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JURISPRUDENCE

OBSCENE LITERATURE

America, today, is in the process of a moral disintegration. This process had its inception about 1917, when the United States entered its first major war. Taken from their homes, uprooted, and disoriented, young soldiers were led to excesses which they would have found inconceivable in their accustomed environment. The war was followed by the Roaring Twenties and "Flaming Youth." This was the prohibition era, when it became fashionable to flout the law. Automobiles came into greater use, and the term "parking" assumed a new connotation. The crushing depression of the nineteen-thirties brought other problems. A period of economic want and psychic depression, this era ushered in new materialistic philosophies. Many adolescents adopted the conclusion of materialism before their parents realized what it was: Where wealth and the flesh are the only ends in life, then wealth and the flesh at any cost. The social chaos and disorientation of World War II established the lowest standard of morality in the nation's history.

Each stage of immorality has complemented the other, and each has exceeded its predecessor in the number of people corrupted. Today's headlines scream in large block type of sex orgies, rape, juvenile gangs, vice clubs, narcotics rings, gambling syndicates, and murder, to name only the most frequent. Juvenile crime has increased at an almost unbelievable rate. All of this poses a grave problem in the United States. For history has recorded, too often to be ignored, that the collapse of great nations is heralded by a deterioration of morals. If this country is to keep its position as a world power, it can do so only through the moral fiber of its citizens. It would seem almost axiomatic, then, that a correction of moral laxity is essential to our continued existence.

The causes of America's moral weakness are legion and embrace all facets of modern civilization: social, economic, religious, and educational. This article is concerned with only one phase—modern literature in its book and magazine forms. Obscene literature, while certainly not new to our civilization, is now flooding the newsstands and bookstores of America with frightening regularity and with apparent impunity. It is perhaps a debatable point as to whether this deluge of indecent literature is the cause or the effect of America's moral disorganization. It seems indisputable that a steady diet of pornography will have any result but to implant in young impressionable minds an obsession with sex that did not theretofore exist. This obsession, growing stronger with each new magazine, with each new book, must eventually express itself in external behavior. This behavior is inevitably
degenerate and invariably criminal. J. Edgar Hoover, head of the Federal Bureau of Investigation, has stated:

"The increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built."\(^1\)

To combat the menace of obscenity in print, the National Organization for Decent Literature has been established under the leadership of the Most Reverend John F. Noll, Catholic Bishop of Fort Wayne. This organization has promulgated a code by which magazines and books are approved or disapproved.\(^2\) As of July, 1950, no less than 250 magazines and comic books failed to pass this test. An almost equal number of pocket size books and digest type of novels were similarly disapproved.

While the code of the National Organization for Decent Literature and the legal concept of obscenity differ in many particulars, it would seem impossible, nevertheless, that nearly 500 publications which are repugnant to decent men could be sold. For, while not completely uniform, practically every state has on its books statutes making illegal the printing, publishing, sale, distribution, exhibition, or importation of lewd, obscene, or indecent literature. Further, Congress has made such matter non-mailable,\(^3\) and has prohibited its transportation in interstate commerce by common carrier.\(^4\) To understand the failure to better enforce these laws, it is necessary to understand the problems confronting the courts. While these problems are many and varied, they may be summarized under two general headings: a confusion as to what precisely obscenity is; and a fear to exercise a judicial censorship that would violate the constitutional guarantees of the freedom of the press.

I

In 1868, Cockburn, C. J., stated the rule that has been fairly well agreed upon:

"The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose

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\(^2\) This code provides that all literature is banned which:

1. glorifies crime or the criminal;
2. is predominantly "sexy";
3. features illicit love;
4. carries illustrations indecent or suggestive; and
5. carries disreputable advertising.


minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

Most courts will follow this test, but many differences as to application inevitably arise. Further, the distinction drawn by the Massachusetts court has made interpretation of the test even more difficult, viz., that a publication is not within the statutory prohibition merely because it tends to coarsen or vulgarize youth if it does not manifestly tend to corrupt their morals.

