we accept man as he really is in the 20th Century it becomes apparent the old Victorian way of life is completely outmoded. Today, for example, accepting and expecting sexuality as a part of our human nature and part of human behavior and something that one should not be ashamed of has become part of the 20th Century way of life. This is moving at a tremendously rapid pace.

(Fla. 161) The witness regarded this trend as "most healthy." (Fla. 162) See also, Leo, *Women Are Said to Be Infringing on Another Men's Prerogative: The Freedom to Curse*, *N.Y. Times* § 2, at 49 (Oct. 20, 1968):

The use of obscene language among women, from the co-eds of the New Left to the proper matrons at swank Manhattan cocktail parties, has risen sharply in the last few years, according to some leading psychologists.

over the respectability of pornography involves conflicting ideas about social norms,<sup>36</sup> it is impossible to settle the controversy as a matter of law and yet remain true to that ethic.

## II.

The pattern of testimony in the *Tropic of Cancer* trials shows that Roth—in granting first amendment protection to moral *discussion* and artistic *creation* while withholding protection from “obscene” productions—enabled courts to choose from among divergent opinions respecting the proper conduct of art and morality. Competing groups of “experts” argue their respective positions; then courts and juries render a judgment vindicating the intellectual value of an idea.<sup>37</sup> Of course, the more complex the competing arguments the more difficult it becomes to identify the ideas approved and disapproved.

The initial difficulty of courts making these choices is that both art and morality seek to establish their own rules of criticism. That is, the doing of art involves proposals that new standards of artistic value be accepted.<sup>38</sup> By the same token a claim that a given practice is or

36. I am critical of the fact, oh, for example, to illustrate one of the things that our society depends upon, our democracy, is respect, respect for the personality, the individual human being. If my recollection serves me correctly, one of the things in our society is respect for man, respect for woman,—This is the basis of the thing called the family—which our courts are apparently concerned with.

Half of a family situation is a woman. To the best of my memory, except for one woman whose name eludes me, the only way she is referred to in this book is cunt.

I object to this as a democratic citizen . . . .

I say that anything that militates for the disrepute, the disregard for every female is deleterious, is harmful to our society.

(Wis. 106-07) Compare R. NEIBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 74 (1947):

Even if natural-law concepts do not contain the ideological taint of a particular class or nation, they are bound to express the limited imagination of a particular epoch, which failed to take new historical possibilities into consideration. This alone would justify the ultimate freedom of a democratic society, in which not even the moral presuppositions upon which the society rests are withdrawn from constant scrutiny and reexamination. Only through such freedom can the premature arrest of new vitalities in history be prevented.

37. Suppression affirms, at least symbolically, the view of the clergyman who testified: “I felt that the book [*Lady Chatterly's Lover*] had me thinking things that morally I feel I have no right to think.” (Wis. 186)

38. Art is mind, and mind does not at all need to feel itself obligated to the community, to society—it may not, in my view, for the sake of its freedom, its nobility. An art that ‘goes in unto’ the folk, which makes her own the needs of the crowd, of the little man, of small minds, arrives at wretchedness, and to make it her duty is the worst small-mindedness, and the murder of mind and spirit. And it is my conviction that mind, in its most audacious unrestrained advance researches, can, however unsuited to the masses, be certain in some indirect way to serve man—in the long run men.

T. MANN, *DR. FAUSTUS* 322 (19—).

Still I can't get it out of my mind what a discrepancy there is between ideas and

is not consistent with generally accepted tenets of goodness, amounts to a proposal that a given practice be regarded as immoral. It is crucial to recognize that disputing these grounds with standards external to the enterprise is not relevant argument but constitutes counterproposing that one corpus of norms be rejected in favor of another. One cannot dispute the moral claims of Christianity by reference to Hindu norms without making this sort of counterproposal. Likewise, one cannot dispute the claims of abstract art by reference to impressionism without counterproposing that abstract art principles be rejected in favor of those of impressionism.

Because the enterprise seeks to establish its own criteria of criticism, no legal tribunal can determine whether or not a given object is art on the basis of criteria external to the enterprise itself, just as it is impossible to judge the morality or immorality of a given practice by reference to criteria external to a given normative system. Aside from being ill-equipped for these tasks, the law cannot decide either moral or aesthetic questions without reference to the internally generated norms of art or morality.

Judicial administration of aesthetic and moral norms is not facilitated, however, by making the internal norms of art and morality legally relevant. It has been the case that men disagree in the doing of art or in the construction of moral norms: no neutral principles emerge to choose among competing claims, only "arguments more or less persuasive." To say that in the artistic enterprise there are proper judges but no proper judge means that artistic controversy rejects the principle of finality.<sup>39</sup> Decisions binding on the total enter-

living. A permanent dislocation, though we try to cover the two with a bright awning. And it won't go. Ideas have to be wedded to action; if there is no sex, no vitality in them, there is no action. Ideas cannot exist alone in the vacuum of the mind. Ideas are related to living: liver ideas, kidney ideas, interstitial ideas, etc. If it were only for the sake of an idea Copernicus would have foundered in the Sargasso Sea. The aesthetics of the idea breeds flowerpots and flowerpots you put on the window sill. But if there be no rain or sun of what use putting flowerpots outside the window?

H. MILLER, *TROPIC OF CANCER* 219 (1961).

39. M. KADISH, *REASON AND CONTROVERSY IN THE ARTS* 150-51, 178-83, 260 (1968). This observation also holds for the moral enterprise.

So far at least as the concept of objectivity depends in principle on the idea of an underlying consensus of "competent" or "qualified" moral judges, it has no application within ethics. To that extent there can be no such thing as a principle of moral objectivity. Moral discipline is merely a personal regimen, or way of life, whose character is definable only in terms of those precepts to which the individual moral agent holds himself responsible.

H.D. AIKEN, *REASON AND CONDUCT* 144 (1962).

No moral judge, in affirming the truth of a particular judgment or principle, supposes that anyone else must agree with him regardless of his own moral obligations.

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prise necessarily cut off avenues of pursuit, and certainly in the doing of art, all avenues must be open by definition.<sup>40</sup> So also in the moral enterprise there are rules for the conduct of controversy, but with the exception of pronouncements *ex cathedra*, it is not possible to establish the morality of any particular practice save by "arguments more or less persuasive."<sup>41</sup>

For in morals there can be no guarantee that all objective judges will acknowledge the same principles of moral obligation.

*Id.* 169.

40. Interestingly, this proposition is itself subject to debate:

It [*Tropic of Cancer*] seems to be alluring in a bad sense. And with this, if I may, that I think the talent of a man like Henry Miller as an artist could be put to use in art which I believe is to make us more noble, more human, to make us love beauty.

(*Wis.* 175)

Asking whether a particular subject or experience is "what we go to literature for" [W. BOOTH, *THE RHETORIC OF FICTION* 384 (1961)], taken as raising a question for the conduct of art—art as an enterprise which creates its own ends—, may be answered either way and put forth, on its own authority, as a proposition regarding ends.

Now it is the function of Art to propose an end. This end having been proposed, it is handed to the sciences, which in turn treat it as an effect. They explore its causes, and then send it back to Art with a theorem which states the circumstances and conditions under which it could be produced. Art in turn considers and asserts on its own authority that the attainment of the end is desirable.

H.D. AIKEN, *REASON AND CONDUCT* 49 (1962) (interpreting the view of J.S. Mill). *Compare* Baudelaire:

You know that I have never considered literature and the arts except as pursuing an end which is outside morality, and that beauty of conception and style are enough for me. But this book, whose title *Fleurs du mal* says everything, is clothed, as you shall see, in a sinister and cold beauty: it was composed in fury and patience. Besides, proof of its positive value can be seen in all the bad that's being said of it. The book enrages people. In any case, appalled myself at the horror I was going to inspire, I cut a third of the book out when it was in proofs.

BAUDELAIRE, *SELECTED VERSE* xxxiv (F. Scarfe tr. & ed., 1964). A similar view:

I see no reason in morality (or in aesthetic theory) why literature should not have as one of its intentions the arousing of thoughts of lust. It is one of the effects, perhaps one of the functions, of literature to arouse desire, and I can discover no ground for saying that sexual pleasure should not be among the objects of desire which literature presents to us, along with heroism, virtue, peace, death, food, wisdom, God, etc.

Tynan, *Dirty Books Can Stay*, 70 *ESQUIRE*, No. 4, at 168, 170 (Oct. 1963) (quoting Lionel Trilling).

41. But I do not mean to suggest that moral claims are "personal." We speak of certain reasons as valid or invalid and of certain moral decisions as reasonable or unreasonable. When we do, we are asserting claims—not in our own persons, but rather in the name of a set of principles to which all normal persons in our moral community are committed. In short, the moral judge or critic acts as the voice of an impersonal system of prescriptions and procedures which are impersonally regulative of our deliberations.

H.D. AIKEN, *REASON AND CONDUCT* 107 (1962).

In the Wisconsin trial, the cross-examination of one witness involved debate on the question of objective versus subjective moral truth. The witness began by testifying that the view expressed in *Tropic of Cancer* meant that one greeted each day by affirming the essential value of life, by a positive willingness to take the world as it is and accept events as they come. The state's attorney asked whether this meant that one takes whatever comes without concern for whether it was right or wrong. The witness replied that he would have to think about that since to him matters of right and wrong were personal. The state's attorney then asked whether it was true that one was only able to determine whether a (fictional) character's actions were right or wrong by the character's evaluations, and the witness agreed. The witness then denied the state's attorney's suggestion

There are two distinguishable locations for the controversy involving critics and clergy. The parties may disagree on the question whether a work at issue is the embodiment of some serious purpose rather than a mere exhibition of sexual exchanges, or one faction may concede there was some attempt at a serious purpose but argue that the attempt failed in the execution.<sup>42</sup>

The first area of dispute has been called the difference between pornography and "erotic realism,"<sup>43</sup> the difference between soft and hard-

that it was possible to judge an act right or wrong objectively "by the facts." The witness, asked whether he viewed those instances in which characters in the novel went to bed with prostitutes as right or wrong, replied that he would not engage in such conduct but was indifferent to the views of others. (Wis. 343-45)

42. See TAN notes 58-66 *infra*.

43. Phyllis and Eberhard Kronhausen seem to be responsible for the influence of this phrase. E. & P. KRONHAUSEN, *PORNOGRAPHY AND THE LAW: THE PSYCHOLOGY OF EROTIC REALISM AND PORNOGRAPHY* (1959). This book warrants particular attention because several witnesses and prosecutors in the *Tropic of Cancer* trials relied on its findings, and because it purports to develop objective standards from a scientific (psychological) investigation.

Initially, the Kronhausens misconceived the nature of their task: rather than propose that material with certain characteristics ought to be included in a category to be called pornography, the authors assumed that examining a large body of material would yield up the similarities and differences which would define the obscenity category. In short, their approach presupposed that the material would define itself.

