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OBSCENITY: SOME PROBLEMS OF VALUES
AND THE USE OF EXPERTS

JOHN P. FRANK*

John P. Frank advances the view that for trial convenience, the
complainant should be required to make his prima facie case of
obscenity, with the literary merit of the work as an independent
affirmative defense. He applauds the recent development by the
Supreme Court of the "pandering test" as an element of obscenity,
but supports the view of Justices Clark and White that the question
of "redeeming social value" should merge in the analysis of the
dominant theme of the material—or, he suggests instead, should be
an affirmative defense. He considers the functions of experts in
obscenity cases, reporting the submission of a number of works to
experts for experimental purposes. He concludes that under the
current decisions, the standard of obscenity is so low as to make
experts superfluous; they are unnecessary to identify hard-core
pornography, and not much else is obscene. However, he outlines
areas in which experts could be useful, and discusses what he feels
are unanswered serious questions on the relationship of obscenity to
social values of crime control and family life.

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This article is an adaptation of two lectures given at the University of Illinois,
the first to the Faculty Forum in October 1963, the second to the NDEA Illinois
English Institute in July 1966. Since the 1963 lecture, there have been con-
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Recent decisions of the United States Supreme Court on obscenity start a new burst of thought on this well-worn theme. In part the Supreme Court has answered some questions. In part it has posed new questions. In part it has not touched at all on some of the fundamental values which must be appraised for sensible decision on legal control of obscenity.

It has been the practice for some time to use expert witnesses, particularly professors of literature, in the trial of obscenity cases. This was true in the recent decisions as well. The future use of experts in the light of the decisions is reconsidered here. While that topic may appear narrow, it necessarily touches on the whole theory of obscenity control. The function of the expert is to express opinions, and we must therefore determine what opinions he can be expected to express. This in turn requires the establishment of a standard of

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relevancy—his opinion must be relevant to an issue in the case. To know the issues, we must know the field.²

I begin with some only casually argued postulates in order to give a foundation for the remainder of the discussion.

I. PRELIMINARY PREMISES

A. Obscenity has no tight definition; certainly this is true in 1966.

We need a definition of “obscenity” to know what publications, if any, in this general class are subject to punishment. First-class minds have devoted first-class efforts to this definition for many years, and we must get used to their want of success. Obscenity may be defined either at some high level of abstraction or in functional terms, but this is a social problem which is not ever going to be reducible to some simple formula of the $A = \pi r^2$ variety. Not only is obscenity incapable of a mathematically precise definition; it is also incapable of definition with the precision of many a good, usable legal formula. A definition of burglary as breaking and entering in the nighttime for the purpose of committing a felony has a flatly tangible quality to it. There is going to be no equivalent in the law of obscenity.

This is no criticism. Many legal terms escape precise definition. The elusiveness of the definition of obscenity is no greater than that of “due process of law,” or “burden on interstate commerce,” or “flash of genius” in the field of patents. The imprecision of these terms

²Numerous important books and articles are cited in the notes following. The bed-rock, basic material on obscenity includes first, the various works of Dean William Lockhart and Professor Robert McClure of the University of Minnesota Law School, which have been followed by the Supreme Court and to which all students are heavily indebted. These include Literature, The Law of Obscenity, and the Constitution, 38 MINN. L. REV. 295 (1954); Obscenity in the Courts, 20 LAW & CONTEMP. PROB. 587 (1955) (essentially a condensation of the previously cited article); Censorship of Obscenity, 45 MINN. L. REV. 5 (1960); and an individual address by Dean Lockhart, reported in 7 UTAH L. REV. 289 (1961) (taken from the work of both, hereinafter cited as Address).

Also basic is Symposium—Obscenity and the Arts, 20 LAW & CONTEMP. PROB. 531 (1955). In addition, Professor Louis Schwartz, Reporter for the relevant section of the Model Penal Code, has kindly furnished a current draft of the American Law Institute comment (hereinafter cited as Comment). His views are more generally available in Schwartz, Morals Offenses and the Model Penal Code, 63 COLUM. L. REV. 669 (1963). An especially thoughtful and useful concise case review is Kalven, The Metaphysics of the Law of Obscenity, 1960 SUP. CT. REV. 1, and the cases are also reviewed in Lockhart & McClure, Censorship of Obscenity, 45 MINN. L. REV. 5, 13-47 (1960). Other more recent references of particular utility are Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. PA. L. REV. 834 (1964); Note, 39 N.Y.U.L. REV. 1063 (1964). For serious and very stimulating discussion of values, see Murphy, The Value of Pornography, 10 WAYNE L. REV. 655 (1964).

My own thinking has been particularly affected (partly by way of some dissent) by GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS ch. 2 (1956).

The most recent case collections are Annotations on substance and procedure at 5 A.L.R.3d 1158 and 1214 (1966).
only makes all the greater the challenge of solving the problems with which they deal.

The problem is no easier for the Supreme Court than for anyone else, and the nine Justices are pretty well divided. Justices Black and Douglas take the view that no publication is obscene in the sense that its publication is punishable. Justice Black declines even to look at the material—to him the Constitution bars "any type of burden on speech and expression of ideas of any kind"; and Justice Douglas says, "[T]he First Amendment allows all ideas to be expressed—whether orthodox, popular, off-beat, or repulsive."

Justice Stewart would define "obscene" as "hard-core pornography." This in turn he defines as:

Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense of literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .

Justice Harlan would apply a double standard. So far as the federal government is concerned he adopts the Stewart standard. So far as the states are concerned, he would give them much more latitude—they can suppress a publication by their own individual standards so long as they "reach results not wholly out of step with current American standards." He thinks it impossible and highly undesirable to be much more precise than this.

To Justice Brennan, as a spokesman for Chief Justice Warren and Justice Fortas, material is obscene if:

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2. Id. at 491.
3. Id. at 499 n.2. Justice Stewart has said that he may not be able to define hard-core pornography but he knows it when he sees it. Jacobellis v. Ohio, 378 U.S. 184 (1964). This leads to a quip by Kruger, Fair Comment: What's All This—About Pornography, 40 L.A. BAR. BULL. 505, 519 (1965): "I'll know it when Potter Stewart sees it."
5. Id. at 418.
6. (c) was compromised in Ginzberg at 471-75 wherein advertising calculated to emphasize the sexual nature of material made that material obscene in spite of itself.
(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

In this view, each of the three elements is independent: if, for example, the material has any social value, it is immaterial how much its theme appeals to a prurient interest or how offensive it may be.

Justices Clark and White, though not quite at one, very nearly agree. They accept the first two elements of the Brennan formula. The third, the social value factor, they consider not to be an independent element, but rather, simply a factor in determining the dominant theme of the work.

The law of obscenity has been floundering desperately in need of a new idea; and in the recent cases, a new idea emerges. Clearly there is an element of relativity in obscenity; it may be illegal to sell hard-core pornography to the kiddies on a school ground and wholly proper to sell the same thing for discussion by the psychiatric class at a medical school. In Roth v. United States,9 Chief Justice Warren suggested a test of purpose—that an intent to pand to prurient interest may make the material, in context, obscene. What was an individual thought in 1957 has become the view of Justice Brennan, Chief Justice Warren, and Justices Fortas, Clark and White. This is summarized in the context of the Ginzburg case thus:9

The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publication to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the

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fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test.

The same matter is more concisely put in another excerpt:

Petitioners' own expert agreed, correctly we think, that "[I]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion.

Faced with such divergencies on high, anyone who attempts to formulate a general rule can easily be wrong. But life cannot stop while the debate goes on, and there must be some usable generalizations. Seven judges will apparently agree that "hard-core pornography" is obscene, with inevitable disputes over whether something is or is not "hard core." There is, however, a general feeling that such stuff as is listed in Justice Stewart's definition is obvious. Beyond this, anything to be obscene must meet all three elements of the Brennan test—prurience, offensiveness, utter lack of social value; but if it is merchandised in a salacious or pandering manner, doubts will be cast against it.

What, then, is "prurient interest?" The term is defined in a standard dictionary as "having lascivious longing," or relating to "desire, curiosity, or lewd propensity." Granted, as has been developed earlier, that there are some inherently necessary ambiguities and obscurities in the definition of "obscenity," this word needlessly complicates an otherwise hard situation; as Dean Lockhart says, it "gets us nowhere." A very large share of the sales literature of the United States—not only for female undergarments and perfumes, but for hair oils, manicure sets, clothing and even automobiles is calculated to appeal to the normal desires of normal people.

The American Law Institute Comment suggests the difficulty posed for obscenity controls "in a society like ours in which the female figure is commonly employed by advertisers to evoke interest, where perfumes and textures are widely touted for erotic effect, and where the pervasive theme of mass theatre, literature, and music is an eroticism that is obvious even while it fails to transgress the strictest obscenity law that could be envisioned."

10 Id. at 471. For criticism of this view, see Gerber, supra note 2, at 839: "It scarcely seems appropriate to make the profit motive, at least in this country, the difference between a crime and a lawful act."
The term is defined by the American Law Institute in context with its definition of obscenity. For this purpose, prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion and, in addition, as going substantially beyond customary limits of candor in describing or representing such matters.

The concept of obscenity has three vaguely contoured elements, subject to some overlapping:

1. Offensiveness. This in turn divides into two areas, due to the unfortunate commingling under the one label of obscenity of both the scatological and the sexual. Borrowing Judge Woolsey's felicitous phrase, given matter may be emetic without being aphrodisiac. Granting that the psychiatrists may find some connection between the two and that the same bodily organs may be involved in each, for most workaday legal purposes the distinction between the two needs to be fairly sharp.

The community may feel that unduly detailed attention to excretion is offensive; and it may conclude that undue discussion of these bodily functions in terms of non-accepted descriptive words is also offensive. This must be recognized as a non-rational community response; it will have to be accepted as a legally recognized and legally enforced tabu. That is to say, a legislature probably could not validly make it a crime to describe in whatever detail and in whatever terms the emission of air or the emission of blood from the body. We recognize the special limitations concerning the discussion of excretion as traditional and accepted simply because the community finds this too offensive for common talk.

Offensiveness in relation to excretion involves only one-level offensiveness. That is, it is not the fact or act of excretion which is offensive, but only the act of talking about it or displaying it. It is the publication, not the act, which offends. This is so different from some problems of sexual obscenity as to make it only confusing to commingle them.