In determining whether a publication falls within the statutes, the courts have first found it necessary to determine how much of a book or magazine need be devoted to obscenity before it has a tendency to corrupt, and how much obscenity may be allowed for the sake of “art.” The court held in Regina v. Hicklin\(^5\) that if any portion of the book was obscene, then the book itself was obscene. This view was upheld in Commonwealth v. Friede.\(^8\) The defendant in this latter case was convicted of selling a book in violation of the Massachusetts’ statute,\(^9\) which book contained certain obscene, indecent, and impure language, manifestly tending to corrupt the morals of youth. Only the obscene portions of the book were read to the jury. The Supreme Judicial Court of Massachusetts found no error in the trial court’s instruction:

“It makes no difference what the object in writing this book was, or what its whole tone is, if these pages that are complained of, the language that is set out in the bill of particulars, is in your mind obscene, impure, indecent, and manifestly tending to the corruption of youth, then you must find a verdict of guilty.”\(^10\)

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\(^5\) Regina v. Hicklin, L.R. 3 Q.B. 360, 16 W.R. 801, 11 Cox C.C. 19, 37 L.J.M.C. 89 (1868). In section 4 of its chapter on “Lewdness, Indecency and Obscenity,” American Jurisprudence enlarges on this definition: “Obscenity was indictable at common law, on the ground that what tended to corrupt society amounted to a breach of the peace, and various acts and forms of obscenity are made criminal offenses by statute or ordinance. The word obscenity cannot be to be a technical term of the law and is not susceptible of exact definition in its judicial uses, although it has been defined in a general sense as meaning offensive to morality or chastity, indecent, or nasty. The statutes concerning obscenity are usually broadly worded so as to cover all possible methods of bringing the attention of decent persons to obscene papers, pictures, or articles, the test ordinarily followed by the courts in determining whether a particular thing is obscene within the meaning of the statutes is whether its tendency is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it may fall. Another test of obscenity is whether it shocks the ordinary and common sense of men as an indecency.” 33 Am. Jur. 17. Cases are annotated in 81 A.L.R. 802, 24 L.R.A. 110, and 11 Ann. Cas. 306.


\(^7\) Supra, Note 5.

\(^8\) Supra, Note 5.


\(^10\) Commonwealth v. Friede, supra, note 8. The Supreme Judicial Court then went on to remark, “The seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might
This is no longer the prevailing view in the American jurisdictions, however. A majority of the courts now accept the criterion enunciated, not for the first time, in an opinion by Augustus N. Hand of the United States Court of Appeals for the Second Circuit:

"While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect."^{11}

A book (or magazine) may, under this ruling, contain portions which are patently obscene and yet be held not in violation of the statutes prohibiting obscene literature, providing that such passages do not flavor the whole tone or theme of the book. In reference to novels this may be a correct view, for there is nothing wrong with realism in literature. But if the author of such a book presents his passages as pure pornography or in an approving light, then the court's holding cannot be squared with any defined system of morality or public welfare. By surrounding pornography with innocuous material, the author or publisher is being given a freedom of expression which is destructive of moral society. However, if there are suggestive passages in a book which are not so presented, it is neither morally nor critically correct to condemn the book, even though a few of the sexually weak are affected, for, as Harold C. Gardiner, S.J., says, "portrayal is not an exhortation to emulation." It would certainly be more desirable, nonetheless, if modern authors would handle their themes with the same delicacy as did Emil Zola in his *Nana*.

But magazines fall into a separate category altogether. For partial pornography is easily found when photographic. The younger in his teens will not read Joyce's *Ulysses*, but he will and does devote a great deal of time to the "girlie" magazines which are in such great supply on any magazine rack. The danger is not so much in the bookstores as it is on these racks. And yet the courts, for want of better definition from their legislatures, are using the same tests and rules of law indiscriminately as to both magazine and book.

Perhaps no court has gone so far in allowing the sale of salacious magazines as has the Court of Common Pleas of Ohio for Hamilton County in *State v. Lerner*.^{12} The defendant was indicted in this case for selling a magazine devoted to the promotion of nudism, which magazine contained various photographs of nude men, women, and children, and for selling a series of twelve photographs of a female

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^{11} United States v. One Book Entitled *Ulysses*, 72 F. (2d) 705 (2d cir., 1934).

disrobing—the first of her fully clothed, the others of her at various stages as she disrobed, and the last showing a side view of her in the nude. The court held that the magazine was not obscene, since it did not emphasize sex in any way and did not pander to the lewd and lascivious for profit. Without passing on the merits of nudism, the propriety of placing such magazines on public newsstands is at best doubtful. So placed, they come under the scrutiny of adolescents who are impelled by a natural curiosity as to sex. It is a patent absurdity to contend that these youngsters read such magazines from a detached interest in the health giving benefits of the sun. They read them because of their stimulation of the sexual instinct. While the intention of the publishers of a nudist magazine may not be to pander to the lewd and lascivious, the actual result is in many cases the creation of sex obsession in the young.\(^1\) A constant dosage of nudity can be expected to arouse a preoccupation with sex in the individual, and this preoccupation, as we have said, often expresses itself in criminal behavior or in morally reprehensible acts. It would therefore seem to follow that magazines of this nature would fall within the test for obscenity given in the *Hicklin* case,\(^1\) and later cases. Nor does it matter whether nudity (or partial nudity) constitutes only a portion of a magazine or its whole content. For, unlike the novel, these pictorial magazines have no other purpose or no other effect than to arouse sexual passions, and only portions are necessary to this end.

