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THE "COMSTOCK LOAD"—OBSCENITY AND THE LAW

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INTRODUCTION

Anthony Comstock's tattered old banner, "MORALS, Not Art or Literature," has been taken out of moth balls and various "legions" have revived his crusade against vice. Until quite recently this onslaught against sin appeared somewhat quixotic and what victory was obtained before council or legislature was nullified by the Supreme Court's civil libertarian preference for freedom of expression over censorship in the name of public morality.¹ During the past twenty years the continuing warfare between the resolute and the dissolute has become intensified by the emergence of well-organized pressure groups² which have enlisted on either side to fight the battle in several theaters of operation. Whether the "Comstock load" is pure silver or a more mercurial metal—heavy and unbearable—has been assayed by many courts and assemblies. The "load" left by Anthony Comstock is being weighed and an uneasy balance is being struck between the important values of the security of public decency and morality and freedom of expression. A compromise is being effected and neither value has subjected the other to terms of unconditional surrender despite the intransigence of extremists on each side.

¹ See for example *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954); and *Butler v. Michigan*, 352 U.S. 380 (1957).

² Perhaps the most active and vocal pressure group advancing the cause for censorship is the National Organization for Decent Literature, an unofficial body formed in 1938 by the Roman Catholic hierarchy, which is dedicated to the task of arousing public opinion against what it regards as objectionable matter, and employs methods of persuasion, pressure, and boycott. The leading spokesman for those who are opposed to obscenity laws or who would restrict their scope to a narrow area, is the American Civil Liberties Union and its affiliates. Intervention in litigated cases has been its principal technique.

There have been several important battles or skirmishes in this contest. By coincidence, 1857 and 1957 are significant dates. In 1857, Parliament enacted Lord Campbell's Act,³ which authorized a magistrate or justice of the peace to order the destruction of material found to be "obscene" and in 1957 the Supreme Court celebrated the centennial by upholding a similar New York statute⁴ which the dissenting Chief Justice describing as savoring "too much of book burning." For good measure, the Comstock Act was held not to be inconsistent with the Bill of Rights.⁵ Although the latter verdict placed the Supreme Court—or at least its majority—on the side of the angels, it may prove to be a costly victory as the "disarming generalizations" of the majority opinion may produce a multiplicity of litigation and a spate of judicial review.⁶

It may be of some interest to put these recent decisions in context, to examine the history of the concept of "obscenity," its meaning, the different tests which have been applied in obscenity cases, and some of the sociological, psychological and constitutional questions inherent in the problem.

HISTORY OF OBSCENITY AS A CRIME

An examination of the history of obscenity in America and England discloses the importance of the Comstock movement in the United States and the Victorian Age in England in the evolution of the law dealing with the subject.⁷ Save for a few prosecutions for the common law crime of blasphemy which may have incidentally involved obscenity, the first recorded American prosecution for obscenity was in Massachusetts in 1821 and involved a book entitled "The Memoirs of a Woman of Pleasure."⁸ The first important federal law on the subject was the Comstock Act of

³ The Obscene Publications Act, 1857, 20 & 21 Vict. c. 83. In 1955, the Society of Authors presented a bill to Parliament [House of Commons Bill 56, 1955] which would have amended Lord Campbell's Act by requiring the court to consider the general character and dominant effect of the material in question and its literary or scientific merit, if any, and whether it had had any corrupting effect. Moreover, the court would be required to consider the general character of the person charged, the nature of his business, and the evidence of any experts called in his behalf. Another bill to amend Lord Campbell's Act was introduced in 1957. Both bills were referred to a select committee for consideration and investigation.

⁴ §22-a of the New York Code of Criminal Procedure (L. 1941, c. 925), as amended 1954 (L. 1954, c. 702), held constitutional in *Kingsley Books, Inc. v. Brown*, 77 S. Ct. 1325. (1957).

⁵ 18 U.S.C. §1461, held constitutional in *Roth v. United States* and *Alperis v. California*, 77 S. Ct. 1304. (1957) (hereafter referred to as the Roth and Alperis case).

⁶ Comment and prediction of Mr. Justice Harlan in his concurring and dissenting opinion in the Roth and Alperis case, 77 S. Ct. 1304. 1315. (1957).

⁷ Judge Curtis Bok in *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949), considered the history of obscenity in an extremely powerful and interesting opinion. The recent book of NORMAN ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956) is the leading English work on the subject, and the Autumn, 1955, issue of *Law and Contemporary Problems* had a symposium on Obscenity and the Arts.

⁸ *Commonwealth v. Holmes*, 17 Mass. 336 (1821). An earlier Pennsylvania case, *Commonwealth v. Sharpless*, 2 S. & R. 9 (1815), involved a painting representing a man and woman in "imprudent and indecent posture." It is believed that the book involved in the Massachusetts case is the same one which was published in England in 1748 under the title of "Fanny Hill", ran through some twenty editions, and caused its author John Cleland to be summoned before Privy Council where he was scolded by Lord Granville and granted a pension of £100 on condition that he desist from writing such books in the future!

