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LITERATURE, THE LAW OF OBSCENITY, AND THE CONSTITUTION

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Early in 1946 when Doubleday & Company, Inc., an old and very large and reputable publishing house,¹ published Edmund Wilson's *Memoirs of Hecate County*, book reviewers and critics had a field day; for Edmund Wilson was then as now the nation's most distinguished literary critic, and this was his first book of fiction since *I Was a Daisy*, published in 1929.² To Virgilia Peterson in *Commonweal* the *Memoirs* was "a pathological joke," "a string of satiric stories which, in their aimlessly offensive vulgarity (aimless, unless the aim was in fact to offend) defy description."³ Others went to the opposite extreme: Ralph Bates in the *New York Times* called it "a good, a distinguished book,"⁴ and *Time* magazine said that "it was the first event of the year which can be described as 'literary,'" and that it was "pretty certainly the best contemporary chronicle, so far, of its place and period."⁵ Most reviewers,

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The authors have under way a more extensive study of obscenity censorship of literature, which will be published by the University of Minnesota Press.

1. The Doubleday firm was incorporated in 1897. By 1946 it was publishing more than 300 separate titles and between 24,000,000 and 36,000,000 books per year. See Transcript of Record, pp. 17-18, *Doubleday & Co. v. New York*, 335 U. S. 848 (1948).

2. "When the man who is the sharpest and most readable literary critic of our time produces a long work of fiction he is laying himself wide open to attack. He who has assaulted so many fly-blown reputations and flattened so many writers who were hailed as budding geniuses may expect to find himself in the direful position of the armed knight of old who was pushed off his horse and lay helpless on his back where the common soldier might have a go at him." Smith, Book Review, 29 *Saturday Review of Literature* 22 (Mar. 23, 1946).

3. 43 *Commonweal* 660 (Apr. 12, 1946).

4. *N. Y. Times Book Review*, Mar. 31, 1946, pp. 7, 16.

5. 17 *Time* 102 (Mar. 25, 1946). At least two other reviewers also gave the *Memoirs* extravagant praise. They were Dola De Jong, 6 *Knickerbocker Weekly* 23 (July 22, 1946) and John Richmond, 5 *Tomorrow* 72 (June, 1946).

however, simply took advantage of the opportunity to discuss the book from a literary viewpoint.⁶

The *Memoirs* is made up of six related stories about the lives of upper-crust residents of a suburban community not far from New York City. The longest of these, and the story that provoked the greatest controversy because of its detailed description of sexual intercourse,⁷ is *The Princess With the Golden Hair*. One reviewer described the story as "adulterous dabbling . . . revealing the intimacies of these experiences with unpardonable pleasure."⁸ Most of the other reviewers also noticed the sexual episode but found nothing pleasurable in it, from either the reader's⁹ or the author's viewpoint.¹⁰ For they had discovered that *The Princess* and the other stories of the *Memoirs* were rigidly moralistic studies of evil,¹¹ one was even tempted to "accuse him [the author] of the

6. See Match, N. Y. Herald Tribune Weekly Book Review, Mar. 10, 1946, p. 3; Smith, 29 Saturday Review of Literature 22 (Mar. 23, 1946); Cowley, 114 New Republic 418 (Mar. 25, 1946); Kazin, 13 Partisan Review 375 (1946); Trott, 26 Canadian Forum 163 (Oct., 1946); Chamberlain, 192 Harpers Magazine (June, 1946); and Trilling, 162 Nation 379 (Mar. 30, 1946).

Charles Poore of the New York Times, Mar. 7, 1946, p. 23, col. 3, was Wilson's most caustic critic: "The clarity and force of Mr. Wilson's criticism seem to vaporize when he starts to tell a story; . . . It is hard to understand why Mr. Wilson the critic allows Mr. Wilson the story-teller to clutter up his tales with so much irrelevant or disparate material; . . . It is when he starts collaborating with Proust, Joyce, Freud, Marx, Henry James, Scott Fitzgerald and the historians of the Greek and Roman mythologies, all at the same time, that we want to ask Edmund Wilson the critic to step in and straighten out Edmund Wilson the story-teller."

7. P. 190.

8. Peterson, 43 Commonweal 660 (Apr. 12, 1946).

9. "The descriptions of love are so zoological, the narrator is so intent on making a safari through the bedroom with gun and microscope, that we find he is preserving only the stuffed and mounted hides of his love affairs; what has disappeared is simply their passion, the breath of their life. And the reader feels like those children in a very progressive school who went to their teacher with a question. 'We know all about how babies come to be born,' they said, 'but what we can't understand is why people like to do it.'" Cowley, 114 New Republic 418 (Mar. 25, 1946). See also Kazin, 13 Partisan Review 375 (Summer, 1946); Trilling, 162 Nation 379 (Mar. 30, 1946); 27 Newsweek 96 (Mar. 11, 1946).

10. "The intent is serious, even in the sections that might seem to be sheer pornography, and at moments Mr. Wilson achieves passages of real insight. But there is a blindness in the book that robs it of any ultimate effectiveness; and for a man who spends so much time cultivating the sensuous aspects of life Mr. Wilson exhibits an astounding lack of joy . . . [T]he Casanova in Wilson seems always ready to ask permission of a psychiatrist to enjoy himself. He is the Puritan *malgré lui*." Chamberlain, 192 Harpers Magazine (June, 1946). See also Poore, New York Times, Mar. 7, 1946, p. 23, col. 3; Trott, 26 Canadian Forum 163 (Oct., 1946); Richmond, 5 Tomorrow 72 (June, 1946); De Jong, 6 Knickerbocker Weekly 23 (July 22, 1946); Smith, 29 Saturday Review of Literature 22 (Mar. 23, 1946); 17 Time 102 (Mar. 25, 1946); 2 U. S. Quarterly Book List 183 (Sept., 1946).

11. "Critic Wilson's purpose is to develop a subtle and ambitious theme of Evil in our times." 17 Time 102 (Mar. 25, 1946). "Morally it (Hecate County) is the scene of a conflict between good and evil, in which evil

very Manichean heresy—the belief that ‘the devil is contending on equal terms with God and that the fate of the world is in doubt’—which he himself protests in one of the stories.”¹²

Despite the author’s moral purpose and the intelligent readers’ understanding of it, the sexual episode in *The Princess* did create the risk, as Harrison Smith in the *Saturday Review of Literature* put it, that

“a great deal of what is fine and accurate writing and observation in ‘Memoirs of Hecate County’ may be swept away in the mind of future readers by the notoriety that these scenes will evoke. We have managed to keep at bay the literary censors and the keyhole peepers who insist that books shall not be printed that their little Lucy should not read. It would be unfortunate and ironic if our foremost literary critic should rouse those dogs to bay at literature again.”¹³

Mr. Smith’s guess proved to be right; for that old dog, the New York Society for the Suppression of Vice (since renamed the New York Society for the Improvement of Morals), soon began to bay again.¹⁴

Within a few months, *Memoirs of Hecate County* was under attack for obscenity on three fronts. A jury conviction in Los Angeles and a hung jury in San Francisco were minor skirmishes.¹⁵ The major battle had to be fought at the seat of publication in New York, where Doubleday itself was charged with publishing and selling an obscene book. Here the issue of constitutional protection for those charged with publishing or selling obscene literature was squarely raised in such a way as to reach the Supreme Court of the United States for the first time. The Supreme Court divided equally with no opinions¹⁶—a fitting culmination for this

is stronger and more personalized—one of the characters is or appears to be Satan himself—and wins minor victories one after another, but never achieves a complete triumph.” Cowley, 114 *New Republic* 418 (Mar. 25, 1946). For others who made the same point, see: Poore, *New York Times*, Mar. 7, 1946, p. 23, col. 3; Smith, 29 *Saturday Review of Literature* 22 (Mar. 23, 1946); Kazin, 13 *Partisan Review* 375 (Summer, 1946); Chamberlain, 192 *Harpers Magazine* (June, 1946); Trott, 26 *Canadian Forum* 163 (Oct., 1946). See also Transcript of Record, pp. 29-31, 38, *Doubleday & Co. v. New York*, 335 U. S. 848 (1948).

12. Trilling, 162 *Nation* 379, 380 (Mar. 30, 1946).

13. 29 *Saturday Review of Literature* 22 (Mar. 23, 1946).

14. 150 *Publ. Wk.* 287 (1946).

15. See 150 *Publ. Wk.* 1603, 1983 (1946). In Los Angeles no expert witnesses were permitted; in San Francisco, where expert witnesses testified regarding the literary merit of the book, 8 of the jurymen were reported to have held out for acquittal. The Los Angeles conviction was later upset upon appeal. *People v. Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947).

As the attacks got under way, the initial printing of 70,000 was sold out, and no new printing was planned. 150 *Publ. Wk.* 1506 (1946).

16. *Doubleday & Co. v. New York*, 335 U. S. 848 (1948). Mr. Justice Frankfurter did not participate.

strange litigation in which Doubleday was convicted, and the conviction affirmed by three courts, without a single opinion except the lone unpublished dissent of one of the trial judges.¹⁷ Despite this judicial silence, it is significant that four of the Supreme Court justices must have voted for constitutional protection for the outspoken treatment of sexual intercourse found in the *Memoirs*.

In the trial before three judges in the Court of Special Sessions of The City of New York, the entire case for the prosecution consisted of a stipulation that Doubleday had published and sold *Memoirs of Hecate County* and the introduction of an unmarked copy of the book. One of the justices would have preferred a marked copy indicating the objectionable passages,¹⁸ but his interest was probably satisfied when the prosecution singled out and read into the record two sexual passages¹⁹ during the cross examination of Professor Lionell Trilling of Columbia University, a distinguished author and literary critic.

Professor Trilling testified for the defense that the author, Edmund Wilson, is the best known American literary critic in this country,²⁰ and that *Memoirs of Hecate County* is largely a satirical work, which "makes a rather stern and severe judgment of what is happening in our modern culture," with "the intention of inducing in the reader a sense of disgust with all he is likely to find around him in life."²¹ On cross examination, counsel for the State read to Professor Trilling two passages apparently considered the most objectionable—each a description of sexual intercourse written in the first person. Professor Trilling pointed out how these descriptions, including "a rather precise and literal account of a woman's sexual parts in the sexual act," fulfilled the author's aim in a story about sexuality, in which he sought to contrast the vulgar and outspoken with "tender and charming gallantry."²² Professor Trilling's conclusion was that there is a close relationship between these passages and the theme of the book which is "very moral" in its emphasis upon the defeat of what is good and the corruption of what is pure.²³

In its motion to dismiss, the defense raised the constitutional issue of liberty of the press under the New York Constitution, and

17. Transcript of Record, p. 47, *Doubleday & Co. v. New York*, 335 U. S. 848 (1948).

18. *Id.* at 11-14. All of the justices recognized, however, that the book must be judged as a whole.

19. *Id.* at 34-35.

20. *Id.* at 27.

21. *Id.* at 29-30.

22. *Id.* at 35-36.

23. *Id.* at 38.

the 14th Amendment of the United States Constitution.²⁴ One month later a majority of the trial court found Doubleday guilty on both charges, but wrote no opinion and gave no reasons.²⁵ In a short dissenting opinion finding the book not obscene, Justice Perlman stressed the author's honest concern with "the complex influences of sex and of class consciousness on man's relentless search for happiness."²⁶ He pointed out that this is a problem of deep concern to the mature reading public, who ought not to be deprived of the writer's insight because of the possible harmful effects upon the young and immature. He did not consider the constitutional issues.

The conviction of Doubleday was affirmed without opinion, first in the Appellate Division of the Supreme Court of New York,²⁷ and then in the Court of Appeals where Doubleday had contended that the conviction violated the right to "freedom of speech" guaranteed by the due process clause of the 14th Amendment.²⁸ Evidently the Court of Appeals considered the constitutional issue too trivial for comment—a viewpoint apparently shared by counsel for the state, who chose to minimize the issue by limiting his brief on the constitutional point in the United States Supreme Court to six sentences contending that a conviction for obscenity raises no constitutional problem.²⁹ In contrast, the Supreme Court not only considered this freedom of expression issue substantial,³⁰ but divided equally in affirming the conviction when the sole issue before it was freedom of expression under the 14th Amendment.³¹

24. *Id.* at 14.

25. *Id.* at 42. In commenting on this conviction, Time magazine stated that *Memoirs of Hecate County*

"... was what the non-literary citizen would call a raw book and decidedly not for high school youngsters. One of its 6 short stories had 20 more or less detailed descriptions of sexual intercourse. But *Memoirs* was no flippant bedroom farce. Fat, fiftyish Author Wilson, book critic for the *New Yorker* had written it as a critique of modern manners and morals. . . . The decision made thousands of citizens more impatient than ever to get their morals ruined. It also proved again that finding a yardstick for proving a serious work indecent is as difficult as weighing a pound of waltzing mice." 48 *Time* 23-25 (Dec. 9, 1946).

26. Transcript of Record, p. 48.

27. *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N. Y. S. 2d 736 (1st Dep't 1947).

28. 297 N. Y. 687, 77 N. E. 2d 6 (1947).

29. Brief for Appellees, pp. 8, 11. The State's oral argument was even briefer—three short sentences. See 17 U. S. L. Week 3119 (1948).

30. In response to the State's motion to dismiss or affirm on the ground that the appeal presented no substantial federal question, the Supreme Court noted probable jurisdiction. *Doubleday v. New York*, 68 Sup. Ct. 732 (1948); see Appellee's Motion to Dismiss or Affirm, *Doubleday v. New York*, 335 U. S. 848 (1948).

31. It may be noted that in the trial court the motion to dismiss spoke in terms of "freedom of the press" while the formal order in the Court of Appeals used the term "freedom of speech." Technically, censorship of literature relates directly to freedom of the press, but no issues in this article

In presenting this constitutional issue, counsel for Doubleday did not scatter their shots. Their brief relied exclusively on the First Amendment, as read into the 14th. It centered on the single contention that works of literature, both fiction and nonfiction, dealing with sex problems are entitled to the same constitutional protection as any other literature, and can only be suppressed when their publication creates a "clear and present danger" to some substantial interest of the state. *Memoirs of Hecate County*, it urged, gave rise to no danger, either clear or present, that it would subvert order or morality.³² Similarly, the amicus brief of the American Civil Liberties Union relied exclusively on the First Amendment argument, urging the clear and present danger test as the appropriate criterion.³³ While some point was made of the lack of definiteness in the state obscenity statute and its interpretations, this argument was directed to the necessity for an ascertainable standard of conduct through use of the First Amendment clear and present danger test.³⁴ Neither brief made any claim of invalidity based on the 14th Amendment due process requirement of definiteness in a criminal statute.³⁵

The oral arguments in the Supreme Court, insofar as reported,³⁶ were also concerned exclusively with the freedom of expression issue and the applicability of the clear and present danger test to literature attacked as obscene. Various members of the Court expressed interest in and raised questions about this issue. Mr. Justice Rutledge volunteered:

"It is up to the State to demonstrate that there was a danger, and until they demonstrate that, plus the clarity and imminence of the danger, the constitutional prohibition would seem to apply."³⁷

On the other hand, Mr. Justice Jackson suggested that if the Court decided "constitutional issues on the merits of literary works" in obscenity cases it "would become the High Court of Obscenity."³⁸

Since the sole issue presented to the Court was freedom of expression in literature attacked as obscene, and the members of the

turn on a distinction between freedom of the press and freedom of speech. In general, we use the broader term encompassing both—*freedom of expression*. Cf. 1 Chafee, *Government and Mass Communication* 34-35 (1947); Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1, 2 n. 1 (1951).

32. Brief for Appellant, pp. 13-37.

33. Brief for American Civil Liberties Union as *Amicus Curiae*, pp. 5-15.

34. Brief for Appellant, pp. 37-52; Brief for American Civil Liberties as *Amicus Curiae*, pp. 16-40.

35. Cf. *Winters v. New York*, 333 U. S. 507 (1948); see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

36. See 17 U. S. L. Week 3117-3119 (1948).

37. *Id.* at 3118.

38. *Id.* at 3119.

Court themselves showed much interest in this issue at the oral argument, there can be little doubt that the equally divided vote in the *Doubleday* case reflects a Court closely divided on this constitutional issue. This four to four vote in 1949 indicates that the issue is still an open one. Mr. Justice Frankfurter did not participate in the decision, and three of those who did participate have been replaced.³⁹ Even assuming that two of these, Justices Rutledge and Murphy, probably voted for reversal of the *Doubleday* conviction, the present Court may still be very closely divided. It cannot be assumed that the four justices who voted for affirmance, if still on the Court, would refuse constitutional protection to all literary treatment of sexual issues when attacked as obscene. It must be remembered that *Memoirs of Hecate County*, despite its literary merit, contained one extremely frank passage that may have shocked one or more justices into voting for affirmance when they might have been inclined to give First Amendment protection to literature treating sex problems with a little more restraint.

At the very least the *Doubleday* case demonstrates that constitutional protection for literature attacked as obscene is an open and live issue today, despite the scattered dicta in a number of Supreme Court opinions suggesting that obscenity is not entitled to constitutional protection.⁴⁰ Certainly, after the *Doubleday* case these dicta impose no serious barrier to raising the constitutional issue in an appropriate case. This Article is written in the belief that it is essential for this issue to be raised and carried to the Supreme Court in a strong case in order to establish that literature dealing with sex is entitled to the same freedom of expression as literature dealing with any other significant social problem. Supreme Court recognition that such literature is entitled to the constitutional protection given freedom of expression generally, and is entitled to be tested by the same constitutional standards,⁴¹ would provide a powerful means for inducing local authorities to pay less attention to pressure groups and to adopt a rational and realistic approach in appraising charges of obscenity in literature. Such a ruling would go far toward bringing about a quick restoration of sanity when periodic orgies of censorship break out, as in the most recent widespread outbreak of censorship aimed at paper-bound books.

39. Chief Justice Vinson, and Justices Rutledge and Murphy. It seems likely that Chief Justice Vinson was among the four who voted to uphold the *Doubleday* conviction, judging from his attitude toward obscenity problems reflected in his dissent as a Court of Appeals judge, protesting a decision holding "Nudism in Modern Life" (by a well qualified writer on sociology) not obscene under the Tariff Act. See *Parmalee v. United States*, 113 F. 2d 729, 738 (D.C. Cir. 1940).

40. These dicta are considered in the text to notes 377-401 *infra*.

41. See text at note 402 ff. *infra*.

I. CENSORSHIP TODAY

A. FORCES AND METHODS

There are many reasons for the current nation-wide efforts to censor paper-bound books. The volume of their sales, the manner of their distribution, their modest price and ready accessibility to the public, the provocative nature of some of their jackets and blurbs, and the existence of a national organization that had already sharpened its teeth on comic books and magazines—all these contributed to the outbreak of censorship aimed at literature in this form.

Though paper-bound books are not new in the United States,⁴² their sale in the present format began in 1939, when Pocket Books published 34 titles which sold 1,508,000 copies from June through December of that year.⁴³ Other publishers soon entered the field, until at one time there were more than 30 companies engaged in the publication of inexpensive paper-bound books.⁴⁴ Now there are only ten major publishers still in business,⁴⁵ but their sales and the number of published titles have soared. In 1953 alone between 250 and 300 million copies⁴⁶ of some 1,200 titles⁴⁷ were sold.

This torrent of books is distributed through magazine wholesalers to some 100,000 retail outlets, where they are placed upon display racks for public sale.⁴⁸ Most of the titles sell at retail for a quarter, though a few may run as high as 75 cents.⁴⁹ Paper-bound books are thus placed within easy reach—both physical and financial—of the public at large.

Books marketed in this way have to be sold promptly. The retailer—usually a newsstand or a drugstore—has little space for their display,⁵⁰ and his margin of profit is necessarily low;⁵¹ he can't afford to carry a large stock, and what stock he does carry he wants to turn over rapidly.⁵² But to be sold promptly the books displayed must catch the eye and interest of what is sometimes called the

42. Lewis, *Paper-Bound Books in America* 2-6 (1952).

43. *Id.* at 7.

44. *Ibid.*

45. 48 *Fortune* 123, 144 (Sept., 1953); *cf.* H. R. Rep. No. 2510, 82d Cong. 2d Sess. 18-19 (1952).

46. Waller, *Paper-Bound Books and Censorship*, 47 *A. L. A. Bull.* 474 (Nov., 1953); 48 *Fortune* 123 (Sept., 1953).

47. 48 *Fortune* 123, 125 (Sept., 1953).

48. Lewis, *op. cit. supra* note 42, at 9-13; Waller, *op. cit. supra* note 46; H. R. Rep. 2510, *supra* note 45, at 19-21.

49. Waller, *op. cit. supra* note 46.

50. 48 *Fortune* 123, 148 (Sept., 1953); Lewis, *op. cit. supra* note 42, at 11.

51. 48 *Fortune* 123, 148 (Sept., 1953). The estimate here is 5½¢ a book.

52. Lewis, *op. cit. supra* note 42, at 11-12; 48 *Fortune* 123, 147-148 (Sept., 1953).

"impulse buyer"⁵³ and must do so not only in competition with each other but also in competition with magazine covers.⁵⁴ For these reasons, publishers often employ provocative jackets and blurbs to attract the attention of prospective buyers and readers.⁵⁵ Once in a while even the title of a book is changed to make it more attractive to the general public.⁵⁶

As the sales of paper-bound books mounted, so too did the attention of the sensitive and censorious.⁵⁷ Many were offended by the jackets and blurbs,⁵⁸ and many were doubtless shocked to discover what had been going on between the covers of books all these years. For between 80 and 90 per cent of the paper-bound books are reprints of books previously published in hard covers,⁵⁹ which during their sale in that format encountered little opposition.⁶⁰ Apparently those who were disturbed by paper-bound books either didn't know or care very much about the books that were bought by those intellectuals who could afford it from the book clubs and the relatively few general bookstores that are so lightly scattered across the country.⁶¹ But they did know and care about books that were so readily accessible to the public at large, because of their

53. Waller, *op. cit. supra* note 46; 48 *Fortune* 123, 124 (Sept., 1953).

54. Lewis, *op. cit. supra* note 42, at 15.

55. Lewis, *op. cit. supra* note 42, at 15-16; Waller, *op. cit. supra* note 46, at 474-475; 48 *Fortune* 123, 124-125 (Sept., 1953); Dempsey, *The Revolution in Books*, 191 *Atlantic Monthly* 75 (Jan., 1953); 56 *Commonweal* 286 (June 27, 1952).

56. 48 *Fortune* 123, 124 (Sept., 1953).

57. Cf. Bok, *Censorship and the Arts*, in *Civil Liberties Under Attack* 117-120. (1951).

58. Lewis, *op. cit. supra* note 42, at 15; Dempsey, *supra* note 55. *Commonweal*, referring to the jackets on Koestler's *Darkness at Noon* and Orwell's *1985*, commented: "These are books in which the erotic element is either practically non-existent or so submerged in a much greater context that it has justification and meaning. But they are among hundreds of other serious literary works prostituted to the lowest kind of commercial exploitation by publishers over-anxious to sell their wares at any price." 56 *Commonweal* 286 (1952).

59. Waller, *op. cit. supra* note 46; 48 *Fortune* 123, 125 (Sept., 1953).

60. Only a few of the hard-cover books since reprinted in paper-back format ran into censorship trouble. Some were old-timers like Boccaccio's *Decameron* and Apuleius' *Golden Ass*, which were excluded by the customs before 1930. Ernst & Lindey, *The Censor Marches On* 14-16 (1940). Others included such books as Smith's *Strange Fruit* and Caldwell's *God's Little Acre*, both of which were held to be obscene in Massachusetts. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N. E. 2d 819 (1950). But in both New York and Pennsylvania, *God's Little Acre* was cleared of obscenity charges. *People v. Viking Press*, 147 Misc. 813, 264 N. Y. Supp. 534 (1933); *Commonwealth v. Gordon*, 66 D. & C. 101, *aff'd sub nom.* *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950).

61. One estimate is that as late as 1937 there were only 500 good bookstores in the United States and possibly 500 department stores that sold books. Ernst, *The First Freedom* 123 (1946). The estimate seems reasonably accurate, for an advertisement for the February, 1953, Bowker Mailing Lists shows only 908 selected general bookstores, including major department stores.

fear that the widespread reading of current literature would lower the moral standards of the nation.⁶² Some even found in the paper-bound book industry a communist plot so to deprave the public that the communists would find it easy to take over.⁶³

Meanwhile, the National Organization for Decent Literature had been busying itself with magazines and comic books, seeking to suppress those it believed to be objectionable; and as the sale of paper-bound books increased, these too were brought within the scope of the organization's activities.⁶⁴ These activities include: 1) the arousal of public opinion against "objectionable" magazines, comics, and paper-bound books;⁶⁵ 2) more rigorous enforcement of existing laws governing obscene literature;⁶⁶ 3) promotion of new and more strict legislation to suppress such literature;⁶⁷ 4) preparation of monthly lists of magazines, comics, and paper-bound books disapproved by the organization;⁶⁸ and 5) visitation of newsstands

62. H. R. Rep. No. 2510, *supra* note 45, at 116; Investigation of Literature Allegedly Containing Objectionable Material, *Hearings before House Select Committee on Current Pornographic Materials on H. R. 596 and 597*, 82d Cong., 2d Sess. 76-77, 340, 341 (1952); *cf.* Drive for Decency in Print, Report of the Bishops' Committee Sponsoring the National Organization for Decent Literature 7-8 (1939); Noll, *Manual of the N. O. D. L.* 17 (n.d.).

63. 23 *The Wanderer* 4 (Nov. 26, 1953); Falque, *What is Common Decency*, 29 *St. Cloud Register* 1, 3 (1953); *Hearings, supra* note 62, at 317; *cf.* Drive for Decency in Print, *op. cit. supra* note 62, at 192; Noll, *op. cit. supra* note 62, at 50, 161-162, 165-168.

64. The National Organization for Decent Literature was formed in 1938 by an Episcopal Committee appointed by the Roman Catholic Hierarchy "to devise a plan for organizing a systematic campaign in all dioceses of the United States against the publication and sale of lewd magazine and brochure literature." Drive for Decency in Print, *op. cit. supra* note 62, at 5. Information about its activities is also available in Noll, *op. cit. supra* note 62; NODL Code and Its Interpretation (n.d.) and in the testimony of Rev. Thomas J. Fitzgerald, executive director of the Chicago Archdiocesan Council of Catholic Women, before the Gathings Committee. *Hearings, supra* note 62, at 75. For a detailed critical analysis of the origin and operations of the NODL, see Volkart, *Censorship of the Press in the United States 437-494* (unpublished thesis in Yale Law School Library, 1947).

65. *E.g.*, 29 *St. Cloud Register* 1 (Mar. 13, 1953). See also Drive for Decency in Print, *op. cit. supra* note 62, at 15, 23-24, 39, 131-156; *Hearings, supra* note 62, at 77.

66. Drive for Decency in Print, *op. cit. supra* note 62, at 14, 20, 186-187; Noll, *op. cit. supra* note 62, at 100-112, 211.

67. Drive for Decency in Print, *op. cit. supra* note 62, at 19, 43, 177-185; Noll, *op. cit. supra* note 62, at 57-97; NODL Code and Its Interpretation 17-19 (n.d.); *Hearings, supra* note 62, at 77-78.

68. The lists are prepared monthly by the Chicago Archdiocesan Council of Catholic Women and are printed and distributed by Our Sunday Visitor Press, Huntington, Indiana. Sometimes local organizations reprint the lists for local distribution as in St. Paul, Minnesota, by the Organization for Decent Literature and in Detroit, Michigan, jointly by the Detroit Archdiocesan Council of Catholic Women, Detroit Council of Church Women, and Detroit Council of Churches.

Two codes or sets of standards are used in preparing the lists; one applies to comic books, the other to magazines and paper-bound books, NODL Code and Its Interpretation 3, 6-7 (n.d.), though the distinction between the two isn't always maintained. *Hearings, supra* note 62, at 76. There is some devia-

and drug stores to secure the removal of blacklisted literature.⁶⁹ Because of its extensive local organization in Roman Catholic dioceses,⁷⁰ the NODL soon became a powerful and effective instrument for the accomplishment of its goal.⁷¹

As a result of all of these circumstances and the activities of the NODL, civic and religious groups from one end of the country to the other organized to combat literature that offended their sensibilities; they held meetings, passed resolutions, and started campaigns to eliminate such literature from newsstands in their

tion in the wording of the code originally applicable to magazines and later to both magazines and paper-bound books. The original draft set up the following standards "by which in the opinion of the Committee publications may be judged objectionable:

- (a) Those which glorify crime and the criminal;
- (b) Those whose contents are largely 'sexy';
- (c) Those whose illustrations and pictures border on the indecent;
- (d) Those which make a habit of carrying articles on 'illicit love';
- (e) Those which carry disreputable advertising."

Drive for Decency in Print, *op. cit. supra* note 62, at 13.

Standard (a) was later changed to "glorify or condone reprehensible characters or reprehensible acts," NODL Code and Its Interpretation 3 (n.d.); the local Detroit list for April-May, 1953, however, used only the words "featuring crime." Standard (b) was changed to "predominantly 'sexy,'" Noll, *op. cit. supra* note 62, at 42, and later to "contain material offensively 'sexy,'" NODL Code and Its Interpretation 3 (n.d.); on the local Detroit list it was rephrased to read "objectionable and offensive presentation of sex facts." Standard (c) became "carries illustrations indecent or suggestive," Noll, *op. cit. supra* note 62, at 42; NODL Code and Its Interpretation 3 (n.d.), though the local Detroit list recast the phrase and substituted "and" for "or" so as to read "indecent and suggestive illustrations." Standard (d) was changed to "feature illicit love," Noll, *op. cit. supra* note 62, at 42; NODL Code and Its Interpretation 3 (n.d.); the local Detroit list substituted "portrayal of illicit love." Standard (e) became "advertise wares for the prurient-minded," NODL Code and Its Interpretation 3 (n.d.), and in Detroit, "vulgar and lewd advertising." Detroit added a new standard of its own: "blasphemous, profane, and obscene speech."

Rev. Thomas J. Fitzgerald, executive director of the Chicago Archdiocesan Council of Catholic Women, is "in charge of reviewing publications, judging as to their conformity to the National Organization for Decent Literature code." *Hearings, supra* note 62, at 76.

69. Drive for Decency in Print, *op. cit. supra* note 62, at 15-17, 20-21, 23, 25-26; Noll, *op. cit. supra* note 62, at 211-213; NODL Code and Its Interpretation 21-22 (n.d.); *Hearings, supra* note 62, at 83-84.

70. The organization plan is outlined in Drive for Decency in Print, *op. cit. supra* note 62, at 10-17, and in NODL Code and Its Interpretation 21-23 (n.d.).

71. Within less than a year after its organization, when about half the Roman Catholic dioceses of the country had been covered by organized campaigns, the magazine publishers "one by one, began to ask for interviews with the National Committee and offered to agree to almost anything which might lead to the elimination of their particular periodicals from the N.O.D.L. black list." Drive for Decency in Print, *op. cit. supra* note 62, at 24. And "as the campaign extended from one diocese to another until it covered nearly the entire United States, it became increasingly easier to secure cooperation of fully nine-tenths of all sellers of magazine literature in every community." *Id.* at 18-19. For a revealing account of the interviews and correspondence between Bishop John F. Noll, chairman of the NODL, and magazine publishers, see *Id.* at 40-79.

communities.⁷² Proposals for new legislation to broaden existing laws against obscene literature cropped up almost everywhere⁷³ and many were adopted.⁷⁴ In May, 1952 the House of Representatives

72. Available space permits only a few illustrations; they are, however, typical of many others throughout the nation. In Modesto, California, a group of citizens adopted a resolution "to curb publication and sale of immoral and profane books . . . by alerting the public conscience to the evil influence of such publications." In New Hampshire, the Catholic War Veterans resolved to support and participate "in the drive to rid our newsstands of literature threatening our way of life, the sanctity of the home, and the sense of morality and justice on which our country was founded." In Chattanooga, Tennessee, a local schoolmasters' club issued a report opposing "the peddling of smut" and the circulation of "demoralizing material." Other instances are recounted in the working paper for the American Library Association—American Book Publishers Council Conference on the Freedom to Read, April 23, 1953 (mimeographed). See also *Hearings, op. cit. supra* note 62, at 153-154; H. R. Rep. 2510, *op. cit. supra* note 45, at 29.

73. One of the most extreme legislative proposals was introduced in the Minnesota state legislature in February, 1953. One section made it a criminal offense to sell, give away, possess, or import any book "containing obscene, immoral, lewd or lascivious language, or detailed descriptions, figures, or symbols of [sic] scenes, or dialogue of a sexual nature or language immoral and depraving in its nature or tending toward the corruption of the morals of youth, offensive against common decency." Another section dealt with selling or giving such literature to minors and with its introduction "into any family, school, place of education, or other center frequented by minors." Still another prohibited the exhibition of such literature in a public place or any other place within the view of minors, apparently making it an offense to display a book containing any of the prohibited language even though the covers of the book are closed. The bill was tabled in committee.