1For a somewhat different statement of elements, substantially the same in effect but with substantially different evaluations, see Emerson, Toward a General Theory of the First Amendment, 72 YALE L. J. 877, 937-39 (1963).
12United States v. One Book Called Ulysses, 5 F. Supp. 182, 185, aff'd, 72 F.2d 705 (2d Cir. 1934).
13"The subject, by its very nature, includes a large element of irrationality." CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 210 (1947). The extent to which non-rational community standards may properly be enforced is discussed in Schwartz, supra note 2, at 670-72.
Offensiveness with relation to sexual conduct is two-level. Just as with excretion, the overly candid discussion of perfectly normal sexual activity may be offensive to the community even though the act under discussion is not offensive at all, and is indeed wholly normal and essential to life. Yet in the area of sexual obscenity, we deal also with a second level of offensiveness. Some forms of sexual activity are regarded by the community as offensive in the act itself. This is true of the perversions. Discussion of these acts is doubly offensive, first because the publication is offensive, and secondly because the act is offensive.

Once again, we are dealing with social tabus which do not need strictly rational basis, and which have nothing to do with any clear and present danger.\(^\text{15}\) They are reflections of custom, and indeed of changing custom; a Greek pastime may be today's perversion.\(^\text{16}\) Moreover, the Kinsey Reports demonstrate that there may be class variance as to what is tabu and what is proper or normal; the law needs to be more sensitive than it usually is to the fact that its judges may be drawn from a class reflecting different values from those whom they are judging. In the views of Justices Harlan and Stewart, offensiveness is an essential independent element of obscenity.\(^\text{17}\)

2. Invasion of Privacy. Our standards and notions of privacy directly overlap the problem of offensiveness. Here again, we are dealing with tabus so strong that the law has traditionally recognized them. With reference to the scatological, it is regularly and uniformly accepted that a person may perform some bodily functions in public and not others. At this point there is some overlap with sexual matters, so that, for example, a male may acceptably eat in mixed com-

\(^{16}\) The classic statement of the relevance of changing community tastes is by Judge Learned Hand in United States v. Kennerly, 209 Fed. 119, 121 (S.D.N.Y. 1913). The movement may be pendulum, so that by today's standards probably neither *Canterbury Tales* nor *The Decameron* is at all obscene, without making any special allowance for literary merit. For Boccaccio's attitude on this point in his own day, see MACMANUS, *Boccaccio* 168-73 (1947), commenting also on the censorship of this work, probably on other grounds, by The Council of Trent.\n
\(^{17}\) Manual Enterprises v. Day, 370 U.S. 478, 486-87 (1962), an opinion which illustrates, however, that these Justices have a remarkably liberal standard as to what is offensive. As Dean Lockhart puts it with vivid illustration, *Address*, supra note 2, at 294: "The Supreme Court's concept of obscenity is a very narrow one."
pany but can acceptably only excrete the chemical residue of the
same material in the presence of his own sex. This is of course due
to the multiple purposes of the organs involved and relates to the
problem of indecent exposure.

The larger part of the privacy problem is the overwhelmingly
established belief that completely non-offensive sex acts should non-
theless be private. There is probably no single belief as to the privacy
of any sort of conduct which is more universally accepted than this
one. It follows that unduly candid talk about this activity directly
strikes at this universally accepted standard of privacy.

It is only a partial answer to say that no one needs to read obscene
works; that he who wants his privacy may keep it. This is simply
not true of contemporary sex-merchandising, by which the community
is engulfed with inducements to delight in this orgy or be shocked
by that perversion. This accounts in part, I think, for the emphasis
given by the Brennan opinions to the "pandering" or "merchandising"
phases of obscenity.

3. Social Values. A third element in the Brennan definition is
the factor of "redeeming social value." A singular lack in his dis-
\[\text{\textit{a) Redeeming social value.}}\]

Justice Brennan's own definition is
that "material dealing with sex in a manner that advocates ideas ... or
that has literary or psychiatric or artistic value or any other form of
social importance" meets this test.\(^{18}\)

(b) Social harm. Wholly apart from its offensiveness or its in-
vasion of privacy, many believe, though some deny, that obscenity
may cause anti-social behavior. I shall come back to the pros and
cons of this argument in a moment, but for purposes of this intro-
ductive statement of definitions, we note only that this phase of the
problem relates solely to the sexual branch of the subject. No one
has suggested that scatological writing is likely to increase either the
frequency or the public exposure of the functions with which it deals.
But there is very serious suggestion that obscene sexual materials

may increase either the frequency of perversion or of promiscuity.

B. Obscenity is a parvenu in Anglo-American Law, and its pendulum history has had the most serious consequences on its present state.

It was a technical impossibility to be obscene in Chaucer's time. Obscenity is a violation of social tabus, and five hundred years ago those tabus did not exist with a sufficient degree of intensity or strength to make their violation criminal. It did not occur to the Church to render the angels of the Vatican modest by clothing them until Pope Paul IV drew the veil over the works of Michelangelo in 1558, and the Council of Trent in 1564 did direct restrictions at obscenity, but to little serious effect. The first reported English case said to involve obscenity is *Sydlye's Case* in 1663, a matter involving the naked exposure of a drunken Lord Sydlye on a balcony from which he threw bottles containing urine at the passers-by; but while this may be treated as a precedent in the field of obscenity, it is better explained as a matter of disturbing the peace or of drunk and disorderly conduct.

The law of obscenity is to the history of social customs and social values as the law of theft is to the history of private property. There must be an institution of private property before there can be an offense of stealing it. Similarly there must be a strong community sense of the offensiveness or privacy of sexual activity and of the evil of promiscuity before there can be a body of law protecting those values; and this is what the law of obscenity seeks to do. Such a scheme of social values did not exist in sufficiently dominating force to cause a body of law to arise to protect it until the 18th century in England, and it did not reach a real ascendancy until early in the 19th century.

In the 18th and 19th centuries, such a scheme of social values did arise and was commonly accepted. The law of obscenity flowed from it. The original general act in England is as recent as 1857, and the first great case in the English courts, *Regina v. Hicklin*, was in 1868. The first actual prosecution in England challenging a serious

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19 *Durant, The Reformation* 899 (1957).
21 "Criminal sanctions must be reserved for misbehavior that is quite generally recognized as a threat to individual security and, is therefore reprobated by common consent." Comment, supra note 2, at 5.
22 20 & 21 Vict. C. 83.
23 L. R. 3 Q. B. 360 (1868).
literary work as distinguished from clear obscenities, was in the 1880's.24

What followed was a period of gross over-protection of the underlying social values. The first formal prosecution of a literary work may have been in the 1880's, but it followed almost a century of extreme public pressure. This was also true in America. Unquestionably the evils of Comstockery, as the bizarre over-protection of privacy was called, after Anthony Comstock, its principal exponent,25 led to absurd results. From about 1830 to about 1930, a century which can fairly be described as a hundred years of minding other people's business, America was in the intense grip of a movement of social reform. Some of the results were benign—the abolition of slavery, women's suffrage, the abolition of child labor, for examples. Others, which stemmed from the same moral forces, were distinctly less successful. Literary controls and prohibition are salient examples.

C. We are now in a period of reaction to the censorship extremes, but in a period of counter-reaction as well.

In our reaction against Comstock, we have very nearly totally abandoned any legal protection of the underlying social values and standards.26 In our flight from the Philistines we have embraced the pornographers.27 One underlying problem is the large-scale prevalence of clear obscenity. Much of the material under serious challenge in our own day is not what may be the literary work of the century,
it is the plainest and crudest kind of pornography; this is what Justice Stewart talks of as hard-core pornography and, as he suggests, it would be so evaluated by virtually anyone who looked at it.

The rise of an immense, low cost paper book trade radically alters the general problem by permitting an absolute flood of material. The items in the Stewart definition—the comic books or other pamphlets—are instances. But ease of reproduction also permits the immense and cheap multiplication of sleazy works just one notch superior to what Justice Stewart regards as hard-core pornography. This is well documented in the Mishkin case, which describes the manner in which the smut publisher devised fifty booklets, specializing in deviant activity. These were written by a stable of writers given instructions to “make the sex sense very strong” with as much Lesbianism and homosexuality as possible, all garnished with a good coating of torture and abuse. These were then rolled out by a photo-offset printer paid fifteen cents or forty cents a copy, depending on whether it was a thick or thin book. The resultant product was large enough and cheap enough to stock an industry.

A challenge to our legal institutions is whether we can devise a legal procedure capable of distinguishing between a Ulysses or a Strange Fruit on the one hand and plain pornography on the other. As Professor Kalven puts it, “There seems to be no way to phrase a formula that will reach the [French] postcard and leave Molly Bloom’s soliloquy in Ulysses or the Song of Songs unscathed.” If the materials did in fact fall clearly and easily into only those two categories, there probably would not be much problem; as has been noted, it is not really very difficult for anyone to tell the difference between Ulysses and a book of locker room cartoons. But there is an immense gradation as is illustrated in the grubby pulp of the Mishkin case. At this moment in our legal history, we are floundering in an effort to distinguish this endless mass of published material into the acceptable and the non-acceptable. Every aspect of the problem is made more difficult by the rapid change in the nature of


what is being published. One popular volume reports a study contrasting the volume of sex references in publications, television, radio programs, plays, books, and other sources between 1950 and 1960. The ten-year comparison shows "2½ times as many references to sex in 1960 as in 1950, an increase from 509 to 1341 'permissive' sex references in 200 media studied." There is also a significant shift in the object of sex orientated publications from the traditional locker room to the contemporary living room. The author observes that "the most striking new sexual phenomenon, however, was the increased and evidently 'insatiable' lasciviousness of best-selling novels and periodical fiction, whose audience is primarily women."31

II. THE FUNCTION OF EXPERTS

A prime development in the law of obscenity during the past forty years has been the creation of a role for experts to help determine whether given material is or is not obscene. The theory is of a peer approach—let authors be assessed by authors, artists by artists. This impulse has been a product essentially of three things: the low-level administrators are frequently incompetent; the high-level administrators and judges have difficulty making informed decisions in marginal cases; and the experts have become highly respectable.