1873⁹ which declared obscene material to be non-mailable matter. Today, federal statutes not only deny the use of the mails but also forbid the interstate transportation of obscene material¹⁰ and punish obscene language used on radio broadcasts.¹¹ Moreover, all forty-eight states have diverse types of obscenity statutes.

There has been considerable dispute as to whether or not obscenity was a common law crime. Apparently, it had no independent status at the time of Coke but was regarded as a crime by the time of Blackstone, although the cases cited by the latter in support of the claim that obscenity was a common law crime involve conduct which might be considered as a nuisance.¹² The case of *Rex v. Churl*,¹³ decided by the King's Bench in 1727, is often cited as the first definite obscenity case, but it is noteworthy that there are only a handful of cases before the nineteenth century and they are inconclusive as evidence to support the claim that obscenity historically had been a common law crime.

Why is it that this offense, in any event a Johnny-come-lately to English jurisprudence, did not achieve importance until mid-nineteenth century? There are two explanations. First, such sin was within the jurisdiction of religious authority which did not need nor call for temporal assistance.¹⁴ Church authorities might condemn the reading of erotic literature as a menace to the soul's salvation and provide their own effective sanctions. Secondly, and more important, before the nineteenth century, reading was by men only!¹⁵ In 1788, Dr. Johnson remarked to Boswell that "all our ladies read now." The habit was only then being acquired by women! The diversion spread, and books came to be read by the family, often aloud. What had been inoffensive to males had to be cleaned up for mixed company! With the intrusion of wives and mothers into the world of literature a new concept of obscenity emerged. What one may unscientifically call a female evangelical urge was engendered; suffrage, women's rights, and morality in literature became the objects for crusade. Its ultimate was "podsnappery"—the avoidance of topics which would cause a young person or female to blush. Not only was pressure exerted for the enactment of laws but Societies for the Suppression of Vice were organized both in America and England. Masculine toleration or indifference was superseded by feminine rectitude and an army of amazons merely awaited the leadership of a Comstock. The concept of obscenity, if not born in the Victorian Age, at least then acquired identity.

During most of this period expurgation and censorship was accomplished on a pri-

⁹ U.S.C. §1461.

¹⁰ 18 U.S.C. §1465.

¹¹ 18 U.S.C. §1464.

¹² See ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956) Chap. II.

¹³ 2 Str. 788, 93 Eng. Rep. 849 (1727).

¹⁴ See American Law Institute, *MODEL PENAL CODE*, (Tent. Draft No. 6 (1957)), comment upon §207.10, at page 5. (hereafter cited as Tent. Draft No. 6). ST. JOHN-STEVAS, *op. cit.* Chap. I, doubts whether ecclesiastical authorities concerned themselves about obscenity, as sacrilege or blasphemy was of much greater concern. It may also be noted that originally censorship was directed against heresy, later against sedition, and finally against obscenity. It was not until the nineteenth century that there was censorship of obscenity as such. For example when BOCCACIO'S *THE DECAMERON* fell under papal ban in 1559 this was not because of its obscenity but because it satirized the clergy, and when the latter references were removed the Church authorized an expurgated edition.

¹⁵ ST. JOHN-STEVAS, *op. cit.*, 25-28.

vate or administrative level. The first important English case was in 1868 when Lord Cockburn decided the famous Hicklin case¹⁶ and held that "the test of obscenity is whether the tendency of the matter charged as obscenity is such as to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." The Hicklin test has persisted in England to this day, has been incorporated into many American statutes,¹⁷ and was the basis for decision in many of the older American cases.¹⁸ In 1913, Judge Learned Hand disapproved of the test,¹⁹ in 1933 it was rejected in the *Ulysses* case,²⁰ and in 1957 repudiated by name by the Supreme Court.²¹ It is especially obnoxious because of the questionable assumption that bad behavior follows from exposure to pornography, because due to its indefiniteness it inevitably makes criminal law a battleground for conflicting moralities, and since the referrant is an abnormal person rather than a reasonable man, the mildly suggestive may be regarded as obscene.

An alternative to the "tendency to corrupt" test which has been advanced within recent years is an adaptation of the clear and present danger test. Judge Curtis Bok in 1949²² made an analogy to sedition and free speech and limited obscenity to cases where there was a reasonable and demonstrable cause to believe that a crime had or might result from the material in question and thus a causal relation between the book and criminal behavior had been established. Judge Frank, shortly before his untimely death, likewise expressed preference for some such test.²³ The American Civil Liberties Union has supported this view.²⁴ Despite the logical appeal that evil thoughts are outside the ambit of temporal concern and that it is conduct or the instigation of conduct that is the law's concern, the clear and present danger test has the practical defect that it imposes an all but impossible burden of proof upon the prosecution because there is little if any creditable evidence that pornography causes criminal conduct. For this reason, perhaps, both the American Law Institute in its Model Penal Code²⁵ and the Supreme Court finally rejected this proposed approach to the law of obscenity.