In Massachusetts two bills were introduced in the 1954 legislative session. One authorized the Attorney General to appoint a citizens' committee to report to him on books they considered obscene, lurid, depraved, and harmful to the public. The other created a decency review board to review books and report violations of obscenity statutes. One of the bills was withdrawn; the other was defeated in the house.

In New York the state legislature passed the Carlino bill, which empowered police chiefs and sheriffs, without notice to the defendant, to apply for an injunction restraining the sale, distribution, acquisition, or possession of obscene literature. Governor Dewey, however, vetoed the bill.

Other legislative proposals are discussed in American Book Publishers Council, Bulletin No. 377 (mimeographed 1954); Drive for Decency in Print, *op. cit. supra* note 62, at 177-185; Noll, *op. cit. supra* note 62, at 67-95.

74. In Georgia a statute passed early in 1953 created a State Literature Commission empowered "to prohibit the distribution of any literature they find to be obscene" and to recommend prosecutions for violation of Ga. Code Ann. § 26-6301 (1953). The new statute defines "obscene literature" as "any literature offensive to chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed." Ga. Code Ann. § 26-6301a (1953).

In 1950 the St. Cloud, Minnesota, city council passed an ordinance creating a board of review to screen literature sold in the city and to order distributors and newsdealers to cease the sale of books "condemned" by the board. The ordinance prohibits the sale of any book that "prominently features an account of horrors, robberies, murders, arson, assault with caustic chemicals, assault with a deadly weapon, burglary, kidnapping, mayhem, rape, theft, voluntary manslaughter, ridicule of law enforcement or parental authority; or are obscene, immoral, lewd, or are suggestively obscene, immoral or lewd; or ridicules any person or persons by reason of race, creed or color; or advocates Unamerican or subversive activities." Similar ordinances were also passed in Eveleth, Faribault, Foley, Hibbing, Northfield, and Virginia, Minnesota. Morris, Minnesota, introduced some innovations;

created a "Select Committee on Current Pornographic Materials" to determine "the extent to which current literature—books, magazines, and comic books—containing immoral, obscene, or otherwise offensive matter, are being made available to the people of the United States" and also to determine "the adequacy of existing law to prevent the publication and distribution of books containing immoral, offensive, and other undesirable matter."⁷⁵ The committee's hearings were marked by ignorance and prejudice,⁷⁶ inept essays

its ordinance gave the city commission power to declare what publications were harmful and to approve publications as harmless. It defined "harmful publication" as any book that "contains any writing, view, or other matter which suggests, describes in any degree or to any extent, or mentions, any sexual act of a person, or which is actively or suggestively lewd, immoral or obscene, or which is contemptive of any person or persons by reason of race, color or creed, or which advocates or encourages practices which are un-American or subversive to lawful government or governmental activities within the United States of America, or which ridicules law or parental authority, or which contains any other matter which is or may be deleterious to moral or social welfare." Brainerd, Minnesota, didn't go so far; it passed an ordinance applicable only to "any obscene, lewd, suggestive, or indecent book." The St. Cloud ordinance is recommended by the NODL, but apparently without the board of review. NODL and Its Interpretation, 17-19 (n.d.).

In Lansing, Michigan, the licensing power is used to control books sold in that city. Its ordinance requires a license for each newsstand, magazine stand, and rental or lending library in the city. The license may be revoked by the city council for "good cause" which is defined as including the sale, distribution, loan or rental of any book "containing obscene language or obscene prints, pictures, figures or descriptions, manifestly tending to corrupt the morals of youth." Drive for Decency in Print. *op cit. supra* note 62, at 180-182.

In Lynchburg, Virginia, the city ordinance lists 43 publications by title, declaring them to be obscene. It also defines "obscene publication" as any book "containing obscene or indecent language, or language calculated to convey licentious, indecent or sensual impressions, or containing any drawing, print, picture, figure or description of any obscene or indecent character."

The New Hampshire legislature at its 1953 session added a new definition of "obscene" to its existing obscene literature statutes; it defined an "obscene" book as one "whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone viewing or reading it." N. H. Laws 1953, c. 233.

75. H. R. Rep. No. 2510, *supra* note 45, at 1.

76. De Voto, *The Case of the Censorious Congressmen*, 206 Harper's Magazine 42 (April 1953). The minority report observed: "The Committee, however, has seen fit not only to criticize the content by which obscenity may be judged, but has also directed unfavorable comment toward ideas contained in cited publications. This comes dangerously close to book burning. For example, *The Haters*, by Theodore Strauss, a Bantam book, was entered into the record with the objection that 'Author obviously trying to cash in on the Scottsboro pro-Negro agitation which was Communist-inspired.' *Cage of Darkness*, by Rene Masson, was criticized by counsel because, among other things, the 'Author does not seem to like the "upper classes" or law-enforcement officers.' Another book, *The Harem*, by Louis Royer, is condemned by the committee because the author personally advocates polygamy." H. R. Rep. No. 2510, *supra* note 45, at 122. The counsel's criticisms of *The Haters* and *Cage of Darkness* apparently were not included in the printed transcript of the hearings; the printed transcript, however, does show three instances in which counsel objected to a book because its author in a post-scriptum advocated polygamy. *Hearings, supra* note 62, at 31, 69, 208. The majority report itself vigorously objects to the book for this reason. H. R. Rep. No. 2510, *supra* note 45, at 14-15.

into literary criticism,⁷⁷ use of marked passages to condemn whole books,⁷⁸ and rejection of the prevailing legal standard for determining when a book is obscene.⁷⁹ Though the committee blamed the prevailing legal standard, at least in part, for the failure to enforce existing laws against obscene literature,⁸⁰ it did not recommend amendment of the federal obscenity statutes to restore the Victorian standard that once was generally accepted by federal courts.⁸¹ Instead, the committee called upon publishers to eliminate on their own initiative "border line" and "objectionable" literature⁸² and recommended the enactment of federal legislation to prohibit interstate transportation of obscene literature by private carriers.⁸³ It also recommended "the enactment of legislation authorizing the Postmaster General to impound mail addressed to a concern which he has reason to believe is disseminating obscene materials . . . and the exemption of the Post Office Department from the requirements of the Administrative Procedure Act."⁸⁴ Presumably, since John Steinbeck's *The Wayward Bus* offended the committee's sensibili-

77. H. R. Rep. No. 2510, *supra* note 45, at 13-14; *Hearings, supra* note 62, at 12-14, 227, 260.

78. *Id.* at 24-25, 227. One of the committee members, in response to a witness' question whether there was an evaluation of the books in the record remarked, "Yes, there is and if you had read some of the excerpts, you could evaluate them in a hurry." *Id.* at 262. The committee sought to excuse this practice with the following argument: "It is quite impossible to reach a decision on obscenity without considering the questioned parts as such and as related to the text as an entirety; and in so doing the questioned parts must be taken out of context to evaluate them and that the committee has done.

"Quotations from numerous books which were among hundreds of volumes read in the course of committee research have been selected on the basis of obscenity, violence, lust, use of narcotics, blasphemy, vulgarity, pornography, juvenile delinquency, sadism, masochism, perversion, homosexuality, lesbianism, murder, rape and nymphomania, or other objectionable features, and were entered in the record at the same time that the volume from which those quotations were taken was itself submitted as an exhibit.

"Quotations so selected are those considered to be unnecessarily objectionable and of the character to cause the book in which they were found to be obscene within the meaning of numerous judicial decisions." H. R. Rep. No. 2510, *supra* note 45, at 12.

79. "It is as elastic as rubber in its interpretive susceptibility and supplies the purveyors of obscenity with an excuse regardless of what is the degree of obscenity involved and *requires each and every book to be judged separately, an almost impossible task.* . . . The judicial viewpoint on the subject of obscene literature today, establishing a new legal philosophy in that field but one so elastic that it serves as the basis for excuse to print and circulate the filthiest most obscene literature without concurrent literary value to support it, ever known in history." [italics added] H. R. Rep. No. 2510, *supra* note 45, at 6. See also *Hearings, supra* note 62, at 23, 298-301.

80. H. R. Rep. No. 2510, *supra* note 45, at 5-6.

81. The committee, however, did express a devout wish for return to the pious reserve of Puritan England and the literary restraint of the Victorian era. H. R. Rep. No. 2510, *supra* note 45 at 5.

82. *Id.* at 120.

83. *Id.* at 116-117.

84. *Id.* at 119.

ties,⁸⁵ the committee would give the Postmaster General power to impound all mail addressed to the Viking Press, which originally published the book in 1947, and to Bantam Books, Inc., which reprinted it in paper-bound format in 1950,⁸⁶ and would give him this sweeping power without the procedural safeguards of the Administrative Procedure Act.

But despite the agitation against paper-bound books, there have been very few criminal prosecutions attacking them under obscene literature ordinances and statutes. So far as we have been able to determine, prosecutions have been initiated in only four cities; in three of the four cities the cases were resolved favorably for the books concerned, and in the fourth the case is still pending.⁸⁷

Apparently, those anxious to suppress paper-bound books that offend them are reluctant to use the normal and traditional legal procedure for the handling of obscene literature cases. A judicial proceeding is a public affair in which the merits as well as the demerits of a questioned book may be considered, in which those interested in the preservation of a free literature as well as the censorious may be heard. And publicity, as every censor knows, often increases the demand for the very book he seeks to suppress. Moreover, a judicial proceeding is not suitable for the mass suppression of large numbers of books. The censor prefers a procedure that permits the secret suppression of books en masse. And this is the course that has been most often followed in the current efforts to censor paper-bound books.

The National Organization for Decent Literature uses the de-

85. *Id.* at 16; *Hearings, supra* note 62, at 295, 312.

86. *Hearings, supra* note 62, at 301. Grosset & Dunlap, Inc. and Curtis Publishing Co. are the majority stockholders in Bantam Books Inc.; each holds 42½ per cent. *Id.* at 290, 315.

87. In St. Paul, Minnesota, Judge James C. Otis found a local news-dealer not guilty of selling an indecent or lewd book in violation of a city ordinance. The book involved in the case was *Women's Barracks*, by Tereska Torres, *St. Paul v. Fredkove*, 38 Minn. Munic. 362 (Mun. Ct. 1953).

In Springfield, Missouri, a municipal court dismissed charges against local news agency operators.

In Detroit, Michigan, a federal court dismissed an indictment against several publishers and distributors when, upon inspection of the grand jury minutes, it appeared that the jury had no evidence of interstate shipment in violation of the federal statute. The paper-bound books involved were: *Awake to Darkness*, by Richard McMullen; *Sinful Life*, by Glen Watkins; *Find Me in Fire*, by Robert Lowry; *Prettiest Girl in Town*, by Thomas Fall; and *Private Life of a Street Girl*, author unnamed.

In Youngstown, Ohio, the prosecution of a local distributor is still pending. 165 Pub. Wk. 36 (Jan. 2, 1954). The criminal charge was filed shortly after a federal court enjoined the city's police chief from ordering the distributor to withdraw from sale certain books published by the plaintiff. *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953). The criminal charge of course involved a book published by the plaintiff: *Down All Your Streets*, by Leonard Bishop. 164 Pub. Wk. 845 (Sept. 5, 1953).

vice of organized persuasion, and sometimes of open general boycott, in its efforts to suppress literature that violates its codes of decency.⁸⁸ Through its detailed organization in many Roman Catholic dioceses and parishes,⁸⁹ canvassing teams are appointed to call upon the dealers in each community; they explain the NODL's crusade and request each dealer's cooperation and his promise to withdraw from sale all publications appearing on the NODL lists.⁹⁰ Vigilance committees may follow the canvassing teams to determine whether the dealers are continuing their cooperation.⁹¹ Parishioners sometimes assist in the campaign; when patronizing a dealer for other merchandise, they ask him whether he cooperates with the NODL and, upon observing any blacklisted publications on display, object to them.⁹² In some communities, the local organization issues certificates to cooperating dealers for display in their places of business.⁹³ In all of this, there frequently is at least an implied threat of a general boycott against the dealer who refuses to cooperate.⁹⁴ Since the dealer's gross profit on the sale of paper-bound books is very small,⁹⁵ many dealers succumb to the pressure, sacrificing the relatively small profit from sale of books blacklisted by the NODL for the sake of the larger profit derived from general trade with customers.⁹⁶ As a result, approximately 300 to 750 titles of paper-bound

88. See text to notes 64-71 *supra*.

89. See note 70 *supra*.

90. Drive for Decency in Print, *op. cit. supra* note 62, at 14-15, 23; Noll, *op. cit. supra* note 62, at 211. Such a campaign was initiated in Minneapolis, Minnesota, early in 1953, using the St. Paul, Minnesota, NODL list. Minneapolis Star, Mar. 21, 1953, p. 10, col. 7; 70 Christian Century 404 (Apr. 8, 1953).

91. Drive for Decency in Print, *op. cit. supra* note 62, at 15-16, 25-26, 191; Noll, *op. cit. supra* note 62, at 49.

92. Drive for Decency in Print, *op. cit. supra* note 62, at 25; Noll, *op. cit. supra* note 62, at 212; NODL Code and Its Interpretation, 2-21 (n.d.).

93. Drive for Decency in Print, *op. cit. supra* note 62, at 197; Noll, *op. cit. supra* note 62, at 55. The monthly certificate of cooperation used by a Decent Literature Committee in Brooklyn, N. Y., reads: "This store has satisfactorily complied with the request of the Committee to remove all publications listed as 'OBJECTIONABLE' by the National Organization of Decent Literature, from its racks during the above month."

94. "It is necessary, therefore, for Catholics to do something about the situation. . . . They should serve notice on publishers of such printed filth that they will boycott every place where it is sold in their respective communities; and on those who advertise in such filthy periodicals that they will not purchase any of their wares." Drive for Decency in Print, *op. cit. supra* note 62, at 39. See also *id.* at 26, and Noll, *op. cit. supra* note 62, at 40, 212-213. But see Father Fitzgerald's disclaimer of the use of the boycott. *Hearings, supra* note 62, at 83-84.

95. The retailer's margin on a 25-cent book is $5\frac{1}{2}\%$. 48 Fortune 148 (Sept. 1953).

96. Early last year, in the Flatbush area of Brooklyn, New York, the campaign organized by the Decent Literature Committee of Our Lady Help of Christians Roman Catholic Church became so effective that Bantam Books, Inc., one of the largest publishers of paper-bound books, found it necessary to counterattack with half-page advertisements in the Brooklyn Eagle for February 25, 1953.

books may be withdrawn from sale in those communities in which the NODL is successful in its campaign.⁹⁷ Most people of course are unaware of what titles have been suppressed by this device, since the NODL blacklists are not made public.⁹⁸

In some communities, private groups have made use of the police or prosecuting attorney in censoring literature that offends them. In these communities, voluntary citizens' committees prepare blacklists of publications they believe to be objectionable and deliver their lists to the police or prosecuting attorneys, who then give notice to distributors and dealers to withdraw the blacklisted publications from sale. The notice of course is accompanied by at least an implied threat of criminal prosecution under obscene literature laws if the dealer or distributor fails to comply.⁹⁹ This censorship device was extensively used in New Jersey until Bantam Books, early in 1953, secured an injunction in superior court against the Middlesex county prosecutor.¹⁰⁰ The decision of the superior court has just been affirmed, limited however to the single book in issue.¹⁰¹

The unofficial status of such private censorship groups is of course a weakness from the point of view of the censorious. Voluntary citizens' committees notoriously blow hot and cold, and it's hard to keep them operating at a high level of activity over a long period of time. Members excited at first lose their enthusiasm when faced with the arduous task of reading even a portion of the literature offered for sale in almost any community. But whatever the reason, one state¹⁰² and a number of cities¹⁰³ have established offi-

97. The April, 1953 list of publications disapproved by the NODL contains approximately 300 titles of paper-bound books; the St. Paul, Minnesota, list of the "Organization for Decent Literature" for the same month has 744 titles.

98. Noll, *op. cit. supra* note 62, at 214.

99. For a more detailed description of the use of this device, see: *Bantam Books v. Melko*, 25 N. J. Super. 292, 96 A.2d 47 (1953); *Hearings, supra* note 62, at 317. This device is also used in Denver, Colorado, where early in 1953 a private group gave the local district attorney a list of paper-bound books which the district attorney promptly forwarded to local distributors and dealers. 48 *Fortune* 123, 148 (Sept. 1953).

100. *Bantam Books v. Melko, supra* note 99.

101. The New Jersey Supreme Court apparently confined its affirmance to the single book in litigation — Vivian Connell's *The Chinese Room*. It rejected as moot the superior court's ruling that the county prosecutor lacked authority to promulgate lists of objectionable books. 165 *Pub. Wk.* 1340 (Mar. 13, 1954). The county prosecutor took this as a blanket endorsement of his censorship activities and threatened a new drive to halt distribution of objectionable literature in Middlesex County. *New York Times*, Mar. 9, 1954, p. 34, col. 4.

102. Ga. Code Ann. § 26-6301a (1953).

103. In addition to the cities in notes 72-74, *supra*, official censorship boards have been created or authorized in Canton, Ohio; Hartford, Connecticut; Kenosha, Wisconsin; Miami, Florida; New Britain, Connecticut; Pawtucket, Rhode Island; and Wheeling, West Virginia. Milwaukee County, Wisconsin, has an official literary commission.

cial censorship boards to review literature offered for sale in the state or city.

The operations of the official censorship boards vary widely from place to place. The range of variation is illustrated by an examination of the operations of two such boards—the Board of Review of St. Cloud, Minnesota, and the Georgia Literature Commission. In St. Cloud, Minnesota, the board of review, before its operations were suspended early in 1953,¹⁰⁴ used the NODL blacklist as a buying guide.¹⁰⁵ Some paper-bound books were read by the board members; others were farmed out to volunteer reviewers with instructions to note objectionable passages and to designate whether each book was (1) suitable reading for youth, (2) borderline, or (3) condemned.¹⁰⁶ In condemning a book, reviewers were told to state their reasons and also that “probably in most cases it will not be necessary to read the whole book to reach a judgment of this kind.”¹⁰⁷ The code employed in determining what books were to be condemned consisted of the following items: (1) objectionable and offensive presentation of sex facts, (2) glorification of crime, (3) portrayal of illicit love, (4) blasphemous, profane and obscene speech, (5) indecent and suggestive illustrations, (6) vulgar and lewd advertising, (7) trashy romance, and (8) disrespect for authority.¹⁰⁸ Board meetings of course were secret,¹⁰⁹ and its lists of condemned books and even the code it used as a standard for judging books were not made public.¹¹⁰ Of course the lists were made available to the dealers, most of whom promptly withdrew the condemned books from sale.¹¹¹ During the period of its operations, the board condemned more than 300 paper-bound books.¹¹²

In Georgia, on the other hand, the State Literature Commission

104. Minneapolis Star, Feb. 3, 1953, p. 1, col. 3.

105. Sonderegger, *St. Cloud Book Censors Act on Own Judgment*, Minneapolis Star, Dec. 25, 1952, p. 20, col. 3; cf. Davidson, *St. Cloud—How the Flames Spread*, 128 New Republic 13 (June 29, 1953).

106. Sonderegger, *supra* note 105, at p. 20, col. 1, 3; Schoelkopf and Wilson, *City Censors Ban Classics*, Nation, Jan. 24, 1953, p. 1.

107. The full directions given to reviewers were: “If in your opinion this book should be condemned, state your reasons on the reverse side of this page. Probably in most cases it will not be necessary to read the whole book in order to reach a judgment of this kind.”

108. Sonderegger, *supra* note 105. The code was obviously taken from the NODL. Schoelkopf and Wilson, *supra* note 106. See note 68 for the NODL code.

109. Sonderegger, *Reading Matter is Censored in St. Cloud*, Minneapolis Star, Dec. 23, 1952, p. 1, col. 1; Davidson, *supra* note 105. *But cf.* Schoelkopf and Wilson, *supra* note 106.

110. Sonderegger, *Censors Brand Prize-winning Novels ‘Unfit’*, Minneapolis Star, Dec. 24, 1952, p. 1, col. 1; Sonderegger, *supra* note 105, at p. 20, col. 2-3; Davidson, *supra* note 105; Schoelkopf and Wilson, *supra* note 106.

111. Sonderegger, *supra* note 109, at p. 4, col. 4.

112. Minneapolis Star, Dec. 24, 1952, p. 1, col. 1.

has proceeded much more carefully, despite the contrary inference that might have been drawn from its chairman's early statement, "I don't discriminate between nude women, whether or not they are art. It's all lustful to me."¹¹³ The commission soon adopted a set of criteria for determining whether a particular book is "above suspicion." The criteria apparently took the form of questions: (1) What is the general and dominant theme? (2) What degree of sincerity of purpose is evident? (3) What is the literary or scientific worth? (4) What channels of distribution are employed? (5) What are the contemporary attitudes of reasonable men toward such matters? (6) What types of readers may reasonably be expected to peruse the publication? (7) Is there evidence of pornographic intent? (8) What impression will be created in the mind of the reader upon reading the work as a whole?¹¹⁴ If all of these questions are answered favorably, the commission finds the book to be "above suspicion"; if not, the book is classed as a "possibly obscene" publication.¹¹⁵ In determining whether a "possibly obscene" book is actually obscene, the commission follows the statutory standard,¹¹⁶ which defines "obscene literature" as "any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed."¹¹⁷ In making this determination, the commission does not "condemn that which, though it might be 'erotic to the neurotic,' would give 'no offense to persons of balanced mentality.'"¹¹⁸ The commission gives to any distributor who complains of its rulings an opportunity for a hearing, and it has invited the press to each of its meetings.¹¹⁹ It has not, however, made public its decisions on individual books, though one local distributor served notice on the commission that he would no longer withdraw books from circulation upon the commission's informal notices and that he intended to insist upon a public hearing and a specific finding against each book before he would withdraw any book from distribution.¹²⁰ By the end of its first year, the commission had taken action against only four paper-bound books.¹²¹

113. American Library Association, *op. cit. supra* note 72.

114. Wesberry, *Georgia Scrubs Its Newsstands*, 70 *Christian Century* 1498 (Dec. 23, 1953)

115. *Ibid.*

116. *Ibid.*

117. Ga. Code Ann. § 26-6301a (1953).

118. Wesberry, *supra* note 114.

119. *Id.* at 1499.

120. 164 *Publ. Wk.* 765 (Aug. 29, 1953); American Civil Liberties Union, *Feature Press Service*, *Weekly Bulletin* No. 1608 (mimeographed 1953)

121. Wesberry, *supra* note 114, at 1499.

In other communities, the police do their own censoring without the aid of official censorship boards. The Detroit, Michigan, police department, for instance, has a "license and censor bureau" which censors literature offered for sale in that city.¹²² Local distributors, in advance of distribution, submit copies of paper-bound books for review by policemen assigned to the bureau.¹²³ In the reviewing process, the police officer notes objectionable passages in a book and, if the police inspector in charge of the bureau agrees that they are sufficiently naughty or numerous, the offending passages are submitted to the county prosecuting attorney for an opinion on whether the particular book violates Michigan law.¹²⁴ If the county prosecutor, after reviewing the excerpts, concludes that the book in his opinion violates the Michigan statutes, he prepares a letter to that effect for the censor bureau, which in turn transmits a copy of the letter to the distributor of the book.¹²⁵ The censor bureau also prepares and sends to the local distributors a monthly list of books found to be in violation of the law.¹²⁶ So far, the local distributors in Detroit have withheld from circulation every book banned by the censor bureau and the county prosecutor.¹²⁷ From 1950 to 1952 more than 100 titles of paper-bound books were withheld from circulation in this way.¹²⁸ The public of course is kept in ignorance, for the censor bureau does not make its lists public and the Detroit newspapers cooperate in keeping them under cover.¹²⁹

But the Detroit police censor bureau, like the Gathings Committee, discovered that there were many "objectionable" or "borderline" books not clearly in violation of the obscene literature statutes. So the censor bureau has a second list of "partially objectionable"

122. There are two good sources of information about the censorship activities of the license and censor bureau. One is the testimony of Inspector Herbert W. Case before the Gathings committee. *Hearings, supra* note 62, at 132-142. The other is a series of articles by Leo Sonderegger in the *Minneapolis Star*, Feb. 9-11, 1953.

123. "We called them in, and we threatened prosecution... We had them in a conference with the Wayne County prosecuting attorney's office, and there they voluntarily agreed to submit to us for inspection the pocket-size magazines before distribution." *Hearings, supra* note 62, at 116 (testimony of Inspector Case).

124. *Hearings, supra* note 62, at 120-121; Sonderegger, *Censors Guard Young Morals in Detroit*, *Minneapolis Star*, Feb. 9 1953, p. 18, col. 1.

125. *Hearings, supra* note 62, at 116.

126. Sonderegger, *supra* note 124.

127. *Hearings, supra* note 62, at 116.

128. *Hearings, supra* note 62, at 136-139. Sonderegger estimates 150 titles. Sonderegger, *supra* note 124, at p. 17, col. 7.

129. Sonderegger, *Detroit Public Not Told What Is Censored*, *Minneapolis Star*, Feb. 10, 1953, p. 15, col. 1; *Hearings, supra* note 62, at 127. After the Sonderegger articles appeared in the *Minneapolis Star*, the *Detroit Free Press* ran a series of three articles, concluding Mar. 17, 1953.

books which may contain passages technically in violation of the Michigan statutes but which are not suitable for criminal prosecution.¹³⁰ These lists are sent to local dealers who are told that, if a complaint is received on a listed book, they will "have to take it off the stands."¹³¹ Since the NODL is active in Detroit and has been joined by local Protestant groups,¹³² most dealers are afraid to handle books that appear on the censor bureau's "partially objectionable" lists.¹³³

Detroit's censorship influence is not confined to the city limits. Since the prosecuting attorney is a county official and the Detroit censor bureau distributes its lists of banned books to all police chiefs in the county, the Detroit censorship is effective throughout Wayne county.¹³⁴ The censor bureau also distributes its lists to the police departments of seventeen or eighteen other cities in Michigan¹³⁵ and also to any prosecuting attorney or chief law enforcement officer who requests them.¹³⁶

One of the chief law enforcement officers who requested and received the Detroit censor bureau's lists was the chief of police of Youngstown, Ohio. He had earlier, with the assistance of the Youngstown police department's vice squad, prepared a list of his own, containing 108 paper-bound books, most of which had been placed on the list solely because of their jackets and blurbs and without reading even a part of their contents.¹³⁷ To these, he added in a separate list all the books appearing on both Detroit lists—140 books on the "illegal" list and 195 books on the "partially objectionable" list—apparently without recognition of their different nature.¹³⁸ Still discontented with the progress of his campaign to rid the city of "almost all" the paper-bound books offered for sale there,¹³⁹ the police chief joined forces with the Federated Women's Clubs of Youngstown in the organization of a committee

130. *Hearings, supra* note 62, at 116.

131. Sonderegger, *supra* note 129, at p. 18, col. 3.

132. The NODL list issued in Detroit bears the endorsement of the Detroit Archdiocesan Council of Catholic Women, the Detroit Council of Church Women, and the Detroit Council of Churches.

133. Sonderegger, *supra* note 129, at p. 18, col. 3.

134. *Hearings, supra* note 62, at 116; Sonderegger, *supra* note 129, at p. 18, col. 1.

135. *Hearings, supra* note 62, at 131.

136. *Id.* at 134.

137. *See* New American Library of World Literature v. Allen, 114 F. Supp. 823, 826 (N.D. Ohio 1953).

138. *Id.* at 827.

139. "These books include almost all of the so-called paper backed 'pocket books' . . . , which as a matter of policy, glorify and dwell upon immorality. Admittedly, there are some few which are not in this category, yet so few are they in number that their publication would seem to be a subterfuge designed to whitewash the great bulk of these publications." *Id.* at 826, quoting the chief of police.

to assist him in the screening of books.¹⁴⁰ Armed with his lists and heartened by the prospect of the assistance of women club-members of the city, he requested the local distributors and dealers to remove from the newsstands of the city all books appearing on the combined lists and threatened criminal prosecution if they failed to comply.¹⁴¹ When the distributors and dealers complied in part with the police chief's demands by removing the books on his own list,¹⁴² The New American Library of World Literature, publisher of some of the books on that list, sought an injunction in federal court, and got it.¹⁴³ Shortly afterwards, criminal proceedings were instituted against a local distributor for distributing an obscene book; the book, of course, was one of those published by The New American Library.¹⁴⁴

Detroit's enormous influence in the current battle between the forces of censorship and those of intellectual freedom is thus readily apparent. Its influence is not limited to the city of Detroit alone; it blankets Wayne county and extends to many other cities both in Michigan and in other states. The measure of its influence is indicated by the fact that one publisher of paper-bound books submits manuscripts to the censor bureau for approval before their publication.¹⁴⁵ Since it is obviously impossible for a publisher to print two editions—one for Detroit and Wayne county and other cities using the Detroit lists, and the other for the rest of the country—the Detroit censor bureau and an assistant prosecuting attorney for Wayne county are able to this extent to censor literature for the entire country.¹⁴⁶

B. BOOKS UNDER ATTACK

With all of the public agitation and concern over paper-bound books and the very great efforts that have been made in many parts of

140. *Id.* at 828.

141. *Id.* at 826-828.

142. *Id.* at 827.

143. *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953).

144. 164 Publ. Wk. 845 (Sept. 5, 1953).

145. Sonderegger, *What Detroit Censors May Affect All U. S.*, *Minneapolis Star*, Feb. 11, 1953, p. 46, col. 1; *Hearings, supra* note 62, at 128, 130-131. This practice once caused embarrassment to the censor bureau; they forgot to remove the book from the illegal list after the publisher had made the required deletions. Inspector Case testified: "In one instance . . . there were deletions made in our manuscript form, and it happened that we slipped up. We had withheld the book, and they had made the deletions; and as the book came out—in fact, it happened a month ago—we still had this on our banned list, and up in the prosecutor's office, and we couldn't find out the things that we had banned. They were not there; they had taken them out. We were quite red-faced about it, and we sent a letter to all the police chiefs in the county, and the book is circulated." *Id.* at 131.

146. Sonderegger, *supra* note 145, p. 33, col. 1.

the country to censor them, what kinds of books have offended those who have been active in the current censorship campaigns against such books? Are they books that clearly fall within the ambit of statutes prohibiting obscene literature? Or are they books that in hard covers were considered to be legitimate and in some instances even great literature? To put the question another way, are the censors of today any more discriminating than their predecessors? The question of course almost answers itself.

The NODL blacklists are the most elaborate of all of the lists currently in use. They contain a larger number of titles of books than any of the other lists we have been able to obtain. But the number of titles changes from month to month, and the lists issued by local branches of the NODL are not always identical. In April, 1953, for instance, the national NODL list contained the titles of some 300 paper-bound books, while the Detroit NODL list for April-May, 1953 had more than 350 titles and the St. Paul NODL list for April, 1953 had almost 750. Apparently the St. Paul list was a cumulative one, which had not dropped titles as they were dropped from the national list. At any rate, all of the titles on the national list also appeared on the St. Paul list. But the Detroit list contained titles that did not show up on either the St. Paul or the national lists for April 1953, though many of them did turn up later on the national lists for subsequent months.

The titles of the books on the NODL lists make a strange collection. They range all the way from something called *Hot Dames on Cold Slabs* to William Faulkner's *Pylon*, *Sanctuary*, and *Soldier's Pay*, with Mickey Spillane's tours in sadism and voyeurism¹⁴⁷ sandwiched somewhere in between. Among the authors who had at least three books on one or more of these lists were James M. Cain,¹⁴⁸ Erskine Caldwell,¹⁴⁹ James T. Farrell,¹⁵⁰ Pierre Louys,¹⁵¹ W. Somerset Maugham,¹⁵² John O'Hara,¹⁵³ and Emile Zola.¹⁵⁴

147. The Spillane titles that appeared on the lists were: *The Big Kill*, *I, the Jury*, *One Lonely Night*, and *Vengeance Is Mine*.

148. *Love's Lovely Counterfeit*; *Mildred Pierce*; *Past All Dishonor*; and *The Postman Always Rings Twice*.

149. *Episode in Palmetto*; *God's Little Acre*; *A House in the Uplands*; *Journeyman*; *A Place Called Estherville*; *A Swell Looking Girl*; *This Very Earth*; *Tobacco Road*; *Tragic Ground*; *Trouble in July*; and *A Woman in the House*.

150. *Bernard Carr*; *Ellen Rogers*; *Gas House McGinty*; *A Hell of a Good Time*; *Judgment Day*; *Meet the Girls*; *When Boyhood Dreams Come True*; *A World I Never Made*; and *Young Lonigan*.

151. *Aphrodite*; *Collected Works*; *Psyche*.

152. *Fools and Their Folly*; *The Painted Veil*; *Up at the Villa*.

153. *Appointment in Samarra*; *Butterfield 8*; *Hope of Heaven*; *A Rage to Live*.

154. *Nana*; *Piping Hot*; *Theresa*.