Apart from this original sin, the Kronhausens' book is dangerously misleading in three respects. The authors propose principles of moral order disguised as therapeutic truths for the achievement of mental (sexual) health; their two structural principles of pornography are ancient clichés here stated in psychological rhetoric that purports to infuse them with scientific veracity; and the eleven content criteria for obscene books which they offer are not the product of psychoanalytic content analysis but are superficial characterizations of the literal events which appear in the books they examined.

The central thesis of the book is that there is a clear distinction between "erotic realism" and hard-core pornography. Pornography has the single purpose of erotically stimulating the reader, the authors explain, while "erotic realism" aims at the truthful description of the basic realities of life as the individual experiences it. The difficulty with the thesis is that the authors don't seem to use the term "erotic realism" consistently. Sometimes they imply it to mean a test of historical veracity. In discussing *Tropic of Cancer*, for example, the Kronhausens' remark: "Miller tried to follow Emerson's advice, so that most, if not all of his books, are autobiographical in nature. They are more than that, they are also truthful, as Emerson suggested such books should be." *Id.* 125. Since the Kronhausens have no way of knowing whether the experiences Miller relates actually happened to him or actually happened to anybody, as a matter of historical truth the Kronhausens' statement is unverifiable. The important issue, however, is why truthfulness, or even believability, is relevant to a distinction between pornography and "erotic realism." The authors suggest an answer: it is apparently their view that men would be better off if society operated on the principle of full disclosure, including disclosure of the individuals' secret guilt fantasies. But they have quietly altered the meaning of realism and truthfulness to include fantasies, an alteration which renders their original distinction nearly meaningless.

On other occasions "erotic realism" seems to imply a criterion of complexity. Pornography is not realistic because it is simple-minded in its treatment of human behavior with regard to, and attitudes toward, sexual exchanges. Thus pornography can be distinguished from "erotic realism" not because it is untruthful in the historical sense, but because it is unbelievable as the portrayal of an experience with which mature readers can identify. *Id.* 28. The difficulty with this meaning is that it proposes an aesthetic standard with which one need not agree. The relevant test is whether the character or situation is *sufficiently* complex to meet applicable standards of artistic excellence. As several witnesses pointed out, the characters in *Tropic of Cancer* are not "fully developed"

core pornography, and the difference between mere pornography and a work which is the product of the "pornographic imagination." These terms cloud a simply stated point: serious purpose means the attempt in the work to achieve some aesthetic or moral goal independent of the sexual exchanges described. The sexual exchanges and their description become a means to some independent goal of imagination, form or intellect. (Fla. 155)<sup>44</sup> In judicial opinions, serious purpose is a conclusory label meaning the work is not deemed pornographic.<sup>45</sup> The function of the term "serious purpose" is clearly to take the material out of the pornography category and settle it in the world of ideas. The phrase serious purpose is used at trial in questioning witnesses

in the ordinary sense of the word. (Phila. 231-2; Wis. 327-8, 404-6; Syr. 287-8; Conn. 195-6). The question, however, is whether they ought to be.

Finally, the Kronhausens use "erotic realism" in a way which cannot be reconciled either with "historical veracity" or "insufficiently complex and therefore unbelievable." There is some indication that the authors give "realism" a third meaning which allows the inclusion of satire. *Id.* 29. They seem to recognize that satire, like caricature, is a tendentious form of expression which does not depend on historical veracity, and which purposefully disregards complexities; to be effective satire must be unbelievable in the way *Gulliver's Travels* is unbelievable. The essential characteristic of satire is that it have the illusion of reality, and according to the Kronhausens, it is this illusion of reality in satire which makes it realistic. *Id.* 41. Thus the third meaning of "erotic realism" is actually "serious purpose": the attempt in the work to achieve some moral or artistic goal independent of the sexual exchanges described. If this is indeed the third meaning of "erotic realism," the Kronhausens have not succeeded in objectifying the controversy intrinsic to the question whether a given work "contains" any serious purpose.

Having failed adequately to describe what pornography is not, the authors proceed to specify two structural characteristics of obscene books: a succession of erotic scenes, and a buildup of erotic excitement. *Id.* 178. The Kronhausens offer no reason why the obscene should be limited to works exhibiting these structural characteristics. Instead they offer a tautology: we examined a lot of obscene books and found two structural characteristics; if a book has these two structural characteristics it is obscene. More important, whether or not these characteristics are present is a question of perception subject to discussion. For example, several of the witnesses in the trials thought the philosophical discussions in *Tropic of Cancer* were "mere filler" to lead the reader from one sexual episode to another. (Chi. 857, 910). The Kronhausens claim a progressive buildup of erotic excitement is generally found in the most stereotyped pornography, but is this characteristic essential? Suppose one were to write a book of sexual exchanges with the most exciting activities at the beginning and proceed down the scale of erotic complexity and excitement. Does the book become "erotic realism" or ineffective pornography?

Finally, the authors offer a list of the "major criteria" of obscenity: Seduction, Defloration, Incest, The Permissive-Seductive Parent Figure, Profaning the Sacred, "Dirty" Words in Dirty Books, Supersexed Males, Nymphomaniac Females, Negroes and Asiatics as Sex Symbols, Homosexuality, Flagellation. *Id.* 243. One witness in the trials found every one of these "criteria" in *Tropic of Cancer*. (Chi. 942). Another found incest in the desire of a character to have sexual relations with the mother of his mistress. (Chi. 948). To my knowledge there are neither Negroes nor Asiatics in the book, but one witness found them. (Phila. 231-2). More important, how many of these "criteria" are necessary? Will any number do provided they are in "proper" relationship to the whole, whatever that mysterious relationship may be? Must all these sexual relationships be "real" or may they be implied, exist in fantasy, or merely operate to inform the artistic vision?

44. A machinery salesman, asked his definition of an obscene book, said: "Well, I think it is a book which uses improper symbols for a very little observable purpose other than just for their own sake." (Conn. 89). After much reflection I am unable to understand the concept of a symbol being used for its own sake.

45. *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2nd Cir. 1934).

of all kinds, on either side, and elicits a wide variety of responses. Literary critics use serious purpose to defend a work against charges of frivolousness, shallowness, pointlessness or commercialism.<sup>46</sup> Clergymen, however, seldom use the term—they offer descriptions of the book in terms of sexuality which necessarily asserts the lack of any serious purpose. On the occasions when clergymen employ serious purpose they do so in morally evaluative terms. For example, rather than testify that the book has no purpose, the witness says: “It serves no purpose *in lifting anyone* . . . . [I]t takes some of the highest things of life and places them upon the lowest scale.”<sup>47</sup> (Phila. 277) “There seems to be an intention on the part of the author to go out of his way not to create a literary masterpiece . . . but . . . to describe sex in its most shameful aspects . . . . [T]his seems to be the main motive of the author.” (Wis. 72-73) Ostensibly intending to say the book is frivolous, clergymen actually say the book is serious but wrong or evil, or treats its subject matter in an immoral way. Suppression, to them, is justified by the offensiveness of the work’s ideas.

For critics, seriousness immediately distinguishes *Tropic of Cancer* from pornography as a matter of artistic judgment. They counter evaluative statements by the clergy with critical claims in terms of seriousness rather than in terms of moral goodness. Critics also draw the distinction between subject matter and its treatment. An author may deal with an obscene subject in an artistic manner so long as it is “being faced seriously, honestly and with talent . . . .” (Mass. 263) Even perverse sexuality is “admissible in serious literature. The purpose is what use is made of them and what treatment is made of them.” (Syr. 252; Fla. 186) The crucial difference between the moralist and the critic in this respect is the difference between a “good” purpose (clergy)<sup>48</sup> and a “serious” purpose (critic).<sup>49</sup> “[I]t is a somewhat morbid book [in the sense that Dostoevsky is morbid], but a serious one.”

46. W. BOOTH, *THE RHETORIC OF FICTION* 586 (paper edition, 1961).

47. Emphasis supplied. “I see nothing in this book which would be of any value to help correct any of the evils or any of the problems facing Philadelphia, or that would be constructive in solving any of these difficulties.” (Phila. 272).

48. See G. GARDINER, *NORMS FOR THE NOVEL* (1952).

49. In the Wisconsin trial, the state’s attorney asked a critic whether he would evaluate the language of a book as “good” if the author chose good language to describe an act of perversion. Answer:

Well, in terms of a strictly literary judgment, where you are judging in terms of language, you would not necessarily introduce a moral issue; you would simply say that this particular passage, such as it were, whether the kind of act you mentioned or a group of cows in a meadow, whether or not the scene in a unified work of art has been successfully stated.

(Wis. 127-28)



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(Mass. 252) In attempting to convince the trier of fact that the book is serious and therefore not pornographic, critics call Miller a writer of "great moral seriousness" (Phila. 133) who uses objectionable words in the service of a "very serious moral purpose." (Conn. 191-92) *Tropic of Cancer* is described as a totally serious book which achieves its intention (Conn. 267-68), written with honesty (Chi. 419, 415-17), an honesty missing from books written with commercial intent. (Chi. 516-17) It is characterized as a didactic novel, a "work whose aim it is to demonstrate the validity of a serious proposition and argument." (Conn. 146) One may fault these descriptions and judgments for lack of clarity, but nevertheless they unambiguously convey the opinion that the work employs sexuality as a means to an independent end rather than for the single purpose of heightening sexual interest. (Fla. 155)

Attributing some serious purpose to a work does not necessarily mean that its artistic value is first rate or that its nonformal characteristics (meaning, theme, etc.) are morally good. Nor does it mean that the formal characteristics (style, structure, etc.) alone establish the artistic significance of the work. For the critic, serious purpose means he is able to claim that the work's formal and/or nonformal characteristics render it a proper object for artistic analysis. It is the extent to which the nonformal and the formal characteristics are claimed to be appropriate to each other that is important to a judgment of artistic excellence.<sup>50</sup>

Moral criticism of a work's nonformal characteristics disallows this kind of judgment of appropriateness. If the moral impropriety of particular nonformal characteristics is asserted, or if it is claimed that certain nonformal characteristics require other nonformal characteristics (e.g., sin must always be treated as wrong), a judgment of appropriateness is impossible. Critics and clergy are, therefore, engaged in a dispute over the relative independence of the artistic enterprise from moral dogma; pornography is only the stage upon which the

50. Miller deliberately creates and very skillfully, creates the impression of formlessness, chaos and confusion in the organization of his novel. He does it deliberately, that is, on purpose, and I think very skillfully, because first of all this is a major re-enforcement to do this and to create this effect he has to provide a major re-enforcement for the thesis of his novel. He is arguing that the society is corrupt, confused, formless and chaotic, and to so create the impression, the facet in his novel of formlessness, chaos and confusion he has to provide a re-enforcement for a major strain, at least in his thesis. Actually I think with the strong impression that he creates there is a reasonably well-organized progression in the novel and an organization which proceeds according to the pattern and plan which is deliberate. I don't think the novel is formless or confused or chaotic.  
(Conn. 148-50)

drama is enacted.<sup>51</sup> So long as the basic issue is the sovereignty of the artistic enterprise, the partisans are not likely to agree in general terms. They are most likely to agree when there is nothing at stake—when the critic regards the work as artistically bankrupt in form and the clergyman regards it as morally objectionable.