Because of the drawbacks to these historical tests of obscenity, the Supreme Court when for the first time the issue was squarely presented to it, rejected both and adopted at least in part the test which a month before had been promulgated by the

¹⁶ (1868) L.R. 3 Q.B. 360.

¹⁷ See discussion of this test and a citation of state authorities supporting it, in LOCKHART & McCLURE, *LITERATURE, THE LAW OF OBSCENITY, AND THE CONSTITUTION*, 38 MINN. L. REV. 295, 329 (1954).

¹⁸ See discussion in *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933).

¹⁹ *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913).

²⁰ 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd 72 F.2d 705 (C.A.2, 1934).

²¹ *Buller v. Michigan*, 352 U. S. 380 (1957) and the Roth and Alperets case, 77 S. Ct. 1304, 1311 (1957).

²² *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).

²³ See concurring opinion in *United States v. Roth*, 237 F.2d 796 at 804 (1956).

²⁴ See Tent. Draft No. 6 at 24.

²⁵ *id.* at 28.

Model Penal Code.²⁶ Obscene matter is that which appeals to a "prurient interest," and "prurient" is held to mean a shameful or morbid interest in nudity, sex, or excretion, which goes beyond the customary limits of candor in description or representation of such matters.²⁷ The only judicial precedent in support of such a test, however, is some general language by Mr. Justice McKenna in the *Mutual Film* case.²⁸

The drafters of the Model Penal Code made a rather convincing argument for the "prurient interest" test. On the one hand, it is recognized that there is a normal interest in sexual matters for which it should be lawful to provide satisfaction. On the other, it is also recognized that society may have a legitimate interest in deterring the deliberate stimulation and exploitation of emotional tensions arising from a conflict between social convention and the individual's sex drive. The description or representation must go substantially beyond customary limits of candor, it is recognized that customs change from time to time and the material in question must be disapproved by generally observed custom. The purpose is to prevent commerce in the obscene—the "pandering" of filth.²⁹ The spotlight is put on the material itself rather than upon the customer-victim. The predominant appeal of the work as a whole must be a prurient interest.

Among the possible objections to the "prurient interest" test is the complaint that it neglects to sufficiently emphasize the importance of judging the work as a whole and passages in context and the difficulty of determining what are the "customary limits of candor." The latter most certainly invites captious and arbitrary judgments. Inevitably, the conclusion will be highly subjective. However, this is a serious objection to any jury determination of such questions and applies *a fortiori* to the "tendency to corrupt" test which heretofore has prevailed. Only some variation of the clear and present danger test might obviate such difficulty. As long as we have the crime of obscenity it is inevitable that some one's notion of morality will be imposed upon others and that perhaps such imposition may be that of a vocal minority. It may be unrealistic to suppose that instructions in terms of "the degree of public acceptance of the material in this country" will be any more meaningful to a jury than one in terms of "tendency to corrupt." Moreover, the American Law Institute has rejected any special privilege for serious artists³⁰ although it does recommend that evidence of literary merit should be admissible³¹ and excludes dissemination to institutions or individuals having scientific or other special justification for possessing such materials.³²

The difficulty of formulating any test or rules in this area stems in part from the uncertainty and inadequacy of available psychological materials. Legal scholars

²⁶ The obscenity provision in the Model Penal Code was considered at the May 1957 meeting of the American Law Institute and §207.10 was then approved. The court decisions followed a month later.

²⁷ See comment and explanation of §207.10 in Tent. Draft No. 6 at 29 *et seq.*

²⁸ *Mutual Film Corp v. Industrial Commission*, 236 U. S. 230, 242 (1915).

²⁹ Tent. Draft No. 6 at 13 *et seq.*

³⁰ Tent. Draft No. 6 at 39 *et seq.*

³¹ §207.10 (2) (c).

³² §207.10 (4) (c).

have concluded that the research of psychologists neither proves nor disproves the existence of a causal relation between obscenity and criminality or antisocial conduct.³³ It may be that obscenity may be a substitute for rather than a stimulus to physical activity.³⁴ Or, on the other hand, the popular supposition that obscenity triggers conduct may some day be verified.³⁵ It is also true that to some extent erotic thoughts are projected to objects and hence obscenity may be largely a subjective experience so that individuals inclined in that direction will derive sexual stimulation from whatever is available.³⁶ Havelock Ellis tells of the English schoolmaster who became excited by the sight of a boy in knickerbockers!³⁷ Due to the unsatisfactory nature of empirical evidence on the psychological meaning and effect of obscenity, courts on the one hand might indulge in the assumption that all obscenity statutes are attempts at thought control and hence objectionable, or on the other continue as at present to presume a causal relation. A full scale inquiry into the problem by competent scientists might be helpful, although the obstacles to a controlled test or isolation of the pertinent factors appears to be an insurmountable barrier. Psychologists may find it impossible to reach a consensus.