Comstock was worse than a prude, he was a fool. Moreover, the persons inclined to concern themselves with this business are likely to be fools or incompetents.32 They may be citizens' groups, the members disturbed themselves, with an obsessive interest in salacious materials. They may also, without being eccentrics, be simply incompetent. Judgments on these matters have frequently been made by policemen or minor administrative officials who are wholly incapable of making them. This has been frequently lampooned—the dumb policeman reading his first book and trying to decide whether it is fit to go into the homes of the community is an easy and tempting target, partly because he deserves to be. He is too easy and too

32 For an amusing illustration in detail, see Ciardi, Manner of Speaking, Saturday Review, Jan. 1, 1966, p. 22, reporting testimony in an obscure trial in Connecticut. The "expert," apparently a local housewife, after expressing some remarkable opinions, was asked when she became an expert on obscenity. She replied "the first time I became aware was when I started getting into this and realized I had a broad background in experience and training." This "expert" felt that any mention of Playboy bunnies, any reference to a girl's measurements as 36-23-32, and any article on Marilyn Monroe "appealed to prurient interests."
tempting because as a practical matter he may not be dumb at all. He may be a very sincere and very dedicated policeman who honestly wants to do his job and who is simply unequipped to handle this one. I have had vice squad members for whom I have had the highest personal respect as officers and as gentlemen, honestly dedicated to public service, tell me that in this area they simply do not know. Hence the call for experts to give them help.

High level judges and administrators may have the same problems. In the marginal cases, the issue of obscenity may be genuinely difficult. Ninety per cent of the material challenged as pornographic may be so clearly in that category that no reasonable men can differ about it; Thurman Arnold, a close student of the problem, has pungently suggested that the best solution for the whole difficulty is simply to let someone stack the challenged literature in Yes and No piles without attempting to reason about it at all. For the overwhelming weight of the material, this would be quite adequate. But while ninety per cent of the material may present no problem, ninety per cent of the problems come from the rest of the material. These can be honestly difficult. The best of judges are not likely to be terribly well informed in the field of literature. Judge Woolsey, confronted with the case of *Ulysses* is entitled not only to respect for his disposition of it, but also to all sympathy for the difficulties before him. In short, like the honest policeman, the honest judge may want and benefit from expert help.

If I were to select from among the many wise and thoughtful men who have given deep thought to this subject, to choose the one man who has had the greatest experience with it, my choice would be Mr. Huntington Cairns. Mr. Cairns for many years was Assistant General Counsel of the Treasury Department. He is also Secretary of the National Gallery of Art and was well described as "an enlightened connoisseur of the arts and literature." During his years at the Treasury Department, he was able in about an hour a week to review the doubtful Customs or import cases, advising as to what should come in and what should stay out. Mr. Cairns has performed this function to such universal satisfaction that, while he rejected im-

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23 Judge Arnold's views are quoted at length in Kalven, *supra* note 2, at 43-45.
24 As Justice Douglas says in *A Book Named Memoirs v. Attorney Gen'l of Mass.*, 383 U.S. 413, 427 (1966): "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except as in our capacity as private citizens...."
mense quantities of material as pornographic, no one ever appealed one of his rulings. In his hands, an administrative system in the Customs Service which had been an endless series of absurdities and international embarrassments became wholly satisfactory.

We had a superman in Mr. Huntington Cairns, and the country liked it. Mr. Cairns was himself a very great expert on both art and literature, although in the doubtful cases, he developed the practice of consulting other experts. For illustration, the question of whether so-called "scientific literature" is really serving some purpose of medicine or whether it is simply fodder for the trade in eroticism was a matter he might not wish to decide himself. As a kind of a superman in the field, Mr. Cairns made experts highly respectable.

The result has been the increasing utilization of experts in obscenity cases. An English statute now provides for their testimony. Massachusetts, tired of the embarrassment of jokes concerning its administration in these matters, adopted an obscenity statute which also called for free use of experts. The American Law Institute now proposes in its Model Penal Code, which will doubtless be widely adopted throughout the United States, that "expert testimony and testimony of the author, creator, publisher or other persons from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissable." In current prosecutions, experts are commonly being called and the various opinions in the recent cases refer to them freely; in a lone concurrence, the late Justice Frankfurter seemed to believe that their use, if desired by the defense, is constitutionally required.

We therefore come to the question of the identification, purpose, and function of these experts. What kind of experts? What shall they be asked when they are on the stand? What weight is to be given to their conclusions? In short, what is their job?

We may approach the topic in a questioning but not a hostile

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38 § 251.4(4) (1962 draft).

39 Smith v. California, 361 U.S. 147, 164-65 (1959). For some purposes, Lockhart & McClure, Censorship of Obscenity, 45 Minn. L. Rev. 5, 91 (1960), think them "indispensable," a thought further developed by them with constitutional emphasis at 98; see also 5 A.L.R. 3d 1194-95 (1966).
spirit. As every lawyer knows, while experts are not exactly a dime a dozen in price, the dozen can be had on all sides of most questions. Moreover, the tradition of the experts themselves is not such as to give us absolute confidence in their judgment on the ultimate question in issue in an obscenity case. The establishment normally tends to the conservative, and there have been some appalling examples of expert misjudgment. The Academy in France refused to hang Manet’s *Luncheon on the Grass* on the grounds of indecency, a judgment which in retrospect seems even odder than the choice of costumes made by the artist in that particular work. Persons who would qualify as experts violently attacked as obscene Thomas Hardy’s *Jude the Obscure*; Ibsen; Shaw, whose *Mrs. Warren’s Profession* was not performed publicly until 1925, twenty-three years after its first private performance; and Zola, of course. Tennyson, surely an expert and one who was on occasion attacked himself, poetically denounced Zola for feeding “the budding rose of boyhood with the drainage of your sewer.” The list is long—Balzac, Flaubert, Wilde are included, and Swinburne bore the worse attacks of all.

The experts are thus demonstrably capable of being Philistines, too. Dickens declined to appear as a literary expert in behalf of fellow author George Reade because “what was pure to an artist might be impurely suggestive to inferior minds.” Even more commonly, literary experts are quite capable of being pretentious or foolish. Justice Clark rightly makes a frightful hash out of some of those who rallied around pumping literary merit into *Fanny Hill* in the current cases. At the same time, for all the limitation of the expert system, the policeman who triggers off the prosecution at the bottom of the line does need help. There are judgments to be made in at least some cases which involve something more than a look at the challenged object and spontaneous reaction by the judge or jury.

To explore the use of experts, I attempted a modest experiment by presenting selected materials to experts along with questions. The terms of the experiment were these:

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40 For an extensive series of contemporary responses to Ibsen’s *Ghosts*, of which “naked loathsome-ness” is typical, see excerpt from Shaw, *The Quintessence of Ibsenism*, in Levin, *Tragedy* (1960).

41 Most of the examples are taken from St. John-Stevas, *op. cit. supra* note 24, ch. 3.

A. The Materials

The experiment covered six pieces of printed work:

1. *Fanny Hill*: This is a volume published originally in 1750 in England, describing the careers of a common prostitute. It is described by Mr. Cairns "as the first deliberately pornographic novel in the English language." The volume includes great detail as to how the lady and her friends conducted their trade and is fairly fully though restrainedly summarized by Justice Clark in his opinion in the current cases. This book, in 1963, had recently been published by Putnam. I included it at that time, three years before the Supreme Court's recent opinion concerning it, because while I regarded it as clearly pornographic, it puts the problem of a work presented by a generally respected publisher, nicely turned out, and with at least a touch of claim of historical value as a reflection of the life of a distant time.

2. The second sample is Henry Miller's *Tropic of Cancer*, a work formerly banned but now fairly commonly available in the bookshops of the United States. I include it because it makes serious claims of being a very genuinely significant literary, albeit tedious, work.

3. The third item I shall define, without thereby meaning to denigrate the paper book trade, as a slightly more than salacious paperback. It purports to be an historical novel dealing with the life and peculiar sexual experiences of the Emperor Nero. It is completely devoid of literary merit, a bit of sleazy junk, and has no historical accuracy. The episodes consist of a series of mixed beads of sexual experience, normal and abnormal, and sadism strung together upon the faintest wisp of a plot. The volume is a sample of what is commonly available now in low quality bookshops throughout the United States.

4. The next item is a fairly extreme example of a so-called "girlie type" magazine, purchased in a dingy book store without difficulty or question and without high price. It also is a sample of a universal product. The pictures are rather more determinedly suggestive than the prose, which includes stories and articles carefully calculated to be salacious and suggestive without, however, the detail of *Fanny Hill*.

5 and 6. These two items are samples of what anyone would

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regard without question as hard-core pornography. 45 Item 5 consists of a mimeographed story, miserably written, of the sexual experiences observed or experienced by the protagonist. It is a type of material not commonly available in bookshops, but is of the sort seen in locker rooms or likely to be handed about on occasion among high school boys. A series of detailed descriptions of sexual activities, it differs from *Fanny Hill* in two essential respects, other than age: first, it is very poorly written, and second, it is physically grubby, not nicely published or handsomely turned out.

The last item is a group of cartoons involving familiar comic strip figures engaged both in normal and perverted sexual activities.

### B. The Experts

Two panels, each of three experts, reviewed the materials. One panel was drawn from Arizona State University at Tempe and one from the University of Illinois at Champaign-Urbana. Each panel included two professors of literature and one psychologist. Since the names are immaterial, I shall identify the four professors of English in the order of the two universities named as Experts 1 through 4 and the two psychologists as Experts A and B. Each would unquestionably be accepted as a qualified expert in any trial arising in his respective area or, indeed, in any part of the United States—they are a genuinely distinguished group.

Professor 1 has his B.A. in the classics, his M.A. in comparative literature, and his Ph.D. in English. He has been a professor of English for more than twenty-five years and is widely regarded by his fellows and by the community as truly distinguished in his field. Professor 2 has a Ph.D. in classical literature from one of the country's great universities and for five years was head of the English Department of a large university. This expert has produced some significant scholarly translations. Professor 3 also has a Ph.D. in English and has many years of teaching experience at both the undergraduate and graduate levels. Professor 4 holds the usual three degrees and has specialized in 18th and 19th century English literature with a minor in comparative literature. He has published numerous articles and is a consultant to a national educational group.

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Psychologist A has a Ph.D. in Clinical Psychology and is a Diplomate in the American Board of Examiners in Professional Psychology. He is director of a psychological clinic and has often qualified as an expert in legal proceedings, at which he is one of the ablest expert witnesses I have ever seen in any field. Psychologist B is well trained with all the academic trappings and is the director of an important university program which is immediately relevant to the broader aspects of this problem and which he could not hold except as an esteemed expert.

C. The Questions Presented

Answers were needed and the questions were presented in 1963, prior to the most recent legal developments. Hence the questions do not fit perfectly the most recent cases although they come very close. The questions put to the experts of course do not go into the detail possible upon oral examination and must be regarded as a sort of written deposition or interrogatory.

