Notre Dame Law Review

Volume 41
Issue 6 *Symposium*

Article 13

7-1-1966

Book Reviews

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BOOK REVIEWS

SEX, PORNOGRAPHY, AND JUSTICE. By Albert B. Gerber. New York: Lyle Stuart, Inc., 1965. Pp. 349. $10.00. In a recent issue of the *Washington Law Review,* Mr. Justice Douglas suggests the adoption of an editorial policy requiring each author to indicate his special interest in the subject matter of his article.[1] He warns that too often "I fear that law journals have been more seriously corrupted by non-disclosures than we imagine."[2] A similar policy ought to be adopted by the book publishers. The obscenity field is already replete with examples of special pleading by defense lawyers.[3] Yet, the dust jacket of attorney Albert V. Gerber's *Sex, Pornography, and Justice* merely indicates that he is a "prominent lawyer in Philadelphia, specializing in criminal and civil law in the obscenity and pornography field." The situation would have been clearer at the outset had the book been subtitled, "A Defense Counsel's View."

Gerber begins his book with some general observations about "the shifting, changing scene."[4] He immediately sets the tone for the rest of the text by quoting a long passage from Judge J. Irvin Shapiro's opinion in *New York v. Birch,*[5] in which Judge Shapiro dismissed an indictment charging that a series of the so-called "Nightstand"[6] books were obscene. With obvious approval, Gerber calls the opinion "outstanding."[7] What he neglects to tell us is that one of the books which lower court judge Shapiro held constitutionally protected, to wit, *College For Sinners,* had already been affirmed as outside the protection of the constitution by the appellate division of the New York Supreme Court, a decision the Court of Appeals and the United States Supreme Court refused to review.[8] United States District Judge Noel P. Fox has aptly capsuled Judge Shapiro's opinion as "not being a correct statement of the law."[9]

Recognizing that any new book dealing with obscenity needs some special justification, Mr. Gerber seeks to warrant the publication of his by the inclusion

1 Douglas, *Law Reviews and Full Disclosure,* 40 WASH. L. REV. 227 (1965).
2 *Id.* at 229.
3 See, *e.g.,* ERNST & SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE (1964).
4 Text at 18.
5 40 Misc. 2d 626, 243 N.Y.S.2d 525 (Sup. Ct. 1963).
6 The "Nightstand" books have been aptly described as "unqualifiedly pornographic and just as obviously 'thrown together' for a 'quick sale.' Lacking literary merit, they neither shock nor offend because they are so blatant and blunt. Written in a dull and slimy style, they are void of subtlety and spare nothing for the imagination." Slough and McAnany, *Obscenity and Constitutional Freedom—Part I,* 8 ST. LOUIS U. L. REV. 279, 331 n.189 (1964).

For a more specific description of the books, which only narrowly avoided judicial condemnation on the substantive issue of obscenity by the Supreme Court, see generally A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (mass seizure held unlawful without adversary hearing). For a long article dealing with the aspect of the pornography racket they represent, see generally New York Times, Sept. 5, 1965, p. 1, col. 3.
7 Text at 28.
8 Commentaries on the Law of Obscenity, No. 2, 1965, p. 1-9, 10; New York v. Fried, 18 App. Div. 2d 996, 238 N.Y.S.2d 742 (1963), *appeal dismissed and cert. denied,* 378 U.S. 578 (1964). Virtually identical "Nightstand" books have been repeatedly affirmed as obscene by appellate courts. See, *e.g.,* Illinois v. Sikora, 32 Ill. 2d 260, 204 N.E. 2d 768 (1965).
9 United States v. West Coast News Co., 228 F. Supp. 171, 197 (W.D. Mich. 1964), *aff'd,* Sixth Circuit, No. 15792, March 22, 1966.

of actual excerpts of indicted materials with his case analysis. In all, he has spread throughout the book passages and pictures from approximately ten cases.[10] The idea of bringing together examples of materials held obscene is laudable. Too often the uninitiated get lost in discussions of the obscenity issue solely because they have no concrete image to associate with the abstract term. Mr. Justice Holmes had a favorite admonition, "Think things not words."[11] If we could get more concrete images into the discussion the going would be unquestionably easier.[12] Unfortunately, however, Gerber violates one of the most important lessons we have learned over the years in the obscenity debate: the work must be judged as a whole.[13] At one point, toward the end of the book, Gerber rhetorically asks us, after we have read extracts from *Tropic* of *Cancer, Pleasure Was My Business, Fanny Hill* and *Candy,* to "make an intelligent differentiation."[14] He then suggests that the books are "pornographically speaking . . . without a distinction."[15] Without all of the material placed in its proper context, Gerber is right. Yet by not giving us all of the material in its proper context, Gerber deprives us of the ability to make a constitutionally sound decision — and his book of any special relevancy on this score.