Also disturbing to those who compose the literati is the fact that even under the Penal Code test there may be a conviction notwithstanding great artistic competence where it is concluded that the main appeal is to prurient interest.³⁸ Literary merit will not save the author. He may fare no better under the new test than he did under the "tendency to corrupt" test. There is no exemption for "old and standard works."³⁹ Some may feel that this is too high a price to pay for a law which at best is based upon a shaky premise of social concern. By hindsight we may see that the excesses and abuses of the censors of the past, the prosecution and persecution of many of our greatest modern artists, is the greater immorality!⁴⁰ If any obscenity law or test is

³³ See Mr. Justice Harlan's opinion in the Roth and Alperets case, 77 S. Ct. 1304, 1318 (1957), and Judge Jerome Frank's concurring opinion in *United States v. Roth*, (C.A.2, 1956) 237 F.2d 796. Professors Lockhart and McClure, however, take a stronger position that there is a lack of causal relation between obscenity and misconduct. See their article, *Obscenity in the Courts*, 20 LAW AND CONTEMPORARY PROBLEMS 587 at 596. The work most frequently cited is that by DR. JAHODA, Summary of Report of Dr. Jahoda and Associates, *THE IMPACT OF LITERATURE: A PSYCHOLOGICAL DISCUSSION OF SOME ASSUMPTIONS IN THE CENSORSHIP DEBATE* (1954). Also cited by Judge Frank is FEDER, *COMIC BOOK REGULATION* (Uni. of Calif., Bureau of Pub. Adm., 1955 Legislative Problems No. 2).

³⁴ See KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 360 (1954).

³⁵ DR. FREDERIC WERTHAM in his book *SEDUCTION OF THE INNOCENT* (1954) makes the strongest case in support of the popular supposition but he may engender more heat than light on the subject.

³⁶ D. H. Lawrence, who might be regarded as a practical authority on the subject of obscenity, has said that what is pornography to one man is the laughter of genius to another. Quoted by ST. JOHN-STEVAS, *op. cit.* at page 2. The highly subjective character of sensualism is perhaps illustrated by HUYSMANS' *AGAINST THE GRAIN*, the book which supposedly corrupted Dorian Gray.

³⁷ Quoted by ST. JOHN-STEVAS, *op. cit.*, at page 1, in support of the thesis that obscenity resides exclusively not in the thing contemplated but in the mind of the contemplating person—a sort of Pavlov's dog approach. See also note 63 *post*.

³⁸ Tent. Draft No. 6 at 42.

³⁹ *id.* at 40.

⁴⁰ The depressing harrassment of great artists is recounted in ST. JOHN-STEVAS' *OBSCENITY AND THE LAW* and a fascinating account of a recent English trial is described by WARBURG, *Onward and Upward With the Arts*, *THE NEW YORKER*, April 20, 1957, describing the author's experiences in the case of R. V. Maryin Secker Warburg, Ltd., (1954) 2 All Rng. 683 (C.C.C.). An interesting procedure

accepted, to that extent freedom of expression is impaired. In order to have creativity, at least some offense to good taste must be tolerated. To limit an artist to the "customary limits of candor in description or representation" is to restrict his subject matter, make him a candidate for martyrdom or a victim of harrassment. Non-artists impose these conditions.

There is also considerable futility in the application of obscenity laws. The "wet paint" philosophy of the public, the commercial value of a "banned in Boston" interdict, the added spice that proscription lends, tend to defeat the avowed purpose of the Comstockian crusaders. In the final analysis, education, not expurgation, is the condition precedent to decency and morality. Good taste cannot be legislated nor imposed by fiat. It is the responsibility of family, church, and school to inculcate decency, and such a responsibility implies affirmative action by precept and example. At best, obscenity laws are a negative approach and an attempt to shore up the failure of those having primary responsibility.

RECENT SUPREME COURT DECISIONS

We turn now to the recent Supreme Court decisions. Perhaps the key Justice in these cases was Mr. Justice Frankfurter who wrote the majority opinion in *Kingsley Books, Inc. v. Brown*⁴¹ and helped to make up the narrow majority in the Roth and Alpert cases.⁴² Mr. Justice Frankfurter, it will be remembered, dissented in *Winters v. New York*,⁴³ concurred in The Miracle decision,⁴⁴ and wrote the opinion in *Buller v. Michigan*.⁴⁵ Thus, his prior record indicated that although he regarded "sacrilage" as too vague and indefinite a term for a movie censorship statute he did not feel the same way about the language of the New York horror or crime magazine act. Yet he is opposed to the Hicklin technique employed by Michigan which had the effect of reducing the level of lawful discourse to that fit for children. For the past few years, Mr. Justice Frankfurter has been the Court's leading proponent of laissez faire for the legislative branch and the leading opponent of the "preferred rights" theory of the First Amendment freedoms. He is willing to presume the constitutionality of legislation even where there is an abridgement of the basic freedoms guaranteed by

has evolved under a new French statute (a law of 25 September 1946, discussed by ST. JOHN-STEVAS, *op. cit.*, at 249) which permits a review of old decisions condemning literary works. Under this procedure BAUDELAIRE'S LES FLEURS DU MAL was vindicated in 1949. The list of great artists who have been subjected to the censor's wrath reads like a Who's Who of the literary world. However, in many instances, obscure writings were skyrocketed to the "best seller" class due to the activities of censors. For example, *Bradlaugh v. R.* (1878), 3 Q.B.D. 607, increased the sales of an obscure pseudo-scientific book from a few hundred a year to over one hundred and twenty thousand. ST. JOHN-STEVAS, *op. cit.*, at 74.