Here too were Nelson Algren's *The Man With the Golden Arm* and *Never Come Morning*, Niven Busch's *Duel in the Sun*, C. S. Forester's *The African Queen*, Ernest Hemingway's *A Farewell to Arms*, D. H. Lawrence's *Lady Chatterley's Lover* and *Love Among the Haystacks*, James A. Michener's *Tales of the South Pacific*, Christopher Morley's *Kitty Foyle*, Irwin Shaw's *The Young Lions*, Natalie Anderson Scott's *The Story of Mrs. Murphy*, and Ben Ames Williams' *The Strange Woman*. Boccaccio's *Decameron*, Flaubert's *Madam Bovary*, and a collection of stories by De Maupassant also appeared on one of the lists. The Detroit NODL list also designated some books as "particularly objectionable." Among these were Walter Karig's *Caroline Hicks*, Francois Mauriac's *The Desert of Love*, John Dos Passos' *The Forty-Second Parallel*, John Masters' *Nightrunners of Bengal*, Vardis Fisher's *Passions Spin the Plot*, Edgar Mittelholzer's *Shadows Move Among Them* and F. Van Wyck Mason's *Three Harbours*. The NODL lists, however, are not restricted to works of fiction; they also include such books as *The Sexual Side of Marriage* by M. J. Exner, M.D., *How Shall I Tell My Child* by Belle S. Mooney, M.D., and *The Story of My Psychoanalysis* by John Knight.

The lists prepared by the private citizens' committees that work through police departments and prosecuting attorneys in suppressing paper-bound books are no more discriminating than those of the NODL; they're only shorter. In Denver, Colorado, the list of 55 titles prepared for the district attorney contained such books as Emile Zola's *Nana* as well as others on the NODL lists.¹⁵⁶ In Middlesex County, New Jersey, most of the 36 books on the list prepared for the county prosecutor by a Committee on Objectionable Literature also appeared on the NODL lists.¹⁵⁶ The New Jersey committee withdrew four books from its list when the publisher protested their inclusion,¹⁵⁷ but it refused to withdraw Vivian Connell's *The Chinese Room*, even though the half-price and the paper-bound editions had been bowdlerized at the instance of the New York Society for the Suppression of Vice.¹⁵⁸ This was the book on which the prosecutor and the committee took their stand,

155. 48 *Fortune* 123, 148 (Sept., 1953).

156. Some of them were: Vivian Connell's *The Chinese Room*, Erskine Caldwell's *God's Little Acre*, *Journeyman*, and *Tragic Ground*, James T. Farrell's *Meet the Girls*, Caroline Slade's *Margaret*, John O'Hara's *Butterfield 8* and Susan Morley's *Mistress Glory*.

157. The four books were: *The Heller* by William E. Henning, *The Bride Saw Red* by Robert Carson, *Come Clean, My Love* by Rosemary Taylor, and *No Marriage in Paradise* by Myron Brinig. Of these, *The Heller* is the only one to appear on the NODL lists; it was also condemned by the St. Cloud Board of Review.

158. Legman, *Love & Death: A Study in Censorship* 68 (1949).

and lost in a suit by the publisher to enjoin the prosecutor's activities.¹⁵⁹

In Detroit, where the police do their own censoring, the censor bureau's lists show the same obtuseness to literary values. It is quite apparent that the censor bureau has never accepted the Detroit public library's offer to advise it on literary values,¹⁶⁰ for its list of some 150 books declared to be in violation of Michigan law includes such books as James T. Farrell's *A World I Never Made*, Ernest Hemingway's *Across the River and Into the Trees*, John O'Hara's *The Farmers Hotel*, Jan Valtin's *Wintertime*, James Warner Bellah's *Ward 20*, and Lillian Smith's *Strange Fruit*.¹⁶¹ And its list of partially objectionable books includes Sherwood Anderson's *Dark Laughter*, John Dos Passos' *The Forty-Second Parallel*, James T. Farrell's *No Star Is Lost*, Mackinlay Kantor's *Signal Thirty-Two*, and Ethel Waters' *His Eye Is on the Sparrow*.¹⁶² In Youngstown, Ohio, of course, the situation was equally as bad. For there, the chief of police not only prepared his own list from the appearance of the jackets and blurbs on paper-bound books but also took both the "illegal" and the "partially objectionable" lists of the Detroit censor bureau and combined them in a single list.¹⁶³ Among the books he succeeded in suppressing, until a publisher obtained an injunction in federal court against him,¹⁶⁴ were John Steinbeck's *Cannery Row*, Christopher Isherwood's *The Last of Mr. Norris*, and Pierre Lamure's *Moulin Rouge*.

Some of the official censorship boards were equally as obtuse. Perhaps the worst was the St. Cloud Board of Review. Most of the books it condemned were books blacklisted by the NODL, for its standards of judgment were about the same as those used by the NODL and it used the NODL lists as buying guides. Among the books it condemned were W. Somerset Maugham's *Cakes and Ale* and *The Painted Veil*, William Faulkner's *The Wild Palms* and *Sanctuary*, Herbert Ernest Bates' *The Purple Plain*, Evelyn Eaton's *Quietly My Captain Waits*, Richard Wright's *Native Son*, and Thomas Heggen's *Mister Roberts*.¹⁶⁵ In Georgia, however, the State Literature Commission proceeded much more carefully.

159. Bantam Books v. Melko, 25 N. J. Super. 292, 96 A. 2d 47 (1953). See note 101 *supra*.

160. Minneapolis Star, Feb. 10, 1953, p. 18, col. 5.

161. Sonderegger, *Detroit Public Not Told What Is Censored*, Minneapolis Star, Feb. 10, 1953, p. 15, col. 1.

162. Minneapolis Star, Feb. 10, 1953, p. 18, col. 3.

163. See text to note 137 *supra*.

164. New American Library of World Literature v. Allen 114 F. Supp. 823 (N.D. Ohio 1953).

165. Sonderegger, *Censors Brand Prize-winning Novels "Unfit,"* Minneapolis Star, Dec. 24, 1952, p. 1, col. 1.

In nearly a year of its operation it has ruled against only four paper-bound books. Three of the four are reported to be *Spring Fire*, by Vin Packer, and *Women's Barracks*, by Tereska Torres, both Fawcett publications, and Erskine Caldwell's *A Place Called Estherville*.¹⁶⁶ What it will do in the future remains to be seen.

Surely, in the face of this record, it could not seriously be contended that today's censors are any more discriminating than their predecessors. The same ignorance or disregard of the literary and other values of a book marks the censor's activities today as it has in the past,¹⁶⁷ and the reasons for this are not hard to find. For the censor is seldom a person who appreciates esthetic values or understands the nature and function of imaginative literature.¹⁶⁸ His interests lie elsewhere. Often an emotionally disturbed person,¹⁶⁹ he sets out to look for smut and consequently finds it almost everywhere, oblivious of the context and the values of the book in which he finds what he seeks.¹⁷⁰ His one-track interest often is reinforced when his smut-snuffing becomes a professional occupation.¹⁷¹ Surely, Heywood Broun was far from wrong in observing that "[o]nce censorship is let loose, nothing is safe from the smirch of its exceeding dirtiness."¹⁷²

II. LAW OF OBSCENITY

A. CONCEPTS OF OBSCENITY

No one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature. Some find the key to it in the sense of shame; whatever violates the community's sense of shame is obscene.¹⁷³ The obscene

166. American Civil Liberties Union, Feature Press Service, Weekly Bulletin No. 1608 (Aug. 24, 1953).

167. See Haight, *Banned Books* (1935), for an itemized account of books censored for various reasons, including obscenity. Ernst and Seagle, *To the Pure . . .* (1928); Ernst and Lindey, *The Censor Marches On* (1940); Craig, *The Banned Books of England* (1937); and Scott, *Into Whose Hands* (1945) deal specifically with books banned for obscenity.

168. Speaking of Anthony Comstock, Heywood Broun observed: "Since death and damnation might be, according to his belief, the portion of the girl or boy who read a ribald story, it is easy to understand why he was so impatient with those who advanced the claims of art. Even those who love beauty would hardly be prepared to burn in hell forever in its service. Comstock's decision was even easier, *for he did not know, understand or care anything about beauty.* [Italics added]." Broun and Leech, *Anthony Comstock* 266 (1927).

169. See note 462 *infra*.

170. See note 463 *infra*.

171. See note 464 *infra*.

172. Broun and Leech, *op. cit. supra* note 168, at 275. See also Watson, *Some Effects of Censorship Upon Society* in *Social Meaning of Legal Concepts* No. 5, *Protection of Public Morals Through Censorship* 81-83 (1953).

173. Kallen, *Indecency and the Seven Arts* 11, 35-36 (1930); Kallen, *The Ethical Aspects of Censorship* in *Social Meaning of Legal Concepts* No. 5, *Protection of Public Morals Through Censorship* 34, 41-44 (1953); Seagle, *Cato, or the Future of Censorship* 26 (1930).

in this sense usually lies in the exposure of sexual matters,¹⁷⁴ though it may also lie in the exposure of the excremental as well.¹⁷⁵ Similarly, Havelock Ellis found the obscene in whatever is "off the scene" and not openly shown on the stage of life.¹⁷⁶ The obscene in this sense also lies in the public exposure of the naturalistic aspects of sexual and excremental processes.¹⁷⁷ Some have found a quite different kind of obscenity that lacks sexual and excremental exhibitionism. Termed critical obscenity, it attacks accepted moral standards and for this reason is held to be obscene.¹⁷⁸ Others, however, have taken an entirely different approach; to them the obscene is that which arouses the "lower passions or indulgence in sensuality."¹⁷⁹ But most writers have found the term hopelessly subjective and lacking in any definite or acceptable meaning.¹⁸⁰

Sometimes the inability to find a satisfactory meaning of obscenity has led writers to turn to the word "pornography" in the hope of finding something more tangible. One of them found a distinction between the two words; "obscene," he wrote, is a broader word than "pornography," since it includes profanity and expletives, whereas "pornography" is limited to books that are or were intended to be aphrodisiacs.¹⁸¹ Others have found in pornography the essential quality of fantasy deliberately designed to stimulate or pander to the sexual perversion of auto-eroticism.¹⁸² D. H. Law-

174. Kallen, *Indecency and the Seven Arts* 35-36 (1930); Seagle, *op. cit. supra* note 173, at 22, 26.

175. Kallen, *The Ethical Aspects of Censorship*, *op. cit. supra* note 173, at 41-42.

176. Ellis, *The Revaluation of Obscenity* in *More Essays in Love and Virtue* 100 (1931).

177. *Id.* at 100-101. Ellis' interpretation of the obscene seems to be the one followed by the United States Customs. See Chafee, *Government and Mass Communications* 209, 258-259 (1947); cf. Cairns, *Freedom of Expression in Literature*, 200 *Annals* 76, 78 (1938).

178. Seagle, *op. cit. supra* note 173, at 26-27; cf. Housman, *Sex and the Censorship* in *International Congress for Sexual Reform* 311 (3d Cong. 1929); Van Druten, *Sex and Censorship in the Theatre*, *id.* at 317.

179. Burke, *What Is the Index* 23, 37 (1952).

180. Jackson, *The Fear of Books* 69-75 (1932); Scott, *Into Whose Hands* 24-27 (1945); Lawrence, *Pornography and Obscenity* 5-9 (1929); Hallis, *The Law and Obscenity* 20-21 (1932); Russell, *The Recrudescence of Puritanism*, in *Sceptical Essays* 124 (1952).

181. Scott, *Into Whose Hands* 38 (1945); cf. Craig, *Above All Liberties* 168-170 (1942). But see notes 193 and 274 *infra* and text thereto.

182. "We may define pornography, cross-culturally, as words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being." Mead, *Sex and Censorship in Contemporary Society*, in *New World Writing, Third Mentor Selection* 18 (1953). "The character of the daydream as distinct from reality is an essential element in pornography. True, the adolescent may take a description of a real event and turn it into a daydream, the vendor of pornography may represent a medical book as full of daydream material, but the material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and

rence defined "genuine pornography" as that which insults sex and the human spirit.¹⁸³ Havelock Ellis in a somewhat similar vein wrote of "the vulgar, disgusting, and stupid form of obscenity called pornography—the literature and art that is a substitute for the brothel and of the same coarse texture."¹⁸⁴ To Huntington Cairns, however, pornography is "that class of material which is put forward with no other purpose in view than the stimulation of the sexual impulse" whose effect "except on the prurient and the immature is one of repugnance."¹⁸⁵ Heywood Broun, too, noted the dullness of "sheer nastiness."¹⁸⁶ Pornography as a concept seems almost as hard to handle as obscenity.¹⁸⁷

Faced with the impossibility of framing a satisfactory definition of either term, a few writers have endeavored to classify the kinds of books regarded as obscene or pornographic. Alec Craig set up seven categories and described with examples the kinds of books in each category.¹⁸⁸ Holbrook Jackson, on the other hand, set up only two general classes, the facetiae and the literary aphrodisiacs.¹⁸⁹ But these classifications of books do no more than acquaint us with the varieties of books likely to be charged as obscene; they're of no value at all in helping to frame a satisfactory definition of the obscene or the pornographic.

tillate. It bears the signature of nonparticipation—of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners, or because the recipient of the pornography has lost the precious power of spontaneous sexual feeling." *Id.* at 19; cf. London and Caprio, *Sexual Deviations 626-627* (1950).

183. Lawrence, *op. cit. supra* note 180, at 13; see also *id.* at 16.

184. Ellis, *op. cit. supra* note 176, at 130.

185. Cairns, *op. cit. supra* note 177, at 85.

186. Broun and Leech, Anthony Comstock 268-269 (1927).

187. Craig, *op. cit. supra* note 181, at 168-170.

188. *Id.* at 170-188. His categories are: (1) Books like *The Autobiography of a Flea*, *Flossie* and *The Way of a Man With a Maid*, which are designed to extract money from people with an unhealthy curiosity and a hunger for sexual experience of any sort. (2) Books, termed "gallant pornography," that concern themselves with the physical side of sex and nothing else. (3) Books, like those of the Marquis de Sade, that associate the sexual impulse with cruel, hard, and destructive emotions; sadistic literature. (4) Works of historical interest or by reputable sexologists reprinted in tawdry, meretricious, journalistic fashion with sensational and inflammatory headlines and illustrations that have little or no relevance to the text. Examples are *The 120 Days of Sodom* and Carrington's *Satyricon of Petronius*. (5) Books, like the unbowdlerized edition of D. H. Lawrence's *Lady Chatterley's Lover*, that use plain, homely words for the natural functions and anatomy of the body instead of latinized words or circumlocutions. (6) Books that are humorous about sexual subjects. *The Frogs* in the original Greek is an example. (7) Well-written books designed to instruct in and stimulate sexual activity. These were common in classical times and are prominent in oriental literature.

189. Jackson, *op. cit. supra* note 180, at 112-135.

It is not surprising therefore that the delegates to the Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications discovered that they could not define obscenity;¹⁹⁰ "After which, having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion."¹⁹¹ Nor is it surprising that American legislatures have sought to give sensible meaning to their statutes prohibiting obscene literature by adding one or more of the following words: disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, and vulgar.¹⁹² These added words, however, have made little or no difference in judicial interpretations of the statutes.¹⁹³ And though New Hampshire and Georgia have recently enacted statutory definitions of obscenity,¹⁹⁴ these definitions will probably have no more effect than the addition of a long string of synonyms.

Zechariah Chafee gives a number of excellent reasons for the extreme difficulty of framing a satisfactory definition of the obscene.¹⁹⁵ The law, he writes, likes to be logical, but sex is seldom wholly that, since by its very nature it includes a large element of irrationality. The law of obscenity also undertakes to protect a common standard in an area in which there is no such thing; for each community is divided into groups that have different standards of decency. The complexity of the idea of obscenity is another cause of difficulty; for obscenity includes three different factors: 1) of-

190. Causton and Young, *Keeping It Dark* 55 (n.d.).

191. Huxley, *Vulgarity in Literature* 1 (1930).

192. Utah has seven words in its statute; it applies to any "obscene, lewd, lascivious, filthy, indecent, disgusting or impure" book. Utah Code Ann. § 76-39-1 (1953). New York and Pennsylvania each have five; their statutes apply to any "obscene, lewd, lascivious, filthy, or disgusting" book. N. Y. Penal Law § 1141 (1944); Pa. Stat. Ann. § 18.4524 (Purdon 1939). Only Florida, Tennessee, West Virginia, and Wisconsin have been content with the single word "obscene." Fla. Stat. § 847.01 (1931); Tenn. Code Ann. § 1190 (1934); W. Va. Code § 6066 (1949); Wis. Stat. § 351.38 (1951).

193. "The effect of this plethora of epithets is to merge them into one prevailing meaning—that of sexual impurity alone. . . ." *Commonwealth v. Gordon*, 66 Pa. D & C 101, 112 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). See also *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459 (1907); *People v. Wendling*, 258 N. Y. 451, 180 N. E. 169 (1932). Only a few courts have given the words filthy, indecent or disgusting a separate meaning. *United States v. Limehouse*, 285 U. S. 424 (1932); *Commonwealth v. Donaducy*, 33 Erie 330 (Pa. 1949).

194. New Hampshire now defines an "obscene" book as one "whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone reading or viewing it." N. H. Laws 1953, c. 233.

The Georgia definition of "obscene literature" is "any literature offensive to chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed." Ga. Code Ann. § 26-6301a (1953).

195. Chafee, *op. cit. supra* note 177, at 210-212.

fensiveness, 2) an ideological element that seeks to protect moral standards from criticism, and 3) stimulation of sexual impulses and impure thoughts that may lead to immoral conduct. This last factor is the most troublesome of all because of the lack of reliable evidence of the actual consequences of reading any kind of literature. The situation is further complicated by the fact that the reading of literature is not confined to normal adults. Abnormal persons and young people read too, and the effect of literature upon them plays an important part in the determination of what is obscene. Professor Chafee may well despair of framing a definition of the obscene that will work in all situations.¹⁹⁶

But courts cannot await the formulation of a perfect definition of obscenity. Every state, save one,¹⁹⁷ the United States, and many municipalities have laws aimed at obscene literature. Courts have no choice but to do the best they can with an extremely difficult and complex concept.¹⁹⁸ What they have done and how well they have done it merits careful study.¹⁹⁹

B. OBSCENITY IN THE COURTS

In the United States before the Civil War there were few reported decisions involving obscene literature.²⁰⁰ This of course is no indication that such literature was not in circulation at that time; the persistence of pornography is entirely too strong to warrant

196. *Id.* at 210.

197. New Mexico.

198. Unless of course they invalidate the obscenity laws for vagueness, which seems unlikely. See text to notes 369-373 *infra*.

199. In the United States many such studies have been made. Perhaps the best are: Ernst and Seagle, *To the Pure* (1928); Ernst and Lindey, *The Censor Marches On* (1940); Chafee, *Government and Mass Communication* 196-366 (1947); Alpert, *Judicial Censorship of Obscene Literature*, 52 *Harv. L. Rev.* 40 (1938); Grant & Angoff, *Massachusetts and Censorship*, 10 *Boston U. L. Rev.* 36, 146 (1930); Grant & Angoff, *Recent Developments in Censorship*, 10 *Boston U. L. Rev.* 488 (1930); Jenkins, *The Legal Basis of Literary Censorship*, 31 *Va. L. Rev.* 83 (1944). For consideration of special problems, see Balter, *Some Observations Concerning the Federal Obscenity Statutes*, 8 *So. Calif. L. Rev.* 267 (1935); Chafee, *Censorship of Plays and Books*, 1 *Bill of Rights Rev.* 16 (1940); Nutting, *Definitive Standards in Federal Legislation*, 23 *Iowa L. Rev.* 24 (1937); Rogers, *Copyright and Morals*, 18 *Mich. L. Rev.* 390 (1920).

In England, too, there are many valuable studies of the obscenity laws: Armitage, *Banned in England* (1932); Causton and Young, *Keeping It Dark* (n.d.); Craig, *Above All Liberties* (1942); Craig, *The Banned Books of England* (1937); Hallis, *The Law and Obscenity* (1932); Scott, *Into Whose Hands* (1945); Seagle, *Cato, or The Future of Censorship* (1930).

200. The first reported case is *Commonwealth v. Holmes*, 17 *Mass.* 336 (1821), which turned on procedural matters and the jurisdiction of the court. The court did, however, hold that an "obscene libel" was a common-law offense. The book involved in the case was entitled *Memoirs of a Woman of Pleasure*. Could this have been John Cleland's notorious *Memoirs of the Life of Fanny Hill* or, *The Career of a Woman of Pleasure* (1748-1749) or one of its many pirated or expurgated versions? For an account of the book, see Scott, *Into Whose Hands* 143-145 (1945).

such an inference.²⁰¹ Nor is it an indication that the people of the time were totally indifferent to the proprieties of the literature they read. In 1851 Nathaniel Hawthorne's *The Scarlet Letter* was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness.²⁰² The lack of cases merely means that the problem of obscene literature was not thought to be of sufficient importance to justify arousing the forces of the state to censorship.

Following the Civil War, however, there was a sharp change in attitude. The financial scandals, the vulgar and lax social behavior, and the flagrant immorality of the years immediately after the war led to a powerful social reaction. "The voice of the reformer was heard in the land. The stage was set for a stern and rigorous revival of the spirit of the Puritan forefathers."²⁰³ This was the stage on which Anthony Comstock stepped to begin his 40-year campaign to purify the reading matter of the American public under the banner "MORALS, Not Art or Literature."²⁰⁴ It was on this stage too that a new legal definition of obscenity, imported from England, first appeared.

In England at about this time the Protestant Electoral Union published a pamphlet entitled "The Confessional Unmasked"²⁰⁵ to further its program for advancing Protestantism and opposing Catholicism, particularly in the election of Protestants to Parliament. The pamphlets were seized under Lord Campbell's Act²⁰⁶ and in the case that arose out of the seizure—*Queen v. Hicklin*²⁰⁷—a new legal definition of obscenity was framed for both England and the United States. In the course of his opinion, the Lord Chief Justice Cockburn said:

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²⁰⁸

201. In 1815 several persons were convicted of exhibiting for a price an obscene painting "representing a man in an obscene, impudent and indecent posture with a woman." *Commonwealth v. Sharpless* 2 S. & R. 91 (Pa. 1815).

202. A. C. Cox in the *Church Review* for January, 1851, reprinted in Mordell, *Notorious Literary Attacks* 122 (1926).

203. Broun and Leech, *Anthony Comstock* 76 (1927). See also Mencken, *Puritanism as a Literary Force* in *A Book of Prefaces* 197 (1917).

204. See Broun and Leech, *Anthony Comstock* (1927); Mencken, *Puritanism as a Literary Force* in *A Book of Prefaces* 197, 253-260 (1917); Trumbull, *Anthony Comstock, Fighter* (1913).

205. See Scott, *Into Whose Hands* 89-91 (1945).

206. 20-21 Vict. c. 83 (1857). For discussions of the developments leading to enactment of this statute, see Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 50-52 (1938).

207. L. R. 3 Q. B. 360 (1868).

208. *Id.* at 371.

This test was soon adopted by American courts.²⁰⁹ By 1913 it had become so well established that Judge Learned Hand, though he personally rejected the test, felt constrained to follow it. In *United States v. Kennerley*²¹⁰ Judge Hand overruled a demurrer to an indictment for mailing Daniel Carson Goodman's *Hagar Revelly* but added his now-famous protest against the *Hicklin* rule:

" . . . I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time. . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. . . .

"Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."²¹¹

This protest, however, was not the only indication of judicial dissatisfaction with the harsh rule of the *Hicklin* case. In New York, long before Judge Hand's protest was written, the courts had been quietly ignoring the rule, despite its early adoption by the Court of Appeals in 1884.²¹² In two cases Supreme Court judges held that standard works of high literary quality were not obscene;²¹³ and

209. *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D. N.Y. 1879); *People v. Muller*, 96 N. Y. 408 (1884); see *United States v. Rosen*, 161 U. S. 29, 43 (1896).

210. 209 Fed. 119 (S.D. N.Y. 1913).

211. *Id.* at 120-121.

212. *People v. Muller*, 96 N. Y. 408 (1884).

213. *In re Worthington*, 30 N. Y. Supp. 361 (Sup. Ct. 1894); *St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N. Y. Supp. (Sup. Ct. 1909).

Among the books involved in the *Worthington* case were: Payne's edition

in one case the Court of Appeals held that a violent newspaper attack on the confessional was not "indecent" under the statute.²¹⁴

But it was not until the early 1930's that American courts generally began to reject the *Hicklin* rule.²¹⁵ In 1930 the Circuit Court of Appeals for the Second Circuit held that Mary Ware Dennett's *The Sex Side of Life*, a pamphlet on sex instruction written for adolescents, was not obscene and reversed a judgment of conviction.²¹⁶ Massachusetts in the same year amended its obscene literature statute to remove at least some of the harshness and inflexibility of the *Hicklin* rule.²¹⁷ The following year Judge Woolsey held two of Dr. Marie C. Stopes' works not to be obscene, and dismissed libels against them under the customs law.²¹⁸ These, however, were mere skirmishes; the major attack on the *Hicklin* rule came with the celebrated *Ulysses* cases of 1933 and 1934.²¹⁹ In the Circuit Court of Appeals Judge Augustus N. Hand explicitly and forcefully repudiated the *Hicklin* rule and in its place substituted a new standard for the determination of what is obscene:

"While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect.²²⁰ In applying this test, relevancy of the objectionable parts to the theme, the established

of *The Arabian Nights*, Fielding's *Tom Jones*, Ovid's *Art of Love*, Boccaccio's *Decameron*, and Queen Margaret of Navarre's *Heptameron*.

The *St. Hubert Guild* case involved a 42 volume set of Voltaire's works.

214. *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459 (1907).

215. In New York most judges, particularly on the lower courts, continued to ignore the *Hicklin* rule. See Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 56-65 (1938); Grant and Angoff, *Massachusetts and Censorship*, 10 Boston U. L. Rev. 147, 173-176 (1930).

216. *United States v. Dennett*, 39 F. 2d 564 (2d Cir. 1930). Although the court (Augustus Hand, J.) did not openly reject the *Hicklin* rule, it did modify the rule by holding that what *might* stimulate sexual impulses is not barred and by emphasizing the *main* effect of the pamphlet.

Mrs. Dennett gives her own account of the case in *Dennett, Who's Obscene* (1930).

217. Before 1930 the Massachusetts statute applied to a book "containing obscene, indecent or impure language, or manifestly tending to corrupt the morals of youth." Mass. Gen. Laws 1921, c. 272, § 28. In 1930 it was amended so as to apply to a book "which is obscene, indecent or impure, or manifestly tends to corrupt the morals of youth." Mass. Acts 1930, c. 162.

The change was doubtless made to correct such cases as *Commonwealth v. Fricde*, 271 Mass. 318, 171 N. E. 472 (1930), in which Theodore Dreiser's *An American Tragedy* was held to violate the statute upon the basis of selected passages alone.

For an account of the enactment of the new amendment, see Grant and Angoff, *Recent Developments in Censorship*, 10 Boston U. L. Rev. 487, 487-491 (1930).

218. *United State v. One Obscene Book Entitled "Married Love,"* 48 F. 2d 821 (S.D. N.Y. 1931); *United States v. One Book Entitled "Contraception,"* 51 F. 2d 525 (S.D. N.Y. 1931).

219. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D. N.Y. 1933), *aff'd*, *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934).

220. The effect Judge Hand refers to is "libidinous." *Id.* at 707.

reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content."²²¹

Thus, *Ulysses* effectively routed the old rule—which ignored literary and other social values, judged a whole book by passages taken out of context, and tested for obscenity by the tendency of the passages alone to deprave the minds of those open to such influence and into whose hands the book might come.²²² In cases arising after *Ulysses*, most courts continued to reject the *Hicklin* rule and to apply the new standard of the *Ulysses* case.²²³ In Massachusetts, although the court refused to accept all of the implications of the *Ulysses* standard, the interpretation it placed upon the 1930 obscene literature law²²⁴ was not very different. In *Commonwealth v. Isenstadt*²²⁵ the Supreme Judicial Court rejected the *Hicklin* rule²²⁶ and approved the *Ulysses* case, apart from its implication that a book is not obscene if sincerity and artistry are more prominent features of the book than obscenity²²⁷ and its approval of taking judicial notice of book reviews and literary criticism.²²⁸ On the latter point, the court expressed no opinion, though at the time of this decision a statute had already been enacted which would authorize courts to receive evidence of the literary, cultural, and educational qualities of a book.²²⁹

Though routed, the *Hicklin* rule was not finally defeated. A battle against it had been won, not the whole war. For *Hicklin* from time to time continued to appear in various guises in the

221. *Id.* at 708.

222. This is Judge Hand's interpretation of the *Hicklin* rule as laid down in *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D. N.Y. 1879).

223. *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936); *Parmelee v. United States*, 113 F. 2d 729 (D.C. Cir. 1940); *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945); *New American Lib. of World Lit. v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953); *Bantam Books v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (1953); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936); *People v. Miller*, 155 Misc. 446, 279 N. Y. Supp. 583 (Mag. Ct. 1935); *State v. Lerner*, 51 Ohio L. Abs. 321, 81 N. E. 2d 282 (C.P. 1948); *Commonwealth v. Gordon*, 66 Pa. D & C 101 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *St. Paul v. Fredkove*, 38 Minn. Munic. 362 (Mun. Ct. 1953).

224. See note 217 *supra*.

225. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945).

226. *Id.* at 549 n. 2.

227. *Id.* at 552-554.

228. *Id.* at 560.

229. Mass Acts 1945, c. 278, § 28F. The court did not overlook the statute; it merely refused to apply the statute since it did not take effect until a later date. *Commonwealth v. Isenstadt*, *supra* note 225, at 561.

decisions of some courts.²³⁰ The Gathings committee, too, sought to revive the old rule.²³¹ But even if the war against *Hicklin* had been won, the problems inherent in any concept of obscenity would still remain.

1. *Effects of Reading*

Perhaps the most difficult of the problems that inhere in any concept of obscenity concerns the effect of reading an obscene book. In the *Hicklin* case Lord Chief Justice Cockburn spoke of the tendency to "deprave and corrupt those whose minds are open to such immoral influences."²³² He also spoke of "depraving and debauching" their minds²³³ and of corrupting their "minds and morals."²³⁴ But he did not explain what he meant by depraving, debauching, or corrupting the minds and morals of the book's readers. The only clue that he gave to the meaning of these words was his firm conviction that the book in question—*The Confessional Unmasked*—"would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."²³⁵ The suggestion of impure and libidinous thoughts, then, is the key to what depraves, debauches, and corrupts the minds and morals of readers, and so makes a book obscene.

a. *Effect on Thoughts*

This is the attitude of most courts. But it is an attitude hard to describe with any precision. For the courts have used such a variety of terminology in expressing it that even some of the outlines of the attitude remain blurred. The federal courts, for instance, have used such phrases as "tendency to suggest impure and libidinous thoughts,"²³⁶ "suggesting lewd thoughts and exciting sensual desires,"²³⁷ "stir the sex impulses,"²³⁸ "lead to sexually impure and

230. *Burstein v. United States*, 178 F. 2d 665 (9th Cir. 1949); *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Calif. 1951), *aff'd sub nom. Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); *Hadley v. State*, 205 Ark. 1027, 172 S. W. 2d 237 (1943); *King v. Commonwealth*, 313 Ky. 741, 233 S. W. 2d 522 (1950); *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A. 2d 440 (1950); *Commonwealth v. New*, 142 Pa. Super. 358, 16 A. 2d 437 (1940).

231. See notes 79-80 *supra*.

232. *Queen v. Hicklin*, L. R. 3 Q. B. 360, 371 (1868).

233. *Id.* at 370.

234. *Id.* at 373.

235. *Id.* at 371.

236. *United States v. Bennett*, 24 Fed. Cas. 1093, 1104, No. 14,571 (C.C.S.D. N.Y. 1879).

237. *United States v. Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930).

238. *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821, 824 (S.D. N.Y. 1931); *United States v. One Book Entitled "Contraception"*, 51 F. 2d 525, 528 (S.D. N.Y. 1931); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D. N.Y. 1933).

lustful thoughts,"²³⁹ "arouse the salacity of the reader,"²⁴⁰ and "allowing or implanting . . . obscene, lewd, or lascivious thoughts or desires."²⁴¹ In New York the courts have employed almost as wide a variety of terminology; they have spoken of the tendency to "excite lustful and lecherous desires,"²⁴² "excite to lustful desire and what has been rather fancifully called 'impure imaginations,'"²⁴³ and "stir sex impulses or lead to sexually impure thoughts."²⁴⁴ In Massachusetts, at least since the adoption of the 1930 statute,²⁴⁵ the courts have been a little more consistent; they speak of "inciting lascivious thoughts or arousing lustful desire."²⁴⁶

But what kinds of desires, imaginations, impulses, and thoughts are impure, lascivious, lecherous, lewd, libidinous, lustful, obscene, sensual, or sexual? Do these words embrace thoughts of normal sexual intercourse? If so, within wedlock or only without? Or, on the other hand, do they embrace only thoughts of sexual perversions, including of course the sexual perversion of auto-eroticism in which the reader gains sexual gratification solely from reading and not from a live person of the opposite sex?²⁴⁷ None of the cases gives a clear answer to any of these questions. We can only infer from the nature of much of the literature held to be obscene that thoughts of sex in any form are included within the meaning of the words used by the courts.