The book itself is divided into six parts broadly dealing with the history of the obscenity problem, the work of the Supreme Court, the various tests for obscenity, and a review of the law today. Like many obscenity defense counsels, Gerber treats the history of the problem as if it were all the doing of Anthony Comstock,[16] clearly a high devil in libertine demonology. This is, of course, just so much nonsense. The concept of decency is virtually as old as man himself.[17] No human society has ever existed which did not attempt to draw the line.[18] Today this universal aspiration of man is represented in the legal prohibition

10 Queen v. Read [Q.B. 1700] Fort. 98, 92 Eng. Rep. 777 (*The Fifteen Plagues of a Maiden-Head* pp. 56-64); King v. Curl [K.B. 1727] 2 Strange 789, 93 Eng. Rep. 849 (*Venus in the Cloister or the Nun in her Smock* pp. 65-67); One, Inc., v. Olesen, 355 U.S. 371 (1958) (*One-The Homosexual Magazine* pp. 135-41); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958) (*Sunshine and Health* and *Sun Magazine* pp. 144-48); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (*MANual, Trim* and *Grecian Guild Pictorial* pp. 164-67); A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (*Lover or A Professional Stud in the Big City Lust Jungle* pp. 260-74); Dale Book Co. v. Leary, 233 F. Supp. 754 (E.D. Pa. 1964) (unnamed nudist magazine pp. 282-83); *Fanny Hill* pp. 292-301; *Candy* pp. 302-10; and sculpture of Ron Boise depicting a theme from *Kama Sutra* pp. 320-21.

11 FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 81 (Atheneum 1965).

12 When Roth v. United States, 354 U.S. 476 (1957) was argued before the Supreme Court, the Solicitor General sent up to the Justices several crates of the vilest sort of pornography. What had begun on an abstract plane was quickly brought down to earth, and the basic constitutionality of obscenity legislation was affirmed. See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV., 25-26 (1960).

13 See text accompanying note 25.

14 Text at 311.

15 *Ibid.*

16 A 19th-century crusader against obscenity whose efforts were largely responsible for the passage of the prototype of the present federal obscenity law, which is 18 U.S.C. § 1461 (1964).

17 Biblical tradition roots the concept in the first sin of Adam and Eve. *Genesis* 3:7. It is not necessary to accord the story divine origin to recognize it as an ancient insight into the character of man.

18 Mead, *Sex and Censorship in Contemporary Society,* in NEW WORLD WRITING (3rd Mentor Selection) 7 (1953).

of the obscene by most foreign countries,[19] by all of the states,[20] and on the federal level by the United States.[21] Treating this legislation as an anachronistic holdover from 17th-century Puritans or 19th-century Anthony Comstocks is the grossest sort of historical distortion. For example, the first piece of federal legislation aimed at obscenity, The Tariff Act of 1842,[22] was passed during the second generation of the American Republic without challenge on the score that it was inconsistent with the first amendment. The second major federal effort, which was directed against the pornographers exploiting the loneliness of Union soldiers, was passed during the administration of that patent precursor of Anthony Comstock, Abraham Lincoln.[23] Naturally enough, Mr. Gerber tells us virtually nothing of this.

Moving from his historical treatment of the issue to a consideration of the work of the Supreme Court in recent years, Gerber falls into what Judge Jerome Frank has termed, "The Upper-Court Myth."[24] The work of the High Court is, of course, significant. But what is happening at the trial court level is far more important. The Supreme Court can only lay down broad rules; their application remains the work of others. Consequently, any treatment of the obscenity issue which fails to broaden its view to include the prosecution and trial level becomes necessarily narrow minded.

After a brief treatment of some of the early cases which come before the Court, Gerber takes up the now-famous *Roth* definition of obscenity — "Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"[25] — and then smugly and superciliously carps: "If this test is analyzed slowly and carefully on a word-for-word basis it becomes evident that, far from being a test, it is a meaningless conglomeration of words purporting to set forth a profound equation but really saying practically nothing."[26] The *Roth* definition is, of course, not perfect. Indeed, Mr. Justice Brennan, its author, has been among the first to acknowledge it.[27] Apparently, however, Mr. Gerber has never been exposed to classical learning. "Precision is not to be sought for alike in all discussions; it is the mark of an educated man," Aristotle taught, "to look for precision in each class of things just so far as the nature of the subject admits. . . ."[28] In light of the nature of obscenity, and after examining the test on the functional level, we may honestly conclude — Mr. Gerber notwithstanding — that the attempt of *Roth* to work an honest accommodation between the

19 Among the foreign nations with obscenity legislation are Argentina, Belgium, England, France, Germany, Italy, Japan, Spain, Switzerland, Mexico and Russia, MODEL PENAL CODE, & 207, 10, comment, footnote 3 (Tent. Draft No. 6, 1957). In addition, over fifty nations are signatory to an international agreement to suppress traffic in the obscene. See Roth v. United States, 354 U.S. 476, 485 (1957).

20 Representative state statutes are collected in *Religious Institutions and Values: A Legal Survey (1955-57)*, 33 NOTRE DAME LAWYER 416, 436 n.125 (1958).

21 The federal statutes are collected in Roth v. United States, 354 U.S. 476, 485 n. 17 (1957).

22 5 Stat. 566 (1842).

23 13 Stat. 507 (1865) (obscene mailing made criminal).