⁴¹ 77 S. Ct. 1325. (1957).

⁴² 77 S. Ct. 1304. (1957).

⁴³ 333 U. S. 507, 520 (1948). Mr. Justice Frankfurter was impressed by the 60-year-age of the New York statute and the fact that some twenty odd states had similar statutes and argued that there was no possible excuse for or merit to publications which "massed" crime and horror material.

⁴⁴ *Burstyn v. Wilson*, 343 U. S. 495, 506 (1952). Mr. Justice Frankfurter inserted a lengthy appendix showing the many meanings of "sacrilage."

⁴⁵ 352 U. S. 380 (1957).

the Constitution due to his perspective as to the function of judicial review under a tri-party system. His position in the Flag Salute cases⁴⁶ illustrates his approach.

In the Kingsley Books case, a five-four decision, Mr. Justice Frankfurter upheld the constitutionality of the New York act which authorized a summary *ex parte* procedure before a magistrate which might culminate in a temporary restraining order against the sale of books of an "indecent character" which were "obscene, lewd, lascivious, filthy, indecent or disgusting" and which after prompt hearing might result in a permanent state-wide injunction against sale and distribution and an order for their destruction. The appellants did not claim that the books involved were not obscene, nor did they assail the legislation insofar as it outlawed obscenity. Sole reliance was placed upon the contention that the procedure was *per se* unconstitutional as an undue restraint upon freedom of the press under the doctrine of *Near v. Minnesota*.⁴⁷ With the issue thus narrowed, Mr. Justice Frankfurter distinguished the two cases on the ground that *Near v. Minnesota* truly involved a prior restraint as future publications were enjoined due to past defamation, whereas the New York law in all cases operated on publications already issued and restraint impinged only after a finding of obscenity. Moreover, since New York might constitutionally convict the defendant under a criminal statute, an auxiliary means of dealing with the matter should be available. The legislature was entitled to a choice of remedies. In any event, the defendant was better off under the New York procedure since he had advance warning and would not end up in jail unless he defied the injunction.

This rationale was unacceptable to the Chief Justice, and Justices Douglas, Black, and Brennan. Chief Justice Warren objected to a procedure which he felt "savors too much of book burning" and argued that it is the conduct of the individual that should be judged, not the quality of art or literature, and that the New York statute did involve a prior restraint. Mr. Justice Brennan felt that the absence of a right to a jury trial on the issue of obscenity was a fatal defect. Mr. Justice Douglas condemned the statute because its summary features permitted a prior restraint *ex parte* before even a hearing was held and because an injunction issued in one part of the state would be applicable to possibly different circumstances in another part of the state, in effect "making the censor supreme."

⁴⁶ *Minnerville School District v. Gobitis*, 310 U. S. 586 (1940), overruled by *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). Mr. Justice Frankfurter argued in each case that the Supreme Court should not interfere with the authority of a local school board, that the question was one of legislative policy peculiarly within its competence. Mr. Justice Jackson writing for the majority in the *Barnette* case pointed out that the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy and to place them beyond the reach of majorities and officials and that the Court alone could effectively safeguard such fundamental rights. The so-called "preferred rights" theory, *i.e.*, that the burden of justifying infringements upon First Amendment freedoms rests upon proponents of such legislation, is discussed in MASON, HARLAN FISKE STONE 513, 556-57 (1956).

⁴⁷ 283 U. S. 697 (1931), holding that a statute which permitted a court to enjoin as a "public nuisance" a magazine or newspaper which had published "malicious, scandalous or defamatory" material was an unconstitutional abridgement of the free press guaranteed by the First Amendment as read into the "liberty" guaranteed by the Fourteenth Amendment due process clause. In 1925, *Gillow v. New York*, 268 U. S. 652, had assumed that the Fourteenth Amendment might incorporate free speech guaranteed by the Bill of Rights.

To those who had been following the Supreme Court's decisions in this area, the Kingsley Book case came as a "shocker." The Miracle decision and the *per curiam* opinions⁴⁸ thereafter had indicated that censorship as a sanction was unconstitutional and that *Near v. Minnesota* was being extended rather than limited. However, when Mr. Justice Frankfurter's concurring opinion in The Miracle case is examined, it is evident that censorship and free speech was not the problem so far as he was concerned, rather, the defect in the New York act was that "sacrilegious" was such an uncertain term that it could not pass the requirement of definiteness imposed by due process. It had no settled meaning, hence it did not sufficiently apprise those bent on obedience of the law of what may be foreseen to be illicit by the law-enforcing authority. Moreover the particular statute did not have a sufficient provision for judicial review.