There were nine questions:

1. Assuming your own definition of literary merit, does this writing have literary merit? This question was intended for the professors of literature. As will be developed below, there is some confusion as to the precise relevance of literary merit to the subject at hand, but in any case it is assumed to be a proper question for a literary expert.46

2. Do you believe that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest, defining this as a tendency to excite lustful thoughts?

3. Do you believe that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest, defining this as a shameful or morbid interest in nudity, sex or excretion and, in addition, as going substantially beyond customary limits of candor in describing or representing such matters?

This is the definition as given by the American Law Institute.47 It is far clearer than the Supreme Court’s definition, and yet may well be the same thing. The Supreme Court itself has said that its definition is intended to be a shorthand for the American Law Institute’s

46A foremost instance of acceptance of literary standards is Halsey v. New York Soc’y for Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922).
The difficulty lies here in the circumstance that the professor of literature and the psychologist must, within the scope of their expertise, divide this question. Presumably the psychologist has an opinion worth having as to whether the given material appeals to a "shameful or morbid interest in nudity, sex or excretion," while the opinion of the professor of literature on this score is not much better than that of any well-informed person. On the other hand, the professor of literature is better qualified than the psychologist to express a view as to whether the writing goes "substantially beyond customary limits of candor" since the psychologist might very well not know what those customary limits are.

The excellence of this ALI definition is that it frankly recognizes and operates from the fundamental tabu hypothesis on which the whole law of obscenity is built. Since a key element in the definition is whether or not the material is offensive, a definition in terms of "customary limits" becomes a fair measure of what is offensive.

4. A leading commentator described pornography as material as to which "the purpose is to stimulate erotic response, never to describe or deal with the basic realities of life." Assuming this to be a valid proposition and applying it to the material at hand, do you regard this material as pornographic?

5. The same commentator has suggested as an alternative test, material as to which "the purpose is to stimulate erotic response, never to describe or deal with the basic realities of life, in a manner which is patently offensive to current community standards." Is your result any different if this limitation is added, and if so, how?

This and the next two questions introduce a new element into the problem, one which seems to writers and artists the most important of all. This is the question of the intent with which the work is done. In this view, acceptability depends upon whether the creator of the material was in fact seriously seeking to create a work of art or literature; and it is fairly well accepted that this can be evaluated by an expert. As Mr. Cairns puts it, "There is no difficulty in disting-

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48 In Roth v. United States, 354 U.S. 476, 487 n.20 (1957), the Court, in giving its definition expressed agreement with the American Law Institute's definition, but there has been severe doubt as to whether the two are really co-extensive. The American Law Institute's own doubts are expressed politely in Comment, supra note 2, at 9; Lockhart, Address, supra note 2, at 291-92.

49 Question Four is based on Lockhart & McClure, Censorship of Obscenity, 45 Minn. L. Rev. 5, 58-68 (1960). Question Five is taken from a letter to the writer by Dean Lockhart.

50 Cairns, supra note 43, at 87.
uishing between those books the impulse behind which is literary and those whose impulse is pornographic. Any man with a modicum of literary knowledge can do so without hesitation." Art, as he says, "has its own morality, its own integrity."61

The relevance and proper weight to be given to intent is discussed below; but assuming it to be relevant, it is the proper business of the literary experts to evaluate it. I doubt that the psychologists have anything of great importance to contribute here, although perhaps their powers of diagnosis reach to hidden motives.

6. Does the work appear to you to be a work of serious intent as distinguished from being merely a kind of pandering or commerce in the obscene, or is it in some third category, such as non-obscene entertainment?

This puts the intent question in terms of the purpose as Chief Justice Warren develops it individually in Roth,62 and as it becomes the majority view in the current cases. This is whether the dominant purpose of the whole publication seems to be a serious work or pandering. The first alternative—the serious intent versus the commercial obscenity—is Warren's thought. But a third alternative has been added to the question. Honest entertainment is neither of these polar alternatives and is at the same time a thoroughly legitimate business.

7. If this particular work were suppressed, would an average adult American be deprived of ideas, news, or artistic or literary or scientific communication which you believe he ought to have? This is the "redeeming social importance" issue which is given such vital independent standing by the Brennan opinion in the current cases. This is a matter on which the literary expert can express a view only on a small portion—the matter of literary excellence. Beyond this, neither his opinion nor the psychologist's is necessarily more valuable than anyone else's.

8. Do you believe that the widespread dissemination of this material among adults would do any harm, and if so, how? This is intended for the psychologists. Presumably the professors of literature have a secondary contribution to make in the sense that by comparing materials in question with materials disseminated in the past, they may have sufficient historical knowledge to evaluate probable consequences; but primarily this is not their department.

61 Id. at 85.
9. If you conclude that one or more of these readings is obscene, how do you distinguish it or them from the others? (For this purpose, one comparative answer will cover all readings.) This question was intended for each group to deal with the difficulties of distinction and of definition, to see whether it felt that it could comfortably sort the work into piles of the acceptable and the non-acceptable.

III. EXPERT RESPONSES

A. Fanny Hill.

Professor 1 thought this work had no literary merit—just a fair degree of technical skill. Professor 2 thought it had some literary merit. On the other hand, Professor 3 felt that, "There is no question that the novel has literary merit. It is well written, well constructed, frank." Professor 4 believed that "Literary merit may be defined either as writing which is skillfully done in order to produce a certain effect (tone or meaning in the work and emotion in the reader) or as writing which offers insights into the nature of character and human life, including both human emotions and various social relationships. Fanny Hill possesses distinct literary merit in the first definition; markedly less in the second. Yet the main character is believable, after all, and a certain group of insights are presented."

Thus the experts divide. This does not mean that the system of soliciting expert opinion is ineffective; it means that in the particular instance we have come to a hard case, as is illustrated by the division of the Supreme Court Justices concerning this same book. Justice Douglas found merit where Justice Clark found none. On the other hand, the misfortune of the Fanny Hill trial is that the State left the field of experts entirely to the defense, offering nothing itself. Perhaps had a different case been made, a different result might have been reached.

Taking questions two and three together, these being essentially whether the dominant theme of the material taken as a whole appeals to the prurient interest, three of the four English professors concluded that it does. The fourth believed that the work would appeal to the prurient interests of some, but that on the other hand, it would neither corrupt nor shock an average reader. Psychologists A and B believed that the work would unquestionably excite lustful thoughts. However, as one of them added:

Whether or not the material is shameful or morbid is another matter,
since in this work there is little emphasis on the morbid aspects of sexual experience even though much of it could be described clinically as aberrant. I think it was Anatole France who said that all sexual aberrations are strange but of these the strangest is chastity. This book does go beyond the customary limits in describing sexual behavior but it is done with a style that does not ignore the more serious problems of the characters or their life situation.

The expert response to question number four—does the book have a purpose “to stimulate erotic response, never to describe or deal with the basic realities of life”—proved conclusively that this is a bad question. The book does both—it stimulates erotic response by dealing with some of the basic realities of life. However, when the fifth question’s further element is added, as to whether dealing with the basic realities of life is in a manner “patently offensive to current community standards,” most of those answering found it clearly offensive.

As to whether the book has a serious intent or is merely a kind of pandering to the commerce in the obscene, the book was well described by one of the psychologists as “a piece of erotic entertainment.” As Professor 1 put it, “Three guesses—profit, sick mind, or delight in being a real devil. I’d lay a small bet on the last.” Professor 3 thought that it is in the third category of “amusing, amoral works intended neither to corrupt readers nor to chastise vice.” Professor 4 placed it in the category of “commerce in the obscene” if we are restricted to three categories, but finds it close to the edge of becoming “obscene literary entertainment.” Psychologist B thought it “a vehicle for commercial sex rather than a serious work of literature.”

Professors 1 and 2 thought it would be no loss if Fanny Hill were suppressed. Professor 3 thought that the suppression of this book would open the way for the suppression of others. Professor 4 made his answer depend upon utility to whom—thus a student of 18th century life might find some value here but he thought that “little or nothing would be lost if the book were denied the ‘average adult American.’”

Neither psychologist thought that the widespread dissemination of this book among adults would do any harm. As one of them put it, “In adults the arousal of emotion does not necessarily mean that it had to be acted upon or that if it is acted upon it must be carried out in a deviant fashion.”
In summary, the overwhelming, though not quite unanimous, conclusion of these experts is that applying the American Law Institute or the United States Supreme Court standards as they stood in 1963, this book is pornographic; thus they conflict with the majority of the Supreme Court. If the test is offensiveness to current community standards, most of them thought it offensive. Although they divided as to whether it has literary quality, most of them thought that it has no serious literary intent. In terms of practical consequences, none of them thought that its loss by itself through suppression would be a serious social loss to the community, except as it may become a precedent for suppression of other and better works. Neither of the psychologists believed that there would be any harm from its dissemination. On the other hand, one of the professors of English here made the point quoted extensively earlier that the widespread circulation of the book would generally cheapen the moral standards of the community.

B. Tropic of Cancer

Three of the four professors of English believed that this work has serious literary merit. None of the four thought that it oversteps the bounds of the Supreme Court’s definition of obscenity in terms of appeal to a prurient interest and the excitement of lustful thought. For the most part they found it a tedious book. As Professor 1 said, “I think the average person would read it only for ‘indecent’ passages, but I shouldn’t think he’d find it very stimulating. I’d say the dominant theme was a sort of disordered egocentricity.” As one of the psychologists said, “The attitude of the writer is not shameful or morbid in approaching his material. These would have to be attitudes brought to the work by the reader.”

On the other hand, a different result was reached when the American Law Institute definition was utilized. Professors 1 and 2 felt that Cancer does go beyond the customary limits of candor. All believed that the purpose of the work, within the limits of Miller’s eccentricities, is to deal with what he thinks are the basic realities of life, although he may be doing so in a manner patently offensive to current community standards. All four acknowledged the serious intent of Miller—as Professor 1 said, “It is a nasty thing to say about the author, but I believe it is a work of serious intent. Of course, I could easily be wrong.” Two of the professors thought that there would
be no loss if the book were suppressed and two thought that there would.

On the effects, neither psychologist believed that there would be any harm from the widespread dissemination of the book. As one of them said, "This is a clear-cut case in which the wide reading public of this book has been created artificially by the unwitting advertisement it has been given through its attempted suppression." Professor 1 said, "A teacher of literature has to believe that ideas are to some extent contagious, so I can't say No. But I think the book is too dull to have much effect on most people, and that if it leads anybody astray it will be by encouraging selfish futility rather than prurient interests."