24 FRANK, COURTS ON TRIAL 222-24 (Atheneum 1963).

25 354 U.S. at 489.

26 Text at 129.

27 Jacobellis v. Ohio 378 U.S. 184, 191-92 (1964) (opinion of Brennan J.).

28 MCKEON, INTRODUCTION TO ARISTOTLE: ETHICS 309-10 (Modern Library 1947).

requirements of free speech, the hopes of legitimate artistic expression, and the demands of common decency has been brilliantly successful. Even Mr. Gerber has had to admit that "the United States today probably has greater freedom for the communication of ideas than any other country in the world."[29] No serious work of art has been successfully banned or suppressed since 1957, the date of *Roth*. Moreover, despite the tightening of standards brought on by *Roth*, the ability of careful prosecutors to secure obscenity convictions in abundance has remained substantially unimpaired.[30]

Only two further comments need be made here on Mr. Gerber's treatment of the work of the High Court. Both importantly affect the quality of the book. Evidently, Gerber does not understand the legal significance of the no-majority opinion rule.[31] One of the basic postulates of the American case law system is that the decision of the majority settles the controversy. When a majority agree on a result, the decision is final between the parties. When the majority also agree on reasons supporting the result, the opinion expressing those reasons is called "the opinion of the court." The precedent value of a particular case is substantially undermined, however, when there is no majority opinion. "No majority opinion" cases stand only for their results. The opinions may give some indication of the thinking of individual justices, but they are not the law of the land. Mr. Gerber's indiscriminate references to such cases as *Manual Enterprises, Inc. v. Day*,[32] *Jacobellis v. Ohio*,[33] *A Quantity of Books v. Kansas*,[34] *Grove Press, Inc. v. Gerstein*,[35] and *Tralins v. Gerstein*[36] demonstrate little recognition of this fact. Except as it was implicit within the *Roth* test itself,[37] the requirements of "patent offensiveness,"[38] for example, has never been established in a

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29 Text at 39.

30 The following table represents arrests and convictions on the state and federal level for violation of obscenity statutes in which the Post Office Department aided the prosecution:

Fiscal Year	*Arrests*	*Convictions*
1957	201	175
1958	293	213
1959	315	272
1960	389	306
1961	457	377
1962	605	503
1963	761	637
1964	805	627
1965	874	696

Letter of H. B. Montague, Chief Inspector, Post Office Department to G. Robert Blakey, Assistant Professor of Law, Notre Dame Law School, Dec. 20, 1965. A spot check of the *Annual Report of the Director of the Administrative Office, United States Courts*, moreover, indicates that, at least on the federal level, most of these convictions are on guilty pleas. If the standard were all that unworkable, would not more defendants want to litigate? Apparently, most receive probation, which probably puts them out of business. However, when a sentence is imposed, it is high — an average of two years. One would suppose, therefore, that obscenity prosecutions are not just "negotiated away"; they are "for real." See, *e.g.*, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 241, 246 (1963).

31 See, *e.g.*, WAMBAUGH, THE STUDY OF CASES 50 (2d ed. 1894).

32 370 U.S. 478 (1962).

33 378 U.S. 184 (1964).

34 378 U.S. 205 (1964).

35 378 U.S. 577 (1964).

36 378 U.S. 576 (1964).

37 See Mr. Justice Brennan's opinion in Jacobellis v. Ohio, 378 U.S. at 191.

38 Manual Enterprise, Inc. v. Day, 370 U.S. at 478 (Opinion of Justices Harlan and Stewart interpreting 18 U.S.C. § 1461, not the Constitution).

majority opinion of the Court as a mandate of the Constitution.[39] The absence of careful, workmanlike attention to detail like this characterizes the whole of Gerber's book.

Mr. Gerber also spends so much time speaking of the cases the Supreme Court has accepted for hearing that he leaves you with the impression that the High Court never allowed an obscenity conviction to stand until *Ginzburg*[40] and *Mishkin*,[41] which were, of course, decided only after the publication of his book. The opposite conclusion is fact. Indeed, the Court has substantively ruled on only a handful of obscenity convictions since 1957. None were reversed by full-scale majority opinions. Yet, significantly, the Court has allowed some twenty-three convictions to stand by denying certiorari or dismissing the appeal.[42] Any general treatment which ignores this aspect of the work of the Court seriously distorts the picture.

Eventually Mr. Gerber comes to the standard ploy of most defense counsels. Speaking of the various rationales of obscenity legislation, he first concedes that such legislation may rest on a consideration of its offensiveness to the community.[43] He then denies that the community is justified in suppressing obscenity out of a hope that socially undesirable behavior might thereby be curbed at least in part.[44] Like virtually all defense counsels, Gerber neither asks nor answers here any of the truly lawyer-like questions. For example: who has the burden of proof? To establish what? By what kinds of evidence? To what degree of satisfaction? To whose satisfaction?