It is difficult to see how the amorphous term "obscene" has any more of a settled meaning than the term "sacrilegious." But Mr. Justice Frankfurter overcame this difficulty by pointing to the definition of obscenity which was adopted in the companion Roth and Alpers case in terms of an appeal to "prurient interests." As so defined, the words of the New York statute were sufficiently clear and definite. The fact that this definition was formulated retroactively upon appeal, was not contained in the statute, nor used by the trial court, and as a practical matter gave no fair or sure guide to a possible offender, was immaterial. It is obvious that under all of the various tests of obscenity the ultimate judgment becomes a matter of degree except in the most extreme cases. The "prurient interest" test admittedly and avowedly turns on a matter of degree—whether the "predominant" appeal is to prurient tastes. Realistically, therefore, it is evident that the due process requirement of definiteness is being sacrificed because it is felt that the public interest in suppressing trash is more important than advance notice of what the law permits and condemns. It is difficult to reconcile the Justice's approach in these cases.

The alarming element of the Kingsley Books case, however, is the validation of the procedure authorized by the New York statute. Not only is the preliminary hearing *ex parte* but there is no right to a jury trial. Books may be destroyed. Despite the venerable nature of equity procedure and despite the historical use of such procedure in obscenity cases, it seems barbaric today. True, Lord Campbell's Act established this technique and the statutes of several states authorize it,⁴⁹ but nonetheless recent experience with "book burning" has been such that it seems anachronistic to tolerate such an "auxiliary means" of dealing with the problem even though it may have to run the gamut of judicial review. It is ironic that Mr. Justice Frankfurter seems to have forgotten the significant contribution of Professor Frankfurter in

⁴⁸ See for example: *Gelling v. Texas*, 343 U. S. 960 (1952); *Superior Films v. Dept. of Education*, 346 U.S. 587 (1954); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954); *Holmby Productions v. Vaughn*, 350 U.S. 870 (1955). These cases certainly warranted the inference that possibly all censorship was unconstitutional and suggested that the Court would permit the use of a criminal sanction against obscenity only within a narrow area. See, for example, the Pennsylvania Supreme Court's interpretation of these cases in *Hallmark Productions, Inc. v. Carroll*, 284 Pa. 348, 121 A.2d 584 (1956).

⁴⁹ For example, see Colo. Stat. Ann. c. 48 (1935) (Supp. 1953) §219, and Mass. Ann. Laws c. 272 (1956) §28. The Colorado law adopts injunction procedure and the Massachusetts act permits an action against the offending book.

criticizing the labor injunction and the arguments he made against the comparable procedure he now finds unobjectionable.⁵⁰ It is difficult to believe that this decision will stand and if it revives or encourages censorship the situation may become intolerable.

Although the Kingsley Books case may have been the most shocking of the June decisions, the Roth and Alperets case have a wider affect upon the law of obscenity. At the outset, it should be noted that the facts of the cases before the Supreme Court were such that if any obscenity convictions or restraints are to be sustained, the situations at hand warranted such treatment. Both cases involved commercial peddlars of erotic material, "pandering" to prurient interests. The material in question was not the product of a serious artist dealing with the seamy side of life. Mr. Justice Brennan wrote the majority opinion, Mr. Justice Harlan concurred as to the Alperets case but dissented as to Roth, Chief Justice Warren wrote a concurring opinion, and Justices Douglas and Black dissented.

The majority opinion established the rule that obscenity is not within the area of constitutionally protected speech and press and that a dichotomy exists between obscenity and material having "social importance." Thus, obscenity joins "fighting words"⁵¹ and "race libel"⁵² as being outside the pale of constitutional concern. But having indulged in this Linnean technique with a resulting hardening of the categories, Mr. Justice Brennan proceeded to indulge in "disarming generalizations" and neglected to give any satisfactory explanation as to how to accomplish the procrustean feat of fitting individual cases into one class or the other. He did, however, indorse the "prurient interest" test but then approved of jury instructions couched in terms of the old "tendency to corrupt" test which had been expressly rejected by the drafters of the Model Penal Code.⁵³

It is difficult to tell for sure just what the majority opinion means. There was no need for going beyond the immediate facts at hand. If it had been noted that those facts established that the materials in question were obscene under the broadest definition of obscenity and that commercial purveyors of obscenity had no claim for free press protection, and that the convictions must stand because under either the "tendency to corrupt" or the "prurient interest" test the material was obscene, but that the latter test was determinative, considerable difficulty would have been avoided.

But the opinion is drafted in such a way that it appears that there is an indulgence in word magic, a personification of labels, and the crucial issue as to why the particular material is properly classified as obscene is ignored. It is also confusing to indorse and adopt a definition and then not to comment upon a contrary definition which the trial court employed in instructing the jury. If one looks at the facts of these cases the result seems reasonable, but the rationale and *obiter dicta* muddy the waters. The

⁵⁰ Cf. FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930), which bitterly criticizes equity procedure in labor cases and was responsible for legislative reform in this area.