There must of course be some causal relationship between the literature and the thought. But what degree of causal relationship is required? Is it enough if reading the book merely allows the thought to arise, or suggests or leads to it? Or must the book stir, arouse, implant, excite, or incite the prohibited thought? Only a

239. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D. N.Y. 1933).

240. *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936); *Walker v. Popenoe*, 149 F. 2d 511, 512 (D.C. Cir. 1945).

241. *Burstein v. United States*, 178 F. 2d 665, 667 (9th Cir. 1949); *Besig v. United States*, 208 F. 2d 142, 146 (9th Cir. 1953).

242. *People v. Brainard*, 192 App. Div. 816, 820, 193 N. Y. Supp. 452, 455-456 (1920); *People v. Seltzer*, 122 Misc. 329, 335, 203 N. Y. Supp. 809, 814 (Sup. Ct. 1924); *People v. Vanguard Press*, 192 Misc. 127, 129, 84 N. Y. S. 2d 427, 430 (Mag. Ct. 1947).

243. *People v. Viking Press*, 147 Misc. 813, 813-814, 264 N. Y. Supp. 534, 536 (Mag. Ct. 1933); *People v. Vanguard Press*, 192 Misc. 127, 130, 84 N. Y. S. 2d 427, 430 (Mag. Ct. 1947); *cf. People v. Muller*, 96 N. Y. 408, 411 (1884) (photographs of nude paintings).

244. *People v. Vanguard Press*, 192 Misc. 127, 130, 84 N. Y. S. 2d 427, 430 (Mag. Ct. 1947).

245. See note 217 *supra*.

246. *Commonwealth v. Isenstadt*, 318 Mass. 543, 550, 62 N. E. 2d 840, 844 (1945); *Attorney General v. Book Named "Forever Amber,"* 323 Mass. 302, 307, 81 N. E. 2d 663, 666 (1948); *Attorney General v. Book Named "Serenade,"* 326 Mass. 324, 326, 94 N. E. 2d 259, 260 (1950). Other courts have also used this terminology. See *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 131 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *People v. Wepplo*, 78 Cal. App. 2d 959, 961, 178 P. 2d 853, 855 (1947).

247. See note 182 *supra*.

few cases have discussed this question. In *United States v. Dennett*²⁴⁸ the court remarked that the statute did not bar "everything which *might* stimulate sex impulses"²⁴⁹ and went on to hold that a book on sex instruction for adolescents was not obscene because "[a]ny incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect."²⁵⁰ This idea was carried a bit further in *United States v. Levine*;²⁵¹ there the court suggested that the degree of likelihood of sexual stimulation as well as the degree of intensity of the resulting sexual thought must outweigh the merits of the book.²⁵² But whatever words or scales are used to determine the required degree of causal relationship between the book and the thought, there will always be the extremely difficult, almost impossible task of applying them in particular cases; for who can say with reasonable certainty when, in what ways, and how much the reading of a particular book will affect the thoughts and desires of any reader?²⁵³ Yet on this precise question, courts reject the expert testimony of psychiatrists.²⁵⁴

248. 39 F. 2d 564 (2d Cir. 1930).

249. *Id.* at 568.

250. *Id.* at 569; cf. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 708 (2d Cir. 1934) ("dominant effect" of book).

251. 83 F. 2d 156 (2d Cir. 1936).

252. "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands. . . ." *Id.* at 158.

The degree of intensity of the resulting sexual thought is emphasized in *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945). The court said: "It would make nonsense of the statute to hold that it covers works of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader." *Id.* at 512.

253. "It is impossible to say just what his (the average modern reader's) reactions to a book actually are. . . . If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the *Mechanics' Lien Act* while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another? When, where, how, and why are questions that cannot be answered clearly in this field. The professional answer that is suggested is the one general compromise—that the appetite of sex is old, universal, and unpredictable, and that the best we can do to keep it within reasonable bounds is to be our brother's keeper and censor, because we never know when his sensuality may be high. This does not satisfy me, for in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." Bok, J., in *People v. Gordon*, 66 Pa. D. & C. 101, 137-138 (1949), *aff'd sub nom.* *Commonwealth v. Feigenbaum*, 166 Pa. 120, 70 A. 2d 389 (1950). Cf. Gardiner, *Tenets for Readers and Reviewers* 12-17 (1944) for a discriminating analysis of the problem from the standpoint of a reviewer for Roman Catholic readers.

One writer has facetiously suggested an objective test of the causal relationship between the book and the thought. Legman, *Love & Death: A Study in Censorship* 20 (1949).

254. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); see *Attorney General v. Book Named "Forever Amber,"* 323 Mass. 302, 307, 81 N. E. 2d 663, 666 (1948).

b. Effect on Conduct

A more fundamental question is whether a book is obscene solely because it may cause thoughts of sex in the minds of its readers, without consideration of the relationship between such thoughts and physical conduct. In other words, is the causal relationship with which we are concerned an immediate relationship between the book and the thought? Or is it a relationship between the book and the conduct of its readers, with the thought of sex only a link in the chain between the two? The old *Hicklin* rule is ambiguous on this point, for it tested obscenity by the tendency of a book to "deprave and corrupt those whose minds are open to such immoral influences" by suggesting impure and libidinous thoughts.²⁵⁵ Here it is impossible to tell whether the words "deprave and corrupt" refer to the reader's mind or to his behavior. The same ambiguity lies in the Massachusetts test of obscenity, which requires the book to have "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires."²⁵⁶ Many courts, however, speak of depraving and corrupting the *morals* of the reader by means of sexual thoughts,²⁵⁷ thus suggesting that the words "deprave" and "corrupt" refer to the reader's behavior and not to his thoughts alone. If so, the proposition, however stated, is fraught with ambiguities and an assumption of doubtful validity. When is a person depraved and corrupted? And in what ways? Presumably, since he is to be depraved and corrupted by thoughts of sex, the depravity and corruption of the reader must be sexual in nature. Is he depraved and corrupted when he engages in normal sexual intercourse? Within wedlock, or without? Or is he depraved and corrupted only when he practices a sexual perversion? Moreover, underlying these ambiguities is the doubtful assumption that a causal relationship exists between reading a book that suggests

255. See text to notes 232-235 *supra*.

256. *Commonwealth v. Isenstadt*, 318 Mass. 543, 550, 62 N. E. 840, 844 (1945); *Attorney General v. Book Named "Forever Amber,"* 323 Mass. 302, 307, 81 N. E. 2d 663 (1948); *Attorney General v. Book Named "Serenade,"* 326 Mass. 324, 326, 94 N. E. 2d 259, 260 (1950). See also *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 131, *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *People v. Wepplo*, 78 Cal. App. 2d 959, 961, 178 P. 2d 853, 855 (1947).

257. *Commonwealth v. New*, 142 Pa. Super. 358, 360, 16 A. 2d 437, 438 (1940); *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 613, 76 A. 2d 440, 441 (1950); *United States v. Bennett*, 24 Fed. Cas. 1093, 1103-1104, No. 14, 571 (C.C.S.D. N.Y. 1879); *United States v. Journal Co.*, 197 Fed. 415, 417 (E.D. Va. 1912); *United States v. Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930); *Burstein v. United States*, 178 F. 2d 665, 667 (9th Cir. 1949).

A clearer emphasis upon sexual conduct appears in *People v. Creative Age Press*, 192 Misc. 188, 190, 79 N. Y. S. 2d 198, 201 (Mag. Ct. 1948), where the court speaks of "the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior."

or incites sexual thoughts and the conduct of the reader, a proposition on which there is little or no reliable information.²⁵⁸

Some courts, however, do not go beyond the thoughts of sex that may be caused by reading a book to discuss the possible consequences of such thoughts;²⁵⁹ to them, sexual thoughts alone may be enough to make a book obscene. But their reasons for disregarding the consequences of sexual thoughts have never been expressed. One possible explanation is the ancient theological doctrine that the contemplation of sex is just as much an evil as its physical expression;²⁶⁰ but this explanation seems quite unlikely in view of the fact that in all but one of the cases the books involved were held not to be obscene.²⁶¹ Another explanation is that these courts have tacitly assumed that thoughts of sex do in fact lead to undesirable consequences. Their tacit assumption may be that sexual thoughts translate themselves into action, an assumption of doubtful validity.²⁶² Or their assumption may be that sexual thoughts, without necessarily inducing the reader to engage in sexual acts, somehow lead to a lowering of the moral standards of the community—a form of critical or ideological obscenity.²⁶³

c. Effect on Community Moral Standards

Ideological obscenity does not often explicitly appear in the opinions of courts as a basis of their decisions. Perhaps the clearest example is *People v. Dial Press*,²⁶⁴ in which the court construed the New York statute to prohibit "publication of a book which contravenes the moral law and which tends to subvert respect for decency and morality."²⁶⁵ D. H. Lawrence's *The First Lady Chatterley*, the court held, was clearly obscene because of its central theme, which the court interpreted to be that "it is dangerous to the physical and mental health of a young woman to remain continent and that the most important thing in her life, more important

258. See text to notes 516-531 *infra*. See also Heywood Broun's observations on this point in Broun and Leech, *Anthony Comstock 266-269* (1927).

259. *United States v. One Book Entitled "Contraception,"* 51 F. 2d 525, 528 (S.D. N.Y. 1931); *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D. N.Y. 1933), *aff'd* *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934); *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936); *Walker v. Popenoe*, 149 F. 2d 511, 512 (D.C. Cir. 1945); *People v. Brainard*, 192 App. Div. 816, 820, 183 N. Y. Supp. 452, 456 (1920); *People v. Viking Press*, 147 Misc. 813, 816, 264 N. Y. Supp. 534, 536 (Mag. Ct. 1933).

260. *May, The Social Control of Sex Expression* 82 (1931).

261. The one exception is *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936) and in that instance the case was sent back to the district court for a new trial.

262. See text to notes 516-531 *infra*.

263. See note 178 *supra*.

264. 182 Misc. 416, 48 N. Y. S. 2d 480 (1944).

265. *Id.* at 417, 48 N. Y. S. 2d at 481.

than any rule of law or morals, is the gratification of her sexual desires."²⁶⁶ A more common expression in the opinions of New York courts is whether a book tends to "lower standards of right and wrong, specifically as to the sexual relation."²⁶⁷ But even though courts have not often mentioned ideological obscenity as a basis of their decisions, there can be no doubt that it has exerted a powerful influence on the law of obscene literature.²⁶⁸ Here, too, the difficulties of framing an acceptable standard and then of applying it to a particular book are enormous. Perhaps courts could without excessive difficulty frame a generally acceptable ideological standard concerning sexual behavior, despite the manifold social and religious groupings of a nation as large as ours. The chief difficulty lies in its application to literature. When does a book tend to subvert respect for decency and morality or to lower standards of right and wrong? If the causal relationship between a book and sexual thought and between a book and sexual behavior is hard to determine, what can be said about the causal relationship between a book and the community's moral standards governing sexual relations? For the factors that influence the growth and formulation of moral standards and their modification are so numerous and complex that it is impossible to say what effect a book might have.

It is of course possible to formulate a standard of obscenity that avoids the troublesome questions of causal relationship between the book and the reader's thoughts or behavior, or between the book

266. *Id.* at 418, 48 N. Y. S. 2d at 483.

267. *People v. Berg*, 241 App. Div. 543, 544-545, 272 N. Y. Supp. 586, 588 (1934), *aff'd*, 269 N. Y. 514, 199 N. E. 513 (1935); *People v. Larsen*, 5 N. Y. S. 2d 55, 56 (Sp. Sess. 1938); *People v. Vanguard Press*, 192 Misc. 127, 130, 84 N. Y. S. 2d 427, 430 (Mag. Ct. 1947); *cf. People v. Fellerman*, 243 App. Div. 64, 65, 276 N. Y. Supp. 198, 200 (1934), *aff'd*, 269 N. Y. 629, 200 N. E. 30 (1936). This expression was taken from *People v. Wendling*, 258 N. Y. 451, 453, 180 N. E. 169, 169-170 (1932), where with reference to the play *Frankie and Johnnie* the court said, "[T]he question is not whether it would tend to coarsen or vulgarize the youth who might witness it, but whether it would tend to lower their standards of right and wrong, specifically as to the sexual relation."

268. *E.g.*, *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D. N.Y. 1879) (*Ezra Heywood's Cupid's Yokes*); *People v. Friede*, 133 Misc. 611, 233 N. Y. Supp. 565 (Mag. Ct. 1929) (*Radclyffe Hall's The Well of Loneliness*); *People v. Pesky*, 230 App. Div. 200, 243 N. Y. Supp. 193 (1st Dep't 1930), *aff'd*, 254 N. Y. 373, 173 N. E. 227 (1930) (*Arthur Schnitzler's Hands Around*); *Commonwealth v. Allison*, 227 Mass. 57, 116 N. E. 265 (1917) (Birth control pamphlets); *cf. People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936) (*Andre Gide's If It Die*). See *Broun and Leech*, *Anthony Comstock* 170-185 (1927).

Theodore Dreiser's *An American Tragedy* was prosecuted in Massachusetts because, according to Arthur Garfield Hays, "In the story, Clyde had killed his love-mate Roberta when her pregnancy threatened his social plans and an advantageous marriage. 'A story like this is indecent,' declaimed the district attorney. 'It's an invitation to young people to learn birth control.'" Hays, *City Lawyer* 238-239 (1942).

and its effect upon the moral standards of the community. One such standard is the religious principle that, if sin is discussed or portrayed in a book, it must be recognized for what it is;²⁶⁹ another, is Havelock Ellis' definition of the obscene as that which is off the scene and not openly shown on the stage of life.²⁷⁰ Although these standards avoid the problem of casual relationship, they create new problems of a different kind. The religious principle, for example, raises such questions as these: What is sin? How and in what way must it be recognized? Who must recognize it—the author, the characters in the book, the reader, all readers?²⁷¹ Havelock Ellis' definition of the obscene is even more troublesome. Both its desirability as a standard and its usefulness in application are doubtful; for it is a static standard that "might easily fetter American works of literary and artistic distinction" and it also "pretty much says, 'We will permit what we permit,' which is going around in a circle."²⁷² And in addition to the difficulty of ascertaining what is off the scene and not openly shown on the stage of life, which is no mean task in itself, it squarely raises issues concerning vulgar and offensive language and scatological matters not customarily used or discussed in public.

d. Offensiveness

With rare exceptions,²⁷³ courts agree that the use of vulgar and offensive language does not in itself make a book obscene.²⁷⁴ Such

269. Gardiner, *op. cit. supra* note 253, at 7 (1944).

270. See text to note 176 *supra*. In *State v. Lerner*, 81 N. E. 2d 282, 289 (C.P. Ohio 1948) the court said: "The community concept of what is 'obscene' literature is approximately ascertainable. It goes without saying that public opinion, community concepts condemn sexually nasty, perverse publications, prints, pictures, drawings or photographs as 'obscene,' not because they might excite sexually impure ideas in minds susceptible of such ideas because that is a mere matter of conjecture, but because they offend the moral concepts of the people as a whole, and the people have the right to establish codes of right conduct for literature as well as for other forms of community conduct." See also Judge Learned Hand's suggestion in *United States v. Kennerley*, 209 Fed 119, 121 (S.D. N. Y. 1913) that the word "obscene" should be taken to "indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now."

271. Gardiner, *op. cit. supra* note 253, at 7-12.

272. Chafee, *Government & Mass Communications* 209-210 (1947).

273. *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); *People v. Seltzer*, 122 Misc. 329, 203 N. Y. Supp. 809 (Sup. Ct. 1924). See also note 193 *supra* and cases cited, holding that the word "filthy" in obscene literature statutes includes vulgar and offensive language.

274. *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459 (1907); *People v. Wendling*, 258 N. Y. 451, 180 N. E. 169 (1932); *People v. Viking Press*, 147 Misc. 813, 264 N. Y. Supp. 534 (Mag. Ct. 1933); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D. N. Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, *aff'd sub*

language is not ordinarily sexually stimulating, nor does it tend to lower moral standards concerning sexual behavior;²⁷⁵ yet it often is language not customarily used in public. And it is perfectly clear that the use of such language in a book has an important bearing upon judicial decisions in particular cases. In *United States v. Dennett*,²⁷⁶ for example, the court emphasized the "decent" language of the booklet on sex instruction involved in that case.²⁷⁷ Conversely, in *Besig v. United States*,²⁷⁸ the court was so shocked at the language of Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* that it undoubtedly was a very important factor in the court's decision that these two books were obscene.²⁷⁹ Yet James Joyce's *Ulysses*,²⁸⁰ James T. Farrell's *A World I Never Made*,²⁸¹

nom. Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A. 2d 389 (1950). See also *People v. Vanguard Press* (Mag. Ct. 1937) reported in Ernst and Lindey, *The Censor Marches On* 33-37 (1940) and Craig, *Above All Liberties* 127-130 (1942).

275. *People v. Wendling*, 258 N. Y. 451, 180 N. E. 169 (1932).

276. 39 F. 2d 564 (2d Cir. 1930).

277. "[W]e hold that an accurate exposition of the relevant facts of the sex side of life in decent language, and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene." *Id.* at 569. See also *United States v. One Book Entitled "Contraception"*, 51 F. 2d 525, 527 (S.D. N.Y. 1931); *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821, 823 (S.D. N.Y. 1931); *Walker v. Popenoe*, 149 F. 2d 511, 512 (D.C. Cir. 1945).

278. 208 F. 2d 142 (9th Cir. 1953).

279. "The vehicle of description is the unprintable word of the debased and morally bankrupt. Practically everything that the world loosely regards as sin is detailed in the vivid, lurid, salacious language of smut, prostitution, and dirt. . . . [E]ven human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house." *Id.* at 145. See also *Commonwealth v. Isestadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) and Morris L. Ernst's comments on the case in Ernst, *The Best Is Yet* 114-115 (1945).

280. "The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe." Woolsey, J., in *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183-184 (S.D. N.Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934).

Morris L. Ernst describes how this matter was handled in the trial of the *Ulysses* case. "I told Judge Woolsey about all these words unused by the polite. I tried . . . to trace the convention in words. Tastes change, taboos vary, but man has always found a new combination of letters to convey a concept if the old word was deemed disgusting. No better series in our own generation can be found than in the travelogue of bathroom, toilet, water closet, W. C., gentleman's room, john, can, and now 'I'm going to telephone.' No one is ever really deceived." He also explained the derivation of the common word for sexual intercourse and euphemisms currently used to describe the same act. Ernst, *The Best Is Yet* 116 (1945).

281. *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 105-106, 114 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *People v. Vanguard Press* (Mag. Ct. 1937), reported in Ernst and Lindey, *The Censor Marches On* 33-37 (1940) and Craig, *Above All Liberties* 127-130 (1942).

and other books containing similar language²⁸² have been held not obscene. Perhaps Massachusetts has arrived at as candid and satisfactory a solution to the problem as possible. In *Commonwealth v. Isenstadt*²⁸³ the court held that, although realistically coarse scenes and vulgar words are not in themselves obscene, they may be considered in determining the effect of a book on its readers.²⁸⁴

Some kinds of literature raise a similar but much more difficult problem. Such pieces of literature as Benjamin Franklin's *Letter to the Academy of Brussels*²⁸⁵ and Mark Twain's *1601*,²⁸⁶ for example, deal with matters not often discussed in polite society, but they are not sexually stimulating and it's hard to see how either of them could have any substantial tendency to lower moral standards concerning sexual behavior. Yet Benjamin Franklin's *Letter* was once held to be obscene,²⁸⁷ and Mark Twain's *1601* undoubtedly would be if a censor could ever find a suitable occasion for prosecution.²⁸⁸ Far below such literature as Franklin's *Letter* and Twain's

282. Among them are Charles O. Gorham's *The Gilded Hearse*, People v. Creative Age Press, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948), and Calder Willingham's *End As a Man*, People v. Vanguard Press, 192 Misc. 127, 84 N. Y. Supp. 427 (Mag. Ct. 1947); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 107-108 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950).

283. 318 Mass. 543, 62 N. E. 2d 840 (1945).

284. "The prohibitions of the statute are concerned with sex and sexual desire. The statute does not forbid realistically coarse scenes or vulgar words merely because they are coarse or vulgar, although such scenes or words may be considered so far as they bear upon the test already stated of the effect of the book upon its readers." *Id.* at 550, 62 N. E. 2d at 833-845.

285. Franklin's *Letter*, sometimes entitled *A Prize Question* or an essay *On Perfumes*, is a facetious response to the Royal Academy's request for a prize scientific question possessing utility. His prize question, bolstered with elaborate arguments to demonstrate its need and values, was: "To discover some Drug, wholesome and not disagreeable, to be mixed with our common Food, or Sauces, that shall render the natural discharges of Wind from our Bodies not only inoffensive, but agreeable as Perfumes." Franklin, *Satires and Bagatelles* 37 (1937).

286. Twain's *1601, or a Fireside Conversation in ye Time of Queen Elizabeth* was written in 1876 for Clemens' friend, the Reverend Joseph Twitchell of Hartford, Connecticut, to reveal to Twitchell "the picturesqueness of parlor conversation in Elizabeth's time." Somehow in 1880 a copy of the manuscript came into John Hay's hands. Hay, who was later Secretary of State, sent it to Alexander Gunn of Cleveland, Ohio, who proposed that he set it up in type and run off a few copies. Hay protested that he could not consent to the printing but asked Gunn to "save me one" if it were printed. Later, in a letter to a Mr. Orr of Cleveland dated July 30, 1906, Clemens described how he first came to write the piece and noted that it had been privately printed in several countries, including Japan, and that a sumptuous edition made by Lt. C. E. S. Wood of West Point, which was distributed among "popes and kings and such people," was worth 20 guineas a copy in England in 1900.

287. Scott, *Into Whose Hands* 157-158 (1945).

288. Twain's *1601* was once published in a magazine called *Two Worlds Quarterly* sometime in 1926 or 1927. A Clean Books Committee in New York instituted some kind of action against the magazine, but whether the particular issues contained Twain's piece is not clear; neither is the outcome of the proceedings. *Ibid.*

1601 are the dirty books that, lacking wit, are dull or even repulsive.²⁸⁹ They are not sexually stimulating, since they repel rather than attract the normal reader. At most, they pander to existing appetites for literature of that kind. Such a book, apparently, is *Waggish Tales From the Czechs* which was before the Court of Appeals in *Roth v. Goldman*.²⁹⁰ There the court recognized "the curious dilemma involved in a view that the duller the book, the more its lewdness is to be excused or at least accepted."²⁹¹ The majority of the court, to Judge Frank's bewilderment,²⁹² sought to avoid the dilemma by hiding behind the limited scope of judicial review and by the argument that "within limits it perhaps is not unreasonable to stifle compositions that clearly have little excuse for being beyond their provocative obscenity and to allow those of literary distinction to survive."²⁹³ A better and more candid solution to the dilemma was found by the same court a few years earlier in *United States v. Rebhuhn*,²⁹⁴ which held that books of this kind were obscene when sold in such a way as to appeal to the "salaciously disposed" and "to gratify their lewdness,"²⁹⁵ thus returning to something akin to Margaret Mead's analysis of pornography.²⁹⁶

2. Effect on Whom: The Probable Audience

Inherent in all definitions of obscenity and in the standards for determining what is obscene is a reference to the effect of a book upon its readers or the moral standards of the community or to a community concept of what is not properly exposed to public view. This reference, particularly to the effect of a book upon its readers, has caused trouble ever since the decision of *Queen v. Hicklin* in

289. "Sheer nastiness is feeble stuff. When I was a youngster and carefully shielded I, too, had the romantic notion that among the forbidden books were some powerful enough to steal away the very soul. By now I have read them and another illusion is gone. There is scarcely a kick in a barrel full. By what seemed a happy chance there fell into my hands, the other afternoon, a whole library of paper-backs prepared in Paris for the American trade. Shock was the whole objective, but it was not there. Indeed, after less than half an hour of reading my only emotion was one of profound pity for the poor pornographers." Heywood Broun, in Broun and Leech, Anthony Comstock 268-269 (1927). See also text to note 185 *supra*.

290. 172 F. 2d 789 (2d Cir. 1949). The court described the book as "a collection of some ninety-six 'waggish tales,' supposed to have been brought down to us from another era and another clime, and sold through the mails at the special discount of \$10 from the listed \$20 per volume. Our task is not made easier, however, when we discover them to be American-made or shared smoking room jests and stories, obscene or offensive enough by any refined standards and only saved, if at all, by reason of being both dull and well known." *Id.* at 789.

291. *Ibid.*

292. *Id.* at 798.

293. *Id.* at 789.

294. 109 F. 2d 512 (2d Cir. 1940).

295. *Id.* at 514-515.

296. See note 182 *supra*.

1868.²⁹⁷ In that case the Lord Chief Justice defined obscenity in terms of the tendency of the book to deprave and corrupt "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²⁹⁸ He also remarked that "with regard to this work,²⁹⁹ it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."³⁰⁰ The question this definition raised was whether the effect of a book upon its readers is to be judged by reference to normal adults, abnormal adults, or children.³⁰¹

Many courts, following an unduly restrictive interpretation of the *Hicklin* rule, rejected the normal adult as the standard by which to judge the effect of a book upon its readers; they read into the obscene literature statutes a desire to protect the young and the weak.³⁰² In some jurisdictions state legislatures enacted statutes explicitly aimed at the protection of the young.³⁰³ The typical statute, in addition to the usual terminology,³⁰⁴ speaks of books that tend or manifestly tend to corrupt the morals of youth.³⁰⁵ This

297. L. R. 3 Q. B. 360 (1868).

298. *Id.* at 371.

299. *The Confessional Unmasked*. See note 205 *supra*.

300. L. R. 3 Q. B. 360, 371 (1868).

301. See Chafee, *Government & Mass Communications* 201-202 (1947); Scott, *Into Whose Hands* 30-31 (1945); Bok, *Censorship and the Arts*, in *Civil Liberties Under Attack* 107, 112 (1951).

302. *United States v. Bennett*, 24 Fed. Cas 1093, No. 14,571 (C.C.S.D. N.Y. 1879); *People v. Seltzer*, 122 Misc. 329, 203 N. Y. Supp. 809 (Sup. Ct. 1924); *Commonwealth v. Friede*, 271 Mass. 318, 171 N. E. 472 (1930); *People v. Berg*, 241 App. Div. 543, 272 N. Y. Supp. 586 (1934), *aff'd*, 269 N. Y. 514, 199 N. E. 513 (1935); *Commonwealth v. New*, 142 Pa. Super 358, 16 A. 2d 437 (1940).

303. Fla. Stat. § 847.01 (1951); Iowa Code Ann. § 725.4 (1950); Me. Rev. Stat. c. 121, § 24 (1944); Mass. Ann. Laws c. 272, § 28 (1933); Mich. Stat. Ann. § 28,575 (1938); R. I. Gen. Laws c. 610, § 13 (1938); S. C. Code § 16-414 (1952); Tex. Stat., Pen. Code art. 526 (1952); Utah Code Ann. § 76-39-1 (1953); Vt. Rev. Stat. § 8490 (1947); Va. Code § 18-113 (1950); *cf.* Tenn. Code Ann. § 11190 (Williams 1934); W. Va. Code Ann. § 6066 (1949); Wis. Stat. § 351.38 (1951).

In this respect, the recent New Hampshire statute seems to be the most extreme of all obscene literature statutes. It defines an obscene book as one "whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of *anyone viewing or reading it* [Italics added]." N. H. Laws 1953 c. 233, p. 326.

304. See note 192 *supra*.

305. The mutations through which the Massachusetts statute has passed illustrate most of the various forms of statutes explicitly aimed at the protection of the young. The 1835 Massachusetts statute applied to any person who handled "any book . . . containing obscene language . . . manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school, or place of education . . . any such book. . ." Mass. Rev. Stat. 1835 c. 130, § 10. In 1862 the words "manifestly tending to corrupt the morals of youth" were dropped, Mass. Acts 1862 c. 167, § 1, but were reinstated in 1880. Mass. Acts 1880 c. 97. This is substantially its present form. Mass. Ann. Laws c. 272, § 28 (Supp. 1953). For a discussion of the statutory history see Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 147, 147-151 (1930).

view, in fact, became so well established that Judge Learned Hand in 1913 felt impelled to follow it, although he personally objected to it because it would, he said, "reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few" and "forbid all which might corrupt the most corruptible."³⁰⁶

But Judge Hand's objections to this view of the *Hicklin* rule had greater influence than his compulsion to follow it. Courts soon began to look to the normal person as the standard for determining the effect of a book on its readers, instead of the young or weak. Now most courts at least start from the premise that the normal or average person in the community is the proper touchstone,³⁰⁷ though some still speak of the young and weak as part of the reading public.³⁰⁸

The normal person, however, is not always a suitable hypothetical individual for testing the effect of a book on its readers. Books, like other things, are sometimes distributed in channels that reach certain kinds or classes of people. A book that is advertised and more or less surreptitiously distributed as pornography, for instance, normally reaches those who have an appetite for literature of that kind. In these circumstances, the normal person is hardly the proper person to serve as a standard for determining the effect of the book. Faced with this problem, many courts take into account what may be called the probable audience of the

306. *United States v. Kennerley*, 209 Fed. 119, 121 (S.D. N.Y. 1913). See also text to note 211 *supra*.

307. "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law." Woolsey, J., in *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D. N.Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934).

See also *Walker v. Popenoe*, 149 F. 2d 511, 512 (D.C. Cir. 1945); *People v. Pesky*, 230 App. Div. 200, 204, 243 N. Y. Supp. 193, 197 (1930), *aff'd*, 254 N. Y. 373, 173 N. E. 227 (1930); *People v. Viking Press*, 147 Misc. 813, 816, 264 N. Y. Supp. 534, 539 (Mag. Ct. 1933); *People v. Larsen*, 5 N. Y. S. 2d 55, 56, (Sp. Sess. 1938); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 136-138 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *State v. Lerner*, 81 N. E. 2d 282, 288-289 (C.P. Ohio 1948); *St. Paul v. Fredkove*, 38 Minn. Mun. 362 (Mun. Ct. 1953).

308. "The thing to be considered is whether the book will be appreciably injurious to society . . . because of its effects upon those who read it, without segregating either the most susceptible or the least susceptible, remembering that many persons who form part of the reading public and who cannot be called abnormal are highly susceptible to influences of the kind in question and that most people are susceptible to some degree, and without forgetting youth as an important part of the mass, if the book is likely to be read by youth." *Commonwealth v. Isenstadt*, 318 Mass. 543, 552, 62 N. E. 2d 840, 845 (1945).

See also *id.* at 557, 62 N. E. 2d at 848; *People v. Vanguard Press*, 192 Misc. 127, 129, 84 N. Y. S. 2d 427, 430 (Mag. Ct. 1947); *Sunshine Book Co. v. McCaffrey*, 112 N. Y. S. 2d 476, 482 (Sup. Ct. 1952).

book.³⁰⁹ If the book is advertised and distributed in such a way as to reach those upon whom it is not likely to have undesirable effects, it is not obscene.³¹⁰ But if, on the other hand, the book is so advertised and distributed as to reach those upon whom it is likely to have undesirable effects, it is obscene.³¹¹ And in ascertaining the probable audience of a book, courts take into account the circumstances of its publication.³¹² Among the circumstances sometimes considered are a) the nature of the advertising and promotional material,³¹³ b) the reputation of the publisher,³¹⁴ c) the channels of distribution,³¹⁵ and d) the price and quality of the edition.³¹⁶

309. "[A] book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach." Miller, J., in *Parmelee v. United States*, 113 F. 2d 729, 731 (D.C. Cir. 1940).

See also *United States v. Levine*, 83 F. 2d 156, 157 (2d Cir. 1936); *People v. Creative Age Press*, 192 Misc. 188, 190, 79 N. Y. S. 2d 198, 201 (Mag. Ct. 1948); *Commonwealth v. Isestadt*, 318 Mass. 543, 552, 62 N. E. 2d 840, 845 (1945). But see *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705, 708 (2d Cir. 1934).

310. *Consumers Union of United States v. Walker*, 145 F. 2d 33 (D.C. Cir. 1944) (Report on contraceptives distributed to members upon written certificate stating, "I am married and use prophylactic materials on the advice of a physician."); *United States v. Nicholas*, 97 F. 2d 510 (2d Cir. 1938) (*Magazine Married Hygiene* claimed by its American editor); *United States v. Dennett*, 39 F. 2d 564 (2d Cir. 1930) (Booklet on sex instruction for adolescents).

311. The defendants "indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limits; the circulars were no more than appeals to the salaciously disposed. . . ." L. Hand, J., in *United States v. Rebhuhn*, 109 F. 2d 512, 514-515 (2d Cir. 1940).

