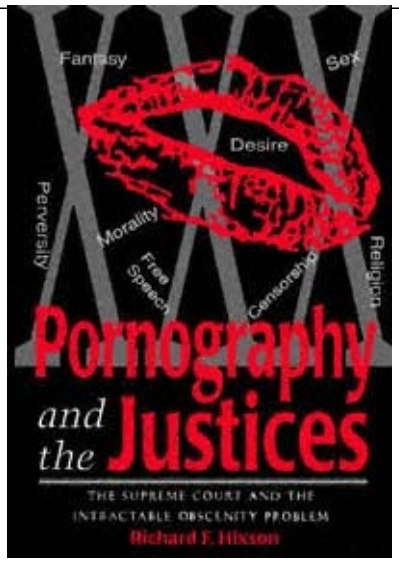

Pornography and the Justices

The Supreme Court and the Intractable Obscenity Problem

Richard F. Hixson

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For Terry

Contents

Preface

In the end, Justice John Marshall Harlan was probably right when he concluded, in a letter to a friend just months before his death in 1971, that the "obscenity problem [is] almost intractable, and that its ultimate solution must be found in a renaissance of societal values." But nothing ever comes to an en at the U.S. Supreme Court, least of all societal values that touch upon obscenity and pornography. Such controversial issues seem never to be resolved. They take on a life of their own, as this book attempts to show in its chronological treatment of the many obscenity cases that have reached the Court and in the analyses of the justices' views.

Issues involving the constitutional protection of obscene material have long been the source of controversy within the judicial system, as well as within public discourse in general. The traditional hierarchy of protected free speech, and of the press, as guaranteed by the First and Fourteenth Amendments, ranks political and social expression highest, followed by personal and aesthetic expression, then moral and religious expression"pure speech," in other words. Obscenity's position on the chart continues to be debated, but it is generally said to rank somewhere near the bottom with "fighting words" speech, libelous speech, and commercial

speech"impure speech." While the Constitution itself does not single out obscene material for exceptional First Amendment treatment, most Supreme Court justices have followed this assumption casting the Court in the role of "Super Censor" of low-status speech. It's a dirty job, but someone has to do it.

"The subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication," said Justice Harlan in 1968 in *Interstate Circuit v. Dallas*. It was then that he first alluded to the obscenity problem's intractability. But the subject of obscenity, which is what pornography is called when it is proscribed by law, is more than a problem for the courts. Obscenity is also an issue for society at large, for whether viewed as a struggle against repression or as a fight to prevent harmful expression, the issue is permanently on the public agenda of modern democratic society. Elizabeth Fox-Genovese's view, expressed in *Feminism Without Illusions*, is as much to the point: "Each society gets the pornography it deserves." Justice Harlan could not have said it better.

Judge John M. Woolsey, author of the original *Ulysses* decision in 1933, spoke for the judiciary in general when he said he thought the courts had defined obscene as "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts." Obscenity, according to the Rosewater Law, is "any picture or phonography record or any written matter calling attention to reproductive organs, bodily discharges, or bodily hair." The law was named after Senator Eliot Rosewater of Kurt Vonnegut's *God Bless You, Mr. Rosewater or Pearls Before Swine*, which, though fictional, is as close a concept as the Supreme Court itself has been able to frame.

Anthony Burgess introduced wit to the debate when he wrote in "What Is Pornography?": "A pornographic work represents social acts of sex, frequently of a perverse or wholly fantastic nature, often without consulting the limits of physical possibility."

Peter Gay, author of the ongoing historical series, *Education of the Senses*, added: "Pornography, while it boasts of an impressive repertory of acrobatic feats, is the most monoto-

nous kind of literature extant." W. H. Auden, as if addressing the Supreme Court's penchant for restricting "prurient interest" pornography that arouses sexual desire, asserted in *The Dyer's Hand an Other Essays*: "One sign that a book has literary value is that it can be read in a number of different ways. Vice versa, the proof that pornography has no literary value is that, if one attempts to read it in any other way than as sexual stimulus, to read it, say, as a psychological case-history of the author's sexual fantasies, one is bored to tears."

Finally, the questioning voice of writer Robertson Davies is also incisive. In *A Voice from the Attic*, h wrote: "A concept of obscenity appears to be as necessary to one's view of life as a concept of purity. If we seek to encompass all that we can of the spectrum of human intellect and feeling, we cannot confine ourselves to the reds and oranges; we must know the violets and indigos as well. Which is th wiser courseto attempt to suppress a large part of what occupies the human mind, or to examine and cultivate everything in the mind that can be reached?"

On his retirement from the Supreme Court in 1981, Justice Potter Stewart mused that his enduring legacy would be a throwaway line he wrote in an obscenity case. He had remarked years earlier that h could not really define obscenity but he knew it when he saw it.

Despite Stewart's commonsense approach and Justice Harlan's belief that the solution lay outside the judicial system, the Supreme Court has grappled with the intractable problem for fifty years, first by defining *obscenity* in more elaborate terms than Stewart, then by casting its opinions in terms far mo complex than those suggested by Harlan. Justices William O. Douglas and Hugo Black, the only Firs Amendment absolutists on the Court for many years, were even more straightforward, but they were so blasè on the politics and morality of obscenity that their opinions hardly counted for more than honest statements. Justice William J. Brennan Jr., early on, and John Paul Stevens, more recently, have emerged as consensus builders, as have the conservative chief justices Warren E. Burger and William H. Rehnquist.