⁵¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁵² *Beauharnais v. Illinois*, 343 U.S. 250 (1952), sustaining the Illinois group libel law (§224a of the Ill. Criminal Code, Ill. Rev. Stat., 1949, c. 38, Div. 1, §471) making it a misdemeanor to expose the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

⁵³ Tent. Draft No. 6 19-22.

test of obscenity has been determined, but its implementation and its application to concrete cases, remains uncertain.

Another consequence of the Roth and Alperets cases is that the Supreme Court may receive a flood of cases involving the classification problem of whether particular material falls within the "obscene" category or is a constitutionally protected expression. It remains to be seen whether there will be few or many platypuses, centaurs, and mermaids which are difficult to pigeonhole, and whether there is justification for the fear that "it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes!"⁵⁴ The latter prediction may be well founded. It is reasonable to assume that many well-organized groups will seize upon these opinions as a stimulus to greater efforts to impose censorship in varying forms.

Mr. Justice Harlan's opinion is of interest because of the distinction which he makes between free speech and press under the First and Fourteenth Amendments. He concludes that the prohibition against abridgement of free speech and press by the federal government is broader and more exacting than that against state activity imposed by virtue of reading freedom of expression into "liberty" in the Fourteenth Amendment due process clause. Diversified treatment of the problem of obscenity may be desirable and hence there should be greater leeway accorded to the states. He feels that even though a causal relation between obscenity and criminal or immoral behavior may not have been proved to exist, that it is a proper function for the state legislature to take whichever side it chooses so long as the matter is in dispute. He too rejects the "tendency to corrupt" test but contends that "it is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech."⁵⁵ Mr. Justice Douglas makes the same criticism of the majority opinion, and in addition expresses a preference for the clear and present danger approach to the problem and objects to the "prurient interest" test saying that, "Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislation can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted."⁵⁶ Freedom of expression may be abridged "only if so closely brigaded with illegal action as to be an inseparable part of it."

It is interesting to note that, contemporaneously with the withdrawal of obscenity from the purview of freedom of expression, the Supreme Court has extended such freedom in the area of sedition.⁵⁷ On the surface it would look as if there were a greater public interest in curbing political heresy than the morally indecent and that if seditious utterances are within the scope of constitutional protection and not a separate category the same result should be reached in the case of obscenity. The Court's answer to this contention is that political utterances have some redeeming

⁵⁴ Mr. Justice Harlan, in Roth and Alperets case, *Yates v. United States*, 77 S. Ct. 1064. (1957).

⁵⁵ *id.* at 1321.

⁵⁶ *id.* at 1324.

⁵⁷ See for example *O'Connor v. United States*, *Yates v. United States*, 77 S. Ct. 1064. (1957).

“social importance” but that smut does not. The trouble with this distinction is that obviously some works or objects which under the several tests might be classified as “obscene” in fact do have “social importance” in the world of art and literature and ideas. Their social import may not be in the area of political science but rather in the areas of literature, sociology and psychology. The difficulty may be how to separate the utterly worthless from that which has value and who is to make the choice. The Supreme Court decisions are not too helpful as to this. Further, from the standpoint of the legislature, there is a serious drafting problem because an obscenity statute may on the one hand be so definite and restricted in its application as to be substantially ineffectual, or so broad and vague as to leave improper discretion to law enforcement officials. For this reason, considerable deference may be paid to the legislative product.

It has only been within the recent past that there has been serious doubt as to the constitutionality of obscenity statutes. The Fourteenth Amendment but recently was held to incorporate freedom of expression.⁵⁸ Much territory remains unexplored. It will be interesting to see the extent to which statutes and ordinances are drafted or redrafted in the light of the “prurient interest” test and whether the example of the Model Penal Code is followed in other particulars. For example, the Code excludes private dissemination to adults, not for gain, from its purview. Most statutes at present probably cover this.⁵⁹ Obscenity ordinarily is to be adjudged by adult standards, but the character of the audience for which the material was designed may be taken into consideration.⁶⁰ State laws differ on this score. The defendant may show the artistic, literary, scientific, educational or other merit, the degree of public acceptance of the material in this country, the lack of any appeal to prurient taste in the advertising or promotion of the material, and expert testimony on the various factors may be offered, according to the Code⁶¹ although these matters are not covered by existing statutes.

In addition to the problem of renovating existing statutes to bring them into accord with the Supreme Court decisions, it is to be anticipated that many problems will confront law enforcement people. Private vigilante action—organized boycotts of certain books, magazines or movies, together with pressure exerted upon local officials to adopt a group’s notion or list of what is decent or obscene may continue, although the constitutionality of reasonably drawn statutes should supersede “self-help.”⁶² The criminal sanction may function more liberally and be more tolerant than the controls exercised by private boycott. Logically, there is less excuse for extralegal private action since the Supreme Court decisions, but in all probability the cases will only rekindle the fervor of the censors.

⁵⁸ *Gilow v. New York*, 268 U.S. 652 (1925), *Near v. Minnesota*, 283 U.S. 697 (1931)

⁵⁹ Tent. Draft No. 6 at 15-16.