See also *United States v. Burstein*, 178 F. 2d 665 (9th Cir. 1949); *Roth v. Goldman*, 172 F. 2d 789 (2d Cir. 1949); *United States v. Nicholas*, 97 F. 2d 510 (2d Cir. 1938); *Lynch v. United States*, 285 Fed. 162 (7th Cir. 1922).

312. Even Lord Chief Justice Cockburn recognized this factor. See *Queen v. Hicklin*, L. R. 3 Q. B. 360, 367 (1868).

313. *United States v. Rebhuhn*, 109 F. 2d 512 (2d Cir. 1940); *Roth v. Goldman*, 172 F. 2d 789 (2d Cir. 1949); *Burstein v. United States*, 178 F. 2d 665 (9th Cir. 1949); *People v. Pesky*, 230 App. Div. 200, 243 N. Y. Supp. 193 (1st Dep't 1930), *aff'd*, 254 N. Y. 373, 173 N. E. 227 (1930) (Nature of introduction to Arthur Scnitzler's *Hands Around*). The title of the book or magazine is sometimes mentioned. *Burstein v. United States*, *supra*; *Uttern Publications, Inc. v. Arrow Publications, Inc.*, 166 Misc. 645, 2 N. Y. S. 2d 933 (Sup. Ct. 1938). But in *Attorney General v. Book Named "Forever Amber"*, 323 Mass. 302, 81 N. E. 2d 663 (1948), the court disregarded the advertising for the book.

314. *Ibid.* But the absence of the publisher's name on the book is sometimes disregarded. *Halsey v. New York Society for the Suppression of Vice*, 234 N. Y. 1, 136 N. E. 219 (1922).

315. The open sale of a book through reputable bookstores is sometimes considered, although it is not a conclusive factor. *People v. London*, 63 N. Y. S. 2d 227 (Mag. Ct. 1946). Some courts disregard this factor altogether. *People v. Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947). The use of an alias by a mail distributor of the book is apparently an important consideration. *Burstein v. United States*, 178 F. 2d 665 (9th Cir. 1949). So also is the use of a restricted mailing list, particularly when coupled with a certificate

Reference to the probable audience of a book to determine its effect upon readers introduces a new variable into a problem that is already full of them. In this view, a book is not obscene as such. A book may be obscene when distributed to one class of persons but not when distributed to another. Indeed, in two cases there is even language susceptible of an interpretation that would make the obscene nature of a book turn upon its effect on a single individual.³¹⁷

from each purchaser. *Consumers Union of United States v. Walker*, 145 F. 2d 33 (D.C. Cir. 1944).

But evidence of the persons to whom the book has been sold may be inadmissible, at least when offered by the defendant. *See United States v. Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930); *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936).

In the *Levine* case one of the purchasers, we have been reliably informed, was a former jurist of high standing. In explanation of its decision on this point, the court remarked: "The judge refused to allow in evidence a list of purchasers of the books, among whom were a number of well-known persons. He was right. Such a list taken alone told nothing of the standing of the works in the minds of the community; even respectable persons may have a taste for salacity. Obviously it would be impossible without hopelessly confusing the issues to undertake any analysis of such a list by finding out why each buyer bought."

But in the *Dennett* case the court said, "It was perhaps proper to exclude the evidence offered by the defendant as to the persons to whom the pamphlet was sold, for the reason that such evidence, if relevant at all, was part of the government's proof. In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper. Here the pamphlet (*Dennett's The Sex Side of Life*) appears to have been mailed to a married woman. The tract may fairly be said to be calculated to aid parents in the instruction of their children in sex matters. As the record stands, it is a reasonable inference that the pamphlet was to be given to children at the discretion of adults and to be distributed through agencies that had the real welfare of the adolescent in view. There is no reason to suppose that it was to be broadcast among children who would have no capacity to understand its general significance."

316. *In re Worthington*, 30 N. Y. Supp. 361 (Sup. Ct. 1894); *People v. Fellerman*, 243 App. Div. 64, 276 N. Y. Supp. 198 (1st Dep't 1934), *aff'd*, 269 N. Y. 629, 200 N. E. 30 (1936); *cf. St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N. Y. Supp. 582 (Sup. Ct. 1909). But in *People v. Gotham Book Mart*, 158 Misc. 240, 244, 285 N. Y. Supp. 563, 568 (Mag. Ct. 1936), the court said, "Counsel for the defendant urge as factors to be considered by me that the book in question sells for \$5 and is part of a very limited edition. Such evidence is immaterial. I cannot say that a 50 cent book is obscene but, that a \$5 book or a 'de-luxe' edition is respectable. Such a view gives rise to two contrary implications — *first*, that the rich and extravagant have a monopoly of good manners and morals, which is not true; or, *second*, that the rich and extravagant had either already been corrupted or were not worth saving, which is also not true."

317. In *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936), the defendant was convicted under an indictment containing eight counts for mailing obscene circulars advertising obscene books. The conviction was reversed because the trial court instructed the jury that the test of obscenity was the effect of a book upon the minds of "the young and immature, the ignorant and those who are sensually inclined." On appeal, however, the court added, "Our reversal does not mean that on another trial the proper standard can under no circumstances refer to the adolescent. It may appear that the prospective buyer in the eighth count was a youth and that the accused had reason

3. *Literary, Scientific and Educational Values: Partly and Wholly Obscene*

The weight to be given to literary, scientific, and educational values in the determination of what is obscene has engendered more bitterness and emotional disturbance than any other problem inherent in the various concepts of obscenity. This is particularly true of literary values. To those who place a high value upon literary qualities, the censorious are philistines. To the censorious, on the other hand, literary qualities are suspect—they serve only to make the obscene palatable and therefore all the more insidious and dangerous.³¹⁸

In the fight between the literati and the philistines, the philistines were at first on top. They got there by means of a rule of law that called for judging a book by the obscenity of passages taken out of context—the so-called partly obscene test. Where this rule came from is not wholly clear. Probably it developed out of an old rule of pleading that required the indictment to specify the parts of a book alleged to be obscene.³¹⁹ At any rate, the rule became

to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader. It is when the crime consists of importing the work, or offering it for general sale, that the test cannot be found in the interests of those to whom it is sent, though abnormally susceptible, lest in their protection the interests may be sacrificed of others who might profit from the work. . . . But even when the crime consists of a single sale, and so may be judged by possible injury to the buyer, the book must be taken as a whole. . . . The standard must be the likelihood that the work will so much arouse the salacity of *the reader to whom it is sent* as to outweigh any literary, scientific or other merits it may have *in that reader's hands* . . . [Italics added.] *Id.* at 158. See also *United States v. Nicholas*, 97 F. 2d 510 (2d Cir. 1938).

In *People v. Muller*, 96 N. Y. 408, 413 (1884), however, the court said, "It would we conceive be no answer to an indictment under the statute for the sale of an obscene picture, that it was sold to a person not liable to be injured by it. . . ."

318. "If the things said by Gautier in this book of *Mlle. De Maupin* were stated openly and frankly in the street, there would be no doubt in the minds of anybody, I take it, that the work would be lewd, vicious, and indecent. *The fact that the disgusting details are served up in a polished style, with exquisite settings and perfumed words, makes it all the more dangerous and insidious*, and none the less obscene and lascivious. Gautier may have a reputation as a writer, but his reputation does not create a license for the American market. Oscar Wilde had a great reputation for style, but he went to jail just the same. Literary ability is no excuse for degeneracy." [Italics added.] *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1, 14, 136 N. E. 219, 223 (1922) (Crane, J., dissenting).

See also *People v. Seltzer*, 122 Misc. 329, 334, 203 N. Y. Supp. 809, 813 (Sup. Ct. 1924); *Besig v. United States*, 208 F. 2d 142, 145 (9th Cir. 1953); *cf. People v. Dial Press*, 182 Misc. 416, 417, 48 N. Y. S. 2d 480, 482 (Mag. Ct. 1944).

319. The two rules are coupled in *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D. N.Y. 1879), but the connection between the pleading requirement and the partly-obscene rule does not appear here as clearly as it does in the Massachusetts cases. Compare *Commonwealth v. McCance*, 164 Mass. 162, 41 N. E. 133 (1895) and *Commonwealth v. Friede*, 271 Mass. 318, 171 N. E. 472 (1930).

firmly imbedded in American law³²⁰ and was inserted in the obscene literature statutes of a number of states.³²¹

Yet some courts, even at an early date, refused to apply the rule to literary classics, to what they called "standard literature,"³²² and thus left open a means of escape from a rule that totally ignored literary values. But it was not until Massachusetts in 1930 tripped and fell over Theodore Dreiser's *An American Tragedy* that courts generally began to reject the partly-obscene rule and to substitute in its place the requirement that a book must be judged as a whole.

In *Commonwealth v. Friede*³²³ the trial court, despite the defendant's repeated efforts, refused to admit in evidence for the jury's consideration the two volumes which then comprised *An American Tragedy*³²⁴ and permitted the jury to consider only the allegedly objectionable passages together with some pages and chapters in which they appeared. Exceptions to the trial court's rulings were overruled on appeal because, as the Supreme Judicial Court said, "[E]ven assuming great literary excellence, artistic worth and an impelling moral lesson in the story, there is nothing essential to the history of the life of its principal character that would be lost if these passages were omitted. . . ."³²⁵ The court added, for good measure, that the "seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the ob-

320. *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D. N.Y. 1879); *United States v. Kennerley*, 209 Fed. 119 (S.D. N.Y. 1913); *Commonwealth v. Friede*, 271 Mass. 318, 171 N. E. 472, 69 A. L. R. 640 and Note (1930); *cf. United States v. Besig*, 208 F. 2d 146 (9th Cir. 1953).

321. Conn. Rev. Gen. Stat. § 8567 (1949); Del. Rev. Code c. 70, § 2555 (1935); Fla. Stat. § 847.01 (1951); Iowa Code § 725.4 (1950); Me. Rev. Stat. c. 121, § 24 (1944); Mich. Stat. Ann. § 28.575 (1938); Ohio Gen. Code § 13035 (1935); R. I. Gen. Laws c. 610, § 13 (1938); S. C. Code § 16-414 (1952); Tenn. Code Ann. § 11190 (Williams 1934); Vt. Rev. Stat. § 8490 (1947); Va. Code § 18-113 (1950); W. Va. Code Ann. § 6066 (1949); Wis. Stat. § 351.38 (1951); *cf. Ark. Stat. Ann. § 41-2704 (1947)*; Colo. Stat. Ann. c. 48, § 217 (1935), as amended, Colo. Laws 1937, p. 504, § 2; Md. Code Ann. art. 27, § 514 (1951). The recent New Hampshire statute defines an obscene book as one "whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone viewing or reading it." N. H. Laws 1953, c. 233, p. 326.

The "partly obscene" provisions of the Ohio statute have been ruled invalid as a violation of the freedom of the press guarantees of the Federal and Ohio Constitutions. *State v. Lerner*, 81 N. E. 2d 282 (Ohio C.P. 1948); *see New American Library of World Literature v. Allen*, 114 F. Supp. 823, 830-831 (N.D. Ohio 1953).

322. *In re Worthington*, 30 N. Y. Supp. 361 (Sup. Ct. 1894); *St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N. Y. Supp. 582 (Sup. Ct. 1909); *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1, 136 N. E. 219 (1922); *see People v. London*, 63 N. Y. S. 2d 227, 230 (Mag. Ct. 1946).

323. 271 Mass. 318, 171 N. E. 472 (1930).

324. *Id.* at 320, 171 N. E. at 473.

325. *Id.* at 322, 171 N. E. at 474.

noxious passages or that if they should read them would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of a tale."³²⁶ This was too much, even for Massachusetts. Within the year, it amended its statute to eliminate the partly-obscene rule.³²⁷

Since then, the courts of Massachusetts³²⁸ and of most other jurisdictions in which the question has been considered³²⁹ have explicitly adopted the requirement that a book must be judged as a whole, not by its parts taken out of context. Only the United States Court of Appeals for the Ninth Circuit retains any vestige of the old partly-obscene rule.³³⁰

But the requirement that a book must be judged as a whole does not mean that a book is obscene only if it meets Mark Twain's description of his *1601*: "[I]f there is a decent word in it, it is because I overlooked it."³³¹ A book is obscene if that is its "domi-

326. *Ibid.*

327. See note 217 *supra*.

328. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *Attorney General v. Book Named "Forever Amber"*, 323 Mass. 302, 81 N. E. 2d 663 (1948); *Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N. E. 2d 819 (1950); *Attorney General v. Book Named "Serenade"*, 326 Mass. 324, 94 N. E. 2d 259 (1950).

329. *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2d Cir. 1934); *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936); *Parmalee v. United States*, 113 F. 2d 729 (D.C. Cir. 1940); *Walker v. Popenoe*, 148 F. 2d 511 (D.C. Cir. 1945); *People v. Viking Press*, 147 Misc. 813, 264 N. Y. Supp. 534 (Mag. Ct. 1933); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936); *People v. Vanguard Press (Mag. Ct. 1937)*, reported in *Ernst and Lindey, The Censor Marches On* 33-37 (1940) and *Craig, Above All Liberties* 127-130 (1942); *People v. Dial Press*, 182 Misc. 416, 48 N. Y. S. 2d 480 (Mag. Ct. 1944); *People v. London*, 63 N. Y. S. 2d 227 (Mag. Ct. 1947); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *State v. Lerner*, 81 N. E. 2d 282 (Ohio C. P. 1948); *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N. D. Ohio 1953); *St. Paul v. Fredkove*, 38 Minn. Mun. 362 (Mun. Ct. 1953); see *People v. Wepplo*, 78 Cal. App. 2d 959, 961, 178 P. 2d 853, 855 (1947); cf. *Burstein v. United States*, 178 F. 2d 665 (9th Cir. 1949).

330. "We agree that the book as a whole must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. If an incident, integrated with the theme or story of a book, is word-painted in such lurid and smutty or pornographic language that dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene." *Besig v. United States*, 208 F. 2d 142, 146 (9th Cir. 1953). The court went on to say, on the same page, that it neither approved nor disapproved of *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2d Cir. 1934) and *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936), and that the point was irrelevant anyway, since "we have adjudged each book as an integrated whole."

331. Letter of Samuel Clemens to a Mr. Orr of Cleveland, dated July 30, 1906. See note 286 *supra*.

nant effect"³³² or its "main purpose"³³³ or if it "contains prohibited matter in such quantity or of such a nature as to flavor the whole and impart to the whole any of the qualities mentioned in the statute, so that the book as a whole can fairly be described" as obscene.³³⁴

And in applying the requirement that a book be judged as a whole, courts often speak of the relevance of the passages claimed to be obscene. In the *Ulysses* case, for instance, the court said that, in determining the "dominant effect" of a book, "the relevancy of the objectionable parts to the theme" is a persuasive piece of evidence.³³⁵ If the objectionable parts are relevant to the theme, courts tend to find the book not obscene;³³⁶ if, on the other hand, the parts are irrelevant, the book is usually found to be obscene.³³⁷

But what is "relevant" in this context? And how is it to be determined? In Massachusetts the Supreme Judicial Court tests relevance by the *necessity* of the passages to convey the "sincere message" of the book.³³⁸ In New York, however, courts sometimes determine the relevancy of the passages by the author's sincerity of purpose³³⁹—a far more satisfactory standard of relevance than that employed by the Massachusetts courts. For it recognizes what is sometimes called "literary necessity"—the author's need to use

332. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 708 (2d Cir. 1934); *Walker v. Popenoe,* 149 F. 2d 511, 512 (D.C. Cir. 1945).

333. *People v. Gotham Book Mart,* 158 Misc. 240, 244, 285 N. Y. Supp. 563, 568 (Mag. Ct. 1936); *People v. Viking Press,* 147 Misc. 813, 264 N. Y. Supp. 534, 536 (Mag. Ct. 1933).

334. *Commonwealth v. Isenstadt,* 318 Mass. 543, 549, 62 N. E. 2d 840, 844 (1945).

335. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 708 (2d Cir. 1934).

336. *E.g., United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934); *Parmalee v. United States,* 113 F. 2d 729 (D.C. Cir. 1940); *People v. Gotham Book Mart,* 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936); *People v. Vanguard Press,* 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Creative Age Press,* 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948); *Attorney General v. Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663 (1948).

337. *E.g., Commonwealth v. Isenstadt,* 318 Mass. 543, 62 N. E. 2d 840 (1945); *cf. People v. London,* 63 N. Y. S. 2d 227 (Mag. Ct. 1946).

338. In affirming a conviction involving Lillian Smith's *Strange Fruit*, the court said, "[T]he matter which could be found objectionable is not necessary to convey any sincere message the book may contain. . . ." *Commonwealth v. Isenstadt,* 318 Mass. 543, 557, 62 N. E. 2d 840, 847 (1945); *cf. Commonwealth v. Friede,* 271 Mass. 318, 322, 171 N. E. 472, 474 (1930).

339. In one of the cases the author, Calder Willingham, testified that he had two purposes in writing his book *End As a Man*. The court, granting a motion to dismiss the complaint, said: "But whether or not the author has proved a case (which he makes no claim to have done), I find nothing in the book to indicate a lack of sincerity in his purpose. I am satisfied that every passage in the book was included because the author felt it was an element necessary to the truth of his literary picture." *People v. Vanguard Press,* 192 Misc. 127, 128, 84 N. Y. S. 2d 427, 429 (Mag. Ct. 1947). See also *People v. Creative Age Press,* 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948).

whatever words and passages will produce the effect he intends.³⁴⁰ It also calls for a livelier appreciation of the nature and function of literature.

Although the now generally accepted requirement of judging a book as a whole permits courts to weigh the merits of a book against its alleged demerits (which the old partly-obscene rule did not), not all courts have taken advantage of the opportunity. Despite their acceptance of the whole-book requirement, a few courts still cling to the notion that literary values are irrelevant.³⁴¹ Most courts, however, do consider the literary qualities of a book under attack. In Massachusetts the literary qualities of a book are not very important but they are no longer totally ignored.³⁴² At the opposite extreme, New York courts have occasionally held that the obscene literature law is totally inapplicable to works of genuine literary value.³⁴³ To most courts, however, the literary qualities of a book are important, but not conclusive.³⁴⁴ The same observations apply to educational and scientific works. If a book has literary, educational, or scientific values, these values are weighed in determining whether the book is obscene, and their weight is usually enough to bring about a decision favorable to the book.³⁴⁵ On the

340. Transcript of Record, p. 36, Doubleday & Co. v. New York, 335 U. S. 848 (1948); Miller, *Obscenity and the Law of Reflection* 9-10 (1945); cf. Milton, *An Englishman, His Defense of Himself, In Answer to Alexander More, & c.* (1655), in 9 *Works of John Milton* 107-113 (Patterson ed. 1933).

341. *People v. Dial Press*, 182 Misc. 416, 48 N. Y. S. 2d 480 (Mag. Ct. 1944); *People v. Friede*, 133 Misc. 611, 233 N. Y. Supp. 565 (Mag. Ct. 1929); *People v. Seltzer*, 122 Misc. 329, 203 N. Y. Supp. 809 (Sup. Ct. 1924); see *People v. Wepplo*, 78 Cal. App. 2d 959, 962, 178 P. 2d 853, 856 (1947).

342. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N. E. 2d 819 (1950); cf. *United States v. Besig*, 208 F. 2d 142 (9th Cir. 1953).

343. *People v. Viking Press*, 147 Misc. 813, 264 N. Y. Supp. 534 (Mag. Ct. 1933); *People v. Miller*, 155 Misc. 446, 279 N. Y. Supp. 583 (Mag. Ct. 1935).

344. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934); *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948); *St. Paul v. Fredkove*, 38 Minn. Mun. 362 (Mun. Ct. 1953).

345. *E.g.*, *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934); *Parmalee v. United States*, 113 F. 2d 729 (D.C. Cir. 1940) (*Parmalee's Nudism in Modern Life*); *Walker v. Popenoe*, 149 F. 2d 33 (D.C. Cir. 1945) (*Popenoe's Preparing for Marriage*); *People v. Larsen*, 5 N. Y. S. 2d 55 (Sp. Sess. 1938) (*Life magazine's Birth of a Baby*); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (1936) (*Gide's If It Die*); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947) (*Willingham's End As a Man*); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948) (*Gorham's The Gilded Hearse*). *Contra*: *People v. Berg*, 241 App. Div. 543, 272 N. Y. Supp. 586 (Sup. Ct. 1934), *aff'd*, 269 N. Y. 514, 199 N. E. 513 (1935) (*Clarke's Female*); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) (*Smith's Strange Fruit*).

other hand, if a book with obscene tendencies lacks these values, courts are likely to condemn it.³⁴⁶

Judges however are seldom equipped by training or experience to evaluate the literary, educational, and scientific values of a book. Some of them of course don't recognize their limitations; to them, the obscene is self-evident, and they neither need nor want the help of evidence concerning a book's values in these respects.³⁴⁷ Fortunately, few judges are afflicted with this form of bigotry and obtuseness. Today, most courts readily consider some form of evidence of the literary, educational, or scientific values of the book under attack. But they do not always agree on what kinds of evidence it is proper to consider. Some of them consider the published book reviews and appraisals of competent critics.³⁴⁸ Others admit the testimony of expert witnesses.³⁴⁹ And one court has even gone so far as to receive and consider the solicited letters of persons qualified to appraise the book.³⁵⁰

4. Author's Purpose

The final major problem inherent in the concept of obscenity concerns the author's purpose and its bearing upon the determination of what is obscene. Is the author's purpose relevant in any way? If so, is it relevant to the literary, educational, or scientific

346. *E.g.*, *Roth v. Goldman*, 172 F. 2d 789 (2d Cir. 1949) (*Waggish Tales From the Czechs*); *People v. London*, 63 N. Y. S. 2d 227 (Mag. Ct. 1946) (*Wolsey's Call House Madam*—defendant held for trial).

347. "It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency and good morals." *People v. Muller*, 96 N. Y. 408, 410 (1884), quoted with "hearty" approval in *People v. Fellerman*, 243 App. Div. 64, 276 N. Y. Supp. 198, 199 (Sup. Ct. 1934), *aff'd*, 269 N. Y. 629, 200 N. E. 30 (1936). See also *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *People v. Seltzer*, 122 Misc. 329, 203 N. Y. Supp. 809 (Sup. Ct. 1924); *People v. Friede*, 133 Misc. 611, 233 N. Y. Supp. 565 (Mag. Ct. 1929); *United States v. Two Obscene Books*, 92 F. Supp. 934 (N.D. Calif. 1950), 35 Minn. L. Rev. 326 (1951); *cf.* *United States v. Two Obscene Books*, 99 F. Supp. 760 (1950), *aff'd sub nom.* *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); see *People v. Wepplo*, 78 Cal. App. 2d 959, 963, 178 P. 2d 853, 856 (1947).

348. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936); see *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936); *United States v. Rebhuhn*, 109 F. 2d 512, 515 (2d Cir. 1940).

349. *United States v. Besig*, 208 F. 2d 142 (9th Cir. 1953); *Attorney General v. Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663 (1948); *Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N. E. 2d 819 (1950); *Attorney General v. Book Named "Serenade,"* 326 Mass. 324, 94 N. E. 2d 259 (1950); *People v. Larsen*, 5 N. Y. S. 2d 55 (Sp. Sess. 1938); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (1947). *But see* *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936).

350. *People v. Viking Press*, 147 Misc. 813, 264 N. Y. Supp. 534 (Mag. Ct. 1933); *cf.* *Dennett, Who's Obscene 70-131* (1930). *Contra:* *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948).

values of a particular book? Or is it directly relevant to the issue of obscenity itself?

This problem arose early in the development of the law of obscene literature. In the *Hicklin* case³⁵¹ *The Confessional Unmasked*³⁵² was published and distributed to advance the objects of the Protestant Electoral Union, a society formed to oppose Roman Catholicism and to secure the election of protestants to Parliament.³⁵³ The defendant conceded that the book was obscene but argued that the defendant was not guilty of a crime because his intention was honest and lacked the requisite criminal animus.³⁵⁴ The court, however, rejected the argument and ruled that the defendant's motives, however honest or even laudable, were no defense to the action.³⁵⁵ This decision was carried a step further in *United States v. Bennett*,³⁵⁶ where the court suggested that the author's purpose is totally irrelevant.³⁵⁷ This is the view apparently accepted in the *Dennett*³⁵⁸ and *Ulysses*³⁵⁹ cases.

Yet in both the *Dennett*³⁶⁰ and *Ulysses*³⁶¹ cases the court spoke of the authors' sincerity as a point in favor of the books involved in those cases. Many other courts, holding a book not obscene, have also emphasized the sincerity of the author.³⁶² The reverse is also true: when a court finds, or thinks it finds, an insincere author whose intent is obscene, it readily holds the book obscene too.³⁶³

351. *Queen v. Hicklin*, L. R. 3 Q. B. 360 (1868).

352. See Scott, *Into Whose Hands* 89-91 (1945), for a description of the book.

353. *Queen v. Hicklin*, L. R. 3 Q. B. 360, 362 (1868).

354. *Id.* at 363-368.

355. *Id.* at 370-378.

356. 24 Fed. Cas. 1093, No. 14, 571 (C.C. S.D. N.Y. 1879).

357. *Id.* at 1105.

358. "It is doubtless true that the personal motive of the defendant in distributing her pamphlet could have no bearing on the question whether she violated the law. Her own belief that a really obscene pamphlet would pay the price for its obscenity by means of intrinsic merits would leave her as much as ever under the ban of the statute." *United States v. Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930).

359. "It is true that the motive of an author to promote good morals is not the test of whether a book is obscene. . . ." *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 708 (2d Cir. 1934).

360. "The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions." *United States v. Dennett*, 39 F. 2d 564, 569 (2d Cir. 1930).

361. *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 706-707 (2d Cir. 1934).

362. See *United States v. One Book Entitled "Contraception,"* 51 F. 2d 525, 527 (S.D. N.Y. 1931); *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D. N.Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934); *People v. Vanguard Press*, 192 Misc. 127, 128, 84 N. Y. S. 2d 427, 428 (Mag. Ct. 1947); *People v. Creative Age Press*, 192 Misc. 188, 191, 79 N. Y. S. 2d 198, 200-201 (Mag. Ct. 1948).

363. *People v. Peskv*, 230 App. Div. 200, 204, 243 N. Y. Supp. 193, 197 (1st Dep't 1930), *aff'd*, 254 N. Y. 373, 173 N. E. 227 (1930); *People v.*

Some courts even go so far as to suggest that a book cannot be obscene unless it is written with a pornographic purpose.³⁶⁴

But how can a court ascertain the nature of the author's purpose? In two recent cases, the author himself testified as a witness, describing his objects and purposes in writing the book.³⁶⁵ More frequently, courts resort to the book itself³⁶⁶ and to the testimony of expert witnesses³⁶⁷ as evidence of the author's purpose. Yet, however the court ascertains the author's purpose, it usually is regarded as only one of several factors to be considered and therefore not conclusive on the issue of obscenity.³⁶⁸

Despite the evolution of relatively sane standards for the application of obscene literature statutes since the *Ulysses* case, the recognition of a constitutional limitation on obscenity censorship is necessary to provide adequate protection for the values of freedom in literature. A soundly conceived constitutional standard has obviously beneficial effects. If accepted, it will eliminate the undeserved weight often given to the decisions of trial judges and juries who frequently are incapable of recognizing literary values, since it will require appellate review on the merits. It will insure more careful consideration of the factors that should govern a decision whether a particular book can be censored. It will also tend to develop a uniform and liberal standard for book censorship throughout the nation in place of the present unsatisfactory system that permits one or a few states to control the reading of the nation.

We therefore turn from the interpretation of obscene literature statutes to a consideration of the constitutional standards that might reasonably be anticipated when and if the issue is properly presented to the United States Supreme Court.

Berg, 241 App. Div. 543, 544, 272 N. Y. Supp. 586, 587 (2d Dep't 1934), *aff'd*, 269 N. Y. 514, 199 N. E. 513 (1935); *Sunshine Book Co. v. McCaffrey*, 112 N. Y. S. 2d 476, 483 (Sup. Ct. 1952).

364. *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 151 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950); *People v. Gotham Book Mart*, 158 Misc. 240, 244, 285 N. Y. Supp. 563, 567-568 (Mag. Ct. 1936); *People v. Viking Press*, 147 Misc. 813, 814, 264 N. Y. Supp. 534, 536 (Mag. Ct. 1933).

365. *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948).

366. *E.g.*, *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945); *United States v. One Book Entitled "Contraception"*, 51 F. 2d 525 (S.D. N.Y. 1931); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945).

367. *E.g.*, *People v. Larsen*, 5 N. Y. S. 2d 55 (Sp. Sess. 1938); *Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N. E. 2d 819 (1950); *St. Paul v. Fredkove* 38 Minn. Mun. 362 (Mun. Ct. 1953).

368. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N. E. 2d 819 (1950); see *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947).

III. THE CONSTITUTION AND OBSCENITY

The constitutional issue that concerns us here is the extent to which the freedom of expression guarantees of the First and Fourteenth Amendments protect literary treatment of sex against obscenity charges. Another constitutional issue that might be raised is whether the typical obscenity statute is so uncertain and vague as to fall under the due process requirement of reasonable definiteness and certainty in a criminal statute,³⁶⁹ particularly since it restricts the exercise of freedom of expression.³⁷⁰ We do not raise this point. Despite the impossibility of determining in advance whether a particular book will be held obscene,³⁷¹ and the unpredictable variety of tests applied to a charge of obscenity even within the same jurisdiction,³⁷² it is not likely that this attack would be successful. Such a claim would encounter the dubious judicial assumption that obscenity is a common law term with a well-understood judicial meaning,³⁷³ and the very practical consideration that without a broadly drawn "obscenity" statute it would be difficult to control indefensible pornography having no literary merit or justification.

Unlike motion picture censorship, prior restraint has seldom been an issue in book censorship, since no statutes provide for review and approval prior to publication. Prior restraint problems are raised, however, by the growing, but not expressly authorized, practice of furnishing to distributors lists of disapproved books with the warning that their sale will result in prosecution.³⁷⁴ On two occasions this practice has been enjoined by lower courts.³⁷⁵ In view of the recent per curiam decision of the Supreme Court invalidating prior censorship of an alleged "immoral" motion picture

369. Cf. *Lanzetta v. New Jersey*, 306 U. S. 451 (1939); *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921); see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

370. Cf. *Winters v. New York*, 333 U. S. 507 (1948).

371. See, e.g., *People v. Friedrich*, 385 Ill. 175, 52 N. E. 2d 120 (1944).

372. See Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 64-65 (1938), for a discussion of the variety of tests applied by the New York courts.

373. See *Winters v. New York*, 333 U. S. 507, 518 (1948) ("words well understood through long use in the common law—obscene, lewd, lascivious, filthy, indecent or disgusting"); *Commonwealth v. Buckley*, 200 Mass. 346, 352, 86 N. E. 910, 911 (1909); cf. *Beauharnais v. Illinois*, 343 U. S. 250, 253, 282 (1952); *Nash v. United States*, 229 U. S. 373, 377 (1913).

374. See text to notes 99-100, 122-146 *supra*.

375. *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953) (some discussion of constitutional rights to freedom of expression, but decision based on deprivation of property rights without due process because chief of police lacks authority to censor books), *Comment*, 52 Mich. L. Rev. 575, 580 (1954); *Bantam Books v. Melko*, 96 A. 2d 47 (N.J. Super. 1953) (freedom of press violated, with stress on prior restraint), *modified on appeal*. See note 101 *supra*.

without explanation,³⁷⁶ it would be fruitful to explore current methods of bringing pressure on book distributors in relation to prior restraint. Space and time limitations prevent us from pursuing this problem at this time, and we limit ourselves to freedom of expression problems in obscenity censorship independent of any prior restraint issues.

A. AN OPEN QUESTION

Constitutional protection for literature attacked as obscene is an open question today under freedom of expression guarantees of the First and Fourteenth Amendments. To establish this it might perhaps be sufficient merely to refer back to our introductory exposition of the 1948 *Doubleday* case,³⁷⁷ where the Supreme Court divided equally when squarely faced with the single contention that a work of literature attacked as obscene because of its treatment of sex episodes was entitled to constitutional protection under freedom of expression guarantees. Apart from *Doubleday*, the Court has never considered a case in which these constitutional guarantees were asserted as a defense to an obscenity charge against literature.

The Supreme Court has mentioned obscenity in relation to freedom of expression only in casual dicta classifying obscenity with libel to illustrate permissible limits on freedom of expression. It is apparent that these were off-hand remarks, made without the benefit of briefs or careful consideration of the relationship between charges of obscenity and the First Amendment freedoms. It is perhaps significant that these unguarded dicta stopped after the Court faced that issue in *Doubleday*, except for one statement by Mr. Justice Frankfurter, who did not participate in the *Doubleday* case.³⁷⁸ Brief analysis of these dicta demonstrates that, even if taken seriously, they do not preclude a carefully considered ruling by the Court on the extent to which literary treatment of sex is entitled to constitutional protection.