In summary, utilizing all going definitions of obscenity, this book was generally regarded as beyond the customary limits of candor, but not as otherwise obscene. If one may attempt to diagnose the common denominator of the responses, the belief is that this is a very bad book but one of serious intent in which its erotic orientation is redeemed by the integrity of its effort. 53

C. Paper Bound Book

The unanimous conclusion was that this book has no literary merit at all. Five of the six believed that the book as a whole appeals to a prurient interest and has a tendency to excite lustful thoughts, although one believed it to be such a bad book that it probably would fail in that purpose and the other thought that its sadism probably would obscure its sexuality. Applying the American Law Institute's definition, all four of the professors of literature believed that it fully qualifies as an obscene book. One of the psychologists found it so bad that it has not even a sexual interest. The other observed

that, "it is perhaps its flippant attitude towards sex, its denial of the depth of human relationships that is its most damaging aspect."

With this book we pass beyond the group of those which have any possible pretension of dealing with the realities of life—this one is pure fantasy. Hence the dominant response of the experts was that this is a book whose sole purpose is to stimulate erotic response. Against this must be balanced the comments of those who found the book so poor that it is unlikely to evoke any response. All agreed that this is the straightest kind of pandering or commerce in the obscene, and nobody thought that the community would suffer from its suppression.

We reach then the question of whether its dissemination will do harm. Again, the psychologists thought not. As Psychologist A put it, "It seems to me that the implication in this question is always this: given a normal, healthy adult, whose life experiences have not produced serious sexual distortion, would the reading of a volume of this kind produce a morbid sexual frame of mind or a proclivity toward perversion? The answer must be No. The morbid appeal of perversion is always to the perverted and the person who does not already have tendencies in this direction will not all of a sudden be changed into a sexual monster."

D. Magazine

Nobody thought the girlie magazine has any literary merit. Professors 1, 2 and 3 thought that the magazine is obscene under the Supreme Court and the American Law Institute standards. Professor 4 noted a great difference between the prose and the photographs. He found that the writing stays rather carefully within the bounds of what someone thought was legal, leaving it to the pictures to sell the publication and excite the purchaser.

All six experts concluded that the purpose of this publication is to stimulate erotic response and not to deal with the basic realities of life. As to whether it would have that effect, Psychologist B observed that this would depend upon the age and sophistication of the reader. Professor 4 distinguished when asked to decide whether the purpose is to stimulate erotic response and when asked whether it carries out this purpose in a manner "patently offensive to current community standards." He found it not "patently" offensive to "current" community standards.

Most of the experts thought that the purpose of the work is, as
one of them put it, "pure commercial pandering" although some think it may fall at the edge of entertainment. No one supposed that there would be any social loss if its circulation were eliminated. On the other hand, neither psychologist believed that there would be any particular harm from its widespread dissemination.

In sum, the experts regarded this publication as obscene by the standard definitions; but, again, they did not suppose that someone would read this magazine and thereupon commit a sex crime which he would not otherwise commit.\textsuperscript{54}

\textit{E. and F. Mimeographed Booklet and Cartoons}

None of the experts supposed that the two samples of hard-core pornography have any literary merit. All agreed, as one of them said of one of the publications, "It appeals in the crudest way to a prurient interest." None believed that any have any bona fide or serious intent—in short, these are dirt for dirt's sake in the clearest possible way.

We then reach the consequences of the dissemination of the material. We are dealing with the grossest kind of obscenity to be found in any market anywhere. Neither psychologist thought that the widespread dissemination of the material among adults (with an emphasis on the adults) would do any harm. Psychologist \textit{A} said that, "Since adults already have their sexual orientation well crystallized and are no longer impressionable, even this material is not likely to do harm." Psychologist \textit{B} believed that the materials are too crass and unimaginative to have any effect at all. Psychologist \textit{A} also said:

One distinguishing feature in the acceptability psychologically of pornographic material is the extent to which it appeals to perversion and to a destructive form of sexual functioning as opposed to a mature genitality. Much of this material makes an appeal to sexual perversion in an extremely crude and insensitive way. However, the element of perversion itself is probably not reason for suppression of printed material. Proust, which as far as I know has never been on any suppressed list, is among the most perverted of literature and yet has always been considered a work of literary merit. Similarly, "As You Like It" is filled with scenes of clear-cut homosexuality and homosexual suggestiveness, and yet no one thinks it should be suppressed. Indeed

\textsuperscript{54} It is well established that nudity without more is not obscene. Mounce v. United States, 355 U.S. 180, \textit{reversing} 247 F.2d 148 (9th Cir. 1957). This is so even if nudity is used for homosexual stimulation. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); One, Inc. v. Olesen, 355 U.S. 371 (1958), \textit{reversing} 241 F.2d 772 (9th Cir. 1957).
it is remarkably enough considered ideal high school freshman reading material just at an age when the students themselves are likely to be suffering from a degree of confused sexual identity. Furthermore, suppression of this kind of material seems to be attacking the problem from the wrong end. The appeal of this material is to the perverted, the neurotically frustrated, and the characterologically immature, and it is better to attack the source of the interest than its symptom.

Yet while the psychologists concluded that the dissemination of this material would not do harm, all four of the English professors thought to the contrary, at least as to persons already disordered. As Professor 3 put it, "I believe that a booklet as filthy and depraved as this could arouse the worst instincts in readers lacking moral stability."

G. Comparison and Comment

The difficult question becomes, how do these experts sort these matters out and tell them apart? The one expert who thought that both *Fanny Hill* and *Cancer* were not pornographic made his distinctions this way:

The cartoons and the mimeographed booklet are pornography at its crudest. They have no literary or artistic merits and pander to the lowest desires and instincts. The paper bound book and the magazine are cheap, trashy, even nasty. They are only a step away from pornography if they are even that. *Fanny Hill* and *Tropic of Cancer* cannot reasonably be considered pornographic. Both have genuine literary merits and valid artistic purposes.

Another of the professors of English summarized thus:

I'd say that the last four [paper bound book, magazine, mimeographed booklet, and cartoons] are unquestionably obscene, three obviously for profit, and the mimeographed book possibly for that, more probably a sick fantasy. *Fanny Hill* shows much more technical skill and intelligence, but otherwise belongs in the same class. If anything should be censored, all these should. Miller's book does not seem to me pornographic in intent. I'd call it the honest expression of a worthless mind. I can't see how it would do anybody any good, but if we censored this I don't know where we'd stop.

The distinguishing line for the other two of the professors of English was the intent of the author. As one of them put it:

Regardless of the difficulties in establishing an author's intent, it seems to me possible to make judgments about the apparent intent of the work as it exists before us. And it is on the basis of this apparent intent that
I distinguish obscene writing from other kinds. If a work apparently exists for no other reason than to appeal to a prurient interest as defined in Question No. 2, it seems to me obscene. If, however, certain disputed passages or even words contribute—in the total context—to the intelligent development of character or to the presentation of "life," which I take to include the nature of man and the nature of man's various relationships with his society, then obscenity ceases to be the issue, perhaps even ceases to exist. It is on this basis that I exempt Tropic of Cancer, crude and even disgusting as it may be; place Fanny Hill on the borderline; and place all the other exhibits in the category of the obscene, regardless of the degree to which they are in fact explicit or the degree to which they technically exceed "customary limits of candor."

Panels of experts from two universities predominantly concluded that five out of six of the sampled materials are obscene. Of those five samples, two are gross extremes of pornography, not in common exchange; they are what is described by Lockhart and McClure as "so foul and revolting that few people can contemplate the absence of laws against it." The other three are either typically or specifically available to anyone who wants to buy them in most if not all American cities of any size. Any adult—any young adult—and probably any child mature enough to wish to make the purchase can probably get his hands on most of them. If these samples are, as the experts predominantly concluded, technically obscene, then this country is being flooded with obscene literature without any real working controls. On the other hand, under the Supreme Court standard, two of them (Fanny Hill and the magazine) are not obscene.

I must note that I do not personally take quite so gloomy a view as the panels assembled. I have no serious personal doubt but that Fanny Hill is a pornographic work. It is said by John Ciardi in the Saturday Review to be as plainly a pornographic work as he has ever seen. Granting that the judgements are subjective, I do not myself see much difference but the binding between it and the plainest

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56 For documentation, see Kilpatrick, op. cit. supra note 15.
57 Ciardi, Book Review, Saturday Review, July 13, 1963, p. 20. Mr. Ciardi says with great accuracy:
With all scholarly details in place, however, and with all incidental stylistic merits recognized, the book still remains an overt piece of pornography. It was conceived and written with no intent but to titillate the reader by ringing the sexual changes in minute (and yet evasive) detail, the author's catalogue of sexual variations being limited only (and considerably) by his own lack of imagination. (He might at least have read the classics and given Roman substance to English mannerism). With Cleland's series of sexual encounters there is no effort to depict the lives of men and women
hard-core pornography in the collection. With all due respect to the Justices of the Supreme Court taking a different view, the difference between so-called comic book hard-core pornography and *Fanny Hill* is solely that one verbalizes what the other pictures. The difference between having the experiences explained in running prose, line after line, book style, or in a balloon over a comic figure's head, seems to me not much. If Putnam can publish this, then there is very little meaningful limitation on the dissemination of obscenities in the United States. Samples 3 and 4, however—the paper bound book and the girlie magazine—I find on a troublesome margin. They occupy the point of the systematically and determinedly salacious; whether they are over the line into obscenity, I am not personally comfortably sure. Certainly they serve no useful purpose and certainly they are typical of a vast amount of current publication.

**IV. The Relevance of Merit and Intent: The Relationship of Experts**

The primary function of a literary expert in an obscenity case relates to the evaluation of the literary merit of the work and to the determination of the intent of its author. While there is no doubt that in a disputed case a literary expert is a helpful guide as to each, there is very great doubt as to the relevance of either.58

There is no reason why a work cannot be both meritorious and obscene. Great writers have on occasion tried a hand at the erotic, and their skills are much the same as when they are at tamer stuff. The older writers, in an era before obscenity was recognized as a social offense, made no distinction at all, so that there is no difference whatsoever in the literary merit of Chaucer vulgar and Chaucer sedate or Boccaccio bawdy or merely entertaining.

Indeed literary skill may heighten the very factors which make

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58 Under the strict "hard-core" approach experts may be superfluous because no expert may be needed on the obvious. It does not take an expert to tell that a dirty cartoon book is a dirty cartoon book; no one would be in much doubt about it. In these cases, which involve a very large fraction of the challenged literature, it would be a waste of time to involve experts.
for obscenity. If the elements to be measured are appeal or incitement, the talented hand will do considerably better with it than a clod. For illustration, half our experts thought that Fanny Hill has some literary merit, though only one gave it much, but almost all of them thought it an obscene book.