With regard to the "Strip Tease Act," the twelve photographs of a female disrobing, the court set up a new test for obscenity. The representations must show a lack of neatness. Only where the actions are slovenly can they be termed obscene.\(^1\) Further, if people act in any particular way, then a pictorial representation of such acts is entirely

\(^{13}\) As Dr. James Walsh has said: "Just as soon as sex ideas find their way into the consciousness, an excitation of certain nerve centers is produced, and this by reflex but quite unconscious action causes more blood to find its way to the sex centers of the spinal cord, thus highly sensitizing them. These produce corresponding physical effects upon the external sex apparatus. The mental reaction consequent upon these physical effects attracts increased attention to the sex sphere and a tendency for the mind to become absorbed more or less completely in the process. . . . "Preoccupation of mind with sex thoughts make for emphasis of feelings to such a degree that their suppression becomes extremely difficult; and yet this reaction which takes place in the tissues of the body is not so important as that which occurs in the brain, if attention continues to be concentrated on sex subjects with such exclusiveness as prevents diversion of mind from taking place. . . ." Individuals who permit themselves to become addicted to sex thoughts act thereby upon their sex sphere, so increasing its sensitivity and irritability as to make it almost impossible for them to control their sex impulses." Quoted by John F. Noll, *op. cit.*, pp. 126-127.

\(^{14}\) *Supra*, Note 5.

\(^{15}\) "There is not anything distasteful to the eye in this series of photographs. This young woman is neatly appareled and she has a nice face and form, and her poses are graceful and her manner playful." *State v. Lerner*, p. 294, *supra*, note 12.
proper. People do undress, ergo, photographs of the act of undressing are proper.\textsuperscript{16} The fallacy of such a holding is apparent when one reflects on the many legitimate acts which are done only in privacy. Certainly the view of the \textit{Lerner} case cannot be accepted as law in any nation interested in promoting virtue among its citizens.\textsuperscript{17}

Works which have been held not within the purview of the statutes are books of a scientific nature,\textsuperscript{18} classical literature,\textsuperscript{19} and works of art.\textsuperscript{20} And it has further been held that the fact that children might accidentally obtain a pamphlet intended for doctors, nurses, or adults, would not bar its publication.\textsuperscript{21} These decisions are correctly accepted in most jurisdictions. But it is, nevertheless, the very reasonableness of these decisions that has allowed so much salacious material to reach America's newsstands. For no matter what the content of his publication, the defendant in a criminal action will claim immunity because (1) his book contains scientific information; or (2) it is great literature; or (3) it merely reproduces works of art. Such spurious claims are often successful because of the courts' reluctance or refusal to set themselves up as critics of art and literature.\textsuperscript{22}

\textbf{II}

Dr. Sámuel Johnson has well expressed the dilemma which is posed by censorship of literature:

"He published about the same time his 'Areopagitica, a Speech of Mr. John Milton for the liberty of unlicensed Printing.' The danger of such unbounded liberty, and the danger of bounding it, have produced a problem in the science of government, which human understanding seems hitherto unable to solve. If nothing may be published but what civil authorities shall have previously approved, power must always be the stand-

\textsuperscript{16} "This young woman gives a photographic presentation of a woman disrobing. There is not anything unchaste or shameful in a woman disrobing,—they do disrobe;..." State v. Lerner, p. 294, \textit{supra}, note 12.

\textsuperscript{17} A far better view is that expressed by Mr. Justice Philips: "To the pure all things are pure, is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. ... From that day to this civilized man has carried with him the sense of shame—the feeling that there were some things on which the eye—the mind—should not look; and where men and women become so depraved by the use, or so insensate from perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic." United States v. Harmon, 45 Fed. Rep. 414, 423 (1891).

\textsuperscript{18} United States v. One Book Entitled Ulysses, \textit{supra}, note 11.

\textsuperscript{19} In \textit{re Worthington}, 30 N.Y.S. 361, 24 L.R.A. 110 (Sup. Ct. 1894). The reason generally advanced for excepting classical literature from the statutes is that such books are not liable to reach the hands of the young.

\textsuperscript{20} People v. Muller, 96 N.Y. 408, 411, 48 Am. Rep. 635, 637 (1884).

\textsuperscript{21} United States v. Dennett, 39 F. (2d) 564, 568, 76 A.L.R. 1092 (2d cir., 1930).