Questions concerning the theme of a work present the same dispute in a different form. When a witness is asked what the book is about or what its theme is, he may answer either in terms of sexuality or in terms of serious purpose. Any assumption that a response stated in terms such as reality, the human condition, history, philosophy, or mysticism satisfies the *Roth* rationale of idea content or social value is not consistent with the testimony at the *Tropic of Cancer* trials I examined. Responses to thematic questions show quite clearly the extent to which the testimony goes beyond an inquiry into serious purpose and into the validity, goodness or truthfulness of the purpose.<sup>52</sup>

This evaluative type of thematic explication is common in the testimony of clergymen appearing for the state. Though a few of these witnesses did describe the book's theme as vulgarity (Chi. 976) or lust (Chi. 1114), most went further and said the book gave a false picture of life (Phila. 234) or took an obscene approach to life. (Phila. 254)<sup>53</sup> Another witness discerned a distorted, warped concept of the relationship between men and women. (Phila. 268) Other clergymen found it an unfortunate and improper frustration reaction on the part of the author to the conditions of life (Md. 76-77), or an argument for taking as much from life as possible while you can (Wis. 190), or thought the hero was trying to find his selfhood through vulgar relations with women. (Wis. 297)

51. Question: As a matter of fact, isn't it a fact that most novels are written with a moral purpose? Answer:

Well, again I am not sure I understand what is meant by a moral purpose. I don't think the artist is first of all concerned with morals. I mean by that, first of all, he is concerned with writing a certain kind of novel, in which the moral element may be extremely complex. I would hesitate very much to state what the moral purpose of a certain book is. I don't know what the writer's moral purpose is always. (Wis. 136)

52. It is interesting to speculate how a witness appearing on behalf of the book might answer the following question: "Dr. [Richard Ellmann], in the book, *Tropic of Cancer*, is Mr. Miller advocating the free use of the body and sexual organs as being a healthy way of life?" (Chi. 234). A "no" answer would seem to take the book out of the realm of ideas, while a positive response either designates the idea as frivolous or is offensive to the trier of fact. Given the dilemma, the witness' actual response is admirable: "The book is not an advocacy of anything." (Chi. 235).

53. The state's attorney asked one critic: "Your conclusion is that there is social value from elevating sexual behavior as opposed to making a living by going to work?" (Phila. 79; see also *Id.* 173).

Critics, demonstrating a professional concern quite different from that of the clergymen, seem more or less committed to the task of textual explication. A critic can properly say that the *Tropic of Cancer* involves the hero's quest for his place in the world (Chi. 419) through a series of adventures (Mass. 52) which lead to a rebirth (Chi. 40), or is an account of a man's self-realization (Phila. 68) in a mad (Md. 96) world—a world filled with depression and misfortune (Wis. 115) wherein the individual has been corrupted and dehumanized by automated forces (Conn. 147-48; Fla. 124-25). They can say the book is mainly "about" the affirmation of life (Wis. 327) in a culturally eroded world (Mass. 24-41), or they can characterize it as a didactic work prescribing moral revolution (Conn. 207).

Critics do engage in moral evaluations, but in doing so they attempt to distinguish personal moral reactions from their construction of the book. One critic, for example, was asked if he found anything objectionable in the novel.

He [Miller] is a snob. He feels . . . that he is the only person alive in the world, he and his friends are the only ones who know how to live and everyone else is dead. It seems to me that there are a great many ways to be alive and I can't consent to the snobbery and exclusive aspect of Mr. Miller's sensibility. (Conn. 202)

Witnesses who were neither clergymen nor professional critics were more willing to explicate the text than clergymen and more willing to moralize the substance of Miller's theme than were critics. A machinery salesman (with a background in English literature) felt the author was trying to explain his lust for life "and all that is below the belt. I don't believe life is made entirely of that." (Conn. 72-73) "His use of symbols to criticize the existing order, if I may call it that, is offensive." (Conn. 80) Another witness (a political scientist, consultant and amateur writer) thought the book was obscene because it embodied a kind of nihilism, a belief in nothing, a reduction of all value. (Conn. 105-109) "[T]he general impression is that there is nothing that we generally refer to as value that Miller presents as values." (Conn. 114) A sociologist testified:

When it comes to religion and philosophy, he [Miller] is rather innocent, and to a large extent, outside of certain antagonisms he is largely, to a large extent, uninformed. (Chi. 908)<sup>54</sup>

54. A neuropsychiatrist, asked what he thought the theme of the book was, made the following statement:

This rehearsal of the thematic controversy demonstrates that almost all the witnesses, whether testifying for the state or for the book, discovered a theme which they could articulate in terms independent of sexuality. Few were able to say the sexuality in *Tropic of Cancer* was employed as an end in itself rather than a means to some independent end. If the *Roth* requirement embodied this distinction only, it would have been rationally impossible to find the book obscene on the basis of the evidence. However, since there were witnesses and apparently courts, lawyers and juries who interpreted *Roth* as allowing judgments on the rightness of the author's point of view, it is understandable that those who disagreed with or were offended by Miller's ideas could find *Tropic of Cancer* obscene. The crucial point is that when a clergyman testifies that a book is morally objectionable and therefore without value, and a critic testifies that as an indictment of modern life a book has tremendous value, one possible meaning of the decision to suppress is that as an indictment of modern life the book has no value.<sup>55</sup>

The essential theme of this book is that of an author projected into the first person expressions here wherein you find, according to neuropsychiatric inference, an individual who, seemingly, had an emotional dependency relationship to his own mother, wherein seemingly, there was a rejection on the part of this mother. And, in general, there are two broad ways in which an individual approaches, then, to seek the emotional dependency, gratification from this maternal individual, either by conforming to the mother's tendency area, thereby gaining mother attention, or by direct opposite, as part of the male individual's attachment to the mother for emotional dependency reason. There is a sexualizing or an erotizing [sic] of this theme—and then, as we follow the expressions of this first person individual in this book, he is expressing the dual effect of the sexual feature as has become perverted in his life as a result of the frustrated emotional dependency element, and the fact that the drive, then, took on a negative turn within the sexuality. There is a sadistic tendency of an intense kind, and the sadism is joined with another feature that one finds in this emotional dependency-seeking, and that is one of restiveness and the reactive tendency that we find in this Gentile who implies he has this great interest in Jews.

(Chi. 1073-74)

55. For legal purposes one must either accept the *fact* of a controversy over value as itself establishing value, or admit that the introduction of expert testimony is absurd. Expert testimony is otherwise absurd because the trier of fact, by definition a non-expert, cannot apply literary criteria in determining whether to accept or reject the expert testimony. If it is proper for the trier to apply some other standard, like common sense, then expert testimony is irrelevant: the expert cannot address himself to the problem in common sense terms. In short, the expert and the trier of fact are playing the game by different sets of rules. This, at least to some extent, is responsive to Professor Kaplan's question:

Competent critics disagree sharply among themselves. The ideal context is as difficult to achieve as ideals usually are. But it is not true that from the nature of the case the ideal is a hopeless one. Beauty and obscenity alike are in the eyes of the beholder. But if—as artists, critics, and lovers of the arts, not as censors—we are prepared to enter into interpretation and evaluation in the one case, why not in the other?

Kaplan, *Obscenity as an Aesthetic Category*, 20 LAW & CONTEMP. PROB. 544, 546 (1955).

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In Great Britain<sup>56</sup> and in some American jurisdictions<sup>57</sup> counsel may ask the expert witness in an obscenity trial whether the offensive sexual material in the book was relevant to its purpose, but not whether the objectionable words or depictions were necessary. Elsewhere, and in all of the *Tropic of Cancer* trials I examined, the question is uniformly stated in terms of necessity. The obvious difference between relevance and necessity is in the degree of justification required to support the use of objectionable material. In either case the witness must relate the author's use of the objectionable material to some purpose in the book. Although mere reference to purpose is sufficient in terms of relevance, necessity implies the task of considering and evaluating alternatives. In the latter instance, the witness must explain what effect—formal or nonformal—the use of alternative expressions would have had on the work as a whole.

Not all explanations of necessity are sufficient to justify use of the objectionable material. If, for example, the witness wants the book suppressed, he may say that the objectionable words or depictions were used to excite the reader sexually or to sell more books. The inquiry into necessity, therefore, requires discussion of serious purpose—although a positive response to the question of necessity does not automatically follow from a perceived serious purpose—and the rendering of artistic judgments which endorse the use of the objectionable material. (Wis. 128)

The necessity controversy produces two principal types of negative responses: the objectionable material was unnecessary because the book had no purpose which it could have served, or the objectionable material was unnecessary because the book's purpose could have been served as well or better by unobjectionable words or depictions. Only the second of these need concern us here, for it certainly follows—given the previously discussed function of serious purpose in the obscenity trial—that if the work contains no serious purpose and offers only sexual words and depictions, it is obscene. The presence of unnecessary objectionable material may be offered as probative evidence of a lack of any serious purpose (Chi. 9-10), but this sort of impeachment is quite different from recognizing a serious purpose but claiming

56. *Regina v. Penguin Books (Lady Chatterley's Lover)* the testimony of which is reprinted in substance in RALPH (ed.), *THE TRIAL OF LADY CHATTERLEY* (1961).