Gerber seems to feel that the proponents of obscenity prosecutions have the burden of proof to establish beyond a reasonable doubt by empirical evidence to the libertine's satisfaction that obscenity immediately leads to sexual crimes. Life is just not all that simple. Since obscenity legislation is already here, one would suppose that those who suggest that it be discarded would have the burden of proof to establish why.[45] It would not, moreover, seem to be necessary for one seeking to support the legislation to demonstrate that every rapist reads an obscene book just before the crime. Indeed, why should the anti-social behavior be limited to sexual behavior? Would it not be enough if there were some evidence

39 There is, of course, every likelihood that it will be adopted. *Cf.* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 Sup. Ct. 975 (1966).

40 Ginzburg v. United States, 86 Sup. Ct. 942 (1966).

41 Mishkin v. New York, 86 Sup. Ct. 958 (1966).

42 For a listing of these cases, see *Religious Institutions and Values: A Legal Survey (1964-66)*, 41 NOTRE DAME LAWYER 681, 783 n.841 (June, 1966).

43 Text at 318-19.

44 Text at 209, 318.

45 The rule has long been established that legislative enactments are to be presumed constitutional. See, *e.g.*, Nicol v. Ames, 173 U.S. 509, 514-15 (1899). Such a rule, of course, throws the burden of proof on he who would seek to overthrow the act to show why. Hence, it should not be observed, as Mr. Justice Rutledge did on oral argument in Doubleday & Co. v. New York, 335 U.S. 848 (1948), quoted in 17 U.S.L. WEEK 3117-3119 (1948) that: "It is up to the State to demonstrate that there [is] a danger, and until they demonstrate that, plus the clarity and imminence of the danger, the Constitutional prohibition would seem to apply." Such a position incorrectly assumes "obscenity" is "speech" in the constitutional sense; it is little more than a *petitio principii*. Indeed, the point in issue is "obscenity—speech vel non." It is clear, moreover, as Mr. Justice Brennan brilliantly shows in Roth v. United States, 354 U.S. 476, 483, (1957), the lesson of history is that "obscenity" is not "speech." Properly understood, the problem is not the application of the usual constitutional rules applicable in free speech cases, but how to define "obscenity" so as to avoid encroachment on legitimate "speech."

to link the deterioration of personality some attribute to obscenity with any socially undesirable behavior?[46] Further, it would seem that other than empirical evidence ought to be admissable on the issue. After all, our commitment to the value of free speech itself cannot be empirically demonstrated to be sound. Finally, since a legislative judgment is at issue, need we find more than a rational basis to justify it? Otherwise, we would be just substituting judicial judgment for legislative judgment.

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46 The evidence may be grouped into several categories:

(1) Law Enforcement Opinion:

Director of the Federal Bureau of Investigation J. Edgar Hoover squarely blames pornographic material, in part, for the rise in juvenile delinquency, sex crimes, and sexual immorality generally. Hoover, *Combatting Merchants of Filth: the Role of the FBI,* 25 U. PITT. L. REV. 469 (1964). See also Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, *Obscene and Pornographic Literature and Juvenile Delinquencies,* S. REP. No. 2381, 84th Cong., 2nd Sess. 23 (1957) (hereinafter cited as S. REP. No. 2381) for the opinions of various Chiefs of Police throughout the United States.

(2) Clinical Testimony:

Dr. Harold Brown Keyes, in behalf of the New York Academy of Medicine, specially petitioned President Johnson in November of 1964 to devote the full resources of the federal government to the fight against obscene literature. The academy particularly noted that such literature had the effect of leading young people into illicit sex relations, illegitimacy and venereal disease. *New York Times,* Nov. 24, 1964, p. 24, col. 5. A statement of the Academy is reprinted in People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1, 4 n. 4 (1963). The testimony of Dr. George W. Henry, Professor of Clinical Psychiatry, Cornell University College of Medicine, before the Kefauver committee is also both illuminating and disturbing. There he was asked, "Doctor . . . could children be sexually perverted by looking at, by studying, and by dwelling upon photos of this nature and the contents of this book [bondage pornographic material]?" He answered, "Yes." S. REP. No. 2381, *supra* at 10. The testimony of Dr. Benjamin Karpman, Chief Psychotherapist at St. Elizabeth's Hospital, the federal mental hospital in Washington, D.C., similarly told the Committee, "You can take a perfectly healthy boy or girl and by exposing them to abnormality, you can virtually crystallize and settle their habits for the rest of their lives. If they are not exposed to that they may develop to perfectly healthy, normal citizens." *Id.* at 12. Dr. Karpman also noted, "There is a very direct relationship between juvenile delinquency, sex life, and pornographic litrature." *Id.* at 13.

For a general summary of the medical testimony see PAUL & SWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAILS 292-97 (1961). The testimony of the doctors is not without some support in reported cases. In United States v. Rees, 193 F. Supp. 849, 853 (D. Md. 1961), "bondage" material similar to that referred to by Dr. Henry was found with a murder weapon of a man who had savagely killed a husband and wife and their two daughters, and who before killing the wife had tried to perform an abnormal sexual act on her. For a devastating rebuttal of the position advanced by a few doctors and many lawyers defending commercial pornographers that obscenity has no harmful social consequences, see MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY 131-51 (1963).