376. *Commercial Pictures Corp. v. Regents of Univ. of N. Y.*, 346 U. S. 587 (1954). As in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952) upon which the Court relied, both prior restraint and indefiniteness of the standard were in issue. See report of oral argument, 22 U. S. L. Week. 3181, 3183-3184 (1954). The separate Douglas-Black opinion, taking a strong position against all prior restraints on any form of expression, indicates unwillingness of the majority to take that strong a stand, at least as to motion pictures. See generally 52 Mich. L. Rev. 599 (1954).

377. See text to notes 1-40 *supra*.

378. See *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952), considered in text to notes 393-394 *infra*. Also, Mr. Justice Clark, who was not on the Court at the time of *Doubleday*, quoted the *Near* and *Chaplinsky* dicta, considered in text to notes 379-385 *infra*, in a footnote designed to leave open the issue of prior restraint of obscene films. See *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 506 n. 20 (1952).

The first dictum was in *Near v. Minnesota*,³⁷⁹ where the Court first applied the previous restraint concept but recognized certain limitations. Permissible previous restraints, it suggested, include publication of the sailing dates of troop transports in time of war, and added:

“On similar grounds, the primary requirements of decency may be enforced against obscene publications.”

With this, of course, we do not quarrel. The issue is where to draw the line between the “primary requirements of decency” and the equally significant requirement that there be freedom to write and read about important social issues, including sex.

The most extensive dicta on this point is in *Chaplinsky v. New Hampshire*,³⁸⁰ where the Court upheld a prosecution for the use of fighting words likely to cause a breach of the peace. There the Court said through Mr. Justice Murphy:

“Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

The casual nature of the inclusion of “lewd and obscene” along with libelous and insulting words is obvious. It seems likely that the Court was thinking here of “lewd and obscene” talk of a conversational or expletive nature,³⁸¹ rather than literature. It pointed

379. 283 U. S. 697, 716 (1931). In *Ex parte Jackson*, 96 U. S. 727, 737 (1878) the Court stated it had “no doubt” of the constitutionality of an act of Congress barring obscene publications from the mails, but the sole issue was the power of Congress under the grant of power to “establish post offices and postroads”; no issue was raised or considered under the First Amendment.

380. 315 U. S. 568, 571-572 (1942).

381. The court may have been thinking of such cases as: *Ricks v. State*, 70 Ga. App. 395, 28 S. E. 303 (1943) (“Come here baby and kiss me, I am going to get into your pants.”); *Dillard v. State*, 41 Ga. 278 (1870) (Defendant asked a woman “to go to bed with him”); *People v. Casey*, 67 N. Y. S. 2d 9 (City Ct. 1946) (solicitation of sexual perversion); *State v. Payne*, 172 Pac. 1096 (Okla. Cr. 1918) (“Will Jim Murphy make an affidavit that he didn’t go out and catch a sexual disease and give it to his wife,” spoken at an open air religious meeting).

Apparently there is “harm in the asking,” though Prosser doesn’t seem to think so. Prosser, *Torts*, 64-65 (1941).

out in the immediately preceding paragraph that the case involved "the spoken, not the written, word,"³⁸² and cited in support of its dictum the following quotation from Chafee, *Freedom of Speech*.³⁸³

"... the true explanation [of what he calls verbal peacetime crimes of obscenity, profanity, and gross libel upon individuals] is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see."

Professor Chafee was not there concerned with literature, where the relationship between the passages attacked as obscene and the author's ideas would be a major consideration, but only with "indecent talk and pictures," unimportant to any exposition of ideas.³⁸⁴ But even if the dicta in *Chaplinsky* be taken as referring to written as well as spoken obscenity,³⁸⁵ the Court's reference to the slight social value of utterances that are "no essential part of the exposition of ideas" leaves wide open the issue of constitutional protection for literature attacked as obscene where the objectionable passages have a reasonable relationship to expression of the author's ideas. It is inconceivable that Mr. Justice Murphy could have written, or Justices Rutledge, Black and Douglas concurred in, an opinion that might reasonably be understood as foreclosing consideration of the constitutional freedoms in such a case.

Winters v. New York,³⁸⁶ decided just seven months before the Supreme Court argument in the *Doubleday* case, assumes in broad generalities that lewd and obscene publications are subject to prosecution. But it does not concern itself with what is obscene and expressly suggests that there may be limits on the extent to which it will permit obscenity statutes to interfere with constitutional freedom of expression. In holding invalid for indefiniteness a statute construed as forbidding the massing of stories of bloodshed and lust, the Court recognized

"the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of

382. See 315 U. S. 568, 571 (1942).

383. See Chafee, *Freedom of Speech* 150 (1941).

384. In the same book and elsewhere Professor Chafee showed his real concern with protecting literature dealing with sex from indiscriminating attack on grounds of obscenity. See 1 Chafee, *Government and Mass Communication* 53-60, 200-234 (1947); Chafee, *Free Speech in the United States* 529-540 (1941).

385. Cf. *Lowell v. Griffith*, 303 U. S. 444, 451 (1938) where in holding invalid a previous restraint on distribution of literature, the Court said, "The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct."

386. 333 U. S. 507 (1948).

sanguinary or salacious publications with their stimulation of juvenile delinquency. . . . Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. . . . They are equally subject to control if they are lewd, indecent, obscene, or profane [Citing *Chaplinsky*].³⁸⁷

* * *

"Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. 1 Bishop, Criminal Law (9th ed.), § 500; Wharton, Criminal Law (12th ed.), § 16. When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, *if it does not transgress the boundaries fixed by the Constitution for freedom of expression* [Italics supplied]."³⁸⁸

The references to the criminal law texts related broadly to control over "immoralities" and "all acts of gross and open lewdness,"³⁸⁹ classifying together the

"keeping of bawdy houses; the public exhibition or publication of obscene pictures or writings; the public utterance of obscene words; the indecent and public exposure of one's person or the person of another. . . ."³⁹⁰

Reliance on these texts broadly classifying obscenity with indecent exposure and the keeping of bawdy houses indicates that in *Winters* the Court was speaking of the indefensible types of "gross and open indecency or obscenity,"³⁹¹ and was not suggesting that the judicial attachment of the label "obscene" to a work of literature automatically places it beyond constitutional protection. Indeed, the suggestion that legislation aimed at extending the "impermissible limits" cannot "transgress the boundaries fixed by the Constitution for freedom of expression"³⁹² seems clearly to indicate that there are limits beyond which government cannot go in its efforts to protect public morals.

The latest dicta of this general type to come from the Court is the unnecessarily broad statement by Mr. Justice Frankfurter speaking for a majority of five in upholding the group libel statute in *Beauharnais v. Illinois*.³⁹³ There in an apparently off-hand comment he classified "obscene speech" with libel as follows:

387. *Id.* at 510.

388. *Id.* at 515.

389. Wharton, Criminal Law § 16 (12th ed. 1932).

390. 1 Bishop, Criminal Law § 500 (9th ed. 1923).

391. See 333 U. S. 307, 515 (1948).

392. *Ibid.*

393. See 343 U. S. 250, 266 (1952).

"Libelous utterance not being within the area of constitutionally protected speech, it is unnecessary, either for us or for State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."³⁹⁴

If by this he means that "obscene speech" of the conversational or expletive nature is not entitled to constitutional protection, this dicta is akin to that in *Chaplinsky*. But if he means serious speech or writing about sex subjects, attacked as obscene, it is fantastic to say that "no one would contend" that the speech is not to be tested by the same test applied to other freedom of expression issues. Indeed, it is clear that four of Mr. Justice Frankfurter's colleagues on the Court in 1948 not only so contended but on that basis voted to reverse the *Doubleday* conviction. Since Mr. Justice Frankfurter could not fail to be acutely aware of the issue in *Doubleday*, even though he did not sit on the Court in that case, the only reasonable interpretation of this dicta is that he was here speaking of filthy talk not directed at any serious ideas, and did not have in mind the problem of literature and censorship on obscenity charges.

This points up the vague and misleading nature of these dicta, which assume that "obscenity"—without defining it—either is or is not entitled to constitutional protection. Such statements are meaningless and misleading when we do not know which of the many meanings of "obscene" the Court had in mind—if indeed it gave any thought to the matter at all when the justice assigned to write the opinion threw in the casual comment on obscenity. The term "obscene" or one of its equivalents is often used to describe typical under-the-counter pornography, which is, of course, not entitled to constitutional protection.³⁹⁵ But the term has also been applied by some state courts to significant literature that deals with vital sex problems in a restrained and intelligent way;³⁹⁶ this

394. *But cf.* Mr. Justice Jackson, dissenting at 343 U. S. 298, 303-304, wherein he strongly takes the position that the "clear and present danger" test is "the most just and workable standard yet evolved for determining the criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities." Mr. Justice Douglas also took the position that the clear and present danger test should condemn the group libel statute, while Mr. Justice Black took his more absolutist position condemning any interference with freedom of expression. The relationship of these positions to prosecutions for publishing literature relating to sex is obvious.

395. See *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 150 (1949), *aff'd sub nom.* *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). For a discussion of erotica, see Jackson, *The Fear of Books*, 121-135 (1932).

396. *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) (*Lillian Smith's Strange Fruit*); *Commonwealth v. Friede*, 271 Mass. 318, 171 N. E. 472 (1930) (*Theodore Dreiser's An American Tragedy*).

type of literature, we contend, is entitled to constitutional protection. Just where the line is to be drawn between these two extremes, and what is to govern that judgment, is our principal concern in this article. The point we make here is that in view of the great variety of meanings attributed to the term "obscene," casual dicta appearing to exclude "obscenity" from constitutionally protected freedom of expression cannot reasonably be taken to mean that the Court intended thereby to exclude the whole area of sex literature from the First Amendment guarantees whenever some narrow-minded state court decides to attach the label "obscene."

Not only has the Supreme Court never decided this constitutional issue, except in the equally divided *Doubleday* decision, but the issue has also gone relatively unnoticed in the state and lower federal courts. These courts have been concerned primarily with determining whether the particular book is "obscene" within the statute. In the few appellate court cases in which the constitutional issue was raised, it was brushed off without careful analysis,³⁹⁷ but in most cases it went completely unnoticed. Only in a few reported trial court opinions was thoughtful consideration given to the constitutional issue; in these, some degree of constitutional protection was recognized,³⁹⁸ but only in one was the constitutional issue given careful and detailed analysis.³⁹⁹

397. *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); *Attorney General v. The Book Named "God's Little Acre"*, 326 Mass. 281, 93 N. E. 2d 819 (1950) (constitutional issue "requires no discussion," citing *Izenstadt* case); *Commonwealth v. Izenstadt*, *supra* note 396 (conviction for sale of *Strange Fruit*: "if the . . . 'clear and present danger' doctrine . . . applies . . . danger of corruption of the public mind is a sufficient danger, and . . . actual publication and sale render that danger sufficiently imminent"); *Commonwealth v. Allison*, 227 Mass. 57, 116 N. E. 265 (1917) (conviction for disseminating contraceptive information upheld; obscenity statutes "contravene no provision of the Constitution" without making clear what constitutional issue was raised); *Williams v. State*, 130 Miss. 827, 94 So. 882 (1923); *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938 (1896); *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A. 2d 440 (1950); Cf. *Sunshine Book Co. v. McCaffrey*, 112 N. Y. S. 2d 476 (Sup. Ct. 1952) (sustaining prior restraint on nudist magazines).

398. *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953) (adopts wholly obscene test to avoid constitutional objection and holds unauthorized prior restraint by police official issuing lists of proscribed books violates due process); *State v. Lerner*, 81 N. E. 2d 282 (Ohio C.P. 1948) (statute punishing sale of book containing any obscenity, as distinct from a wholly obscene book, violates freedom of press under state constitution); *Bantam Books v. Melko*, 96 A. 2d 47 (N.J. Super. 1953) ("freedom of press" violated by prosecutor's order banning *Chinese Room*), affirmed on appeal. See note 101 *supra*.

399. *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949), *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950) (must be clear and present danger that book will cause criminal behavior; clears *Studs Lonigan* trilogy, *Sanctuary*, *Wild Palms*, *God's Little Acre*). The ruling bringing these books under the protection of the 14th Amendment was affirmed by the Superior Court, without opinion, on the basis of two excerpts.

The fact that obscenity prosecutions aimed at literature have proceeded in state courts for many years in virtual disregard of possible constitutional limitations cannot foreclose the Supreme Court from examining this problem and reaching an independent conclusion. This was done in *Bridges v. California*,⁴⁰⁰ where the Supreme Court in a freedom of expression ruling disregarded and overthrew long established state court practice to punish for contempt the publication of comments thought to have a "reasonable tendency" to interfere with the administration of justice in a pending case. In ruling that the clear and present danger test must apply to such cases despite the long established practice of many state courts to the contrary, the Court said:

" . . . state power in this field was not tested for more than a century. Not until 1925, . . . did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press."⁴⁰¹

This is equally true of untested state court convictions for obscenity. Such a dearth of authority on the constitutional question, with no carefully considered treatment of the problem by any appellate court, leaves the issue wide open for consideration on its merits. To that we proceed.

B. FREEDOM OF EXPRESSION FOR SEX IN LITERATURE

Whatever may be its limits, constitutional protection to freedom of expression must be held to apply to literature dealing with sex problems and behavior as well as to literature dealing with other social and economic problems. It is not conceivable that the Supreme Court will ever hold this vast and significant area of human thought and conduct to be unprotected territory, in which speech and writing are subject to unrestricted governmental suppression. Sex has always occupied too important and dominant a

Ibid. The Pennsylvania Supreme Court refused to review, but added this caveat:

"Allocutor refused, without, however, approving the test of 'clear and present danger' as applied to alleged obscene literature adopted by Judge Bok and apparently approved by the Superior Court." See 157 Publishers' Weekly 1823 (1950).

400. 314 U. S. 252 (1914).

401. *Id.* at 267-268.

place in literature and in human interest and concern to be impliedly excluded from the broadly stated First Amendment freedoms.

While the Supreme Court has never had occasion to deal explicitly with this issue, it has made abundantly clear in other connections that constitutional freedom of expression applies to all subject matter of human thought, interest, and concern. In *Thornhill v. Alabama*,⁴⁰² dealing with freedom to communicate viewpoints on labor disputes, Mr. Justice Black, speaking for an all but unanimous Court, said:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period* [Italics supplied]."⁴⁰³

The same viewpoint was expressed five years later in *Thomas v. Collins*⁴⁰⁴ in another labor case:

"The First Amendment gives freedom of mind the same security as freedom of conscience. . . . And the rights of free speech and free press *are not confined to any field of human interest* [Italics supplied]."⁴⁰⁵

And in *Pennekamp v. Florida*,⁴⁰⁶ protecting freedom to discuss judicial action, the Court emphasized:

"Free discussion of the *problems of society* is a cardinal principle of Americanism—a principle which all are zealous to preserve [Italics supplied]."⁴⁰⁷

Literature dealing with various aspects and problems of sex and sex behavior relates to a significant "field of human interest" and "public concern." Such literature deals with some of the most

402. 310 U. S. 88 (1940). While this eight to one decision has been gradually whittled away insofar as it protects picketing as free speech, no doubts have been raised as to the soundness and importance of constitutional protection for expression of ideas in the area of labor disputes, and other areas of public concern.

403. *Id.* at 101-102.

404. 323 U. S. 516 (1945).

405. *Id.* at 531.

406. 328 U. S. 331 (1946).

407. *Id.* at 346.

basic "problems of society." Certainly this is an area in which there is "public need for information and education" to permit intelligent grappling with these problems.

In the decisions quoted above, the particular issues related to expressions in the field of labor and the administration of justice, but it is clear that the Court had no thought of limiting freedom of expression to these and kindred subjects. Indeed, a few years later an unsuccessful attempt was made to limit freedom of expression to such subjects when counsel for the state suggested in *Winters v. New York* that freedom of the press only applies to interference with religion and with "the free expression of ideas on political or economic matters."⁴⁰⁸ In its opinion holding too vague and indefinite a statute forbidding the massing of stories of bloodshed and lust, the Supreme Court rejected this suggestion, saying:

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propoganda through fiction. What is one man's amusement, teaches another's doctrine. Though we see nothing of value in these magazines, they are as much entitled to the protection of free speech as is the best of literature. Cf. *Hannegan v. Esquire*, 327 U. S. 146, 153, 158. They are equally subject to control if they are lewd, indecent, obscene or profane."⁴⁰⁹

Here is an express ruling that magazines dealing with crime and lust are not automatically excluded from constitutional protection, though their publication can be controlled "if they are lewd, indecent, obscene or profane"—whatever that may mean. Of course

408. See Brief for Appellees, pp. 7-8, *Winters v. New York*, 333 U. S. 507 (1948).

409. *Winters v. New York*, 333 U. S. 507, 510 (1948). The citation of the *Esquire* decision in this connection appears to suggest that the Court considers sex subjects in magazines to be entitled to constitutional protection, even when there is "nothing of value" in them, so long as they are not "obscene." There the Court, in finding that the Postmaster General was without statutory authority to revoke the *Esquire* second-class mail permit for "indecent, vulgar, and risqué" writing and pictures, said:

"There doubtless would be a contrariety of views concerning Cervantes' *Don Quixote*, Shakespeare's *Venus and Adonis*, or Zola's *Nana*. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition [of the postal act—"devoted to literature, the sciences, arts"] can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values." *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 157-158 (1946).

The same "basic values" are implicit in the First Amendment, and would seem to lead to the same conclusions.

there are limits on the literary treatment of sex, just as there are limits on the expression of ideas on other subjects, and our major concern in the following pages is how to determine that limit without harmful repression of freedom of expression on a subject of great public interest, concern, and importance. But the point we make here, without discussing the limitations, is that literature dealing with sex problems and sex behavior is entitled to constitutional freedom of expression.

That literature on sex problems, practices, and behavior deals with a subject of great public interest and concern is amply demonstrated by the widespread public interest in the two recent Kinsey studies dealing with the sexual behavior of the human male and female.⁴¹⁰ Not only did these studies become best sellers,⁴¹¹ but they became the subject for extensive comment and discussion in both popular and professional writings. Even before these studies were published, Walter Lippman pointed out man's "immense preoccupation with sex" and the "immense and urgent discussion of sex throughout the modern world."⁴¹² It is common knowledge that in recent years there has been wide distribution and sale in this country of books and other publications dealing with many aspects of sex, sex problems, and sex behavior from a great many points of view—psychology, sociology, anthropology, education, birth control, marital relations, sex instruction, and sex techniques.

Here is an area of life that immediately concerns all of mankind. It creates problems that vitally affect most individuals. It is an area in which man has often groped in the dark, because of periodic taboos on intelligent discussion. The ready response in recent years to the wider distribution of literature dealing with this area demonstrates great interest in and serious concern with problems that so closely affect the lives of all, and the widespread desire for more information, light, and understanding. There are many differing and conflicting viewpoints and opinions concerning the place that sex should play in the life of individuals, and what is acceptable human conduct. This is exactly the type of subject matter on which freedom of expression is essential—because of this great human interest and the great variety of view-

410. Kinsey, Pomeroy, Martin, and Gebhard, *Sexual Behavior in the Human Female* (1953); Kinsey, Pomeroy, and Martin, *Sexual Behavior in the Human Male* (1948).

411. Kinsey's first book on the male was on the *New York Times*' best seller list for nearly ten months. See *N. Y. Times*, *Sunday Book Review Section*, Jan. 25-Nov. 21, 1948, p. 8. The second book on the female was on the *New York Times* best seller list for over two months. See *N. Y. Times*, *Sunday Book Review Section*, Sept. 27-Dec. 6, 1953, p. 8.

412. See Lippman, *A Preface to Morals* 285, 300 (1929).

points. Unrestricted censorship over the expression of ideas in this area would defeat the very purpose of the guarantees of free expression—that men shall be free to express themselves on, and to consider and choose between, conflicting viewpoints in matters of vital concern to themselves.

Not only must constitutional freedom of expression apply to literature dealing with sex problems and sex behavior, but it must apply regardless of the form the literature takes—whether it be fiction, poetry or non-fiction. It is axiomatic that fiction and poetry are important vehicles for the conveyance of ideas. Fiction not only reaches readers that resist non-fiction, but it is often the best method of expressing some kinds of ideas, or for explaining and portraying human behavior. But this point needs no belaboring, for the Supreme Court has clearly recognized that the freedom of expression guaranteed by the Constitution covers fiction and entertainment, as well as more serious works.

This was made clear in two Supreme Court decisions in the past five years. As indicated in the foregoing quotation, *Winters v. New York* noted that the "line between informing and entertaining is too elusive for the protection of that basic right" to a free press. There the Court recognized that fiction is a familiar form of propaganda, and that what is "one man's amusement teaches another's doctrine."⁴¹³ More recently the Court also ruled that a fictional motion picture is entitled to freedom of expression protection for basically the same reason:

"It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact they are designed to entertain as well as to inform [quoting from *Winters v. New York*]."⁴¹⁴

It is equally true that artistic expression through fiction and poetry can be one of the most subtle and effective methods of conveying ideas. To be adequate and effective, freedom of expression must extend to these effective methods of communicating ideas, particularly where, as here, the recipient has complete freedom of choice to read or to leave alone.⁴¹⁵

413. See *Winters v. New York*, 333 U. S. 507, 510 (1948), considered in text at notes 386-392 *supra*.

414. *Burstyn v. Wilson*, 343 U. S. 495, 501 (1952).

415. See I Chafee, *Government and Mass Communications* 208 (1947), quoting the publisher of *Strange Fruit*: "A book . . . is something which any individual can take or leave alone. . . . Consequently it has always been the most adult form of expression which we have. Consequently also it has always

C. CURRENT CONSTITUTIONAL STANDARD FOR FREEDOM OF EXPRESSION: BALANCING THE INTERESTS

The conclusion that literature dealing with sex is entitled to constitutional protection does not mean that it is entirely free from governmental interference. Freedom of expression guaranteed by the First and Fourteenth Amendments is not absolute, for despite its great importance in a democratic society, it must on occasion be subordinated to other interests of high value. In the past three decades the Supreme Court has repeatedly had to determine the extent to which freedom of expression must give way to other interests. Gradually the Court has evolved an approach to these problems that often makes use of a deceptively simple phrase—"clear and present danger"—as the framework for important policy judgments. For the purpose of this article, it is necessary to emphasize the factors that enter into those judgments.⁴¹⁶

While the phrase "clear and present danger" had its origin in an opinion by Mr. Justice Holmes for a unanimous court in 1919,⁴¹⁷ it did not become a tool used by a majority of the Court for resolving freedom of expression issues until 1940.⁴¹⁸ Meanwhile it was kept alive by dissenting and concurring opinions of Justices Holmes and Brandeis.⁴¹⁹ Beginning with *Thornhill v. Alabama* in 1940,⁴²⁰ it frequently though not invariably came to be used by the majority of the Court in deciding freedom of expression issues.⁴²¹ It is significant that with one exception since 1940 the Supreme Court has always used the "clear and present danger" test in determining the validity of governmental regulation interfering with the *content* of an utterance, as distinct from the *manner* or *means* of its ex-

been the means which the community uses for testing and development of new and pioneering ideas in the arts, in the sciences and in the philosophies. To tamper with freedom of expression in book form, therefore, is the most dangerous exercise of interference with freedom of thought which can be imagined." *Cf. Kovaks v. Cooper*, 336 U. S. 77 (1949) (limitation on use of sound truck, but no limit on content of expression).

416. To trace the evolution of "clear and present danger" would be a complete article in itself. This has been well done in recent years, permitting us, for the purposes of this article, to build largely on the scholarship of others. See Antieau, "Clear and Present Danger"—*Its Meaning and Significance*, 25 Notre Dame Law. 603 (1950); Corwin, *Bowing Out "Clear and Present Danger"*, 27 Notre Dame Law. 325 (1952); Gorfinkel & Mack, *Demis v. United States and the Clear and Present Danger Rule*, 39 Calif. L. Rev. 475 (1951); Mendelson, *Clear and Present Danger—From Shenck to Demis*, 52 Col. L. Rev. 313 (1952); Richardson, *Freedom of Expression and the Function of the Courts*, 65 Harv. L. Rev. 1 (1951); Note, *Clear and Present Danger Re-examined*, 51 Col. L. Rev. 98 (1951).

417. *Schenck v. United States*, 249 U. S. 47 (1919).

418. Mendelson, *supra* note 416, at 317 ff.

419. *Id.* at 314-317.

420. 310 U. S. 88 (1940).

421. See Mendelson, *supra* note 416, at 317-330.

pression.⁴²² That exception occurred in the majority opinion in the *Beauharnais* group libel case, where Mr. Justice Frankfurter pushed the test aside saying it was "unnecessary . . . to consider the issues behind the phrase 'clear and present danger'" because libelous utterances are not "within the area of constitutionally protected speech."⁴²³ If the Supreme Court agrees that literature dealing with sex is entitled to the freedom of expression protection provided by the First and Fourteenth Amendments, there is every reason to believe that it will appraise such literature in the light of what Mr. Justice Frankfurter called "the issues behind the phrase 'clear and present danger'."

The first clear statement of the issues behind the phrase was made in 1927 in a separate concurring opinion by Mr. Justice Brandeis, in which Mr. Justice Holmes joined. In approving a conviction under a criminal syndicalism act in *Whitney v. California*,⁴²⁴ Mr. Justice Brandeis stressed the values and necessities of freedom of expression in a democratic society and emphasized three factors essential to state interference with this fundamental freedom:⁴²⁵

1. There must be a "clear" danger that the speech will produce a serious substantive evil that the state has power to prevent. It is not enough simply to "fear" serious injury, but there must be "reasonable grounds" to fear that serious evil will result if free speech is practiced. It is obvious in this opinion that in the thinking of Brandeis and Holmes the single word "clear" connotes a close causal relationship between the prohibited speech and the evil sought to be prevented.

2. There must be a "present" or "imminent" danger. Again, "reasonable grounds" are necessary for believing the danger to be imminent, and that it may result before there is opportunity to avert it by full discussion and the processes of education.

3. The substantive evil to be prevented by suppressing speech must be a "serious" one. Prohibition on freedom of expression is not permissible "unless the evil apprehended is relatively serious." It can never be appropriate to avert "a relatively trivial harm to

422. See Note, *Clear and Present Danger Re-examined*, 51 Col. L. Rev. 98, 99-100 (1951). *But cf.* *United Public Workers v. Mitchell*, 330 U. S. 75 (1947), which sustained the Hatch Act depriving federal civil service employees of the right to take an active part in political campaigns. While no mention was made of the "clear and present danger" test, the opinions are openly an attempt to "balance the extent of the guarantees of freedom against . . . the supposed evil of political partizanship of classified employees of government." *Id.* at 96.

423. *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952).

424. 274 U. S. 357, 372-380 (1927).

425. See *id.* at 374, 376, 377.

society." While the meaning of the term "relatively" is not spelled out here, its most likely meaning is that the seriousness of the harm must be weighed in relation to the importance and value of the freedom of expression being interfered with, and the extent of that interference. Consistent with this interpretation is Mr. Justice Brandeis' later statement in the same opinion that one of the issues in a freedom of expression case is "whether the evil apprehended was one so substantial as to *justify* the stringent restrictions interposed by the legislature."⁴²⁶ Indeed, in an earlier dissenting opinion joined in by Mr. Justice Holmes, Mr. Justice Brandeis emphasized the "clear and present danger" test as "a rule of reason," a "question of degree."⁴²⁷

These three factors became and remained the backbone of the "clear and present danger" test as applied by the Supreme Court beginning in 1940,⁴²⁸ though two substantial modifications were made. (1) The Court came to recognize openly the policy-making, interest-balancing nature of the judicial function in these cases,⁴²⁹ and (2) the *Dennis* case in 1951⁴³⁰ minimized or subordinated the "present" or "imminent" factor, merging it into the "clear" or "probable danger" factor.⁴³¹ We do not consider this latter modification particularly significant on our problem of literature dealing with sex, for if in fact such literature is sufficiently likely to stimulate immoral conduct or other evil consequences to satisfy the requirement of "clear" or "probable" danger, this danger would usually be sufficiently imminent even under the stricter Brandeis view.⁴³²

But the *Dennis* case is significant for our problem in two respects. First, it indicates that all eight justices who participated, seven of whom still sit on the Court,⁴³³ accept the clear and present danger phrase as the starting point for determining the validity of governmental interference with freedom of expression, although they give it varying interpretations and degrees of rigidity.⁴³⁴

426. *Id.* at 379.

427. *Schaefer v. United States*, 251 U. S. 466, 482-483 (1920).

428. These factors have been analyzed and emphasized in a number of recent studies. See particularly those by Richardson, Antieua, and Gorfinkel and Mack, *supra* note 416.

429. See cases cited *infra* note 443.

430. *Dennis v. United States*, 341 U. S. 494 (1951) (upholding conviction of Communist Party leaders under Smith Act).

431. For a treatment of this issue see Gorfinkel and Mack, *supra* note 416, at 492-496; Richardson, *supra* note 416, at 8-9.

432. One possible exception is considered in the text to notes 479-486 *infra*.

433. Mr. Justice Clark did not sit. Chief Justice Vinson has since died and been replaced by Chief Justice Warren.

434. For an analysis of the differing positions of the various justices see Gorfinkel and Mack, *supra* note 416, at 484-487.

Second, it indicates that six of the justices, five of whom remain, consider the "clear and present danger" test not as a rigid formula but as a policy-making rule of reason⁴³⁵ under which the Court weighs the gravity of the evil, and the degree of its probability, against the dangers of infringing freedom of expression. It also indicates that two additional justices would apply the clear and present danger test with greater rigidity in protecting freedom of expression.⁴³⁶

At the present time there remain three significant factors that must be considered in appraising governmental interference with freedom of expression, disregarding what may be left of the "present" or "imminent" factor. The first is the "clear" or "probable" danger factor. This necessity for a probable causal relationship between the forbidden expression and the evil sought to be prevented has been a significant factor since 1940 in determining the validity of interferences with freedom of expression.⁴³⁷ *Dennis* made no change in this,⁴³⁸ indeed, in accepting Judge Learned Hand's reformulation of the "clear and present danger" test the plurality opinion expressly indicated that the probability or improbability of the danger was one of the relevant factors. It must be borne in mind, as so well expressed in Richardson's masterful summation of this factor, that what is required is not simply the probability that the evil will occur, but a probability that the forbidden utterance will be a substantial factor in bringing about the evil.⁴³⁹

The second factor is the relative seriousness of the evil sought

435. The plurality opinion, representing the views of Chief Justice Vinson, and Justices Reed, Burton, and Minton, found the meaning of the phrase "clear and present danger" "squarely presented" and accepted the Learned Hand interpretation of the phrase as follows:

"Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significance. More we cannot expect from words." *Dennis v. United States*, 341 U. S. 494, 508, 510 (1951).

Separately concurring, Mr. Justice Frankfurter's long opinion indicates impatience with attempts to use the phrase "clear and present danger" as a formula, or as a "substitute for the weighing of values," and repeatedly stresses that in freedom of expression cases the problem before the Court is a "careful weighing of conflicting interests." *Id.* at 519 ff. Mr. Justice Jackson would not apply the phrase to cases of communist propaganda like the *Dennis* case, but would "save it, unmodified, as a 'rule of reason' in the kind of case for which it was devised." *Id.* at 568.

436. See *id.* at 479, 481 (dissenting opinions of Justices Douglas and Black).

437. See analysis and cases cited by Richardson, *supra* note 416, at 7-8.

438. See Gorfinkel and Mack, *supra* note 416, at 491.

439. See Richardson, *supra* note 416, at 9-16.

to be prevented by the interference with freedom of expression. Repeatedly since 1940 the Court has stressed the necessity for a grave or serious evil to justify such an interference.⁴⁴⁰ Neither of these factors is an absolute. Each must be considered in relation to the other. The more serious the threatened evil, the lower the required degree of probability. This seems clearly indicated in the *Dennis* opinion accepting Judge Hand's reformulation of the clear and present danger test. Presumably the converse is also true: the less serious the threatened evil, the higher the required degree of probability.⁴⁴¹

But these two factors must not only be weighed in relation to each other, but in the relation to the *third* significant factor, implicitly though not expressly spelled out in the Brandeis formulation of "clear and present danger"—the value of freedom of expression in the context of this utterance, and the effect the challenged suppression may have on freedom of expression on this and similar occasions. Brandeis made clear that in determining whether a danger was sufficiently "clear" or "imminent" or "serious," it is necessary to consider the importance of freedom of expression in a democratic society;⁴⁴² this was not lost on the Court when it began using the "clear and present danger" test in 1940. Repeatedly it weighed the factors of "clear" or "probable" danger and the "seriousness" of the evil against this third significant factor—the value of freedom of expression on this subject and in this context.⁴⁴³

Whether the Court invokes "clear and present danger" or not, in all freedom of expression cases it inevitably must grapple with fundamental policy questions as it seeks to balance two significant interests—the public interest in preventing the supposed evil and the public interest in preserving freedom of expression. In each such case the Court must decide whether the seriousness of the evil, and the probability that the utterance under attack may cause or substantially contribute to that evil, are sufficiently great to

440. See cases cited in *Antieau*, *supra* note 416, at 604 n. 4, 5; Note, 51 Col. L. Rev. 98, 99 n. 10 (1951).

441. See *Richardson*, *supra* note 416, at 17-18.

442. See *Whitney v. California*, 274 U. S. 357, 374-375 (1927).

443. See, *e.g.*, *Dennis v. United States*, 341 U. S. 494, 508-510 (1951); *Communications Ass'n v. Douds*, 339 U. S. 382, 397, 399-400 (1950); *Pennekamp v. Florida*, 328 U. S. 331, 346-347 (1946); *Thomas v. Collins*, 323 U. S. 516, 530-532 (1945); *Bridges v. California*, 314 U. S. 252, 268-271 (1941); *Cantwell v. Connecticut*, 310 U. S. 296, 310-311 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 104-105 (1940). In others the Court has engaged in this same process of weighing the supposed evil against the importance of freedom of expression without using "clear and present danger" talk. See, *e.g.*, *Breard v. Alexandria*, 341 U. S. 622, 643, 644 (1951); *United Public Workers v. Mitchell*, 330 U. S. 75, 96 (1947); *Prince v. Massachusetts*, 321 U. S. 158, 165 (1944).

justify the interference with freedom of expression in this particular case and the resulting suppression of freedom of expression in similar situations. The "clear and present danger" phrase helps to point up the factors that enter into that determination, but in the last analysis each such determination has to be a policy judgment in which all of these factors are brought into balance.⁴⁴⁴

Therefore, in considering the constitutionality of applying obscenity statutes to literature, it is necessary to balance the seriousness of the evil or evils sought to be prevented, and the probability that the book or article in question will be a substantial factor in bringing about the evil or evils, against the value of the particular book or article, the value generally of literary treatment of sex matters, and the effect the application of the statute to this particular book or article may have upon the freedom of others to write and to read literature touching upon sex and related social problems.