57. *E.g.*, *State v. Ferlinghetti* (the San Francisco trial of Alan Ginsberg's *Howl*), the testimony of which is reprinted in substance in J. EHRLICH (ed.), *HOWL OF THE CENSOR* (1961).

that it is obscured or eliminated by a plethora of objectionable material that need not have been included. (Chi. 1115)

This latter claim involves intricate, perhaps imponderable, questions of artistic merit and the nature of the critical enterprise. In order to respond to the question one must have a critical tradition in which the question of necessity has meaning and can be answered. (Chi. 271) For a witness to say, for example, that the objectionable words were necessary to establish the tone of the novel, and the tone connects the elements of cosmic protest with the action of the characters, both tone and unity must be matters which some critical tradition considers important. If someone else finds the tone offensive because of the objectionable words and fails to see how tone connects meaning and action,<sup>58</sup> the stage is set for serious artistic and moral argument. The issues are the formal and nonformal characteristics of a created object, the extent to which moral norms ought to control the artistic enterprise, and the extent to which moral sensibilities are aroused in the audience.<sup>59</sup>

In the context of litigation there is no way to resolve this controversy or even illuminate its content. Presumably because the judge and jury are non-experts, and thus unfamiliar with the rules of criticism, the testimony of critics is so simplified that it is difficult to imagine anyone being persuaded by their pretentious assertions. In most instances explanations of necessity are reduced to statements that the objectionable material is necessary because it is necessary, or unnecessary because it is dispensable. (Chi. 528) One critic stated the objectionable words were necessary to demonstrate the truth of the book's argument (Conn. 147); another said they were necessary as an instrument and device of the serious literary strategy (Conn. 201-02); still another that they were necessary because the people about whom Miller was writing use such words (Mass. 22; Fla. 132, 184; Phila. 171). One critic could not imagine the book mutilated by excluding the objectionable words. (Mass. 61, 86; Wis. 121-22) A witness for the state

58. One critic was asked, on cross-examination, to read from the lower paragraph on page 91 to the end of page 93 of the paperback edition of *Tropic of Cancer* and to answer whether he thought the passage was representative of the entire theme or tone of the book. The witness replied that it was somewhat representative. He was then asked whether the use of the word "fuck" six times within a paragraph in that section was meaningful in the description or the literary effort of the author. The witness said yes, "because it says something that is in harmony with the tone of the book and the purpose of it, as I understand." (Phila. 90)

59. "He has one beautiful passage in that book that has real literary value, and to it he just adds two sentences with two of the filthiest words known in the English language, without any reason for it." (Phila. 176-77, comment of the presiding judge).

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argued the words were unnecessary because their exclusion would not decrease the power of the book but would make it even more effective. (Conn. 110) Another such witness, however, claimed that even if all the objectionable words were changed into acceptable vocabulary, the book would still be obscene. (Conn. 89)

Some witnesses attempted to connect the objectionable words and depictions to the book's nonformal characteristics. One witness thought the words necessary because they related to the body and sex which are the bases for the spiritual rejuvenation Miller deemed essential. (Conn. 250-51) On more than one occasion sex and sexual episodes were deemed necessary because "they make the literary achievement complete in a way that it would not be without them." (Mass. 99; Chi. 263) Consequently they were "absolutely essential." (Mass. 101; Conn. 251-52)

You couldn't write it [using blanks instead of words], because the language is intrinsic to the meaning. These words used are not exchanges; they are absolutes. A word has a meaning, and the word he uses for coitus, coitus has a different meaning, and has a different overtone. (Phila. 170)

Since the clergy-witnesses generally either denied the existence of any serious purpose or deemed the purpose they found immoral, they were rarely asked to respond directly to the question of necessity. Nevertheless, lack of necessity is often implicit in their expressions of disapproval. For example, in the Philadelphia trial a Catholic critic<sup>60</sup> testified:

There is no beauty or literary value. The book simply has no literary value, either in language,<sup>61</sup> structure or thought. Even the few attempts at something like literary writing are marred, as follows: "at the periphery the light waves bend and the sun bleeds like a broken rectum." There is literature for you, huh? There was a little motion toward literary [sic] ruined in this way. When I was in the Army we called such people swine. (Phila. 233-34)

60. Austine Joseph App, Ph.D., Professor of English Literature, LaSalle College, Philadelphia. The witness received his doctorate from the Catholic University, Washington, D.C. Religious affiliation must be noted in this case because the witness's application of peculiarly religious norms of artistic value make it difficult to classify him as either a critic or clergyman. The importance lent to portrayals of sin and the attitude toward sin expressed in the work is unique to Catholic criticism. See Gardner, *Moral Principles Toward a Definition of the Obscene*, 20 LAW & CONTEMP. PROB. 560 (1955).

61. Compare Harry T. Moore, research professor of English literature, Southern Illinois University: "I think that it [*Tropic of Cancer*] is splendidly written in an age when not many things are splendidly written. In current American literature, for example, we have only a few people who have—'written.'" (Mass. 17)

The witness's selection of the quoted line and his objection to it are of particular interest. The line comes in the middle of Miller's extended discussion of Matisse's conception of art and why that conception is preferable to the inhuman mechanics of contemporary civilization.<sup>62</sup> The two paragraphs preceding the quoted line contain no other objectionable words and have nothing to do with sex. The witness's contention is that the line is objectionable and unnecessary to its context. To rebut this claim one must explicate the relevant passage and relate the discussion of Matisse to the congenital vision of *Tropic of Cancer*. There is no way to argue that the line is necessary without pointing to a complex of formal and nonformal relations. The task of explaining the function of any particular line, passage or image containing objectionable words or depictions is no more difficult here, however, than the task of explaining the value of any line or depiction taken from *any* novel or poem. Indeed, literary critics claim innumerable images to be inappropriate in the sense that they do not do what they seem to have been meant to do. But in criticism the claim is

62. In every poem by Matisse there is the history of a particle of human flesh which refused the consummation of death. The whole run of flesh, from hair to nails, expresses the miracle of breathing, as if the inner eye, in its thirst for a greater reality, had converted the pores of the flesh into hungry seeing moths. By whatever vision one passes there is the odor and the sound of voyage. It is impossible to gaze at even a corner of his dreams without feeling the lift of the wave and the cool of flying spray. He stands at the helm peering with steady blue eyes into the portfolio of time. Into what distant corners has he not thrown his long, slanting gaze? Looking down the vast promontory of his nose he has beheld everything—the Cordilleras falling away into the Pacific, the history of the Diaspora done in vellum, shutters fluting the froufrou of the beach, the piano curving like a conch, corollas giving out diapasons of light, chameleons squirming under the book press, scraglios expiring in oceans of dust, music issuing like fire from the hidden chromosphere of pain, spore and madrepore fructifying the earth, navels vomiting their bright spawn of anguish . . . He is a bright sage, a dancing seer who, with a sweep of the brush, removes the ugly scaffold to which the body of man is chained by the incontrovertible facts of life. He it is, if any man today possesses the gift, who knows where to dissolve the human figure, who has the courage to sacrifice an harmonious line in order to detect the rhythm and murmur of the blood, who takes the light that has been refracted inside him and lets it flood the keyboard of color. Behind the minutiae, the chaos, the mockery of life, he detects the invisible pattern; he announces his discoveries in the metaphysical pigment of space. No searching for formulae, no crucifixion of ideas, no compulsion other than to create. Even as the world goes to smash there is one man who remains at the core, who becomes more solidly fixed and anchored, more centrifugal as the process of dissolution quickens. More and more the world resembles an entomologist's dream. The earth is moving out of its orbit, the axis has shifted; from the north the snow blows down in huge knife-blue drifts. A new ice age is setting in, the transverse sutures are closing up and everywhere throughout the corn belt the fetal world is dying, turning to dead mastoid. Inch by inch the deltas are drying out and the river beds are smooth as glass. A new day is dawning, a metallurgical day, when the earth shall clink with showers of bright yellow ore. As the thermometer drops, the form of the world grows blurred; osmosis there still is, and here and there articulation, but at the periphery the veins are all varicose, at the periphery the light waves bend and the sun bleeds like a broken rectum.

H. MILLER, *TROPIC OF CANCER* 147-48 (1961).



that these are poor images, not that they are unnecessary. Poor imagery can only become unnecessary imagery when artistic controversy becomes legally relevant. Was Ahab's wooden leg really necessary to the theme or characterization in *Moby Dick*? (Chi. 528)

The witness's objection to the sun bleeding like a broken rectum implies the book would have been just as good without this sentence. Some critics however, refuse to deal with the book except as it is, with nothing omitted or deleted. That is, they employ the rule of respect applicable to created objects.<sup>63</sup> But the rule of respect only makes sense among participants in the critical enterprise. The layman may find it merely pretentious because he perceives too much evidence of successful deletion: Shakespeare's best plays have been produced on innumerable occasions with whole scenes omitted.<sup>64</sup> It is certainly proper to claim that the play is better whole than with any of its parts omitted, but that is something different than claiming bowdlerization impossible or beyond conception. Critics participating in legally relevant artistic controversy, therefore, are trying to impress the rule of respect on a lay audience without ever articulating it. Furthermore, the legal context discourages clear explanations: critics are asked to give evidence, not to deliver lectures.

The witness's objection to the quoted line embodies a moral objection. Immediately after the quoted statement he said:

This I say, is a false picture of life. Literature must be true, otherwise, it isn't literature. The Bible is literature, in spite of some four-letter words, because it is the truth, the eternal truth. (Phila. 234)

Throughout *Tropic of Cancer* bodily images are used to describe man, his social relations, cities and nations, governments and other "created" phenomena. Creation is seen in images of corporeal rather than spiritual man, a vision that is clearly at odds with orthodox Christian spiritualism. Thus the image of the sun bleeding like a broken rectum

63. "Take seriously the object before you as a created object, as a performance." M. KADISH, *REASON AND CONTROVERSY IN THE ARTS* 83 (1968).

64. J. BARZUN, *THE HOUSE OF INTELLECT* 224 (1959):  
A New Critic considers a work of art a self-contained object which he means to dissect and appraise by reference to its structure. Though a trifle pompous in its suggestion of rubber gloves and sterile instruments, this is a tenable attitude for the critic provided he adopts it as needed, without system, and provided also, that his talk about structure retains in character of an analogy: remove a structural member from a bridge, and the bridge will collapse; but important parts of poems, plays, and novels can be cut and still leave something to read—spoiled and fragmentary, no doubt, but still intelligible and interesting. Every stage production of Shakespeare and Wagner testifies to this.

becomes "false" in a profound religious sense.<sup>65</sup> This kind of moral disapproval is relevant to the question of necessity only if one is willing to say that what is "false" is devoid of any value and therefore unnecessary. In the context of libelous utterances the Supreme Court has taken this view: "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation."<sup>66</sup> Doubtless the Court had factual falsehood in mind rather than religious "error," but in the obscenity trial religious "error" is apparently acceptable as evidence of the obscenity of a book. Again, the *Roth* assumption that pornography involves no ideas of importance is refuted by the process required to classify a given object as pornographic.

### III.

Professor Finnis has praised the *Roth* opinion for replacing the old *Hicklin* standard of "tendency to corrupt the individual"<sup>67</sup> with the "appeal to prurient interest" standard which, he claims, "unambiguously excluded passions, emotions and desires" from first amendment protection.<sup>68</sup> Whether or not *Roth* achieved this result depends on how one maps the relationship between the *two* standards that emerge from *Roth*: "appeal to prurient interest," and substantially beyond the "contemporary community standards of sexual candor."<sup>69</sup> From my

65. Dr. App had earlier referred to the book as being "irreverent, profane and blasphemous." (Phila. 228-31). Fr. H. Benton Ellis, Episcopal Chaplain to the students and faculty of the University of Miami, took the contrary position. To him Miller attacks God "only in the sense that perhaps all of us should." (Fla. 186-88)

66. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

67. *Regina v. Hicklin*, [1868] 3 Q.B. 360, 371.