(3) Empirical Data:

The danger of perversion among the young or the corruption of their attitudes by pornography is underlined by the finding of the original Kinsey study that few individuals "modify their attitudes on matters of sex or change their patterns of overt behavior in any fundamental way after their middle teens." KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 446 (1948). The significance of vicarious conditioning in the development of human sexual behavior is also confirmed in KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE, 645-72 (Pocket Book 1965). The most recent Kinsey report, SEX OFFENDERS, (1965), contains a statistical analysis of interviews with 1,356 men convicted of rape, homosexuality and a variety of other sexual crimes. These men were compared with 886 non-sex offenders and 477 non-offenders. The criminals generally possessed more pornography and were more aroused by it than the non-criminals, and certain classes of sex offenders possessed even more pornography and were even more aroused by it than the other offenders. See SEX OFFENDERS, Table 14, "Sexual Arousal from Pictures of Sexual Action by Possession of Pictures of Sexual Action for Control, Prison and Sex Offenders Groups 691 (1965). For a differing of judgments on the significance of the new study, see *New York Times,* July 18, 1965, p. 1, col. 3. Other empirical data is collected in Cairns, Paul & Wishner, *Sex Censorship: the Assumptions of Anti-Obscenity Law and the Empirical Evidence.* 46 MINN. L. REV. 1009 (1962).

(4) Parallel Phenomena:

All indications are that the last ten years has seen an increase in the availability of

Gerber's book is filled with other misleading and outright inaccurate material. Enough has been pointed out here. It remains only to consider his conclusion and sum up. Ironically enough, when he finally takes up the question, "Now—The Law," his analysis is not unperceptive.[47] Pictorial nudity alone in reasonably good taste related to its setting is, he feels, constitutionally protected.[48] No serious novel or ordinary nonfiction work will be interfered with; the status of the "Nightstand-type" book "designed solely to capitalize on the newly liberated sexual motif remains "a toss-up."[49] Miller's books are "not really precedents" because they "can qualify as serious 'works' with a significant sexual theme" containing "much that is of social importance and value."[50] Slick magazines, typified by *Playboy,* are constitutionally protected, but recent endeavors "catering to or emphasizing some form of fetishism," such as *High Heels,* or which offer "simply nudity in an exaggerated, unrelated form," are "in for trouble and may not be protected at this time."[51] Any film "in reasonably good taste" will "probably receive constitutional protection."[52] Records with

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obscenity. The Kefauver Committee, writing in 1956, estimated that the pornography racket was then a $500,000,000-a-year industry. S. REP. No. 2381, *supra* at 3. At that time the Post Office received annually approximately 40,000 obscenity complaints; the volume has now risen to 128,000. Letter of H. B. Montague to G. Robert Blakey, *supra* note 30. Accordingly, it is a fair estimate to peg the racket today at $1,500,000,000. Other estimates are higher. See Ogle, "Filthy Paperbacks are Taking us to the Cleaners," Marriage, January 1966, p. 27 ($2 billion). Subject, of course, to the *post hoc propter hoc* fallacy, and the difficult issue of causation, we may also note the following parallel increases in antisocial behavior, which has been attributed, at least in part, to the rise in obscenity.

(a) Juvenile Delinquency:

During 1964 arrest of young persons under 18 for criminal acts rose 15%. This was the 16th year of consecutive increase. Since 1958, police arrests of juveniles have increased twice as fast as the young population growth. For all criminal acts young offenders made up 48% of all arrests. In 1963, persons under 18 represented 8% of the arrests for murder, 18% for forcible rape, 26% for robbery, 14% for aggravated assault, 50% for burglary, 51% for larceny, and 63% for auto thefts. THE WORLD ALMANAC AND BOOK OF FACTS 1965, p. 343; *Id.* 1966, p. 306. On the meaning of criminal statistics, *compare,* Beattie and Kenney, *Aggressive Crimes* 364 ANNALS (March 1966) 73-85, *with* Ottenberg, *Critics of Crime Statistics* 34 F.B.I. LAW ENFORCEMENT BULLETIN (May 1965) 22-25.

(b) Illegitimacy:

In 1940, the illegitimate birth rate was 7.1 per 1,000 unmarried females. Despite the widespread availability of birth control information and devices, that rate had by 1963 increased to 22.5. STATISTICAL ABSTRACT OF THE UNITED STATES 1965, Chart No. 53, p. 51. The significance of that figure, particularly for the young, may be seen when we recognize that one out of every ten girls 15-19 will have an illegitimate child next year. *Ibid.*

(c) Venereal Disease:

In 1955, there were 362,602 cases of venereal diseases among civilians reported to the Department of Health, Education and Welfare. Despite the widespread availability of such drugs as penicillin, by 1963 that figure had jumped to 404,405. *Id.* Chart No. 105, p. 82. Reported cases represent only about one-fourth of the probable actual incidents. There are probably 1,100,000 cases of V.D. each year. Promiscuity among teen-agers and homosexuals is thought to be the chief cause of the rise. The teen-age group, 15-19, for example, have a V.D. rate double that of all other groups. TODAY'S V.D. CONTROL PROBLEM (American Social Health Association, 1965) 13-20.