⁶⁰ Tent. Draft No. 6 at 36 *et seq.*

⁶¹ Tent. Draft No. 6 at 29 *et seq.*

⁶² The possibility that there may be tort liability due to private boycotts is beyond the scope of this discussion. However, such cases as *Advance Music Corp. v. American Tobacco Co.*, 296 N. Y. 79, 70 N.E.2d 401 (1946), *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 972 P.2d 867 (1946), and *Watch Tower Bible Tract Society v. Daugherty*, 337 Pa. 286, 11 A.2d 147 (1940), indicate a possibility of liability at least if a court concludes there was a lack of “justification” for the interference.

CONCLUSION

The fact that basically we are dealing with a matter as nebulous as good taste and with a concept which differs from time to time and place to place means that manners and morals are inexorably interwoven so that it is difficult to separate candor from shame.⁶³ The fact that daily newspapers and periodicals are replete with erotic stimuli yet escape prosecution, that the "classics" and the Bible itself contain much which may fairly be regarded as "obscene," and that the ubiquitous "dirty story" has sufficient vitality to withstand the dictates of either law or good taste, points to the ultimate futility of trying to legislate decency.⁶⁴ For those looking for sex stimuli, reminders are everywhere. The criminal sanction sometimes is a rather sorry weapon and a century of experience indicates that it is of slight utility in a war against sin. There are other means of social control. The force of public opinion, private condemnation, the ridicule and derision of literary and other critics, and the influence of religious groups, in reality, may have far more effect upon the dissemination of obscenity than criminal trials which publicize the matter and whet curiosity. An affirmative approach which encourages a high regard for the moral and the decent may accomplish more than a prohibition.

That the problem of obscenity is not merely a local phenomenon is shown by the fact that most civilized countries and perhaps all cultures attempt some control of what locally is regarded as obscene or shameful.⁶⁵ Societies differ, however, in the

⁶³ For an interesting short discussion of obscenity, see LA BARRE, *Obscenity: An Anthropological Appraisal*, 20 LAW AND CONTEMP. PROBLEMS 533 (1955), where he concludes: "In our society, it must be insisted, obscenity inheres in a definable list of things that may not necessarily be prohibited elsewhere: in the use of tabooed artistic representations or words, in nudity of certain parts of the body, and in the performance of publically prohibited acts . . . Any 'obscenity' involved is the artifact of our own cultural projections. Indeed, in other contexts, the shoe may be on the other foot, and we may be accused of obscenity where none, certainly, is intended." He points out that among Moslem women, it may be more immodest to expose the face than the body, to the Chinese a woman's artificially deformed foot may be obscene, that a Haida woman would be embarrassed to be caught without her lower lip plug, that the Japanese have erotized the nape of a woman's neck, and that the Tahitians who eat only in private may copulate in public.

⁶⁴ Dr. Kinsey's studies indicate that printed materials are an infrequent source of sex information and a 1938 survey conducted by the New York Bureau of Social Hygiene revealed that of the women interviewed as to what they found sexually stimulating, 95 of the 405 who replied answered "books" and 208 said "men"! Quoted by St. JOHN-STEVAS, *op. cit.*, at 196 *et seq.* The studies by the Gluecks also indicate that written obscenity had a negligible effect upon juvenile delinquency for the simple reason that typically but few juveniles read. See LOCKHART AND McCLURE, *Obscenity in the Courts*, 20 LAW AND CONTEMP. PROBLEMS 587 at 596.

⁶⁵ Apparently New Mexico is the only state which has no general criminal obscenity statute, but it authorizes cities to prohibit the dissemination of the obscene. Tent. Draft No. 6 at 5. "Every known human society exercises some explicit censorship over behavior relating to the human body, especially as that behavior involves or may involve sex." MEAD, SEX AND CENSORSHIP IN CONTEMPORARY SOCIETY, in NEW WORLD WRITING (3rd MENTOR SELECTION) 7 (1953). The Geneva Conference of the League of Nations in 1923 resulted in an agreement signed by some forty countries which promised to regulate traffic in obscenity, the World Postal Convention of 1924 resulted in a further agreement. At the present time, under United Nations auspices, there is an international agreement signed by over 50 nations, including the United States. Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511; Treaties in Force 209 (U. S. Dept. State October 31, 1956).

form of sanction employed and in whether it is regarded as a spiritual or temporal matter. In a democratic society which is nourished by a pluralism of ideas, a criminal sanction against obscenity has serious drawbacks because freedom of expression is correspondingly impaired. Since the Victorian Age our courts and legislatures have tried to strike a balance between freedom of expression and the protection of decency and morality. At best they have fashioned an uneasy compromise satisfying to neither adversary in this continuing struggle. Temporary advantages have been won and lost but the contest has not been concluded. Courts and legislatures, council chambers and police station, are not the only scenes of battle. Private vendors are subjected to group pressures too. It might be said that the ghost of Anthony Comstock is quite active these days. Whether his spirit of censorship is a "load" or a "lode" depends on the prospector and what he seeks.