68. Finnis, "Reason and Passion:" *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. Pa. L. Rev. 222, 224 (1967):

*Roth* completed the replacement of the ambiguous notion of tendency to sexual corruption . . . with the relatively less ambiguous notion of "appealing to prurient interest." "Corruption" provided an ambiguous standard because it straddled the realms of ideas and passions. Hence, if the first amendment was to protect all expositions of ideas, "corruption" had to be replaced by a formula which unambiguously excluded passions, emotions and desires. Such was the task and achievement of *Roth*.

69. In *Roth* the Court first stated that obscene material is that which "deals with sex in a manner appealing to prurient interest." 354 U.S. at 487. In a footnote to this statement, the Court stated that it could "perceive no significant difference" between this meaning and the definition of the Model Penal Code. 354 U.S. at 487 n.20. The quote from the Model Penal Code is as follows:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient 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 . . . .

A.L.I. Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957).

Later the Court seemed to merge the two elements in the A.L.I. definition when it accepted for constitutional purposes the following test from the case law: "whether to the

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examination of the trial testimony I think it more likely that the effect of *Roth* was to merge these two "tests" into the simple standard of "tendency to corrupt society." The reason for this merger and modified return to the older formula is that the *Roth* standards are meaningless without the notion of societal corruption.

Appeal to prurient interest can mean either that the material has that tendency or that it has that effect. The difference between tendency and effect is one of vantage point and mode of proof. The tendency of material to appeal to prurient interest can be discerned by examining the material to see whether it contains anything of interest apart from sexuality, *i.e.*, either formal or nonformal values. This is the sort of inquiry involved in the question of serious purpose already examined. If, on the other hand, appeal to prurient interest means a test of historical fact (effect), then one need show that the material has in fact appealed to the prurient interest of persons who have been exposed to it. To prove this one need only select a representative sample of the population exposed to the material and ask them whether the material appealed to their prurient interest.<sup>70</sup> But in the trials appeal in this latter sense was established by asking witnesses who qualified as experts for some other purpose whether the material appealed to *their* prurient interest. Analysis of the testimony on tendency and effect demonstrates that either meaning of "appeal to prurient interest" is simply not provable at trial.

With respect to the tendency of the material, a rabbi, introduced as an expert on cultural value because he was a "moral counselor," was asked whether the book, taking it as a whole and applying contemporary community standards, appealed to the prurient interest. The rabbi said it did. The director of the Milwaukee Bureau of Jewish Education (an expert on educational value) said: "It excites the prurient interest of the average adult and teenager, as I understand the average

average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 469.

This confusion in *Roth* is clarified, however, in later obscenity cases where the Court has indicated that the prurient interest test and the community standards of candor test are indeed separate. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), for example, the Court—after noting the prurient interest test and that the work must be utterly without ideas of social import—stated:

It should also be recognized that the *Roth* standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in the description or representation of such matters.' This was a requirement of the Model Penal Code test that we approved in *Roth*, 354 U.S., at 487, n.20 . . . .

378 U.S. at 191.

70. Prof. Finnis correctly assumes that *Roth* proclaims something like an erect penis test. See Finnis, *supra* note 68, at 235.

in this community." (Wis. 95) On cross examination this witness was asked if *Lady Chatterly's Lover* appealed to the prurient interest.

My answer is "Yes," I think the primary emphasis in *Lady Chatterly's Lover*, the overall view of *Lady Chatterly's Lover* is appealing and exciting to the prurient interest. And that's why people want it, not because they want to read good literature. (Wis. 103)

Asked the same question in regard to *Cancer*, a Catholic priest replied:

I thought it over carefully and I would say to the average person in this our community—it is not a highly sophisticated community—I would say yes it would, to the average person in our community. (Wis. 176)

A Lutheran pastor agreed because of the extensive, vulgar description of sex in the book. (Wis. 290)

A librarian, on the other hand, testified that "the predominant theme of the book does not present a preponderance of prurient interests to the average person in our community." (Wis. 330) A critic went further and asserted that "it purges the reader of prurient interests." (Wis. 370)

In another trial a Lutheran minister thought that, considering its theme and applying contemporary community standards, *Tropic of Cancer* would appeal to the prurient interest. Asked how he arrived at the community standards which he applied the minister said:

Well, first by living in the community I know the standards of our community, and in reading the book *Tropic of Cancer* the very theme of it is contrary to the average living and even the average thinking as to action in Dade County. People in Dade County would not live the type of life Henry Miller did in his autobiography. (Fla. 44)

In the Maryland trial the police officer who seized the book said that he thought *Cancer's* language and the description of sexual encounters did have a tendency to excite "lustful thoughts." Though he was not sure which people would have such experiences, he felt that "perhaps the younger set would derive more lust from a book like that than perhaps the more mature person." (Md. 41-46)<sup>71</sup>

In the Massachusetts proceedings a literary critic was asked whether

71. However, the attorney for the defense in this criminal trial offered to prove through the testimony of a psychiatrist that "in his opinion children would not have their lustful interests aroused by this book but rather if anything to the contrary . . . ." (Md. 173-4)

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the *Rape of Lucrece* would be more likely to incite lustful desires in an adult than *Tropic of Cancer*.

Mr. London, I am an expert in comparative literature, not in comparative lust, but it seems to me that the pertinent factor here is that the sexual act is presented much more attractively in Shakespeare than in Henry Miller. (Mass. 267)

In the Chicago trial a Methodist minister, asked if the dominant theme of the book, taken as a whole and applying contemporary community standards, appealed to the prurient interest, testified:

Well, I think the dominant theme in the book to the people I know would be an absolutely abnormal presentation and preoccupation with sex, which is unworthy, unhealthy; and I think it would be destructive to their ongoing life. (Chi. 732)

But a literary critic thought the average reader would be bored:

I think the average man in our society, unless he happens to be a specialist in literature, unless this is a major consideration, or a specialist in sociology, I think he might find this book dull. I do not think it would stir him to any prurient interest. I feel that if he were occupied with pre-prurient interests [sic] when he picked up the book, he could not survive it, his prurient interest could not survive the reading of this book. (Fla. 118)

This response raises an interesting theme in the testimony that both *Roth* and those who praise it overlook: disgust. Excessively candid or vulgar sexuality may give rise to disgust rather than sexual excitement. Those who see the book in terms of disgust will speculate on the book's *tendency* to encourage that response. The trials seem to indicate that those who are excited by sexual material do not find it offensive while those who find it offensive are disgusted rather than stimulated.<sup>72</sup> The meaning of "appeal to prurient interest" is unclear in this circumstance. For example, one psychologist testified:

Well, actually, most of the material in there I think, if anything, would tend to act in an opposite manner rather than heighten feelings of lust, sexuality or feelings of sexual tension. The kind of descriptions, if any, would seem to kill much of sexual desire, because to a great extent descriptions of sexuality are rather unpleasant, offensive, hardly the kind of thing that whets one's appetite or represent the kind of thing which often appears in pornographic literature as a playing of one's sexual feeling or arousal of passion

72. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 *Sup. Ct. Rev.* 1, 41-42.

to build to a kind of climax, to continually tease the individual. The *Tropic of Cancer*, I think, would tend to kill off that kind of feeling. I think it would tend to act as an antiaphrodisiac. The terms of disgust, vomit, defecation, these are hardly the thing, I think that makes one feel sexy and appeals to the prurient interests in the average man. It may appeal to people that have intense sexual problems but I think average people would hardly feel it aroused them. (Fla. 148-149)

This witness also explained that almost anything could appeal to the prurient interest of somebody under the proper circumstances,<sup>73</sup> and that he did not think *Tropic of Cancer* was written to appeal to the prurient interest.<sup>74</sup> Counsel then asked the witness what types of books would appeal to the prurient interest of the average man.

I think pictorial matter does. I think we live in a society, for example, where we have been conditioned to women in bikinis, or bikini-like bathing suits, in various kinds of posture, for example. I think material that tends to have a playing up of the love-making action about it, wherever detail of a woman's anatomy is described minutely in detail, and generally with the kind of description that tends to leave a certain amount to the imagination and lets the individual's mind fill in this kind of thing that described the intimate scene with a good deal of, oh, stringing out and building up of curiosity within the individual would tend to do this, things that describe often unusual kinds of sexual practices, various types of homosexuality, other types of sexual abnormalities that are given in this kind of minute detail that the average reader may not have ever come across that might only appear in a clinical case history and would tend to have this kind of thing about it. (Fla. 154)

73. We might say if the arousal is there, the most innocent sounding material can be interpreted sexually by the individual, or if the individual is not in this frame of mind certain reading matter, certain pictorial matter, certain visual matter that comes in through the eyes or ears, or at times through the nose, a sense of smell, can certainly involve, or for the moment involve, at least temporary states of high sexual excitement and eroticism.

(Fla. 153)

74. Not in any way that I can see. The general material, the descriptions, sound more like a heavy essay, a philosophy of life, a man's free association, the kind of thinking I might well hear, for example, from the couch, if I told the person to tell me whatever comes into his or her mind and to leave nothing out and just tell it to me whether it makes sense or not. This is more with this kind of thing, it seems like, and certainly in terms of the idea of building up tension it does not have this about it at all. There are such wide gaps here, such as long harangues about the world, the society in which we live, that it could have nothing that could even be considered minutely sexual in it that I hardly see how this could involve any kind of sexual arousal. If anything, I say my reaction would be it would kill it off.

(Fla. 153-54)

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Finally, the witness was asked if four-letter words have a tendency to arouse prurient interests in the average man.<sup>75</sup>

Well, because I think the average man, if he is grown up in what we would consider the general average community of the United States, has by the time he has been an adolescent and gone through high school and heard these words. Indeed, he probably, in order to prove his masculinity, has had to be able to use these words himself; otherwise, he would be regarded as a kind of sissy. In fact, if he flinched when someone used the word, he would be regarded as a kind of sissy. There are many kinds of occupations in our culture where this is used. In the army, for example, you haven't really passed your basic training if you avoid these kind of words. . . . In fact, I would be very much surprised if we went through some of the bars along here Friday evening and did not hear these words in practically every bar we went into.

Certainly, I do not think anybody who is in those bars and listening to the language is having erections or necessarily finds he is having any kind of sexual imagery or being led to any kind of unusual behavior.

. . . .