\textsuperscript{22} "It is no part of the duty of courts to exercise a censorship over literary productions." St. Hubert Guild v. Quinn, 64 Misc. 335, 118 N.Y.S. 582, 585 (Sup. Ct. 1909).
ard of truth; if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmurer at government may diffuse discontent, there can be no peace; and if every skeptick in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors; for it is yet allowed that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious; but this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may be afterwards censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief."

After some two hundred years society has come no closer to discovering a solution than in Dr. Johnson's time. Americans are justly jealous of the Constitutional guarantees of freedom of the press contained in the First and Fourteenth Amendments. Such guarantees are essential to keep the nation free from tyranny. As Jefferson said, "Our liberty depends on the freedom of the press, and that cannot be limited without being lost." For the power to censor one implies the power to censor all.

Yet freedom of the press cannot be an unqualified freedom, for that, in its way, is as tyrannical as absolute censorship. Between these two extremes lies the method of which Johnson speaks, and which is approved by Blackstone. It is rooted in the common law, and has

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24 The First Amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of the press. There is no explicit prohibition in the Constitution forbidding the states from abridging this freedom, however. The Fourteenth Amendment provides in section 1, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There has been an unsuccessful effort made to establish the rights enumerated in the first eight Amendments as those privileges and immunities protected against state action. This view has never been adopted by the courts. Nevertheless, by judicial decision it now seems established that the due process and equal protection clauses of the Fourteenth Amendment preserve at least those basic and fundamental rights enumerated in the First Amendment against state action. In support of this, Mr. Justice Sanford said, in Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), "For present purpose we, may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."
26 "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what
become the general rule of our jurisdictions today. It amounts to this: a man may publish whatsoever he may will, but, if the matter be detrimental to the public welfare, then he will be punished. That obscenity is detrimental to the public welfare, and, therefore, susceptible of punishment, is generally conceded.**27** But punishment does not always fulfill its office. While the immediate end of punishment is to restore the balance of justice, still the legislatures intend as the ultimate end to discourage the publication of pornography. But modern Fagins, impelled by their greed for profits, still publish and still sell obscene literature. This literature reaches the newsstands and the hands of the impressionable young, whether or not the publisher is ultimately punished. Since it should be the primary consideration of the state to preserve its youth free from destructive influences, a further extension of the law is indicated, even at the risk of occasional injustice at the hands of arbitrary officials. This extension would be the use of the injunction.

In *Near v. Minnesota*,**28** the Supreme Court of the United States had before it the Constitutionality of a Minnesota statute which provided for the enjoining of (a) any obscene, lewd and lascivious newspaper, magazine or other periodical, or (b) any malicious, scandalous and defamatory newspaper, magazine or other periodical.**29** The defendant was convicted under that section relating to "malicious, scandalous and defamatory" publications, which conviction was upheld by the State Supreme Court. The Supreme Court of the United States reversed, holding that section of the statute unconstitutional because it was an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. Although the Constitutionality of the first clause of the statute, relating to obscene literature, was not brought into question, the Court said:

"The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470 .... On similar grounds, the primary re-

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**27** "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Gitlow v. People of State of New York*, p. 667, *supra*, note 24.

**28** 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

**29** Ch. 285, Sess. Laws of Minn., 1923.
quirements of decency. may be enforced against obscene publica-
tions."

It is unquestioningly within the authority of the legislatures to de-
fine what is not in the public interest, and to provide means to protect
the public from such elements, provided only, that Constitutional re-
quirements are not violated. One such requirement would be that
the provisions of the statute be definite so that all may know what
is prohibited. It would seem most reasonable for the legislatures to
confer upon the courts the authority to enjoin all obscene literature,
which literature could be defined with detailed exactness. Such a listing
should contain, *inter alia*, magazines devoted wholly or in part to the
pictorial presentation of nude and semi-nude females, whether such
representations are by drawing or by photograph; nudist publications;
comic books emphasizing sex or crime; publications which identify lust
with love or which relate in detail either licit or illicit sexual intimacies;
publications carrying suggestive cartoons; books and magazines pre-
senting immorality in an attractive light; and magazines carrying ad-
vancing for such immoral literature. The list of course could and
should be expanded. Inasmuch as this is not an attempt to draft a
statute, it, too, may be open to the charge of indefiniteness. Still, with
clear thought, and with the allowance of time to correct omissions and
discrepancies, a statute could be drafted which would stand up under
an attack of unconstitutionality, and which would remove printed ob-
scenity from the public eye. To prove the necessity for such a statute,
one needs only to go down to his corner drugstore and watch what
children read.

JAMES E. HARPESTER

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31 "When a legislative body concludes that the mores of the community call for
an extension of the impermissible limits, an enactment aimed at the evil is
plainly within its power, if it does not transgress the boundaries fixed by the
Constitution for freedom of expression." Winters v. People of State of New
32 Ibid.