We turn, therefore, to a consideration of these two competing interests: (a) The significant values of freedom to write and to read literature without restriction as to subject matter, particularly with respect to sex, and the social losses that censorship entails. (b) The seriousness of the evils that are sometimes thought to justify the suppression of literature attacked as obscene, and the probability that these evils will in fact result from the reading of such literature.

D. APPLICATION OF THE STANDARD TO OBSCENITY CENSORSHIP

1. *Values of a Free Literature: Consequences of Obscenity Censorship*

The values of a free literature are of course the same as those of any other form of expression. Indeed, the need to protect freedom of literature in book form is even greater than the need to protect it in other forms. For a book, as publisher Curtice Hitchcock once wrote, ". . . has always been the means which the community uses for the testing and development of new and pioneering ideas in the arts, in the sciences, and in the philosophies. To tamper with freedom of expression in book form, therefore, is the most

444. Qualified commentators have repeatedly noted that whatever formula is used, the Court's function in freedom of expression cases is to balance competing interests in reaching a policy judgment. See, e.g., 1 Chafee, *Government and Mass Communications* 36 (1947); Chafee, *Free Speech in the United States* 31-35 (1941); Freund, *On Understanding the Supreme Court* 27-28 (1949); Antieau, *supra* note 416, at 639-645; Corwin, *Bowing Out Clear and Present Danger*, 27 *Notre Dame Law.* 325, 359 (1952); Donnelly, *Government and Freedom of the Press*, 45 *Ill. L. Rev.* 31, 53 (1950); Emerson & Helfeld, *Loyalty Among Government Employees*, 58 *Yale L. J.* 1, 86 (1948); Wechsler, *Synposium on Civil Liberties*, 9 *Am. L. School Rev.* 881, 889 (1941).

dangerous exercise of interference with freedom of thought which can be imagined."⁴⁴⁵ This of course is self-evident with respect to expository and argumentative literature.⁴⁴⁶ But it is not so apparent in fiction and poetry—at least to the censorious; for the private censorship groups,⁴⁴⁷ the police and prosecuting officers,⁴⁴⁸ and sometimes judges too⁴⁴⁹ do not seem to have much love for imaginative literature or appreciation and understanding of its nature and function.

Fiction and poetry, like all other forms of art and expression are vehicles for the conveyance of ideas. They differ from other forms of art and expression in the use of their own peculiar means of communication.⁴⁵⁰ Sometimes this is obvious, as in A. P. Herbert's well-known novel *Holy Deadlock*, which was written to ridicule the English divorce law and to generate support for its amendment. But the use of fiction and poetry for the communication of ideas is not always so apparent. For it is not necessarily the function of fiction and poetry to teach or instruct or to argue, in the usual sense in which these words are used.⁴⁵¹ This does not mean that the reader learns nothing from fiction and poetry; he does learn, but he learns "in the fashion that is art's unique own."⁴⁵²

But what is "the fashion that is art's unique own"? Harold C. Gardiner, S. J., the perceptive and intelligent literary critic of *America* magazine, tells us that he learns from fiction by its truth of fact and its truth of ideal, that he finds "truth through the door of beauty."⁴⁵³ Using as an illustration Marquand's *So Little Time*, a novel of dull, bored, unthinking people described as "a group portrait of people in a huddle wondering what for," he says:

"[W]here is there the dimmest glimmering of beauty there?"

445. Letter quoted in 1 Chafee, *Government and Mass Communications* 208 (1947). Cf. Seagle, *Cato, or the Future of Censorship* 16-17 (1930).

446. *E.g.*, *Parmalee v. United States*, 113 F. 2d 729 (D.C. Cir. 1940) (*Parmalee's Nudism in Modern Life*); *United States v. One Obscene Book Entitled "Married Love,"* 48 F. 2d 821 (S.D. N.Y. 1931) (Dr. Marie C. Stopes); *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945) (*Popenoe's Preparing for Marriage*).

447. See text to notes 147-158 *supra*.

448. See text to notes 160-164 *supra*.

449. *E.g.*, *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) (*Smith's Strange Fruit*); *People v. Pesky*, 230 App. Div. 200, 243 N. Y. Supp. 193 (1st Dep't), *aff'd*, 254 N. Y. 373, 173 N. E. 227 (1930) (*Schnitzler's Hands Around*).

450. "The sonnet, 'The world is too much with us, late and soon,' may be translated into expository prose as an idea, a thesis. It tells us what many moralists have said less memorably, that the pressure of things and events and affairs corrupts that capacity for pagan joy in the fresh world about us that is our birthright." Edman, *Arts and the Man* 61 (1949).

451. Gardiner, *Tenets for Readers and Reviewers* 18-21 (1944).

452. *Id.* at 19.

453. *Id.* at 19-20.

It isn't *there*, but it emerges from the book; it is in the overtones, it is in the wistful gropings of the rootless characters, it is in the whole poignant contrast that the author never points explicitly but which lurks beneath every page—the contrast between what these people actually are and what, as human beings, they could have been. *There* is beauty; the beauty of the potentiality of the human soul, unrealized, frustrated, dissipated on the husks, but still fundamentally and eternally there."⁴⁵⁴

Irwin Edman also tells us how the reader learns from fiction and poetry. The chief functions of art, he says, are the intensification, clarification, and interpretation of experience.⁴⁵⁵ Experience is intensified by arresting the reader's sensations, focusing his attention upon his own emotions so that he can know them for what they are.⁴⁵⁶ Experience is clarified by setting emotions and random impressions in a pattern so as to make their meaning clear to the reader.⁴⁵⁷ And experience is interpreted, simply because any work of art necessarily carries in it the artist's view of life and his criticism of that phase of experience he has selected for treatment.⁴⁵⁸ To the reader:

454. *Ibid.*

455. Edman, *op. cit. supra* note 450, at 30.

456. "In the clear and artful discipline of a novel or a drama our emotions become reinstated into a kind of pure intensity. It might appear on the surface that the actualities of life, the impingements of those so very real crises of birth and death and love, are more intense than any form of art provides. That is true. But we do not live always amid crises, and the ordinary run of our experiences gives us only emotions that are dull and thin. A tragedy like *Hamlet*, a novel like *Anna Karenina*, clarify and deepen for us emotional incidents of familiar human situations. For many people, it is literature rather than life that teaches them what their native emotions are. And ideas themselves, which in the abstractions of formal reasoning may be thin and cold and external, in the passionate presentation of poetry and drama may become intimate and alive." *Id.* at 26-27.

457. "Everyone has experienced the blindness of human pride or the fatal possessiveness of love. But it requires a Sophocles to show him the tragic meaning of the first in such a play as *Oedipus*, a Shakespeare to exhibit him the latter in *Othello*. Even the most unreflective have at some time or other harbored scattered and painful thoughts on the vanity of life or the essential beauty and goodness of Nature. A few have formulated these scattered insights into a system. But a poet like Lucretius can turn that vague intuition into a major and systematic insight: Dante can exhibit the latter in a magnificent panorama of life and destiny. The kaleidoscope of our sensations falls into an eternal pattern; a mood half articulate and half recognized in its confused recurrence becomes, as it were, clarified forever in a poem or a novel or a drama." *Id.* at 27-28.

458. "All the arts in one way or another, to some greater or lesser extent, interpret life. . . . They may 'interpret' nothing more than sensation. Or they may interpret, as *Hamlet* does, or *War and Peace*, or *Ode on the Intimations of Immortality from Recollections of Early Childhood*, the confused intuitions of millions of men, bringing to a focus an obscure burden of human emotion. A poem like *The Divine Comedy* or Goethe's *Faust* may be a commentary upon the whole human scene, its nature, its movement, and its destiny. When Matthew Arnold defined poetry as a criticism of life, he might well have extended his definition to the whole of the fine arts. For criticism is a judgment upon, an interpretation of, a given section of life." *Id.* at 29-30.

"The great and simple appeal of fiction is that it enables us to share imaginatively in the fortunes of these created beings without paying the price in time or defeat for their triumphs and frustrations. One moves with them in lands where one has never been, experiences loves one has never known. And this entrance into lives wider and more various than our own in turn enables us more nicely to appreciate and more intensely to live the lives we do know."⁴⁵⁹

And this imaginative sharing in the fictitious lives of others helps to give the reader an understanding of unfamiliar problems and modes of life and to foster development of the personal quality the psychologists call "empathy"—the ability to put one's self imaginatively into the other fellow's shoes.

Love and desire and jealousy are among the basic human emotions that give rise to the conflict and tension essential to fiction and poetry. And since sex lies at the root of these and other similar emotions, it is a significant and necessary ingredient of most imaginative literature, and requires broad freedom for the manner in which it may be treated; for only with the freedom to experiment in the manner of treating sex in imaginative literature are authors and poets able to produce their best works. Sex is also significant in its own right; for it is one of the most important elements of all human experience. As such, it demands freedom for rational discussion, scientific investigation, and education. Yet these are the very social values of sex that censorship of obscenity jeopardizes, especially when the censorship is indiscriminate.

And censorship of obscenity has almost always been both irrational and indiscriminate.⁴⁶⁰ Perhaps the best explanation for this fact lies in the personal characteristics of the censor. He is rarely an educated person who understands and appreciates the nature and function of imaginative literature.⁴⁶¹ He is often an emotionally disturbed and intemperate person with a paranoid personality.⁴⁶² His attention is focused on smut, and since he looks for it, he finds

459. *Id.* at 77.

460. In addition to the numerous illustrations discussed at notes 147-166 *supra* and text thereto, and otherwise scattered throughout this Article, see for an extreme example the list of some 2,000 titles of books banned from Ireland. Eason & Son, Ltd., *Books Prohibited in Eire* (1948). See also Craig, *The Banned Books of England 95-98* (1937); Scott, *Into Whose Hands* 84-86 (1945).

461. See note 168 *supra*. The sole exception that has come to our attention is Huntington Cairns. Chafee, *Government and Mass Communications* 254 (1947).

462. Watson, *Some Effects of Censorship Upon Society*, In *Social Meaning of Legal Concepts* No. 5, *Protection of Public Morals Through Censorship* 79-80 (1953).

it everywhere.⁴⁶³ Indeed, his continued existence may depend on his ability to turn it up.⁴⁶⁴ In either case, he is so much interested in smut that he cannot, even if he had the ability, see the good at all.⁴⁶⁵

The effects of obscenity censorship upon authors and publishers are of course difficult to ascertain. Yet the lack of definiteness in any standard of obscenity, the absence of even a uniform indefinite standard applicable throughout the nation, and the constant threat of prosecution instigated by some local smut-hound cannot help but have a repressive effect upon authors and publishers. H. L. Mencken's description of his problems as an editor is illuminating:

"[A]s a practical editor, I find that the Comstocks, near and far, are oftener in my mind's eye than my actual patrons. The thing I always have to decide about a manuscript offered for publication, before ever I give any thought to its artistic merit and suitability, is the question whether its publication will be permitted—not even whether it is intrinsically good or evil, moral or immoral, but whether some roving Methodist preacher, self-commissioned to keep watch on letters, will read indecency into it. Not a week passes that I do not decline some sound and honest piece of work for no other reason. I have a long list of such things by American authors, well-devised, well-imagined, well-executed, respectable as human documents and works of art—but never to be printed in mine or any other American magazine. It includes four or five short stories of the very first rank, and the best one-act play yet done, to my knowledge, by an American. All of these pieces would go into type at once on the Continent; no sane man would think of objecting to them; they are no more obscene, to a normal adult, than his own bare legs. But they simply cannot be printed in the United States, with the law what it is and the courts what they are."⁴⁶⁶

Though Mencken wrote this description in 1917 and the law of obscene literature has changed very much since then, the problems of a publisher today, faced with the current wave of censorship across the country, are probably not very much different.⁴⁶⁷ And

463. Broun and Leech, *Anthony Comstock* 273 (1927); Craig, *The Banned Books of England* 89 (1937); Jackson, *The Fear of Books* 75, 83-86 (1932). "A determined prude detects bawdry everywhere, because he carries it about with him." *Id.* at 84.

464. Scott, *Into Whose Hands* 202-203 (1945); Kallen, *The Ethical Aspects of Censorship* in *Social Meaning of Legal Concepts* No. 5, *Protection of Public Morals Through Censorship* 69 (1953); Mencken, *Puritanism as a Literary Force*, in *A Book of Prefaces* 243-252 (1917). *But cf.* Broun and Leech, *Anthony Comstock* 265-266 (1927).

465. Erskine, *Decency in Literature*, in *The Literary Discipline* 43 (1923).

466. Mencken, *op. cit. supra* note 464, at 277.

467. For a discussion of the effects of obscenity censorship on English publishers, see Scott, *Into Whose Hands* 182-187 (1945).

the publisher's fears are likely to be transmitted in even greater degree to the author. For the author is ordinarily less able to bear the financial risk involved in a book that might be suppressed as obscene,⁴⁶⁸ and his contract with the publisher may even contain a clause that "The author hereby guarantees . . . that the work . . . contains nothing of a scandalous, an immoral or a libelous nature."⁴⁶⁹ The inevitable tendency is to make the serious author timid, to cramp his mind so that the books he is not afraid to write will fall far below the level of his abilities.⁴⁷⁰ And society, as a consequence of the anxiety to suppress smut at all costs, may lose the values of important literary, scientific, and educational contributions. In their place it may have a distorted literature, unfaithful to life,⁴⁷¹ and perhaps even a blacking out of rational public discussion of social problems of immense public importance.⁴⁷²

2. "Evils" Claimed to Justify Obscenity Censorship: *Balancing the Interests*

These significant values that arise out of freedom to write and to read literature without restrictions as to theme or materials, and the substantial losses to society that inevitably result from most censorship aimed at "obscenity," must be balanced against the evils thought to justify the suppression of literature attacked as "obscene." Under the current constitutional approach to freedom of expression issues, this policy judgment requires a consideration of the relative seriousness of the supposed evils and the degree of probability that these evils will, in fact, result from the distribution of the literature under attack.⁴⁷³

As indicated above,⁴⁷⁴ the exact evils aimed at by obscenity legislation, and by courts in applying this legislation to literature, are seldom clearly stated. Professor Chafee has observed that obscenity is a "complex idea" that includes several "real or supposed

468. Mencken, *op. cit. supra* note 464, at 269-272.

469. *Dreiser v. John Lane Co.*, 183 App. Div. 773, 774, 171 N. Y. Supp. 605 (1st Dep't 1918). See also Mencken, *op. cit. supra* note 464, at 270 n. 1.

470. Scott, *Into Whose Hands* 179-182 (1945); Forster, *Culture and Freedom*, in *Two Cheers for Democracy* 32-33 (1951); cf. Van Druten, *Sex and Censorship in the Theatre*, in *International Congress for Sexual Reform* 317-322 (3d Cong. 1929).

471. And also a distortion in the way readers afterwards perceive the book, assuming they can find a copy which, of course, is usually the case. Watson, *Some Effects of Censorship Upon Society*, in *Social Meaning of Legal Concepts No. 5, Protection of Public Morals Through Censorship* 77-78 (1953).

472. Rebecca West, *Introduction to Causton and Young, Keeping It Dark* 8-11 (n.d.); cf. Watson, *op. cit. supra* note 471, at 74-75.

473. See text to notes 437-444 *supra*.

474. See text to notes 232-317 *supra*.

social injuries."⁴⁷⁵ In the main these injuries relate to various effects upon individual readers. The offensive or shocking effect upon the reader is occasionally suggested as among the evils aimed at,⁴⁷⁶ but the effects usually mentioned are danger of stimulating impure sexual thoughts, or sexual conduct contrary to the laws or accepted moral standards of the community.⁴⁷⁷ In addition to these supposed effects upon individuals, another evil sometimes mentioned is the danger that literature challenging or questioning the accepted moral standards of the community might actually bring about a change in the commonly accepted standards.⁴⁷⁸ The relative weight that should be attached to each of these evils when thrown into the balance against the loss to society from this kind of censorship requires critical consideration.

a. Changing Community Moral Standards

Only slight consideration need be given to the contention that literature challenging or questioning the currently accepted moral standards of the community should be suppressed because of the danger that it may in time influence those moral standards through changing laws or customs, as distinct from influencing individuals to deviate from the currently accepted standards. If this purpose were not so apparent in the materials advocating censorship,⁴⁷⁹ in the type of books occasionally censored,⁴⁸⁰ and in some of the judicial decisions applying censorship laws,⁴⁸¹ it would hardly merit discussion. Not only is this purpose inconsistent with the fundamental reasons for freedom of expression, but the causal relationship between such literature and a change in the general moral standards is far too tenuous to satisfy the constitutional standard of "clear" or "probable" danger.

The view that literature may be proscribed because of the risk that it may influence a change in the accepted moral standards of

475. See 1 Chafee, *Government and Mass Communications* 211 (1947).

476. See text to notes 273-284 *supra*.

477. See text to notes 232-258 *supra*.

478. See 1 Chafee, *op. cit. supra* note 475, at 197, 211, and authorities cited in note 481 *infra*.

479. See note 62 *supra*.

480. See notes 264, 268 *supra* and text thereto. Fiction is sometimes used to attack current standards and is thus made the object of censorship. *Shadows Move Among Them*, by Edgar Mittelholzer, and *The Harem*, by Louis Royer are examples.

481. *E.g.*, *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14, 571 (C.C. S.D. N.Y. 1879) (*Cupid's Yokes, or The Binding Forces of Conjugal Love*); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) (*Lillian Smith's Strange Fruit*); *Commonwealth v. DeLacy*, 271 Mass. 327, 171 N. E. 455 (1930) (*D. H. Lawrence's Lady Chatterley's Lover*); *People v. Dial Press*, 182 Misc. 416, 48 N. Y. S. 2d 480 (Mag. Ct. 1944) (*D. H. Lawrence's The First Lady Chatterley*); *People v. Friede*, 133 Misc. 611, 233 N. Y. Supp. 565 (Mag. Ct. 1929) (*Radclyff Hall's The Well of Loneliness*).

the community flies squarely into the face of the very purpose for guaranteeing freedom of expression. Back of this fundamental freedom lies the basic conviction that our democratic society must be free to perfect its own standards of conduct and belief—political, economic, social, religious, moral—through the heat of unrepressed controversy and debate.⁴⁸² The remedy against those who attack currently accepted standards is spirited and intelligent defense of those standards, not censorship. This is the remedy guaranteed and required by the Constitution. Only through unlimited examination and re-examination, attack and defense, can come the ultimate perfection of these standards,⁴⁸³ and the understanding and grasp of the reasons that alone will insure their preservation, if sound.⁴⁸⁴ That the issue in controversy is a currently accepted moral standard, even a standard considered basic to our society, can make no difference. As Mr. Justice Jackson so well said :

“ . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”⁴⁸⁵

Even if there were substantial danger that one book, or several books, would actually bring about a change in the currently ac-

482. This point is too well recognized by the Supreme Court to be documented in detail; therefore the following are quoted as illustrative. Mr. Justice Brandeis concurring in *Whitney v. California*, 272 U. S. 357, 375 (1927) :

“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . that the fitting remedy for evil counsels is good ones.”;

Mr. Justice Murphy speaking for the Court in *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940) :

“The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.”;

Chief Justice Vinson in *Dennis v. United States*, 341 U. S. 494, 503 (1951) :

“We pointed out in *Douss*, *supra*, that the basis for the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse.”

483. See John Stuart Mill, *On Liberty* 40-46 (McCallum ed., 1947) ; 1 Chafetz, *op. cit. supra* note 475, at 39.

484. See Mill, *op. cit. supra* note 483, at 30-40; Merriam, Book Review, 27 *Am. J. Soc.* 97, 98 (1921).

485. See *Board of Education v. Barnette*, 319 U. S. 624, 642 (1943).

cepted moral standards, this still would not be a sufficient evil to justify repression of the book for the reasons stated above. If that were a justification, then freedom of expression would be guaranteed only when it could make no difference. But it is not amiss to point out also that the standards of society are changed neither quickly nor as the result of a single force. Changes in moral standards are necessarily slow and gradual, the result of many inter-related forces. Perhaps a book may be a minor factor in a change of the generally accepted standards, but this will only occur if many other factors also concur in bringing this about. The "probable effect" of any book attacking current moral standards is that it may cause a brief stir and discussion among a relatively small portion of the population, and then be placed on the shelves without causing any perceptible change in the accepted standards. Insofar as "present" or "imminent" danger remains a factor in freedom of expression decisions after *Dennis*,⁴⁸⁶ this is wholly lacking here. When the faint risk that a book may, at some future and probably distant time, be a minor factor in a gradual change of the accepted moral standards is weighed against the incalculable harm that would result from suppressing literature that challenges or questions these standards, we can only conclude that this risk can never justify censorship.

b. *Offensiveness*

Professor Chafee has suggested that one of the injuries sought to be prevented by obscenity laws is "offensiveness, which links indecency to profanity and public drunkenness."⁴⁸⁷ Amplifying upon this, he states at another point:

"... the law wants to prevent the sense of citizens from being offended by sights and sounds which would be seriously objectionable to a considerable majority and greatly interfere with their happiness. From this standpoint, a nasty word in a street-car is treated like a lighted cigar—the law is interested in the immediate effect on the sensibilities of others."⁴⁸⁸

Professor Chafee appears here to have been thinking of publicly

486. *Dennis v. United States*, 341 U. S. 494 (1951), considered in text to notes 430-441 *supra*. That the Supreme Court minimized the importance of a "present" or "imminent" danger in *Dennis*, where the evil to be prevented was revolution that might be attempted as soon as the time was ripe, does not mean that it will consider this factor unimportant where the danger is gradual persuasion of public opinion with respect to a change in moral standards. This is the very kind of case in which there is ample time, without danger, "to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education." See Mr. Justice Brandeis, concurring, in *Whitney v. California*, 274 U. S. 357, 377 (1927).

487. 1 Chafee, *op. cit. supra* note 475, at 211.

488. *Id.* at 196-197.

spoken obscene or profane words of a shocking nature, which we have already noted are sometimes prosecuted under obscenity laws.⁴⁸⁹ But at another point he suggests that a "valiant effort" could be made to justify some convictions for written obscenity on the ground that a state may "protect readers from . . . serious shock to their sensibilities;"⁴⁹⁰ here, however, he was speaking specifically of "grossly indecent" letters, not literature.⁴⁹¹ Still, some convictions for "obscene" publications appear to have been influenced by the desire to protect against offensiveness, judging from the emphasis in some opinions on vulgarity and on the need to protect the public from offensive and shocking materials.⁴⁹²

This becomes again a matter of weighing values. Here the importance to society of complete freedom for authors to write with blunt realism on any subject, when that seems the best way to make their point, and to portray their characters in whatever way seems most appropriate for their purposes, must be balanced against the relatively minor harm that results from disturbing or shocking the sensitive soul.

This harm—if it is a harm—is relatively minor for two reasons. In the first place, few who read literature that might offend the sensitive will in fact be offended, for the sensitive seldom read such literature—unless they are looking for the shock.⁴⁹³ Those who dislike or are offended by such literature need not, and ordinarily do not, read it. If by accident they start to read a book that turns out to be offensive, there is no obligation to continue reading. In this respect, literature containing words, scenes, or ideas likely to offend some readers is quite unlike publicly spoken obscenity from which there may often be no escape. For the offensive materials are confined within the covers of a book, and need not be brought to life unless it is the reader's desire to do so.

In the second place, for the relatively few readers who will be offended by what they read, the shock to their sense of decency and propriety is really a very trivial harm, standing by itself. Those who quite accidentally read a book containing unexpected scenes

489. See note 381 *supra*.

490. 1 Chafee, *op. cit. supra* note 475, at 56. He proceeds to spell out such an argument in terms that might be applied to obscene literature.

491. United States v. Limehouse, 285 U. S. 424 (1932).

492. See *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *Commonwealth v. Donaducy*, 33 Erie Co. Leg. J. 330, 332 (1950) ("disgusting material . . . of equal vice with . . . obscene . . . not apt to incite desires of any kind. It arouses only a feeling of nausea. . .").

493. Samuel Johnson is supposed to have replied to a woman who complained about certain words in his dictionary: "Madam, you must have been looking for them."

or words of a nature shocking to them may at the worst become momentarily embarrassed, and perhaps outraged or distressed that such a book should be available to the innocent reader. Any such emotional reaction is of relatively short duration, and causes no serious or lasting harm. In contrast, the local Comstock, who prowls the book stores and magazine stands searching for "shocking passages" to point at in horror, alarm, and glee, finds exactly what he is looking for and would be disappointed if he did not. Certainly he cannot claim that offense to his sensitivity is a harm that justifies censorship. On the contrary, he protests that he, at least, is immune from harm.⁴⁹⁴ Of course, most readers experience no offense at all, for they know the general character of the book and they read it because they want to.⁴⁹⁵ Whether such literature may be harmful to them from the standpoint of morals is quite a distinct problem, which we consider below, but to sustain censorship in order to protect the usual reader from being shocked or offended by what he voluntarily chooses to read would be fantastic.

This occasionally asserted justification for censorship thus appears to be a relatively trivial harm—a temporary sense of shock, irritation, and outrage at the worst; and it is experienced by relatively few of a book's readers. This infrequent and trivial offense to the sense of decency and propriety of relatively few readers cannot possibly outweigh the values of unrestricted freedom in literature, unless the author is writing only "dirt for dirt's sake."⁴⁹⁶ Such considerations have influenced some courts to interpret obscenity statutes not to forbid vulgarity that is objectionable only because of its offensiveness.⁴⁹⁷ Interpretation apart, a ruling that mere offensiveness cannot constitutionally justify censorship of literature would seem compelled by any reasonable judgment based upon balancing the interests pursuant to the constitutional test for freedom of expression.⁴⁹⁸

494. "For whom does a censor speak? Obviously he does not limit his ban to such things as may endanger his own moral prominence. Comstock worked for many years in a sewer, as he himself described it, but he came up every now and then and went to prayer meetings, where he was accepted as devout and uncontaminated." Brown and Leech, *Anthony Comstock* 268 (1927). See also Schroeder, *Obscene Literature and Constitutional Law* 102 (1911); Ernst, *The Point at Issue*, 47 *Am. Lib. Ass'n Bul.* 457 (Nov. 1953).

495. As Professor Chafee so well states, the objection of those who would ban books for obscenity "is not that these books offend readers but that they delight them." Chafee, *op. cit. supra* note 475, at 57.

496. See *People v. Gotham Book Mart*, 158 *Misc.* 240, 243, 246, 285 *N. Y. Supp.* 563, 567, 570 (*Mag. Ct.* 1936).

497. See cases cited note 274 *supra*.

498. *Cf. Cantwell v. Connecticut*, 310 *U. S.* 296 (1940) where a unanimous Court placed freedom of expression above the risk of breach of the peace that might well result from playing on a public street a highly offensive record attacking the Roman Catholic Church in vicious terms. See *Transcript of Record*, p. 41, *ibid.*

c. Stimulating Sex Thoughts

The basic evil aimed at by obscenity censorship is protection of the moral standards of individuals, stated usually in very broad and inexact terms, even by those who would reduce the excesses of censorship. While the classic obscenity test in *Hicklin*, which would ban literature believed to have a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences"⁴⁹⁹ has been largely discredited, even the most liberal opinions still talk in broad terms of whether "the book as a whole has a libidinous effect", whether its "dominant effect" is "to promote lust",⁵⁰⁰ or whether "the likelihood that the work will so arouse the salacity of the reader"⁵⁰¹ outweighs its merits. Without attempting to be precise, these and countless other statements relating to the "effect" of literature in determining the issue of obscenity appear to be concerned both with the effect upon the *mind* of the reader and the effect upon his *conduct*. There is no attempt to separate these two, as indeed would be impossible in appraising the effect of a book; nor is there any clear indication in typical statutes or court decisions whether the ultimate evil sought to be prevented is *conduct* inconsistent with the existing moral standards, or whether the "evil" of lustful sex *thoughts*, independent of any risk of translating those thoughts into action, is also a purpose of obscenity censorship.⁵⁰²

Is "corrupting" the reader's mind with sex thoughts, independent of any risk that these may be translated into action inconsistent with the current moral standards, in itself a sufficient evil to justify censorship of literature? Without devoting much time to this question, because whatever the answer we are immediately driven to consider the stimulation of sex thoughts into sex conduct, it should suffice to suggest briefly four reasons for real doubt that, standing alone, the stimulation of sex thoughts is a sufficient evil to justify censorship.

First, the creation of normal sexual desires is, in itself, neither

499. See text to note 207 *supra*.

500. See *United States v. One Book Entitled "Ulysses,"* 72 F. 2d 705, 707-708 (2d Cir. 1934).

501. *United States v. Levine*, 83 F. 2d 156, 158 (2d Cir. 1936).

502. In contrast to the legal materials, the church has been insistent that evil thoughts on sex matters should be kept under control. In the Anglo-Saxon period, the "expression of sex was no more an evil than the contemplation of sex," for "sin lay in the desire" and on one occasion a 40-day bread and water fast was required of a layman whose thought dwelt on fornication. See May, *Social Control of Sex Expression* 82 (1931). That the church today is still concerned with the mental effects of books dealing with sex is indicated by Noll, *Manual of the NODL* 18 (n.d.), where the author speaks of the "vicious" effects of literature that falls short of pornography: "It darkens the mind. It enfeebles the will. It corrupts the heart."

immoral nor contrary to the accepted sex standards. The stimulation of thoughts and ideas about sex, even creating the desire for sexual intercourse, may often be in the public interest. For example, education in sexual practices that will make for more satisfying marital relations,⁵⁰³ or an exposition of the delights that can come from the perfect mating of a man and wife in a physical and spiritual union,⁵⁰⁴ may well make for more stable family relationships, and encourage a young man to marry rather than to experiment in unmarried love. Even books that make love attractive when it happens to be illicit may have a beneficial effect on some by attracting young people to marry rather than to seek sex pleasures outside of wedlock.

The second reason is that independent of the danger of inducing or encouraging sex conduct inconsistent with accepted moral standards, the harm that can result from the stimulation of sex thoughts is relatively trivial in the case of the normal person.⁵⁰⁵ Sex thoughts are perfectly natural;⁵⁰⁶ without them men and women would be abnormal. The failure of pro-censorship literature or court opinions to analyze the harm that can come from stimulation of sex thoughts, independent of stimulating action, may indicate that this is really not an important factor. But what are the possible harms? Some of the religious advocates of censorship say that sex literature "darkens the mind" and "corrupts the heart,"⁵⁰⁷ but they do not

503. ". . . for . . . marriage, in its essence, is a status of antagonistic co-operation.

"In such a status, necessarily, centripetal and centrifugal forces are continuously at work, and the measure of its success obviously depends on the extent to which the centripetal forces are predominant.

"The book before me here has as its whole thesis the strengthening of the centripetal forces in marriage, and instead of being inhospitably received, it should, I think, be welcomed within our borders." *United States v. One Obscene Book Entitled "Married Love,"* 48 F. 2d 821, 824 (S.D. N.Y. 1931).

504. See, e.g., *Dennett, The Sex Side of Life* (1918), quoted in *Dennett, Who's Obscene?* 144-145, 149-150 (1930), and partially quoted in *United States v. Dennett*, 39 F. 2d 564, 566-567 (2d Cir. 1930), where a conviction for mailing a pamphlet on sex instruction for youth was reversed on the ground that this "idealization of the marriage relation and sex emotions . . . tends to rationalize and dignify such emotions rather than to arouse lust." *Id.* at 569.