I mean when I read the book I had the feeling this man uses this language not to heighten any kind of sexual feeling but in terms of disgust and revolt, a way of expressing his hostility to the world, as a way of yelling in anger. A man yelling in anger is hardly a good lover. (Fla. 156-157)

In the Connecticut trial a political scientist denied that the book appealed to the prurient interest, taken to mean arousing sexual desires, but found it obscene nonetheless.

I think the treatment of sexual relations in the *Tropic of Cancer* is, with some exceptions, highly offensive, presents sex in a very

75. The witness was also asked to explain why the sexual images and incidents used in the *Tropic of Cancer* would not appeal to the prurient interest. He responded:

I think the language he uses and the way he associates sexual imagery with other kinds of imagery. In other words, vomit and semen are hardly the kinds of things to make one feel aroused. Talking about his feelings of disdain for women, for example. Here is obviously a man, I think as a psychologist, who really hates women. He has probably been done dirty by them in his life and he uses this book to express some of this dislike and disdain. There is nothing in it that gives the reader a feeling of tenderness and affection.

The language itself is unpleasant language. It is what I would call anti-sexual language, and when it is brought in I don't think it is brought in for its sake. To me the pornographer is a man who throws in pornography or obscenity for that purpose alone—to heighten sexual interest. I think when Miller does it it is incidental to the things he is trying to say about the world. In other words, it is secondary.

(Fla. 155)

repulsive fashion. (Conn. 104) As I said before, that if this [appeal to the prurient interest] means the arousing or the appealing to sexual desire as a whole, this book does not. I think, however, unquestionably there is morbid attention to sex relations and excrement. (Conn. 116-7)<sup>76</sup>

In the Philadelphia trial two critics expressed the view that *Tropic of Cancer* was an "antiaphrodisiac." (Phila. 94, 157-8) One of them explained:

Oh, I am perfectly sure of it. Even the skipper, the person who skips from one episode to another, isn't going to be persuaded to engage in sexual intercourse from what he reads there. I think it is the grimmest, most discouraging, most melancholy enterprise that I have ever read in literature anywhere. On the other hand—not at the pornographic level—not in this city, but I could go out and buy a dozen of them in a short time—many books in which sex is treated in a very agreeable and enticing fashion are available. Whether they are beyond the pale of our statute or not would be for others to determine. I do not happen to think that they are. My point is that by contrast with the *Chapman Report*, or with the last two novels of John O'Hara, or with *Lady Chatterly's Lover*—which has been exonerated—or with *God's Little Acre*, the episodes in *Tropic of Cancer* are disagreeable and unenticing, and if they were all that you knew of sexual activity, you would certainly be disinclined to indulge in it. The average person in his right mind, with the American background that we have, would simply not. (Phila. 158-159)

If one finds this evidence of the "tendency to appeal to the prurient interest" unenlightening, the point will have been made that "experts" are not responding, perhaps cannot respond, to the question. Rather than being "experts," these witnesses are a grab-bag of professionals guessing at the hypothetical average man's response to the book. The notion of expertise is meaningless since one must have a subject before one can have an expert. The only defensible sort of expertise applicable here would be one requiring familiarity with the complexities of creative expression and the complexities of audience response.<sup>77</sup>

The testimony respecting tendency is not nearly so absurd, however,

76. Asked whether Miller idealized or romanticized the sex act, the witness replied: No, that's the point of the whole book, it seems to me, at least with regard to his treatment of sex, and this is why it is to me obscene, is that he degrades the sex act, he almost at every opportunity presents it as something repulsive and offensive. And even the conclusion is so significant, that the only satisfactory solution is masturbation. This seems to me the height of obscenity.

(Conn. 114)

77. See, e.g., N. HOLLAND, *THE DYNAMICS OF LITERARY RESPONSE* (1968).



as the evidence on the second possible meaning of "appeal to prurient interest": the actual impact of the book on some known individual, or "historical effect."

Almost all the witnesses who were directly asked whether the book appealed to their prurient interest answered negatively. (Wis. 79, 189; Md. 42; Conn. 51, 77, 174) Three witnesses responded ambiguously. An educator said that although the book caused him to feel revulsion, there were parts of it which left him with an "itching," but since he read the book while hospitalized (presumably not for a rash) the itching did not develop into something more. (Wis. 107-8) A Lutheran pastor said it appealed to his prurient interest and he found it disgusting. (Wis. 301) A female high school teacher said "it was somewhat exciting, but I think that the revulsion counteracted it definitely." (Phila. 294)

Only two witnesses unambiguously stated that they found *Tropic of Cancer* to be sexually stimulating. A psychiatrist: "It certainly gave me some feelings that are very disturbing," but, the witness added, it did not create any longings or uneasy desires because he was a married man. (Phila. 209) A Methodist minister testified the book stimulated him sexually "in an abnormal way." (Chi. 733) On cross-examination, asked how the book stirred him in this abnormal way, the minister said he would stick with his generalization because he didn't see why he should explain that to defense counsel or anyone else. (Chi. 832)

Both the state and the defense also asked witnesses whether the book went substantially beyond contemporary community standards in the description and representation of sexual matters. One type of reply to this question was a straight yes or no. Critics and librarians generally said that the book did not exceed community standards<sup>78</sup> (Chi. 426; Conn. 163, 228, 283, 360), but one critic testified that—though the book was within the limits of community standards—it was on the "outer edge" of those limits (Phila. 86). Most of the straight answers to the question were negative, but some witnesses thought *Cancer* clearly offensive to community standards. (Conn. 74, 757-58; Fla. 44)

The second type of response to the question of community standards is evaluative. Rather than stating whether or not the material violates community standards, these witnesses argue that material will adversely

78. One of the critics testifying in the Connecticut trial stated that the book did not exceed community standards of candor, adding that standards of candor were reflected by best-seller lists and since *Cancer* had been so listed it must be consistent with those standards.

affect the moral standards of society. The witnesses assert that the material is not merely offensive,<sup>79</sup> it is dangerous to society.<sup>80</sup>

It should be noted that the absence of a "straight" answer to this question of community standards is often due to the fact that the question itself is sufficiently vague to allow an evaluation of the substantive effect of the content of the book on community morality. For example, in the Wisconsin trial a critic was asked whether the moral standards of the characters in the novel were in accord with the moral standards of the people in the community (Wis. 417); whether Henry Miller dignifies women as the average person in the community would dignify women (Wis. 418); whether he thought an absolute prostitute was a pretty good standard for womanhood (Wis. 420); whether the dignifying of sex assists its function within the social structure (Wis. 421); whether he thought sex should be treated as Miller treated it (Wis. 422);<sup>81</sup> whether he thought the reading of the printed word would lead the average person to think that society approves of the incidents portrayed in the book (Wis. 434); and whether he would consider the possible deleterious effect on the morals of his students in deciding whether to read parts of the book to them (Wis. 440).

Evaluative responses to the question of community standards usually find the book harmful. A Lutheran pastor testified: "I would say that it [*Tropic of Cancer*] would have an effect of deterioration of the moral

79. *Roth*, as interpreted by the Court (see note 69 *supra*), says that the material must be an affront to contemporary standards of sexual candor, it must violate norms of propriety and manners, it must be offensive, besides appealing to the prurient interest. However, if the material appeals to the prurient interest it necessarily affronts standards of sexual candor. There is no way in which a symbolic work may be constructed to appeal to the prurient interest without being offensive to standards of sexual candor.

The key standard emerging from *Roth* seems to be offensiveness, an affront to standards of sexual candor. The claim of offensiveness or affront may be supported by claims that the only appeal of the material is to pruriency and therefore it is not a serious work; other terms may be employed and testimonial explanations of how and why the given material is offensive may relate to other matters, but the notion that *Roth* dictated three distinct elements to be established in order to suppress a book is an intellectual fiction.

80. Since the mere offensiveness of a mode of expression is generally considered an insufficient reason for withholding the protection of the first amendment, it is fair to assume that something beyond mere offensiveness is being imputed to pornography by the *Roth* rules. The additional factor is dangerousness. The *Tropic of Cancer* trials indicate that the offensiveness of pornography is dangerous because it has a deleterious effect on public morals. One might characterize this danger as a 'tendency to corrupt public morals.' I realize this is contrary to what *Roth* says—obscenity is not protected because it is not speech rather than because it is dangerous. But the process by which *Roth* is enforced clearly exposes the vacuity of that proposition.

81. In the Chicago trial a critic was asked if he would agree that the book portrayed an adolescent or animal type sex. The witness said he couldn't answer the question because it seemed to him to be meaningless and was either an insult to animals or adolescents. (Chi. 201)

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structure of society." (Wis. 293) In the Florida trial another minister said that if someone continually used the words appearing in the book he would have to be "warped." (Fla. 48) He added that he would not use the book to show people the evils of perversion because if they were not properly educated it might drive them to perversion instead. (Fla. 63-64) A psychologist also appearing in the Florida trial, however, stated that the standards of candor regarding language were in a "healthy" period of transition toward liberality. (Fla. 161-162) In Chicago a critic was asked to what extent there was contemporary acceptance of literature dealing with sex and sex relations.

It seems clear that in the Twentieth Century, a great deal more freedom in these matters is allowed than in the late Nineteenth Century, and I should say that it is quite customary to teach books which—in literature courses—deal fairly straightforwardly with sexual matters. (Chi. 138)

Also in this trial a Harvard sociologist, who found the book obscene, discussed the dangerous effect obscene literature has upon the average person:

The evidence generally is that the free dissemination of this kind of writing and art, the free dissemination of such is adverse, in the fact that it becomes important in the early rupture of the control between parent and child. (Chi. 874)

We have the problem of the parent controlling his children. In a society such as ours, he has to control them past adolescence, non-age is doubled and the circulation of this type of material is . . . an important factor in disrupting the relation between parent and child before the child has completed his high schooling and his college years. (Chi. 876-7)<sup>82</sup>

A journalist testifying in the Chicago trial had classified the potential readers of the book into two groups, sophisticates and everyone else. The presiding judge asked the witness what harm the book would do to the latter group of readers.