I suggest therefore that literary merit ought to be important for some purposes in obscenity cases, and that expert testimony concerning it may be significant, but not for the purpose of determining whether the work is obscene. For this purpose it is simply irrelevant.

This is the view of the Japanese Supreme Court on their translation of Lady Chatterley. The Japanese court fully recognized the artistic quality of Lady Chatterley, finding it not only in the book as a whole but also in the various descriptions of sexual activities. However, the court said:

Art and obscenity are concepts which belong to two separate, distinct dimensions; and it cannot be said that they cannot exist side by side. . . . [T]he obscene nature of the work cannot be denied solely for the reason that the work in question is artistic literature. . . . No matter how supreme the quality of art may be, it does not necessarily wipe out the stigma of obscenity. Art, even art, does not have the special privilege of presenting obscene matters to the public. Be he an artist or a literary man, he may not violate the duty imposed upon the general public, the duty of respecting the feeling of shame and humility and the law predicated upon morality.

Almost the same can be said of intent. Most of the experts, most of the thinkers on the subject regard intent as of crucial importance—the integrity of the work is thought to determine whether it is ob-

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60 For emphatic acceptance of this view and rejection of the opposite view of Judge Learned Hand, see the opinion of Judge Goodman in United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951). If I am correct, Judge Goodman is right and the opinion of experts is irrelevant to the issue of obscenity as a matter of literary merit; but it is very relevant to the affirmative defense.

61 Koyama v. State, 11 J. Sup. Ct. Crim. 997 (1957), reported in full, MAKI, COURT AND CONSTITUTION IN JAPAN 3 (1964); and discussed very helpfully in Tokikuni, Obscenity and the Japanese Constitution, 51 KY. L. J. 703 (1963). The principal opinion stresses as the key element of obscenity control a sense of what the Maki translation calls "shame," but which we might call privacy. The original Japanese word is "Shuchishin," which also means shyness or modesty, NELSON, JAPANESE-ENGLISH DICTIONARY (1962); and the theme of the opinion is the notion that the "nonpublic nature of the sexual act" is a "taboo" which may "gradually disappear," but which exists strongly enough at the present time to warrant legal protection. (This Japanese morality does not reflect Japanese culture at all points in its history any more than obscenity reflects a long-standing Anglo-American concept. Judge Mano concurs, giving illustrations from Japanese history when the sexual act was not considered "nonpublic." For a collection of lusty examples of Japanese pornographic art, see GROSBOIS, SHUGA, IMAGES OF SPRING (Nagel publishers, Geneva, Paris, Munich 1964).
scene. By its position on the relevance of pandering, a majority of the Supreme Court has in the current cases made this a vital element in determining whether a given work is obscene or not—in the Ginzburg and Mishkin cases, the obvious intent of the purveyors of Eros and the miscellaneous pamphlets to be as salacious as they can be is argued to control the definition of their conduct almost regardless of the nature of the material they were purveying.

As noted earlier, I applaud the pandering test as a genuinely useful, new contribution in this field without at the same time thinking that it disposes of all intent problems. Its major, underlying contribution is its recognition of the concept of variable obscenity—i.e., of the conception basically developed by Lockhart and McClure that something may be obscene for one purpose and not for another. The identical materials need not be classified for legal purposes in the same way when reported by the Kinsey researchers as when sold in a drug store.

The intent branch of the topic, now covered by the Court so far as pandering is concerned, needs tighter thinking than it has yet had in other respects. The Who and When of intent each confuse the simplicity of the artistic integrity approach. Is the social judgment concerning the dissemination in the 1960's of Fanny Hill and Cancer to be measured in terms of the intent respectively of an author who died two centuries ago or of the expatriate who spent years of his life creating his book for no apparent reward? The recent cases, by adopting the pandering approach, indicate that it is to be evaluated in terms of the intent of the publishing house which in the case of the dead author makes all of the money and which in the case of Cancer makes most of it. But what of the intent of the book seller who manages to classify the works on his shelves so that these two books stand next to each other, having in common absolutely nothing except an identity of appeal to most of his customers?


Except perhaps by Professor Kalven, who anticipates my thoughts on this subject in Book Review, 24 U. Chi. L. Rev. 769, 774-75 (1957), wording what I am here calling an "affirmative defense" as a "privilege." Professor Kalven in turn draws on Judge Jerome Frank's appendix to his thoroughly original concurring opinion in Roth v. United States, 237 F.2d 796, 801-27 (2d Cir. 1956). On the other hand, Professor Kalven treats merit as an element of the definition of obscenity in his Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 13.

The intent of the book seller is made a required element of proof in Smith v. California, 361 U.S. 147 (1959), discussed from this standpoint in Lockhart & McClure, supra note 49, at 103-08.
If the question is the intent of the author, this too may be a variable thing. The work by the Kronhausens on the theory of obscenity is in many respects the most useful and instructive lengthy work in the field. Its distinction between erotic realism on the one hand and pornography on the other may well be legally useful, and is in any case well developed—with a wealth of illustration. When the authors set out to write their books they may well have had the highest integrity of intent. One will perhaps be pardoned for doubting whether, when they concluded to permit their book to be put into a paper edition and sold in the drugstore trade, that intent was still dominant. Clearly at this point they are reaping a harvest based more on their illustrations than on their theories. If carried sufficiently to the point of pandering, this may be impermissible.

The intent talk overlooks the really necessary legal distinctions between general and specific intent. There are undoubted obscenities which are published with the highest of motives by cranks, fools, and perverts. A leading case on obscenity concerns a work written by a dedicated Protestant as an attack on the Catholic Church. Objectively considered, the resultant product is indisputably obscene, and yet the intent is nothing short of holy. There are numerous such "nut" works. Clearly if specific intent is required, these works are not obscene; and yet by any objective standard, they are.

The answer, I think, is that, apart from pandering, intent by itself is not significant. The importance of intent is as a subdivision or ingredient of the judgment on artistic merit. Good intentions do not make a book or a painting a work of art, but the intent is an important element in determining the worth of the resultant product.

The thought just developed is that literary merit has nothing to do with whether a work is obscene or not, and that intent is simply

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For illustration of a book I look forward to not reading, see Seaver, Writing in Revolt (1963), currently offered by the Mid-Century Book Society and which from its advertising appears to be a systematic collection of what the publisher describes as "uniquely dirty." 57 Mid-Century Review 4, 29 (1963).

Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). The argument in this case quotes Lord Eldon as believing that Paradise Lost would be legally offensive if its object were not "to promote the reverence of our Religion." Id. at 366. Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 656 (1964), gives an illustration of a most sincere and most happily libidinous passage in which St. Jerome appeals to the virgin Eustachion to become a nun and enjoy a marriage to Christ.

As Judge Woolsey puts it, in determining whether a book is obscene the decision must be "irrespective of the intent with which it was written." United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933); Lockhart & McClure, supra note 36, at 348-50, regard intent as not conclusive.
a subdivision or element of the judgment on literary merit. It follows
that intent also has nothing to do with whether a work is obscene.

But this does not mean that merit and intent are not relevant to
the ultimate judgment to be made. Far from it—they may be con-
trolling. The ultimate question is not whether the particular work
is obscene, but whether it shall be suppressed, not whether a particular
book seller has sold an obscene book, but whether he should be
punished. There are really two judgments to be made. The first is
whether the work is obscene as defined by the authorities; i.e., does
it have the forbidden appeals, shock the common sense of candor,
and so on. The second judgment is whether, even assuming that
these questions are answered in the affirmative, the merit of the work
is so great that its negative qualities should be overlooked. The
literary merit, and with it the intent, are what is in law regarded as
an affirmative defense. What we are really saying about Chaucer or
about Boccaccio is that here may be an obscene book but it is a
very, very good one, so good that its quality is more important than
its deficiencies. We are saying that society would lose more by the
suppression of this work than by the injury to its tabu standards if
it is allowed to circulate.68

In current terms, this is particularly true in relation to Cancer.
This is a book which is obscene by any knowable standard, but the
plain integrity of the work redeems it. It may be—it is for me—a
book too dull to read but it so clearly is an honest craftsman's try
that each expert consulted here, who considered it, would regard it
as a social loss to suppress it.70 On the other hand, Fanny Hill does
not have clear enough merit to rescue it from a contrary judgment.

In advancing this view, I am consciously following the views of
Justices Clark and White in the recent cases and not those of Justices
Brennan and Fortas and the Chief Justice. The precise distinction

68 The approach I am taking here is in accord with the English Obscene
Publications Act of 1959, 7 & 8 Eliz. 2, c. 66, which makes merit a defense. My
position in this regard is the flat opposite of the American Law Institute's Comment,
supra note 2, at 34-35, which rejects this whole approach as unconstitutional;
but in this one instance, I do not believe that the eminent Reporter's materials come
even close to supporting his position. The review I suggest seems to be supported
by Judge Learned Hand in United States v. Levine, 83 F.2d 156, 158 (2d Cir.
1936)—"salacity" of the work must "outweigh any literary, scientific or other
merits it may have in that reader's hands; of this the jury is the arbiter." This
is precisely the approach taken by the Treasury Department in exercising discre-
publications for recognized merit.

70 This is the essential theory of the decision upholding the book as non-
obscene in Attorney General v. Book Named "Tropic of Cancer," 345 Mass. 11,
184 N.E.2d 328 (1962).
between them is here: the Brennan test of obscenity has three elements, each standing absolutely independent of the other; first, the dominant element of prurience; second, offensiveness; and third, the total absence of redeeming quality including literary quality. Justices Clark and White think that the literary quality is a factor in determining whether the dominant element is prurience. By this merger of conception, the one can be balanced against the other. This approach accords with the view of a later Japanese decision than that quoted above, holding that a work's "literary quality or philosophical quality" may mitigate the determination of what would otherwise be objectionable.\(^1\)

The practical difference between the Brennan approach and the Clark-White approach is illustrated in *Fanny Hill*. The book is as totally dedicated to the appeal to prurience as anything can be—it has lived for this purpose alone for two hundred years. Certainly no one would choose it very seriously for the sake of the story or for the skill of its expression or as a serious description of 18th century London; as has been noted, Justice Clark makes absolute hash out of its literary pretensions. Yet it is not totally without literary skill in the sense that a dirty postcard might be; it is at least passable writing. If no more is required, then under the Brennan test the book clears; while if the exceedingly low level of literary accomplishment is balanced against other factors, then the book fails.