505. See *Roth v. Goldman*, 172 F. 2d 788, 792 (2d Cir. 1949) (concurring opinion): "I think no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result."

506. See *State v. Lerner*, 81 N. E. 2d 282 (Ohio C.P. 1948): "Pure, normal sex ideas are all right. Nature is aflame with sex ideas—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of life and living."

507. See *Noll, Manual of the NODL* 18 (n.d.). *Anthony Comstock* wrote: "Lust defiles the body, debauches the imagination, corrupts the mind,

attempt to indicate just what this harm is, apart from its effect on conduct. Basic to religious thinking is the emphasis that lustful thoughts are as great a sin as lustful acts;⁵⁰⁸ this talk of corrupting the mind probably is derived from the religious duty to think noble thoughts. Certainly it is entirely appropriate for the *church* to discourage reading that turns the mind from spiritual to carnal thoughts, but under our constitutional system the *government* can scarcely claim authority to impose controls on literature for the purpose of directing men's minds away from the physical interests of life toward more spiritual and worthy thoughts. Another possible evil is that excessive preoccupation with sex thoughts may perhaps divert the mind from more important subjects,⁵⁰⁹ such as the study of law, but to ban literature in order to turn the mind into more productive or useful channels would be unthinkable. Again, literature dealing with sex may further stimulate the abnormal thinking of those already mentally unbalanced on sex, but we cannot possibly justify censorship over the reading of all to protect the mentally unbalanced,⁵¹⁰ who can be set off on abnormal tangents in innumerable ways.⁵¹¹ Disregarding at this point the effect on outward conduct, the insignificant and generally indefensible character of these "evils" that may result from stimulating sex thoughts emphasizes the overwhelmingly greater weight of the values to society of freedom in literature.

Assuming that the non-action "evils" that may result from stimulation of thoughts and desires on sex are worthy of some weight in the constitutional balancing of interests, there is a third reason why the danger to worthwhile thinking cannot justify censorship; it is that the causal relationship between literature dealing with sex and the composite sex thoughts and desires of an individual is likely to be extremely tenuous. So many non-literary stimuli to sex thoughts and desires are constantly thrown at mankind, and are ordinarily so much more powerful in arousing sex thoughts

deadens the will, destroys the memory, sears the conscience, hardens the heart, and damns the soul." See Broun and Leech, *Anthony Comstock* 80 (1927).

508. Matthew 5.27-28: "Ye have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."

509. Cf. Edman, *Arts and the Man* 39-40, 45 (1949).

510. See text to notes 551, *infra*, 301-308 *supra*.

511. See, e.g., Krafft-Ebing, *Psychopathia Sexualis* 69-79, 82, 88-124, 126-127, 144-151, 165 (12th ed. 1950); London and Caprio, *Sexual Deviations* 462, 483 (1950).

and desires,⁵¹² that in most cases literature touching on the subject is an exceedingly minor factor.⁵¹³ Thus, even if these "evils" from sex thoughts and desires are entitled to some weight, the relative unimportance of literature in stimulating such thoughts only serves to point up the overwhelmingly greater weight of the value of freedom to write and to read in this area.

Finally, if the purpose of obscenity censorship is really to control the kind of thoughts people have in this important area of human life, this invades dangerous territory constitutionally. The state can properly be concerned with controlling action that harms society, but ordinarily it must stop short of what men think and believe. In the area of sex morals, the Supreme Court recognized this long ago in connection with polygamous marriage,⁵¹⁴ and in more recent days it has been emphasized in connection with political problems.⁵¹⁵ It seems unlikely there should or could be any difference with respect to ideas or thoughts on sex problems generally. We conclude, therefore, that the possibility of stimulating sex thoughts and desires, independent of the danger of stimulating objective conduct inconsistent with current standards, seems altogether inadequate to justify the losses to society that result from interference with literary freedom in this area.

d. Stimulating Sex Conduct

The primary evil aimed at by obscenity censorship is the danger that through stimulating sexual desire obscene literature will

512. See, e.g., Scott, *Into Whose Hands* 5 (1945): "The sexually stimulative effect of erotic literature is enormously exaggerated. Literature occupies a very inferior position in the list of aphrodisiacs. There are many far more potent influences on sexual libido. Dancing exerts a powerful aphrodisiacal effect; so does alcohol; so does women's dress; so does perfume. Yet no one suggests the prohibition or suppression of any of these aphrodisiacs on the ground of its 'corrupting influences' or its power of inciting sexual passion. Indeed, the most powerful sexual stimulate of all, intimate contact of the sexes, it is impossible, in any extended and complete sense, to guard against."

513. Cf. Bradley, *Essay on the Treatment of Sexual Detail in Literature* in *Selected Essays* 618, 620-624 (1935), where the author points out that in successful literature, as well as other successful art, the sexual ideas are embodied in an impersonal setting, so that even in the romance novel an understanding reader attaches them to an object or world of objects beyond his own individual life: "The ideas and emotions that are aroused live not merely in ourselves. They are beyond us as the souls of those figures, whose acts and sufferings, whose sorrows, sins, and delights are for the moment more real to us than anything of our own. What we feel into those creatures we feel out of ourselves." But Bradley recognizes that some authors may fail to keep the detail subordinate, so that it is no longer bound to the service of the artistic purpose, and that the reader may fail to read understandingly, with sufficient detachment of personal feeling.

514. See *Reynolds v. United States*, 98 U. S. 145, 164, 166 (1897).

515. See, e.g., *Communications Ass'n v. Douds*, 339 U. S. 382, 396, 406-412 (1950), and the separate opinions of Justices Frankfurter at 422 and Jackson at 439-444; *Dennis v. United States*, 341 U. S. 494, 502 (1951).

lead to sexual conduct that is illegal or otherwise inconsistent with current moral standards. Preventing deviation from the community standard in sexual matters is sufficiently important to society that the danger of such deviation, if established, would doubtless be given great weight by the Court. If it were established that reading a certain book would, in fact, induce normal persons⁵¹⁶ to engage in sexual conduct that seriously deviates from the accepted community standards, there can be little doubt of the constitutional power to ban the circulation of the book among the general public. But our major difficulty arises because it is impossible to know that the book will have that effect; instead, the effect of any book upon the action of normal individuals is in the realm of prophecy. Therefore, as regards this primary evil asserted in support of obscenity censorship, the constitutional issue is not whether the evil, if established, is serious enough. The issue is whether the possibility that a particular book, or type of book, will adversely affect the moral conduct of the normal reader is sufficiently great to constitute the "clear danger" needed to outweigh the social values of the free distribution of the book and the harm to society that would result if this type of book were subject to censorship.

In appraising the actual effect of literature upon the sex conduct of the reader, there is a great deal of talk and very little factual data upon which to base a fair judgment. The advocates of obscenity censorship simply assume, with no attempt at proof, that reading about sex is a primary cause of sexual deviation.⁵¹⁷ Those who oppose censorship point out that its advocates have "never proved their case,"⁵¹⁸ that censorship "scorns facts" and "substitutes guesses for findings."⁵¹⁹ On both sides there is much heat and little light on this critical question. Both grasp at straws for lack of any dependable information on the effect of reading upon the sex conduct of the reader.

For example, advocates of strict obscenity censorship rely heavily upon the conclusions of prison wardens and law enforcement officers that "salacious material" is an important factor in the in-

516. See text to notes 301-308 *supra*, and 551 *infra* for discussion concerning effect on abnormal persons and youth.

517. See, *e.g.*, Noll, Manual of the NODL 21 ff (n.d.); Note, 34 *Marquette L. Rev.* 301 (1951).

518. See Broun and Leech, *Anthony Comstock* 266 (1927).

519. See Ernst and Lindey, *The Censor Marches On* 222-224 (1940). *Cf.* Scott, *Into Whose Hands* 205 (1945): "In the long history of the prosecution of books on the ground of obscenity, punctuated with many celebrated cases, no one has ever been able to point out a specific person who has admitted being, or who can be proved to have been, injured by the publication in question." To the same effect see Broun and Leech, *Anthony Comstock* 266 (1927); *cf.* Schroeder, *Obscene Literature and Constitutional Law* 103 (1911).

crease in sex crimes,⁵²⁰ although there is nothing to indicate that these conclusions are based upon anything other than bare conjecture from the fact that sex criminals also read sexy magazines. Apart from the fact that these law enforcement officers appear to be talking mainly of the "dirt for dirt's sake" type of material, there is nothing even to suggest that their conclusions were based upon any careful study designed to separate the various factors that might contribute to sex delinquency. So far as appears, these conclusions are guesses based on the fact that those with anti-social sexual desires do read sexy material, without any attempt to determine which is the cause and which the effect.⁵²¹ On the other hand, neither do those who oppose this type of censorship rely on any scientific study of the possible causal relationship between sex literature and sex conduct. Instead, they point to studies indicating that books stand very low among the various sources of sex knowledge.⁵²² From this finding, it is reasonable to conclude that literature dealing with sex is not an important factor in most sex conduct; but this does not necessarily mean that among those who read, such literature is a negative factor.⁵²³ Or they quote unnamed psychiatrists to the effect that "pornographic literature does

520. See Noll, *Manual of the NODL* 31, 123 (n.d.); Cooper, *This Trash Must Go*, 103 *Forum* 61 (1940).

521. Cf. Armitage, *Banned in England* 33 (1932): ". . . is it not nearer the truth to say that obscene reading can never engender sexual desire, but sexual desire, especially if frustrated, may well beget an inclination for obscene reading?"; Broun and Leech, *Anthony Comstock* 272 (1927): "But then you have the old problem of the chicken and the egg and no one would be competent to tell whether the boy came to erotic thoughts by reason of pornographic matter or whether he sought out the book and the pictures because he was erotic. Comstock did not seem to realize the possibilities of spontaneous combustion among the adolescents." See also *Science News Letter*, Jan. 3, 1953, p. 9.

522. Alpert, *Judicial Censorship of Obscene Literature*, 52 *Harv. L. Rev.* 40, 73-74 (1938), points to two studies, not as conclusive, but as casting doubt on the assumption that "immoral" books corrupt the reader. The first is a study by the New York City Bureau of Social Hygiene, in which 1200 out of 10,000 college and normal school women graduates to whom letters were sent reported on the source of their sex information. Only 72 out of the 1200 mentioned books as the source, and though specific books were named, not one of them was of the "dirty" type. Out of 409 responses to the question inquiring what they found most sexually stimulating, 95 said books; and 208 said "Man." The second study indicates that in a cross section of youth, where scientific controls were used to get a good sample of youth from 16 to 24, the percentage securing their sex information from books was substantially less than among the college graduates. Out of 13,528 youth interviewed only 4% named books as the source of their sex information. The particular types of books were not identified. Bell, *Youth Tell Their Story* 41-42 (1938).

523. As indicated in note 522 *supra*, one study indicates that 95 out of 409 women found books the most sexually stimulating factor, but, of course, this does not demonstrate that stimulation from books leads to improper sexual conduct.

not lead to sex crimes" with no reference to any substantiating studies.⁵²⁴

The unfortunate fact is that today relatively little information is available on the effect of sex literature on human conduct. A small amount of tangential information points toward the minor significance of literature as the source of sex knowledge, or of sexual stimulation, but this is fragmentary and falls far short of relating the reading of sex literature to sexual conduct or misconduct. For example, the Kinsey studies found that a slight majority of men and women reported some "erotic responses" from a variety of literature, some romantic, some more specifically sexual, but only 16% of the women and 21% of the men reported that such response was "definite" or "frequent."⁵²⁵ Obviously this is too vague to be dependable in forecasting what kind of literature is likely to lead to sexual desire or arousal, and it gives no light whatever on the causal relationship between such arousal and actual sex conduct inconsistent with the community standard. Although the whole structure of obscenity censorship hinges upon the unproved assumption that "obscene" literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as factor for study the effect of sex literature upon sex conduct. Surely, methods of social investigation have now progressed to the point where this can and should be done.⁵²⁶

But until dependable studies of this kind are made, literature will continue to be censored upon the hypothesis that so-called "obscene" literature is a significant factor in influencing substantial deviation from the community standard of values. There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the great-

524. See Science News Letter, Jan. 3, 1953, p. 9.

525. See Kinsey, Pomeroy, Martin, and Gebhard, *Sexual Behavior in the Human Female* 669-670 (1953). In addition to those with "definite" or "frequent" response, the report shows "some response" by 44% of the female and 38% of the male, and "never" a response by 40% of the female and 41% of the male. The sample included 5699 females and 3952 males.

526. See Ernst, *What Should be the Relation of Morals to Law*, 1 Pub. Law J. 303 (1952); cf. Judge Frank, concurring "with bewilderment," in *Roth v. Goldman*, 172 F. 2d 788, 792 (2d Cir. 1949). Recently the U. S. Senate authorized a subcommittee of the Judiciary Committee to "conduct a full and complete study of juvenile delinquency in the United States" with special attention to its "extent and character" and "its causes and contributing factors." Sen. Rep. No. 89, 83d Cong., 1st Sess. (1935); 99 Cong. Rec. 6016 (1953). With only \$44,000 provided, there is little hope that this investigation will provide any real light on the effect of books on juvenile delinquency.

est concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment.⁵²⁷ Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency,⁵²⁸ but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards.⁵²⁹ The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant.⁵³⁰ And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sex thoughts as compared with other factors in society.⁵³¹

In considering the constitutional validity of obscenity censorship, how much weight should be given these genuine doubts and the absence of any dependable information concerning the effect of literature upon the actual sex conduct of readers? It is arguable that "obscene" literature embodies no "clear" or "probable" danger

527. See Glueck, *Unraveling Juvenile Delinquency* 160-161 (1950).

528. For a quick summary of the broad scope of this study, listing all factors investigated, see the table of contents, *id.* at xiv-xv.

529. The relative insignificance of reading as an aphrodisiac has been noted by many commentators. See, *e.g.*, Ernst and Lindey, *The Censor Marches On* 255 (1940); Jackson, *The Fear of Books* 89-119 (1932); Milton, *Areopagitica* 16-17 (1644); Scott, *Into Whose Hands* 205 (1945); Alpert, *Judicial Censorship of Obscene Literature*, 52 *Harv. L. Rev.* 40, 74 (1938).

530. See note 525 *supra* and text thereto.

531. See note 522 *supra*.

to the public interest when we really know so little about its effect upon sex conduct. It could be urged that the degree of likelihood that such literature will result in improper conduct does not even meet the "reasonable tendency" test rejected by the Supreme Court as not sufficiently "clear and present" to justify interference with freedom to comment adversely and unfairly on pending judicial cases.⁵³² Yet the degree of likelihood that harm will result from an utterance under attack is only one factor in the policy judgment that requires the balancing of several conflicting interests in all constitutional decisions relating to freedom of expression. At this point it suffices to note that the absence of dependable information concerning the effect of "obscene" literature on human conduct is a significant factor that ought not to be overlooked in making such decisions.

E. A CONSTITUTIONAL STANDARD FOR OBSCENITY CENSORSHIP

The foregoing analysis requires the conclusion that much obscenity censorship authorized by the terms of current statutes is unconstitutional. The danger of influencing a change in the current moral standards of the community, or of shocking or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom. Until social research develops more adequate knowledge concerning the effects of reading on sex conduct, probably some leeway must be left for permissible banning of books reasonably thought likely to lead to antisocial sex conduct, when they are found to have insufficient offsetting value to society. But even with this leeway, many of the books now claimed to fall under the ban of current obscenity statutes are entitled to constitutional protection. Certainly the constitutional right to freedom of expression cannot be impaired simply because a legislature or court hangs the label "obscene" on a book. For example in our opinion the Massachusetts decisions upholding convictions for selling *Strange Fruit* and *An American Tragedy* violated the constitutional guarantee of freedom of expression. Similarly, many of the books on the prosecutors' and NODL lists can not constitutionally be banned.

We do not suggest that all obscenity censorship is unconstitutional. It is arguable, of course, that the social values of censorship are always outweighed by its serious deterrent to free expression, particularly in view of the uncertainty that any evil within reach

532. *Craig v. Harney*, 331 U. S. 367 (1947); *Pennkamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941).

of the government actually results from reading sex literature. Yet such a position would be hard to maintain in the face of published material that seems designed to stimulate sexual appetites, contributes nothing to the expression of ideas, and is without literary merit. Whether such pornography should be forbidden, and hence driven under cover, or should be permitted to circulate freely and perhaps thereby die a natural death, is a policy decision for the legislature. In any event it is not entitled to constitutional protection.

1. The Values of a Constitutional Test for Obscenity Decisions

Our real problem arises because it is difficult to draw the line between material that can reasonably be thought harmful in its effects on society, without sufficient offsetting social value, and that which has social values sufficiently great to outweigh any reasonably predictable harm. If any obscenity censorship is to be attempted, and this decision has already been made by legislation, then some agency must be entrusted with power to discriminate between that which appropriately falls under the ban and that which does not. Up to now this decision has been made largely by police officers, or other equally unqualified censors.⁵³³ When a case has been carried to court, the controlling decision has too often been made by a single trial judge, with or without a jury, with no careful, independent review of the issue by an appellate court.⁵³⁴

It is our contention that the final agency to determine what literature may be censored must be an appellate court operating under uniform constitutional standards and subject to ultimate review by the United States Supreme Court. Apart from strong reasons for constitutional protection arising out of the importance of freedom of expression in this area,⁵³⁵ recognition of a constitutional issue in obscenity censorship would have substantial additional advantages in providing a more dependable and sane method of discriminating between that which may be banned as obscene and that which must be permitted to circulate.

First, constitutional review of an obscenity ban will eliminate the undeserved weight given to the decision of a trial jury or judge, which is too frequently the decision of a single judge. Appellate courts quite commonly treat the determination of obscenity in the trial court as an issue of fact, subject to reversal only if the decision could not reasonably be reached on the "evidence," which is simply

533. See text to notes 99-172 *supra*.

534. See text to note 536 *infra*.

535. See text to notes 402-415, 445-472 *supra*.

the book under attack.⁵³⁶ This permits dodging what sometimes is a tough question. In this area, where warped and narrow viewpoints are common, such an important issue as banning the circulation of a work of literature should never be decided without a fresh and independent look by an appellate court. If a constitutional issue is recognized here, the independent judgment of several minds will be assured, and among them will likely be some acquainted with literature and having an appreciation of literary values.

Second, constitutional review will insure more careful consideration of all the factors that should enter into a policy determination as to whether the country should be deprived of the opportunity to read a particular book. Most courts give weight to most of the factors that ought to be considered, though purporting only to apply the statutory terms.⁵³⁷ Others appear not to concern themselves at all with these broader policy issues that are inevitably involved in obscenity censorship.⁵³⁸ If a constitutional review is required, a more intelligent and carefully weighed determination of these cases will be insured, for the constitutional test will necessarily force appraisal of the appropriate factors, and in the background will always be the possibility of review and reversal by the United States Supreme Court.

Third, a right to constitutional review of obscenity censorship will make book censorship throughout the United States subject to a uniform and liberal standard. Most of the book publishing in this country is centered in New York. But whether the publisher is in New York, or in some other state, prosecution of the publisher in the state of publication gives that one state the power to limit the books that will be available throughout the entire United States. Furthermore, apart from nation-wide control of reading material by the state of publication, censorship in an important area of distribution sometimes causes out-of-state publish-

536. See, *e.g.*, *People v. Pesky*, 254 N. Y. 373, 173 N. E. 227 (1930) [where the court on this basis affirmed the conviction for possession for sale of a copy of Arthur Schnitzler's *Hands Around*, the novel from which the motion picture *La Ronde* was made. Censorship of the motion picture was reversed per curiam in *Commercial Pictures Corp. v. Regents of Univ. of N. Y.*, 346 U. S. 587 (1954)]; *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945); *People v. Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947).

537. See, *e.g.*, *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945); *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2d Cir. 1934); *United States v. Dennett*, 39 F. 2d 564 (2d Cir. 1930); *People v. Creative Age Press*, 192 Misc. 188, 79 N. Y. S. 2d 198 (Mag. Ct. 1948); *People v. Vanguard Press*, 192 Misc. 127, 84 N. Y. S. 2d 427 (Mag. Ct. 1947); *People v. Gotham Book Mart*, 158 Misc. 240, 285 N. Y. Supp. 563 (Mag. Ct. 1936).

538. See, *e.g.*, *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953); *People v. Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *People v. Dial Press*, 182 Misc. 416, 48 N. Y. S. 2d 480 (Mag. Ct. 1944).

ers to revise or reject manuscripts before publication, thereby interfering on a national scale with freedom to read. In this manner pre-publication censorship in Detroit has affected the reading of the entire United States.⁵³⁹ The right of citizens of the United States to choose what they shall read should not be at the mercy of the courts of any one or a few states. Literature is international in scope, and should never be controlled by narrow, local standards. At the very least it should be protected by a uniform standard enunciated by the Supreme Court under the liberal principles of the Bill of Rights, and subject to occasional control by that Court.⁵⁴⁰

2. *The Constitutional Standard: Major Values and Significant Considerations*

Just what should the constitutional standard be in obscenity cases? No simple formula will do.⁵⁴¹ Literature attacked as obscene should be tested by the issues behind the phrase "clear and present danger,"⁵⁴² but this provides no formula; it is only a broad guide

539. See text to notes 145-146 *supra*.

540. It need not be feared that this would result in the Supreme Court becoming, as Mr. Justice Jackson put it, "the High Court of Obscenity" 17 U. S. L. Week 3119 (1948) with a flood of obscenity cases to review. The Supreme Court can fulfill its appropriate function by making clear the standards to govern these constitutional decisions without attempting to review many cases. Its jurisdiction is essentially discretionary, whether on certiorari or appeal, and once the Court has made clear the factors that must be weighed in determining the constitutional issue, there will likely be few occasions when it will need to substitute its judgment for that of a state or federal appellate court. Actually, the volume of cases to reach the appellate courts is likely to be quite small. Despite all the agitation, there have been relatively few obscenity prosecutions in recent years. With the establishment of a more intelligent basis for determining obscenity, there may be still fewer in the future, though it is conceivable that once a constitutional right is recognized there will be less bowing to the will of the police censors and for a short period resistance to police lists may result in more, rather than fewer prosecutions.

541. There has been very little consideration of this problem, apart from sweeping statements that the clear and present danger test should be applied. See, e.g., Antieau, *The Rule of Clear and Present Danger: Scope of its Applicability*, 48 Mich. L. Rev. 811, 833 (1950). Professor Chafee has suggested that the test might be "clear and probable" danger of a "substantial evil." See 1 Chafee, *Government and Mass Communications* 59 (1947). The most complete analysis, reaching the most extreme conclusion, is in *Commonwealth v. Gordon* 66 Pa. D. & C. 101 (1949) *aff'd sub. nom.* *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). There Judge Bok concludes that conviction for literary obscenity should be permitted "only where there is reasonable and demonstrable cause to believe that a crime or misdemeanor has been or is about to be committed as the perceptible result of the publication in question: the opinion . . . that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt." *Id.* at 156.

542. See *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952).

to the factors that should enter into the policy judgment required in all freedom of expression decisions. We have already indicated in broad terms that this policy judgment requires the alleged evils to society from "obscene" literature to be balanced against the value of the particular book and the value to society of freedom to read and to write literature of this type.⁵⁴³

In the light of the foregoing analysis of the commonly asserted evils, one phase of the constitutional standard is "clear" or "probable" danger that the particular work under attack will lead to sex conduct deviating from the legal or otherwise currently established moral standards. But standing alone this states in a deceptively simple fashion what must still remain a complex policy judgment into which other factors must enter. Apart from the difficulty of predicting the effect of a particular book on conduct, it disregards the other side of the balance—the value or lack of value of the book under attack, and the effect its banning may have on freedom of expression in literature. Some books are so totally lacking in merit, and so pornographic in content, that their weight in the scale of values is so low as to be outbalanced by relatively slight danger of causing improper sex conduct; and the banning of such books poses no serious threat to freedom of expression in literature. On the other hand, some books have such great literary merit, or such great value in stimulating serious thought, that even though they may reasonably be thought likely to affect adversely the sex conduct of some readers, their weight in the scale of values, added to the importance of freedom of literary expression, outweighs the possible evil that might result from their publication.

The constitutional standard in obscenity censorship cannot be reduced to any formula. As in the case of all policy judgments involving significant conflicting interests, a sound decision here requires the careful balancing of all relevant factors bearing on (a) the losses to society that may result from censoring the book, and (b) the harms to society that may result from not censoring it. Major values to be weighed in arriving at this policy judgment are three: (1) The values to society of freedom of expression through literature, and the importance to this freedom of avoiding governmental action that tends to discourage freedom to read and write in important areas of human interest, including sex. (2) The value to society of the particular book or work of literature under attack. (3) The value to society of avoiding the harmful effect on sex conduct that might reasonably result from reading the book in

543. See text to note 473 *supra*.

question, but weighed heavily against this value must be the recognition that we have very little dependable information or knowledge with respect to the effects of reading on human conduct in this area. In weighing these major values in particular cases the following considerations may often be determinative.

We believe the constitutional standard requires that a book be judged as a whole, rather than by isolated words or passages. Statutes that authorize a finding of obscenity based only on a part of the book are to that extent unconstitutional, as are judgments of obscenity similarly based. It is not possible for a court to give the requisite consideration to the value of a book, or to the effect of suppressing the book upon freedom of expression in literature, without considering the entire book and the relationship of the disputed passages to its theme. To permit a book to be condemned as obscene solely because of isolated words or passages ripped from the total structure of the work would result in depriving society of the value of the particular book, and the value of freedom of expression through literature, without judicial consideration of the value of what is being destroyed.

Both the writer and publisher need assurance that their books will be judged as a whole; for only in this way can the values of freedom of expression through literature be protected. We have seen that the censor is rarely a well-balanced and literate person; he usually is compulsively interested only in finding what he seeks and in its merciless and indiscriminate suppression once he finds it.⁵⁴⁴ To put a writer's months or even years of creative work and a publisher's capital investment in a new publication at the mercy of such a person without an obligation on the courts to evaluate the book as a whole is to invite timidity and restraint in both author and publisher—a sure way to destroy the value to society of freedom of expression in literature.⁵⁴⁵

Society also needs the same protection to preserve the values of the particular book under attack. If the now-discredited standard that called for condemnation of a book solely because of its isolated passages were ever literally and rigorously applied, much of the world's great literature would have to be suppressed as obscene⁵⁴⁶

544. See Broun and Leech, *Anthony Comstock 272-273* (1927); Jackson, *The Fear of Books 84-85* (1932); Mencken, *A Book of Prefaces 243-252* (5th ed. 1924); Scott, *Into Whose Hands 202-203* (1945).

545. See Craig, *Above All Liberties 97-98* (1942); Forster, *Abinger Harvest 65-66* (1936); Mencken, *op. cit. supra* note 544, at 269-279; Scott, *op. cit. supra* note 544, at 179-187; cf. Forster, *Two Cheers for Democracy 31-35* (1951).

546. See *Rex v. The Headmaster of Eton* in Herbert, *More Misleading*

or at least bowdlerized as Shakespeare and others were in Victorian England.⁵⁴⁷ Even if exceptions to censorship be made for recognized classics, equally great literature of tomorrow may well be suppressed today if a book may be condemned on the basis of isolated passages. We know what such an irrational viewpoint accomplished in Massachusetts where suppression of Theodore Dreiser's *An American Tragedy*⁵⁴⁸ on this ground made Massachusetts the laughing stock of the nation. It also demonstrated, even to the people of that state, that society cannot tolerate such an absurd standard.⁵⁴⁹

But in weighing the value of a particular book, the requirement that the book be judged as a whole is not alone enough to give adequate protection to society's interest in literature, or to insure adequate consideration and understanding by the courts of the value of the book in question. Something more is required to give sufficient emphasis to the aesthetic, scientific, educational and other social values of the book, and to enable the courts to appraise these values intelligently. If, for instance, the particular book is a work of fiction or poetry, it is important that it be viewed with a sympathetic appreciation and understanding of the nature and function of imaginative literature. Here, the appraisal of literary critics is indispensable;⁵⁵⁰ for without it, judges are forced to assume the role of literary critics themselves—a role that few courts, if any, are competent to play. Much the same observation applies to non-imaginative literature as well. In considering the values of such works as Mary Ware Dennett's *The Sex Side of Life* or Dr. Marie C. Stopes' *Married Love*, the testimony of experts appraising the value of the particular book in satisfying a social need is equally indispensable. Consideration of literary criticism and other expert appraisal is probably not a constitutional requirement, but it is essential for adequate fulfillment of the judicial function in constitutional adjudication of obscenity charges against literature.

We believe the constitutional standard requires that in making determinations as to the probable effect of a book on sex conduct, courts must take account of the unsatisfactory state of a human

Cases in the Common Law (1930); Jackson, *op. cit. supra* note 544, at 118; Vizetelly, Extracts Principally from the English Classics showing that the Legal Suppression of M. Zola's Novels would logically involve the Bowdlerizing of some of the greatest Works in English Literature (1888).

547. See Jackson, *op. cit. supra* note 544, at 55.

548. See *Commonwealth v. Friede*, 271 Mass. 318, 171 N. E. 472 (1930).

549. See 1 Chafee, *Government and Mass Communications* 228-234 (1947); Grant and Angoff, *Recent Developments in Censorship*, 10 B. U. L. Rev. 488 (1930); 59 Harv. L. Rev. 813 (1946).

550. See text to notes 341-349 *supra*.

knowledge concerning the effect of literature relating to sex. With our present inadequate knowledge on this subject, a court would probably not now be justified in taking the position that a legislature is entirely wrong in basing obscenity legislation on the premise, usually unstated, that reading some kinds of literature probably affects the sex conduct of some readers. Obscenity censorship of literature cannot be rejected in toto on the ground that the effect of obscenity on sex conduct is too uncertain. But in view of the importance to society of adequate protection for freedom of expression in literature, courts are obliged to give careful consideration to whether there is any real and substantial danger that a particular book will bring about anti-social sex conduct. Certainly, in view of the good reasons for doubting that literature relating to sex has any such effect, courts should never make the assumption—so common in past adjudications—that any literature labeled “obscene” has an adverse effect on sex conduct. Such an assumption violates a court’s constitutional obligation to protect freedom of expression.

But tentative acceptance of the premise that some literature dealing with sex can have an effect upon sex conduct cannot justify approval of the stultifying *Regina v. Hicklin* rule that makes the test for obscenity censorship the tendency of the book to deprave or corrupt any whose minds are open to immoral influence. This rule would reduce the reading fare of the public to a level suitable only for some hypothetical person endowed with all the sexual suggestibility than can be imagined in someone else.⁵⁵¹ In our opinion the *Hicklin* rule cannot stand in the face of a constitutional requirement that courts weigh the social cost of censorship against its social gains. The overwhelming cost to society of restricting adult reading and expression to books and articles wholly acceptable for adolescents and abnormal adults could not possibly be offset by the value of protecting the relatively few young or abnormal readers from the contingent and unpredictable effect some books might possibly have upon them. Such a restriction on adult reading would, in our opinion, be unconstitutional.

Yet what may be called the audience to which a particular book is offered may well be a legitimate consideration in appraising the book’s threat to the social value of avoiding immoral sexual conduct. Determination of the particular channel of distribution and the nature of the sales promotion techniques largely controls the audience to which the book is offered. The channel of distribution and the nature of the advertising may also affect the attitude with which the

551. See text to notes 301-308 *supra*.

normal reader within the selected audience reads the book. If both are designed to appeal to those looking for pornography, it is a fair assumption that the normal reader in that class reads the book for its salacious passages. In such cases, courts may and should take this factor into account in appraising the risk that immoral sexual conduct may result from reading the book.⁵⁵² Similarly, if a book is aimed at a youth audience, a court in passing upon the constitutional question can properly consider its probable effect on the sex conduct of that intended audience. In doing so, however, courts should also bear in mind the lack of dependable information on this point and also the possibility that the values of the particular book may offset whatever harmful effects it might have in the hands of even such a reader.

IV. CONCLUSION

The current threat to freedom of expression in literature is the mass suppression of books through secret lists distributed by private or public authorities to book dealers or distributors threatening prosecution unless the books are removed from circulation. Judicial recognition of constitutional protection for books attacked as obscene might well bring about the defeat of this dangerous threat to freedom. It should encourage some dealers and publishers to resist the threat of the secret lists and thus force public prosecutions aimed at individual books. It should also encourage publishers to seek injunctions against the use of such lists by public authorities, for the lists always contain some books whose suppression would not be justified under the constitutional standard outlined above, wholly apart from the possibility of attacking such lists as a prior restraint.⁵⁵³ Regardless of the manner in which the issue is raised, recognition of the constitutional standard would require that each book be considered on its individual merits, and thus discourage their mass suppression. Equally important, it would insure an independent review of the obscenity issue by an appellate court obliged to evaluate the book as a whole and to give careful consideration to all factors relevant in balancing the significant values affected by obscenity censorship.

552. See text to notes 309-316 *supra*.

553. See text to notes 374-376 *supra*.