47 Text at 285. *Compare,* however, Gerber's comment that "to a considerable extent the majority of the United States Supreme Court has been moving in [the] direction" of the "nothing is obscene position," text at 196, *with* the *Ginzburg, Mishkin,* and *Fanny Hill* trilogy, Ginzburg v. United States, 86 Sup. Ct. 942 (1966), Mishkin v. New York, 86 Sup. Ct. 958 (1966), A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 Sup. Ct. 975 (1966).

48 *Ibid.*

49 Text at 286.

50 Text at 286.

51 Text at 286-87.

52 Text at 287.

sexual motifs will be treated like books.[53] Live performances will probably be left up to the "critics and the patrons."[54] Finally, Gerber observes, "history has demonstrated that the High Court grows weary of specific fields, and ultimately finds a mechanism for eliminating the flow of cases."[55] This result, he says, "is inevitable in the obscenity field."[56] Whatever criteria the Court establishes, it must be "practical."[57] Neither "almost anything, if indicted, is obscene" nor "practically nothing, if you fight hard enough, is obscene" will be adopted.[58] Some, as yet undetermined, "intermediate solution" must be found.[59] With this last bit of obviousness, disagreement is not possible. Nevertheless, it must be observed that Gerber's practical predictions fit comfortably with the recent pronouncements of the Court in the *Ginzburg, Mishkin, Fanny Hill* trilogy.[60] Thus, his clients and readers will not go wrong if they take his advice but ignore his reasons.

The dust jacket of *Sex, Pornography and Justice* indicates that it is attorney Gerber's "second full-length book." Hopefully, the first was better than the second. Should he write a third, there is every possibility available to him for improvement.

*G. Robert Blakey**

A THOUSAND DAYS—*John F. Kennedy in the White House.* By Arthur M. Schlesinger, Jr. Boston: Houghton Mifflin Company, 1965. Pp. 1087. $8.50.

KENNEDY. By Theodore C. Sorensen. New York: Harper & Row Publishers, 1965. Pp. 783. $10.00.

These two lengthy books are likely to constitute the official history of the Kennedy Administration for any future writer (and there will be many) studying the New Frontier. Theodore Sorensen, Special Assistant to President Kennedy, was a participant or—at the very least—a listener in most of the fateful decisions between 1961 and 1963. Arthur Schlesinger, Jr.—a Pulitzer Prize-winning former professor of history at Harvard—was also a Special Assistant to the President. Although Mr. Schlesinger's relationship with the President appears to have been considerably more distant than Mr. Sorensen's,[1] *A Thousand Days* is by far the more readable book.

Schlesinger, the professional historian, has an instinctive feel for the proper balance between "heavy" discussions of, for instance, conflicting theories about

53 *Ibid.*
54 Text at 288.
55 Text at 289.
56 Text at 290.
57 *Ibid.*
58 Text at 289.
59 Text at 311.
60 Ginzburg v. United States, 86 Sup. Ct. 942 (1966); Mishkin v. New York, 86 Sup. Ct. 958 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 Sup. Ct. 975 (1966).

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1 Schlesinger's scope of activity seems to have been more circumscribed than that of Sorensen. Schlesinger's field of activity was primarily foreign affairs with some involvement in civil rights, *e.g.*, the draft of the statement exposing Governor Barnett's new Doctrine of Nullification during the James Meredith crisis in Mississippi.

NATO and, on the other hand, the light, gossipy tales of who fell into what swimming pool on a gay summer evening. To be sure, one tires of being told about the bloody marys consumed before a discussion of China policy on J.F.K.'s boat. But—by way of comparison—with Theodore Sorensen we find ourselves plodding through pageloads of uninteresting prose and some very desperate attempts at humor which come off badly.

It is Schlesinger who writes—about the 1961 Kennedy-Khrushchev meeting in Vienna, for example—with a flair for both detail and the dramatic: "And so on to Austria, the great plane touching down at the Vienna airport on a gray and rainy Saturday morning."[2] And then follows an involved discussion of what these two leaders quoted to each other and how each one responded to every argument advanced against his own country. Khrushchev announced that: "The only rule was that they [political ideas] should not be propagated by arms nor by intervention in the internal affairs of other countries. He would guarantee that the Soviet Union would never impose ideas by war. . . . Kennedy quoted Mao Tse-tung's remark that power came out of the end of the rifle. Khrushchev blandly denied that Mao ever said this; Mao was a Marxist and Marxists were against war."[3] When one culls all the evidence about this important meeting, it becomes clear that the so-called "kitchen debate" between Khrushchev and Nixon and, for that matter, the Kennedy-Nixon television debates of 1960—both having been public events—pale into insignificance as serious discussions of the issues. One wonders on how many occasions statesmen have engaged in this type of exhausting exchange, which was in this case a verbal "prelude" to the Berlin Wall and the crisis that surrounded that event.