On the first judgment—whether the book is or is not obscene under the accepted standards—the literary expert is of some value. Insofar as a notion of common standards of candor is involved, he presumably knows them as well as any other expert. It is on the affirmative defense of merit, however, that his value peaks. He is able to see the relationship of the challenged work to the general stream of literature and to help guide the factfinder as to whether the merit of the work is great enough to be worth putting up with it.

\(^1\) Tokikuni, *supra* note 60, at 707, reporting State v. Ishii, 318 Hanrei jiho 3 (Tokyo D. Ct., Oct. 16, 1962), on the Marquis de Sade, *Histoire de Juliette* (1792). The passage quoted above is dictum. For purposes of determining the nature of the appeal of the work to persons likely to read it (in response to the claim that it would be seen only by specialists), the court examined the class background of the persons on the publisher's subscription list and the persons who had checked the book out of the library. It found that its use was not limited to any one class and that students, housewives and blue collar employees had been among the readers and found that the standard to be applied should be that of the average person. The court concluded that the description of sexual acts were so bizarre and fanciful as to be legally insignificant. I am indebted for help on the Japanese law to Professor Dan F. Henderson of the University of Washington School of Law.
V. The Unanswered Questions and the Experts

The foregoing discussion is all premised on the assumption that there both can and should be some control of the dissemination of obscene materials in the community, or at least that governments may constitutionally so conclude. Treating the matter historically, I cannot find any real relevance between the first amendment and this problem. I cannot believe that Jefferson and Madison intended to guarantee a merchant the right to make money by showing for a price the movements of a woman’s face in orgasm. Indeed, as it seems to me, it cheapens the greatest contribution to free government of the Anglo-American people to reduce it to a license to hold a peep show.

But the problem transcends historicity, which is properly only the start of inquiry. The contemporary question is, what should we do now? The real problem for the Supreme Court is to lay down sound policy in a difficult area. It is in this respect that the Court is, I think, doing only part of its job; and it is in this respect that there is a function for experts.

A. Social Consequences

In the current cases, only Justices Douglas and Clark are really facing and considering what sound policy should be. Justice Douglas asks why sex deviates, including masochists, should not be allowed to communicate with each other in symbols important to them. He asks by what right we can determine that the deviates’ social value is not as important as the majority’s social value. “‘Redeeming’” to whom? “‘Important’” to whom? Moreover, he asks, if people wish to enjoy ribald humor or locker room jokes, why shouldn’t they? They are permitted to do so without legal restraint in the locker room. Why should they not be permitted to print what they can say?

These are serious philosophical and social questions. They de-

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83 There is some allusion to problems of obscenity in Milton, Areopagitica, supra note 72, at 195. Milton notes that Ovid had been banished from Rome in his old age “for the wanton poems of his youth” but he describes this as really a political object and not as a significant precedent since “the books were neither banished nor called in.” There are also obscure references to what may have been supposed to have been indecencies, pp. 206-07, and passing references to society’s incapability to “banish all objects of lust,” p. 208; but this appears to allude to matters of thievery. Other references to books of a “sensuous” or “vulgar” or “chaste” nature seem to be 17th century word usages which have no relationship to this subject matter.
serve some answer. They deserve some deeper consideration of the problem of social tabus and offensiveness and privacy than the Court has given. Again we advert to the Japanese view of the same matter: "Be he an artist or a literary man, he may not violate the duty imposed upon the general public, the duty of respecting the feeling of shame and humility and the law predicated upon morality." Should there in truth be such a duty?

1. Incitement to Crime. A majority of the Court—seven of the Justices in recent cases—are not facing the issue of possible social harm from the dissemination of obscene material, and yet this is surely a vital element in the course of decision. Only Justices Douglas and Clark talk squarely of the problem of incitement to crime. Justice Douglas cites the general absence of solid proof that says literature causes sex crimes, and he cites clear illustrations to show that many a sex criminal may be stimulated by completely wholesome material. This includes illustration of, for example, a sex maniac inspired to commit his crimes by the movie, The Ten Commandments.

On the other hand, Justice Clark cites to substantial authority tending to show a direct connection between the literature of perversion and crimes of perversion.

Literature on this point is inconclusive. Probably the best study of the effect on conduct of prurience of nudes, observing genitalia, observing sex acts, lewd artistic stress and so on, comes to conclusions which the authors themselves define as "modest." On the...
other hand, one of these authors thinks that there is a social risk at least where "obscenity falls frequently and easily into the hands of the immature." Mr. Murphy, the leading authority for Justice Douglas, acknowledges that vicarious use of sexuality may be dangerous—"the means of misuse of sexuality by various means remains."70 J. Edgar Hoover expressly connects "the pornography racket" causally with criminal behavior.80

For myself I have no comfortable opinion on this point. Whether, for example, the pervert literature feeds the pervert act or whether both appetites come from the same source is simply not clear. I am hesitant to conclude that a state may not see fit to make up its mind on this subject on the basis of what information it has.81

be thoroughly fair. 18% of the psychiatrists and 27% of the psychologists solicited returned the report; probably those returning were sympathetic with the objectives of the committee. In any case, the psychologists overwhelmingly (114 to 1) reported that they had never had patients "whose behavior was otherwise within a normal range of exposure to sexually oriented literature." On the other hand, 9 out of 59 psychiatrists answered the same question in the affirmative, clearly a portion large enough to be disturbing; and no question was asked as to the relationship of such publications to patients whose behavior was not otherwise in a normal range. The Readers' Right, No. 3 (May 1966).

70 Murphy, supra note 76, at 670.

For an outstanding discussion of the related problems of crime and sex literature and their relationship to antisocial behavior, see various publications of Mr. Arthur J. Freund, a member of the St. Louis Bar and a distinguished protagonist of constitutional rights and civil liberties. Mr. Freund, as Chairman of the Criminal Law Section of the American Bar Association, served in 1947-48 as Chairman of a special inquiry concerning Motion Pictures, Radio Broadcasting and Comic Strips in Relation to the Administration of Justice. The present Chief Justice Earl Warren was at that time a member of the Freund Committee. Mr. Freund adopted the view that the constant repetition in "word and picture of bestial and degenerate scenes and characters make their deep impression upon the plastic minds of growing children and have their dangers for the never-too-mature minds of countless adults." Mr. Freund bluntly lays it on the line that the making of money by these means creates a grave and critical problem for the committee; his emphasis on commercialism may be an antecedent of the pandering approach which the Court, following Chief Justice Warren, takes in the current cases. While Freund fully recognizes the constitutional hazards and the general undesirability of control in the field of communications, he expresses the willingness to accept legislation if need be. The Freund Report expressly equates juvenile delinquency in at least some degree to the daily bombardment of children with publications exalting criminals and the depraved nature of their activities. For full texts, see 94 Cong. Rec. App. A152, A163 (1948); Freund, Motion Pictures, Radio Broadcasting and Comics in Relation to the Administration of Justice, 31 J. Am. Jud. Soc. 171 (1948).

80 A leading bad effect view is Wertham, Seduction of the Innocent (1953), dealing particularly with sadism in comic books. Numerous illustrations are offered purporting to show clinically a causal relation between the readings and the conduct. The trouble is the problem of causality—a girl is promiscuous and reads 20 comic books a day, op. cit. supra, at 186-87. But which is the originating or causative taste, if either? For all these doubts, Wertham describes vast quantities of material which certainly cannot do anyone any good. See also for excellent factual references Censorship & Obscenity: A Panel Discussion, 66 Dick. L. Rev. 421 (1962); and see Report of the Select Committee on Current Pornographic Materials, H. R. Rep. No. 2510, 82d Cong., 2d Sess. 107-108 (1952) (Gathings Report), for testimony asserting a factual connection between obscene literature
Certain subsidiary problems warrant closer study and analysis:

(a) Until the Mishkin decision, it had sometimes been supposed that pornographic material needs to be divided between the merely offensive and the potentially inciteful. The lowest forms of pornography are probably for most persons more revolting than action-inducing. The Brennan opinion in Mishkin should put an end to the dispute as to whether certain pornography escapes being excessively appealing by being revolting. With reference to those publications which appeal only to deviates and which offend the average person, Justice Brennan says that this is immaterial for purposes of the law of obscenity:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest of sex of the members of that group.

This permits closer thought on the stimulus effect of pornographic publications on perversions and on normal sexual activity considered separately. The psychologists generally concur that perverts make books but that books do not make perverts. Doubtless the pervert would not usually be dwelling on such literature if he were not disturbed to start with. But whether and to what extent such literature increases the activities of persons already inclined to perversions enters areas of abnormal psychology in which I am not prepared to go, but in which I do not believe the psychologists have comfortable answers.

(b) The effects of pornographic materials on children are usually conceded to be undesirable. Some distinction needs to be made in ages; the effects on a pre-puberty child may be quite different from those on an adolescent. Nonetheless, even the best friends of complete license in the field of publication are inclined to distinguish the case of children, and to feel that the materials may have ill consequences for them.

But this whole approach assumes a rigidity or pigeonhole structure and anti-social behavior. The "consequence" literature is summarized in the current Comment of the American Law Institute's Model Penal Code, at 14-20, and is discussed in Gellhorn, Individual Freedom and Governmental Restraints 60-67 (1956).

83 For distinctions in responses showing a higher fantasy capacity and responses in 15- to 18-year-old children than those aged 12 to 15, see Cairns, Paul & Wishner, supra note 78. For a comprehensive account of the current status of obscenity legislation affecting children, see Comment, 54 Geo. L.J. 1379 (1966).
to the distribution of publications which is actually non-existent. There are not three islands populated respectively by normal adults, by emotionally disturbed adults, and by children, all separated by impassable oceans. Rather, all are jumbled together in the sea of population. The only practical question is whether a given publication is to be tossed into that sea.

At this point, my thinking fumbles. Clearly publication distribution cannot be controlled by the standards of children and the disturbed; but it may profitably be guided by consideration of them. Our society is not so organized that written material commonly available to adults can as a practical matter be kept from children. We are not dealing with something like alcoholic beverages consumed on the premises for which an I.D. card can be required. The law is essentially incapable of doing more than making a stab at controlling the first sale of written material. Controls based upon the age of the original purchaser will probably be ineffective if we mean seriously to keep particular written material out of the hands of children.