The harm in my own mind would be a degrading of the moral fiber and the moral standards of the community and reducing it to each individual. In the same sense that a person associated with a prostitute degrades himself by this association, I feel very strongly, personally, that our moral fiber is vastly important in our survival and I am greatly concerned with the erosion which is hard

82. On redirect this same witness was asked what impact *Tropic of Cancer* would have on society as a whole.

to discern to which I think a book of this nature contributes greatly. I don't think a person who reads it goes out into the street to look for a person to rape. But, I think, accumulatively, the effect is very bad on our society. (Chi. 1,001-2)

In the Philadelphia trial, a Catholic critic stated:

It is entirely a matter of respectability. That is the chief point which should be made about a book like this. If it floats around on the edges of society it doesn't do much harm—it can't—the skidrowers are bad anyhow—but when you once make it respectable by handing it out from a free library, that means all those who are on the fence, all those who are neutral, all those who are inclined, as is all human nature, to begin to look around, and they think if this book is handed out by the free library it is all right, let me go out and do it—that is the chief argument against this kind of literature. The people who publish it, the people who distribute it, ought to be ashamed of themselves. (Phila. 258-59)<sup>83</sup>

In sum, Professor Finnis' claim that *Roth* replaced the tendency to corrupt or deprave standard with a less ambiguous, more meaningful test is not borne out by the testimony at the *Tropic of Cancer* trials. Witnesses freely stated their opinions on the socially corrupting effect of the book. *Roth* may have changed the form of the question,<sup>84</sup> but the responses continue to involve guesses about the moral effect of the book based on premises which are certainly subject to dispute in the marketplace of ideas.<sup>85</sup>

The most that can be said is that *Roth* replaced a test of tendency to corrupt individuals with a test of tendency to corrupt community stan-

In general, sir, a book like this has a very adverse effect on the public image of the United States, because it is understandable by the teenagers, and those in the various universities in which the conflict of opinion or conflict on which the challenge of allegiances to a certain system of values is an open issue. . . . (Chi. 959)

83. Also in the Philadelphia trial, a psychiatrist stated: "It would induce the young man to sexual indiscretions and delinquency, and certainly is a danger to his morals." (Phila. 197)

84. In some cases *Roth* apparently did not even succeed in changing the form of the question. In the Massachusetts trial, witnesses were asked whether the book had a substantial tendency to deprave or corrupt or incite lascivious thoughts or desires in the ordinary person in the community. Two critics, a linguist and a minister, said "no." (Mass. 87, 104, 172, 210) In the Connecticut trial a critic said *Tropic of Cancer* was not dangerous because it treated sex very morally, but a book like *Fanny Hill* is properly censored because it inflames erotic emotions and could be harmful to the morals of a person of weak or adolescent character. (Conn. 230-31). In the Philadelphia trial one psychiatrist insisted that this book would induce delinquency and immorality (Phila. 197 et seq.), while another psychiatrist claimed it would not act as a stimulus to delinquency or other anti-social conduct. (Phila. 299, 316)

85. *Compare*: "Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant [expert] evidence proffered in this case." *Smith v. California*, 361 U.S. 147, 166 (1959) (Frankfurter, J., concurring).

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dards. Although some witnesses offered their views as to the effect of the book on peculiarly susceptible individuals (adolescents),<sup>86</sup> the great majority of the statements favoring censorship of *Tropic of Cancer* reflect concern for a collective danger: a general weakening of the moral fiber of society. This is true whether the witness was questioned in terms of prurient interest or community standards.

### IV.

The *Tropic of Cancer* trials show the extent to which the road to suppression is paved with contentions and claims surrounding legitimate issues of social concern. Although these particular trials may be somewhat atypical to the extent the book is more complex than those usually considered in the category of hard-core pornography, the admission of extensive testimony condemning the ideas of the author and his creative technique makes it abundantly clear that *Roth* provides no assurance that only sexual propaganda will be suppressed.<sup>87</sup> That *Tropic of Cancer* was the object of more litigation than any other verbal work leads me to suspect that it is the more important rather than the lesser works which fall victim to vigorous prosecution. At some level of consciousness the vigor of suppression is directly proportional to the seriousness and power of a book's challenge to the norms of middle class existence. The censors "recognize," even where more literate readers do not, that books like *Tropic of Cancer* scorn basic values, demolish them by mere assertions of individual will and acts of defiance. How else can one explain the fact that such assorted novels as Dreiser's *Sister Carrie*, Lawrence's *Lady Chatterly's Lover* and Joyce's *Ulysses* were attacked by the censors, while *Peyton Place* met little legal difficulty?<sup>88</sup>

86. For example, one witness, asked to discuss the philosophical content of *Tropic of Cancer*, concluded his response by saying:

The final remark, the immorality of the book: Besides being smutty and obscene, full of sexy and suggestive words, the book is also immoral in tendency and thesis. It makes harlotry, fornication and adultery seem a normal and even desirable way of life. It is an inducement to sexual delinquency in young and old.

(Phila. 238)

87. If the Court's formula is to make any sense, it must place a heavy burden on the definition of obscenity. Obscenity must be so defined as to save any serious, complex piece of writing or art, regardless of the unconventionality of its candor. If the obscene is constitutionally subject to ban because it is worthless, it must follow that the obscene can include only that which is worthless.

Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Cr. Rev. 1, 13.

88. The censors "knew" what they were doing when they objected to Dreiser's *Sister Carrie*, although the novel contains no dirty words, no sex acts performed in view of the reader, nor even a hint of sexual attraction save for vague references to "love." But the

In the opening pages of *Tropic of Cancer* Miller literally dared the world to face his moral challenge.<sup>89</sup> Once the book was published in the United States, the guardians of all those values and customs Miller derided marshalled state obscenity laws to prove that Miller's book offered no ideas, was nothing. But the trials themselves belie this purpose, for the witnesses' concern was to evaluate Miller's vision, to show either that it was valuable and true or degenerate and false.

It is ironic that *Tropic of Cancer* received the precise response it set out to provoke. Witnesses testifying against the book did not

moral horror of the novel is that Carrie's behavior is neither questioned nor decried by the "implied author." Carrie's individual success on the stage and her financial security is set off against the society in which good men once thrived. Relatively trivial moral lapses are punished while Carrie, the amoral, the indifferent, thrives.

Sin must be treated as sin, and the machinations of the moral world—though it can tolerate infraction—must make sense. Dreiser can reasonably be read as telling his audience that the moral order cannot be *forced* to make sense by artificial measurements. In D.H. Lawrence's major novels, however, the men and women internally seethed with the passion to reject established sensibilities, sexual manners, "home," "family," and that most vicious of all barriers—personality. In *Lady Chatterly's Lover* the propagandist of flesh over spirit, body over mind, is quite apparent. *Lady Chatterly* is an act of defiance; the characters' defiance of social class, trust, shame, manners and mind. The censors rightly perceived. The danger of initiation into the deeper mysteries of "pure" sexuality is its power to drive out of consciousness all concern for social work and institutions, duties and agreements, moral injunctions and classical proprieties.

James Joyce also celebrates pure sexuality, the Earth Mother, in *Ulysses*. Molly Bloom is not a wretch, not social scum, but an early middle-aged, middle-class Irish lady who positively enjoys her adulterous affair with the producer of her theatrical performances. Her husband, Leopold Bloom, knows of her matinee life, indeed, practically the entire community knows of it, but Molly has no shame—and no hate. She is positive—about her past, about her afternoon, about the future.

From Sister Carrie to Molly Bloom the range of artistic conception and expression is enormous, but the source of the real perceived threat is the same: morality, manners and social institutions are conceived as artificial, dispensable and absurd. This is precisely why *Peyton Place* was not considered threatening, for in this novel morality and manners are of supreme significance—the only aspects of life that mattered. Whether one conformed or transgressed, the rules retained significance and meaning, they had the power to do harm where and when harm should be done. The ordinary transgressor of norms participates in the scheme of order at least to the point of accepting social designations of evil. Henry Miller does not. In his work the vocabulary of the quest does not allow for conventional moral sentiment. Social rules are nonentities which are simply there.

89. I have no money, no resources, no hopes. I am the happiest man alive. A year ago, six months ago, I thought that I was an artist. I no longer think about it. I *am*. Everything that was literature has fallen from me. There are no more books to be written, thank God. This then? This is not a book. This is libel, slander, defamation of character. This is not a book, in the ordinary sense of the word. No, this is a prolonged insult, a gob of spit in the face of Art, a kick in the pants to God, Man, Destiny, Time, Love, Beauty . . . what you will. I am going to sing for you, a little off key perhaps, but I will sing. I will sing while you croak, I will dance over your dirty corpse . . . .

H. MILLER, *TROPIC OF CANCER* 1-2 (1961). The presiding judge at the Philadelphia trial asked one witness to respond to this passage. The witness replied:

I think it is a protest against the dominating values in art, the dominating values in religion, the dominating view of America—the dominating American view of man, but destiny, I think, probably, too; but time, I don't know. About love, I would say a protest; about beauty, I would say a protest.

(Phila. 100)

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“miss the point.” Even those who were not critics sensed the challenge of the ideas implicit in the text—and the rules of *Roth* did not hinder their ideological and moral responses. For example, a political scientist stated:

Quite obviously the author's intent is to show you that this world is rotten, and not simply the world, but the people in it. Almost without exception I think the people the author presents to us are degenerates, offensive people, people with apparently—like the author, with no values, no restrictions, no laws that they feel bound to observe. (Conn. 105-9)

One district attorney asked a critic if the hero of the book interacts with the “lower trash of Paris.” The critic replied: “His [Miller's] choice of this segment of society constitutes a deliberate rejection of the world of middle-class respectability.” (Syr. 257) A clergyman said the book is “autobiographical sketches of the author's life in Paris, presumably in the thirties; unrelieved pornography, without any literary merit whatsoever; filthy, obscene and immoral.” (Phila. 228-31) A psychiatrist in the Philadelphia trial, who is very active in the censorship business, thought the “compulsively told” sexual episodes revealed “the perverse preoccupation with expository sexual functions.” (Phila. 186) One witness thought Miller did his readers a disservice by reacting to the Depression with anger and frustration because life is made of “advances and reverses” and if everyone reacted to setbacks as Miller did “we would have a very, very sick society.” (Wis. 76-77)

To counter the testimony about the “degeneracy” of Miller's vision, other witnesses testified that *Cancer* was realistic fiction.<sup>90</sup> “He gives us the genuine American bum come to lead the beautiful life in Paris; and he lays him away forever in his dope of Pernod and dreams.”<sup>91</sup> (Md. 95) “It faces life clearly. If this book is obscene then life is obscene.” (Mass. 34-35) The book presented an honest rendering of the way “underground men” actually speak (Mass. 21); it had the ring of truth, of honesty (Chi. 499-500). “This book is about indecent modes of life. It is not an indecent book.” (Mass. 248) “Literature deals with

90. In the Chicago trial the state's attorney attempted to impeach testimony of realism by showing parts of the book were historically wrong. At the beginning of *Tropic of Cancer* there is a scene in which the narrator shaves the armpits of another man because the latter has lice. The state's attorney said this was unrealistic because in the 1930's lice were removed by ointments, not by means of shaving. The line of questioning was stricken. (Chi. 198-99)

91. The sentence was written by Edmund Wilson and read to the court from one of Wilson's essays.

life as a whole, and from time to time obscene things have to be faced." (Mass. 250)

A discovery of spiritual decay and aridity flowing from the World War, the depression, with the threat of Hitler hanging over their heads, a sense of holocaust, the decline of the West, which marked the end of an age. This is the way people felt then. (Phila. 157-58)

We try to act like man is some kind of spiritual being, some kind of angel, and he is not. (Fla. 191)

*Tropic of Cancer's* presentation of reality or degeneracy had an undoubted serious purpose, a clear idea content, undoubted because almost all the witnesses referred to it in one manner or another. "I think it is designed to show up Western culture at a late stage by dealing with the most ignoble sides of it." (Mass. 252) "He is sick of American materialism . . . . He looks on civilization as a cancer gnawing away at mankind . . . . It is a squalid world he moves in, and he has the language to do it justice." (Fla. 115-17)<sup>92</sup>

Another witness stated:

Mr. Miller is saying that Western civilization has become decadent. We have done two things to man: In the first place, we split man half in two. On the other hand, part of the world has said that man is purely an animal. Part of the world, in reacting against this, has looked at man only as a soul. Unfortunately, I am afraid the church too often is looking at man only as a soul and not looking at all of man. The world, on the other hand, has become increasingly materialistic and it looks at man as only an animal, as only a material being. (Fla. 185)

Another:

It is very complex what he is trying to do. It isn't simple at all . . . . He is arguing that what he wants is never called the proper precincts of the human world. He is arguing that these precincts have been infested by an automated machine, industrialist force, which has corrupted and disabled, which is to say has dehumanized the precincts of man. He is arguing that there must be dis-

92. Another witness stated:

I think Miller sees the world as a cancer, eating people, eating into people. He calls it a cancer of time, eating people and destroying them; and he associates with time our compulsion to produce, industrially. He associates with it our sacrifice for the future; and Miller is not willing to make this sacrifice for some future prosperity.