As might be expected, both Schlesinger and Sorensen are highly sympathetic to the Kennedy Administration's viewpoints regarding the motives of the Soviet Union and other matters of public concern. They are chroniclers of an era in which eight years of sluggish economic growth, presidential apathy about the civil rights of Negroes, and the quasi-religious condemnation of neutral nations by Eisenhower, and especially Dulles, all became policies of the past to be replaced by government which was comparatively rational and progressive. Five years under the Administrations of Presidents Kennedy and Johnson have highlighted the intellectual bankruptcy which gripped the previous Administration. As an illustration, Schlesinger quotes Eisenhower on deficit spending:

> In May of 1963 President Eisenhower in an agitated magazine article expressed his "amazement" about this "vast, reckless" plan for "a deliberate plunge into a massive deficit. 'What can those people in Washington be thinking about? Why would they deliberately do this to our country?' I asked myself."[4]

Of John F. Kennedy's accomplishments, one of the most impressive is that he was the first President to put the moral weight of the Executive branch firmly behind the proposition that "separate but equal" is *not* equal but rather a travesty, an outrage against any conceivable notion of justice or equity. Another

2 SCHLESINGER, text at 358.
3 SCHLESINGER, text at 360.
4 SCHLESINGER, text at 1004.

is that for the first time, neutral nations such as many African countries — ever so recently freed from the bonds of colonialism — could identify with a United States which attempted to identify itself with the emergent new nationalisms.

President Kennedy's thousand days set into motion events and ideas which were the antithesis of so much that was characteristic of the postwar years of slumber. Yet, at the same time, one cannot claim more than the record will support. Schlesinger, for instance, is slightly overzealous when he speaks of the "spirit" of the New Frontier at its inception:

> [L]ike the New Dealers a quarter century earlier, they brought with them the ideas of national reconstruction and reform which had been germinating under the surface of a decade of inaction. They had stood by too long while a complacent government had ignored the needs and potentialities of the nation—a nation whose economy was slowing down and whose population was overrunning its public facilities and services; a nation where victims of racism and poverty lived on in sullen misery and the ideals held out by the leaders of the people were parochial and mediocre. Now the New Frontiersmen swarmed in from State governments, the universities, the foundations, the newspapers, determined to complete the unfinished business of American society. Like Rexford G. Tugwell in another age, they proposed to roll up their sleeves and make America over.[5]

We can properly excuse the Kennedy Administration for failing to proceed beyond racial discrimination in the South to dealing with the seemingly intractable problem of the ghettos of the North. The same goes for tax reform and a direct attack on maldistribution of income. There was not enough time and the narrow margin which Northern Democrats had in Congress hardly made the time propitious. But how far were the sleeves rolled up when antitrust action contemplated against U.S. Steel, after the 1962 steel price dispute, was halted when Big Steel rescinded its increases? This was rationalized, according to Sorensen, on the grounds that the prestige of the presidency was no longer directly involved. While one cannot underestimate the Administration's achievement in this affair, surely the effort was a bit on the short side of "making America over."

One can hardly cover all the events discussed in these books which concern those three short years: the Bay of Pigs fiasco in Cuba where Kennedy was plainly misled by his advisors (Schlesinger quotes Kennedy: " 'If someone comes in to tell me this or that about the minimum wage bill,' Kennedy said to me later, 'I have no hesitation in overruling them. But you always assume that the military and intelligence people have some secret skills not available to ordinary mortals.' "); Vietnam, where Kennedy said it was *their* war to be won, and expressed the view that he had not devoted sufficient time to that tragic country's problems; and finally, civil rights. About President Kennedy and the Negro Revolution, Sorensen has this to say: "John Kennedy did not start that revolution and nothing he could have done could have stopped it. But in 1963, he befriended and articulated its high aspirations, and helped guide its torrential currents."[6]

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5 SCHLESINGER, text at 210.
6 SORENSEN, text at 470.

Whether Kennedy or Johnson or anyone is the Great Emancipator of this century is almost beside the point. For, as Anthony Lewis has written: "When John Kennedy died on November 22, 1963, the commitment of the Federal Government to the cause of civil rights—a commitment legal, political and moral —was complete."[7]

Is not this legacy a sufficient one?

*William B. Gould**

THE PETITIONERS: The Story of the Supreme Court of the United States and the Negro. By Loren Miller. New York: Pantheon Books, 1966. Pp. ix, 461. $8.95. Poorer than poor have been the Negroes in America. Thus, a book recounting the Supreme Court's justice to them is appropriate for review in this Symposium issue. That the Negro's problem has been far beyond that of poverty, however, is illustrated by the *Scottsboro* cases[1] of the 1930's.[2]

Caught in the Depression, jobless Negro and white youths, including two white girls, were bumming a ride on a freight train in Alabama. A racial fight broke out, and all but one of the white boys were chased or thrown off the train. Some of the white boys complained to law enforcement officers, who stopped the train and jailed the Negroes. The white girls alleged that they had been raped by six of the Negroes. After two years of litigation during which the Negroes had successfully appealed from the first guilty verdict, one of the white girls changed her story. She denied having been raped and testified that she had not seen the other girl raped. A white boy corroborated this version. Nevertheless, the all-white jury returned another guilty verdict.