2. The Problem of Promiscuity. A problem which really matters is the problem of promiscuity in American life, and with it, the problem of the overwhelming sex orientation of the American community. I mean here not to speak about the problems of morality in the abstract, but rather very precisely of social behavior. One of the major misfortunes of contemporary America is the enormous number of grossly premature marriages based wholly on sexual attraction, resulting in prodigious numbers of divorces and the absence of family upbringing of children. With this is coupled the volume of illegitimacy. I leave it to the sociologists to describe the big picture. As a practicing lawyer, what I see as a by-product from my small vantage point is dark and ugly tragedy. The real social vice in obscenity is quite possibly not that it inspires to crime, but that it descends to callousness. As one of the experts quoted earlier says of one of the works, "It is perhaps its flippant attitude towards sex, its denial of the depth of human relationships that is its most damaging aspect."

"We cannot limit the adult population to reading only what is fit for children or pervertedly susceptible adults." Comment, supra note 81, at 7; for classical references to the children problem, see the opinion of Justice Douglas in Times Film Corp. v. Chicago, 356 U.S. 43, 78 (1961).

A current responsible estimate is that one out of every six girls reaching the age of 13 in Connecticut this year will be pregnant out of wedlock before the age of 20; and the national rate is thought to be equally high. Brecher & Brecher, Every Sixth Teen-Age Girl in Connecticut, New York Times Magazine, May 29, 1966, p. 6.
As another said of *Fanny Hill*: 86

I believe that [the widespread dissemination of this book] would contribute powerfully to the breakdown in conventional moral standards which has been underway for years. This breakdown may well be inevitable, but the novel certainly contributes to it by suggesting very skillfully that promiscuity is extremely pleasant, relatively free of real dangers, and potentially rewarding in money, social position, and even character development. Not least of the danger lies in the sophistication which the author himself displays. His perfect aplomb suggests that there is nothing to fear from the forces of conventional morality.

This is essentially the same as the view of Justice Harlan: 87

The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.

I have no doubt at all that these works have this effect. For purposes of reaching this conclusion, expert opinion is scarcely necessary. While the experts are making up their minds, it would be little short of preposterous to believe that education is largely based on what is read, and yet that this particular writing has no consequences. As Professor 1, quoted above, said, "A teacher of literature has to believe that ideas are to some extent contagious." If there is educational consequence when the teacher takes the kiddies to the firehouse, I must assume that there is also some educational consequence if, directly or by the written word, the teacher takes the youngsters to some other kind of house. 88

But this only opens a difficult question; it does not answer it. The real problem to which the Supreme Court has not addressed

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86 Lockhart & McClure, *supra* note 36, at 333-35, describe and discuss this approach as "ideological obscenity," and think recent Supreme Court decisions have discarded it, *supra* note 55, at 39-42.

87 Roth v. United States, 354 U.S. 476, 502 (1957). The Supreme Court appears to reject the view that promotion of promiscuity may be curbed; see Kingsley Intl Picture Corp. v. Regents, 360 U.S. 684 (1959). The New York Court of Appeals had upheld the restriction of the Lady Chatterley film because it portrayed "acts of sexual immorality ... as desirable, acceptable, or proper patterns of behavior;" but the Supreme Court held that a state cannot prohibit a film because it advocates adultery. Justice Harlan concurs in the result only because the particular film seems to him not one "inciting the commission of adultery." 360 U.S. at 708.

88 "Don't Say" (1966):

The world of mass entertainment, like other worlds, has both a habitual life and crucibles or high points; and although for a time the popculturist was uncertain how to distinguish the one from the other—how, that is, to separate mere occurrences (a season of Ben Casey, a mound of *McCall's*) from significant developments—criteria are beginning to emerge. The surest of these criteria appears to be that which defines a major popcultural event as *success in a declining medium*, or vice versa. And the girlie books plainly qualify as events when judged
itself and which does give room for expert study is whether the contribution of obscenity to the general consequences of promiscuity in the society are large enough to make any significant difference. One might very reasonably conclude—I am so inclined, until the experts can persuade me otherwise—that the total social wave of sexuality is so large that the obscene portion probably makes very little difference. In an age in which automobiles are sold by the phallic symbols on the radiators or in which the general stripe of books available are a paean in praise of fornication, Henry Miller may be immaterial whether he is obscene or not. The last two immature mothers with illegitimate children with whom I have had some professional contact have deeply unhappy lives, but obscenity certainly had nothing directly to do with it.

Somewhere in our society we ought to be entitled to have someone face directly the question whether obscenity seriously contributes to the degeneration of the actual lives of persons who are not inspired to actual crime at all. It may be that sociologists can make a contribution here.

But whether the experts could help or not, the courts ought to face this question. Social standards do not need to be flushed down the drain simply because the social scientists have not yet found methods of assessing the causal relationships of publication and behavior. This relation may be, as felicitously observed, a matter of "expert conjecture" with no demonstrated method of proving connections by this standard. The past decade, as is well known, was catastrophic for mass magazines. Between 1950 and 1960 thirty-two of the Country's two hundred and fifty largest publications quit the game—or merged. And as Woodrow Wirsig, editor of Printer's Ink, points out in Harper's, "of the magazines reporting their profit and loss statements in 1960, 39 percent showed losses." Aware of these statistics, no one can shuffle away the success of the girlie books into an easy generalization about rising literacy rates or normal patterns of production and consumption. Vulgar or shy or brash, U or Non-U, these magazines stand as counterthrusts to current reading trends, manifestations of a free impulse of public taste. And it is for this reason that their claim to regard, as puzzles worth more than a moment's effort to solve, cannot be dismissed out of hand.

As might be guessed, the key to the puzzle lies in the nature of the magazines' simplification of experience. The Playboy world is first and last an achievement in abstraction: history, politics, art, ordinary social relations, religion, families, nature, vanity, love, a thousand other items that presumably complicate both the inward and outward lives of human beings—all have been emptied from it. In place of the citizen with a vote to cast or a job to do or a book to study or a god to worship, the editors offer a vision of the whole man reduced to his private parts. Out of the center of this being spring the only substantial realities—sexual need and sexual deprivation.

Cairns, Paul & Wishner, supra note 78, at 1015, 1035-37, discussing valuably also the methodological problems of this research.

Mr. Robert F. Hogan, Associate Executive Secretary, National Council of Teachers of English, in an essay which is to be published jointly with this text by the University
between the erotic deluge and the observed evils of promiscuity, premature sex relations and marriages, and mounting divorce levels.

3. The Legitimate Claims of Eroticism and the Hazards of Suppression. Eroticism is defined in a standard dictionary as "the arousal of or the attempt to arouse sexual feeling by means of suggestion, symbolism, or allusion in an art form." So defined, it is clearly a legitimate part of human experience, fairly, properly and inevitably a subject of any art. Even straight pornography has its exponents in the name of intellectual freedom. Mr. Cairns, on the matter of social value, has said:

Although many writers have undertaken to show that pornography in itself is harmless and therefore ought not to be the object of governmental suppression, no positive case has been made out for it. The elimination of the crude and pathetic photographs and booklets which now constitutes the bulk of the trade would be no loss to the world whatsoever.

This is not true if a stream of even this much censorship will burst its banks and reach higher ground. The real fear is that by permitting the least amount of control, we will get Comstock back again, and cut into legitimate artistic portrayal of human experience or aspirations.

We need thought on probabilities, on the probability of anti-social conduct as a result of obscenities, or of deteriorating moral values, or of injury to children or of community outrage; and we need this in relation to the likelihood of artistic injury. We may legitimately ask the Supreme Court to consider these matters; and experts may have something of value to say about them.

B. The Future of Experts

If the Court holds to the standards of the recent decisions, experts will be make-weight rather than truly significant in future obscenity cases. As has been noted, hard-core pornography needs no experts. Passing this level, if the standard is "patent offensiveness," and if

of Illinois, observes that promiscuity is a factor of knowledge, impulse and opportunity. He believes that nothing in the passing scene has increased either knowledge or impulse; the big increase has been in opportunity. "In my own mind, the innocent villain in the piece is Henry Ford, and his mass produced automobile. If we wanted through legislation to reduce adolescent promiscuity, our hope would be in a law that prohibits any two people not married to each other from occupying the same car without the presence of a third party."

Cairns, Freedom of Expression in Literature, 200 Annals 76, 87 (1938).
Cancer or Fanny Hill do not qualify, experts will be hard put to find anything which will.

Under the majority approach, the more likely area for expert testimony is as to whether the work has any redeeming social value, including any literary value, no matter how little. As the Fanny Hill opinion shows, on the standard of literary values, the Court is accepting almost any kind of superficial literary palaver as expert testimony. The cases prove that one can find a professor of English somewhere to testify in support of anything, and by the lenient Court standard, this is apparently good enough. If Fanny Hill has literary merit sufficient to give it "redeeming social value," then substantially anything, so long as it is neatly printed and discreetly sold, passes the test. The only area left open for dispute goes to the quality and purpose of the merchandising, and on this there are no experts.

If, on the other hand, the approach suggested in this article and taken from the opinions of Justices Clark and White were adopted, literary merit would become an affirmative defense for a work otherwise obscene. In this approach, literary experts would have a genuine and important contribution to make. In this approach, too, sociologists might have something important to say on the problems of social value and their relation to publications.

The largest function of the experts is for a wholly different duty from any yet suggested. We have been talking of experts in court proceedings; but clearly the overwhelming bulk of these matters will never reach court level. They scarcely could, or both the prosecutors and the courts would have nothing else to do. Most of these decisions must be made informally, at a level of police law enforcement, short of prosecutions. It is impossible, unreasonable, and altogether undesirable to expect police officers to make decisions about bulky printed material.

We come back, as usual, to Mr. Cairns and his example. Each large community has its available experts. They can serve as boards to guide police action and to develop local standards of decision. These are decisions to be made, not by citizens' committees ignorant of literary standards and values, but by persons with legitimate claims to knowledge. The panels in Tempe and in Champaign-Urbana

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63 On the other hand, Justice Douglas at least is insisting on a very high standard of expert proof as to whether pornography does social harm.

64 The City of Chicago's Motion Picture Appeal Board has been established on this theory; see Mulroy, Obscenity, Pornography & Censorship, 49 A.B.A.J. 869 (1963).
could perfectly well be advisory boards giving occasional time to police guidance.

It is easy to expect too much of experts. A Superman is not going to flash down from the clouds to solve this, any more than any other, community problem. On past occasions, the experts have reflected every prejudice of their communities, and doubtless they will again. But if the determination of obscenity is to be attempted on any rational, as distinguished from a merely instinctive, basis, the experts can help the community to solve this problem, as well as it is likely to be solved.

And it warrants solution.