(Wis. 366)

Nevertheless, the book is not bleak but "has a sense of the religion of life, the sacredness of life, the religion of being a human being" (Mass. 67). It is the belief that "the value of life exists in the act of living and we only live in the instant moment" (Mass. 84-85), which is contradicted by the vision of a sterile modern world.



covered a way out of this corruption. So that, I suppose, would be his argument, under the heading of social philosophy. Under the title and related heading of artistic philosophy he is arguing first of all that the art of his own time has been equally corrupted by these forces, dehumanized, conventionalized, and that his novel, of course, is a new departure, a new experiment. And similarly he is arguing that only through art and a special kind of art can man regain the kind of human wholesome state which Miller evidently believes he wants to possess. (Conn. 146)

The state's attorney asked one clergyman if Miller attacked God and religion in the book, and he replied: "Only in the sense that perhaps all of us should." (Fla. 186)<sup>93</sup> But this particular clergyman, a university chaplain, was quite alone in the graciousness with which he received *Tropic of Cancer's* ideas about religion. Other clergymen said "there is not a single favorable allusion to religion or the deity, and many irreverent ones," (Phila. 228-31), or that the book is "one of the most antisemitic pieces of literature I have read in many days, or many, many years. This book would tend to make Hitler's *Mein Kampf* seem like a plea for the validity of Jewish culture." (Phila. 267)<sup>94</sup>

Quite apart from the strictly religious problem, *Tropic of Cancer* provoked strong response from those who read it as proposing extreme social norms.<sup>95</sup>

93. When the church starts looking at how many scalps she has hung on her wall during the last year, how many people have we converted, well, what do you convert them to? When the church fritters away her time and energy on whether or not we can sell beer in a grocery store and does not look hard at the battles that her people are trying to fight in this life, then we are in trouble. I think Miller is saying this. (Fla. 186-88)

94. This statement is almost too ridiculous to refute but too dangerous to ignore. In a separate essay Miller relates the following experience which takes place in Luxembourg in the late 1930's:

In a little cafe, where an old woman sat playing the zither, we ordered some wine. It was a rather melancholy place, and we were soon bored stiff. As we were about to leave, the proprietor came over and handed us his card, saying that he hoped we would call again. While he was talking, Carl handed me the card and gave me a nudge. I read it. It said, in German, "Cafe—free-of-Jews." Had it read "Cafe—free-of-limburger," it could not have struck me as more absurd. We laughed in the man's face. Then I asked him, in French, if he understood English. He said yes. Whereupon I said: "Let me tell you this—though I'm not a Jew, I look on you as an idiot. Haven't you anything better to think of? You're sound asleep . . . You're wallowing in your own shit. Do you understand that?" He looked at us bewilderedly. Then Carl began, in a French that would have done credit to an Apache. "Listen, you fucked-out piece of cheese," he began. The man started to raise his voice. "Pipe down," said Carl threateningly, and he made a move as if to throttle the old fool. "I'll say just two words to you: you're an old cunt. You stink!" With that he was seized with one of his apoplectic fits of laughter. I think the man had the impression that we were mad. We backed out slowly, laughing hysterically and making grimaces at him. The idiot was so slowwitted, so perplexed, that all he could do was collapse on a chair and mop his brow.

H. MILLER, *QUIET DAYS IN CLICHY 75-76* (Grove Press paper ed., 1965).

95. One critic had testified that the book was a protest, a vociferous rejection of con-

This is not a novel of political protest; it is a novel of social protest, and not merely social protest, it seems to me—and this is what makes the book, I think, so offensive and truly obscene, is that it is a protest against human kind. It is a kind of nihilism, a belief in nothing, a reduction of all values. (Conn. 105)

The nihilism is quite clearly related to the sexuality of *Tropic of Cancer*. The characters express little moral consciousness regarding sex and almost no guilt in the conventional sense. Sex is easy to come by and is never “meaningful.” The book, then,

gives a distorted, warped concept of the relationship between man and woman, and nothing is more undermining to the social structure and to the concept of the family, and to the basic decent things we believe America stands for . . . (Phila. 268)

The connection between meaningless sexuality and the corruption of contemporary society and culture was clear to at least one witness. Societies plunder individuals much in the way a whore is exploited by her clientele.

[On page 224 of the paper edition]<sup>96</sup> there is a description of the world on the basis of the private part of a woman, and after that—that is rather interesting because it occurs only in that he sees the private part of a prostitute and then goes on for 3 or 4 pages, none of it obscene in the sense of language but certainly obscene in the sense of symbolism he is trying to derive from this, and then the book tapers off with little or nothing of any real significance. (Conn. 69-72)

A clear picture of the degree to which witnesses offered and trial courts accepted their opinions on the “truth” of Miller’s ideas is presented in discussion of the hero’s relationship with prostitutes. Counsel asked one witness if Miller was setting up one of the prostitutes as a standard for womanhood in general.<sup>97</sup> He stated:

ventional norms and the expression of a dissenting view. The state’s attorney then asked him whether he felt “dissent from these values has a realistic social value for our society?” (Phila. 76). When the witness responded affirmatively and detailed Miller’s criticism of the conception of working for a living as an end in itself rather than a means to some other end, the witness was asked: “Your conclusion is that there is social value from elevating sexual behavior as opposed to making a living by going to work?” Answer:

No. I would change the word living, certainly, which gives a false impression there. I would say it isn’t a matter of either/or. I should think ideally what we want in this country is a full life, which would include making a living, but would include many other things, too, which would have no connection with the pursuit of assets; the cultivation of spirit, and things like that. (Phila. 79)

96. H. MILLER, *TROPIC OF CANCER* 224-27 (1961).

97. This passage describes the whore Germaine. *Id.* at 41-43.

That's not what I said. He thinks of her as a natural woman. In other words, she's not imprisoned by her prostitution. She is, in other words, free, even though she's reduced to the unfortunate activities of a prostitute. And Miller, I think, admires the woman. Not the thing, not the prostitute, but the woman, is what he's trying to say is natural. (Wis. 420)

Other witnesses totally rejected Miller's norms and denounced his treatment of prostitutes because of its stark deviation from conventional mores. Miller's views emerge as "false":

Another literary passage is a glorification of harlots, page 143<sup>98</sup> [paper edition], which is, in fact, false and immoral in that it glorifies a sinful career, a type you do not want your daughter and wives to engage in. (Phila. 234)

I say, that anything that militates for the disrepute, the disregard for every female is deleterious, is harmful to our society. (Wis. 106-07)

Is it possible that a work which is nothing, which involves no serious ideas, could have provoked such specific discussions of issues? If so many reasonably intelligent individuals found so much to say about a piece of writing, is it not absurd to conclude the work itself has no importance?

The discussion generated by *Tropic of Cancer* involved issues of moral and aesthetic significance. Neither the censor nor the liberal can dismiss the *Tropic of Cancer* cases as being atypical and therefore irrelevant to the main issue of free artistic expression. The book is atypical only in that it is more complex and "contains" more ideas than most, but it also attracted more legal harassment than most. How is that to be explained in view of *Roth*? These trials make it very difficult for liberals to say that suppression of the "hard-core" is tolerable—apparently the censors regarded *Tropic of Cancer* as more offensive than the hardest of the core. On the other hand, in the face of these trials, the censors cannot maintain that they are only after smut and not ideas.<sup>99</sup>

98. This passage describes the whore Lucienne. *Id.* at 143-44.

99. Given their frame of reference, the censors were quite correct in regarding *Tropic of Cancer* as a dangerous book. The control of sexuality is essential to the maintenance of a producers' society. Insofar as the book 'speaks to' body consciousness it is the forerunner of short skirts, nudity in the commercial cinema, topless dancers and waitresses, and unlimited intervisitation privileges in college dormitories. If the issue is respectability, then the censors were even more perceptive in regarding *Tropic of Cancer* as dangerous. "Hard-core" pornographic photographs and stories tend to be boring and unimportant; they allow little displacement to meaning and only marginal intellectual extrapolation. *Tropic of Cancer*, on the contrary, allows for substantial intellectual dis-

And even if liberals and censors could agree that a particular work is pornographic, on what theory does that agreement justify legal suppression—the foreclosure of future discussion and artistic pursuits?<sup>100</sup>

cussion (as is apparent in the trials) and in some sense provides an alternative vision of existence for those whose minds are either open or groping for such an alternative. Miller was, therefore, quite correct when he thought his book would appeal particularly to young people. "It is a book which appeals especially to young people and which from all that I gather directly and indirectly, not only does not ruin their lives but increases their morale." *Obscenity and the Law of Reflection*, in REMEMBER TO REMEMBER 279 (1947).

Carle Clark Zimmerman, a professor of sociology at Harvard since 1932 (Chi. 798), took issue with this statement when he testified at the Chicago trial. In his testimony Miller's statement is misquoted in a very interesting way.

It is a book which appeals especially to young people and which, from all that I gather directly and indirectly, *not only does not ruin their lives but increases their morality*. Now, that particular statement is two propositions: One that it appeals directly, especially to young people; and secondly, it has no influence on their lives. Now, my reaction is that I would accept the first proposition, and I would deny the validity of the second proposition.

(Chi. 916-17, emphasis added.)

100. See note 32 *supra*.

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