Racial prejudice tipped the scale of Southern justice in favor of the poor whites against the equally poor Negroes. To be sure, the Negroes in the *Scottsboro* cases, as Judge Miller points out, were well defended by Clarence Darrow and Samuel Leibowitz, and well financed by the NAACP and the "Communist-oriented" International Labor Defense.[3] However, it is to be doubted that the special protection sometimes afforded by the NAACP and like-minded organizations has placed the poor Negro on a parity with the poor white in Southern courts.

While the last-hired and first-fired Negro knows poverty well, being no stranger to that impediment to justice, he has an additional and more onerous burden. Prejudice, more than poverty, has frustrated his quest for justice in which he has sought from the law recognition as a person. As Judge Miller writes:

> [T]he Negro's long struggle for what he calls first-class citizenship has been, and is, nothing more or less than an effort to gain status as an individual,

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7 LEWIS, PORTRAIT OF A DECADE 124 (1965).

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1 Patterson v. Alabama, 294 U.S. 600 (1935); Norris v. Alabama, 294 U.S. 587 (1935); and Powell v. Alabama, 287 U.S. 45 (1932).

2 Text at 266-76.

3 Text at 270.

> as a *person,* because it is only as a person that he can claim the rights, privileges, and protections enjoyed by white Americans who are born as persons.[4]

This book, ambitious in scope and temperate in language, traces the Negro's "effort to gain status as an individual, as a *person,*" through a detailed history of selected Supreme Court decisions. At the outset, Judge Miller acknowledges the risk of distortion in treating any issue in isolation. Furthermore, he warns that his effort to be objective should not induce the reader to forget that his viewpoint is that of an "embattled advocate of complete equality."[5] It is to his credit that the book largely succeeds in spite of a certain amount of unintentional distortion.

Most troublesome is the exaggerated importance and dark motivation frequently attached to Supreme Court decisions. For example, the *Dred Scott* case[6] is said to have hastened the Civil War.[7] There is no evidence that the decision had this effect, and none is cited. Again, it is said that the Court's interpretation of the War Amendments and their supplementary civil rights legislation amounted to a "wholesale undoing of the congressional will. . . ."[8]

> [It] reflected both a deep hostility to the national legislative view of Reconstruction and an obvious determination to re-establish judicial supremacy, so badly damaged by congressional and popular reaction to the Dred Scott case and the Court's dilatory conduct during and after the Civil War. That the Court re-established its supremacy at the expense of the Negro need occasion no surprise; the strong traditionally use the weak as stepping stones to power."[9]

One need not defend these Supreme Court decisions in order to take exception to this characterization. The fact is that the Supreme Court decisions reflected a popular view among white Americans. The wounds of a great Civil War could not be healed by continued occupation of the South. The withdrawal of the troops meant the collapse of the radical program of the Reconstructionists and the resignation of the Negro to the care of the South. This was accomplished pursuant to the compromise of 1876. The Supreme Court decisions were consistent with the dominant national view, which soon regarded the radicals' social restructuring as ineffectual. In short, although the decisions may have been incorrect, one cannot infer from this an attempt to establish judicial supremacy at the expense of the Negro. This is not to suggest, though, that the Court and the "compromisers" are not chargeable with a grave moral insensitivity.

Judge Miller rightly stresses the importance of *Brown v. Board of Educ.*[10] However, he wrongly criticizes as naive the decision to implement desegregation with "deliberate speed."[11] He argues that since immediate implemen-

4 Text at 23.
5 Text at vii-ix.
6 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).
7 Text at 63.
8 Text at 116.
9 *Ibid.*
10 347 U.S. 438 (1954).
11 Brown v. Board of Educ., 349 U.S. 294 (1955).

tation would have been blocked by Southern obstructionists, a gradualist approach only "armed the recalcitrant states with a built-in device for delay and resistance. . . ."[12] His contention is bolstered by the scant integration accomplished since the *Brown* case, but that is to argue from hindsight. It ignores the anticipated practical difficulties involved in immediate compliance, or it grossly underestimates them.

A number of minor criticisms can be made. Judge Miller annoyingly suggests, and then backs away from his suggestion, that seven of the Justices who decided *Plessy v. Ferguson*[13] were influenced by former business connections with railroads.[14] He has a tendency to lapse into colloquialisms which jar the reader (*e.g.*, "Supreme Court judges occasionally get all shook up").[15] He confuses two Supreme Court quotations.[16] Mr. Justice Arthur Goldberg is referred to as "Justice Albert Goldberg."[17] Finally, the Missouri Compromise is discussed without mentioning the admission of Maine.[18]

On balance, however, this is a solid book, reflecting immense research and skilled handling of intricate legal questions. It is eminently readable and frequently provocative. As a petition, listing repetitively the Negro's plea for recognition of personal rights invariably taken for granted by white citizens, the cumulative effect is quite moving.

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12 Text at 353.
13 163 U.S. 537 (1896).
14 Text at 166.
15 Text at 108.
16 Text at 356.
17 Text at 388.
18 Text at 35-38.

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