To say any more in the preface would only give away the

plot, that is, what I learned in the process of research and what I suggest as ways to alleviate the intractability of the obscenity problem.

This volume is in many ways a sequel to my earlier *Privacy in a Public Society* (1987) in which I examined the constitutionalization of personal privacy and the ways the Supreme Court justices have interpreted the phenomenon. The present work looks in much the same waycase studies in historical contextat another area of law affected by America's highest judicial body. A third project, tentatively called "The Fourth Estate," will explore how the Court has interpreted the First Amendment's shortes clause, "and of the press."

As with previous research, I continue to enjoy the support of friends and colleagues, from those with simple encouragement to those recruited as research assistants. Always present in my work is the hand, now unfortunately invisible, of Alfred McClung Lee, friend, scholar, and gentle mentor. Of much the same variety is Brent D. Ruben, a longtime friend and Rutgers colleague who is always available when I need advice. On this project I am especially indebted to Hartmut Mokros, a Rutgers colleague who critiqued part of the manuscript while on vacation with me in Maine; Hilary Crew and Vincent Fitzgerald, doctoral students, who helped with bibliogaphical discovery and, in Ms. Crew's case, provided me with a better understanding of the feminist point of view; and the many students, both undergraduate and graduate, who educated me along the way. Friends in various academic departments across the country, but especially those at home, have assisted in this project and in my work generally. They know who they are, and I thank them profusely. I also want to thank James D. Simmons and Carol A. Burns at Southern Illinois University Press and Rebecca Spears Schwartz, wh carefully edited the manuscript.

As always, my children, Summer and Todd, continue to inspire me and keep me in check as friend, parent, and teacher. Terry, my wife, allowed selflessly for the time it takes to complete such a large design. She also read every word, a gesture of love if I ever heard one. In the end, how-

ever, there is no sharing of the responsibility for any errors of interpretation or misstatements of fact not with the other First Amendment scholars whose publications have informed me, nor with the justices upon whose opinions I ultimately relied.

I
Isolated Passages

I think the test of obscenity is . . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.
Lord Chief Justice Cockburn,
Regina v. Hicklin

Pornographycalled "obscenity" when proscribed by lawis largely defined by efforts to regulate it. But the question of pornographycalled the "intractable obscenity problem" by one U.S. Supreme Court justiceis more than a question of definition or a problem for the courts. It is also, and perhaps more s an issue for society at large. Richard S. Randall's observation is accurate: "Whether viewed as a struggle against repression or as a struggle to prevent offending, possibly harmful expression, the pornography issue has an unavoidable and probably permanent place on the public agenda of modern liberal mass democratic society." [1] Randall's book, *Freedom and Taboo*, is a recent, and reasonable, attempt to understand pornography in its many overlapping dimensions, especially the psychological

For example, the cause-and-effect relationship, where harm is said to stem directly from pornograph has been hotly de-

bated throughout human history, despite the clear absence of empirical evidence. "Sexual murder, rape, and child molestation are universally condemned," writes Randall, "but agreement over the harmfulness of promiscuity, the subordination of women, or masturbation . . . is much more problematic." But, if an effect were proved and widely agreed to be harmful, Randall notes, we might still prefer to realize free-speech values. Conversely, even if an effect were agreed not to be harmful, we might still prefer to give greater weight to considerations of privacy or decency. [2]

Most views assume pornography to have "compelling temptations" as well as more subtle "subversiv properties." After all, as Randall points out, psychodynamically the pornographic is an expression of forbidden and, therefore, usually repressed sexual and aggressive impulses and wishes. "The pornographic thus remains essentially fantastical, a kind of hallucinatory realm where everything is possible, and where we were all once originally supreme." The pornographic is inviting because its fantasies promise gratification of the kind reality seldom affords, the infantile counterparts of which were once ardently soughtyet, because forbidden, it is often perceived as threatening or dangerous.[3]

Randall labels this overall phenomenon the "pornographic within"an interior sexuality of forbidden impulses, wishes, and fantasies that forms the psychological basis of pornography. Such a distinction needs to be kept in mind, Randall suggests, in order to separate pornography as a *psychological* element from pornography as a *social* designation. The former describes an "imaginistic product of a normatively modified sexuality," the latter a "normative judgment on an expression of that product." One needs always to be aware of the two pornographiesthe *psychological* and the *sociological*not to mention a third, the *legal*, which has been society's ultimate instrument in the social control of sexua expression. For example, to borrow again from Randall, the anthropomorphic description of Jerusalem's corruption in the Old Testament Book of Ezekiel might be functionally pornographic for some persons yet not be pornography. And Molly Bloom's soliloquy in James Joyce's

Ulysses might be designated pornography yet for some not be psychodynamically pornographic. [4]

"If the human capacity for pornography is universal," writes Randall, "the human interest in censorin it is no less so." But, equally, liberal notions of free speech, individual rights, equality, and popular rule must coexist if modern liberal democracy is to be sustained. Such conflicting, if not opposing, views are nowhere more apparent than in pornography, where, on the one hand, there is the fact of no appreciable effect beyond immediate and rather short-lived arousal and, on the other, the widespread belief that pornography is indeed harmful. Empirical data pitted against belief structure seldom wins the day. For example, when the President's Commission on Obscenity and Pornography was confronted with evidence that repeated exposure led to lowered levels of arousal, it concluded that ending legal restraints might also lead to a diminished interest in pornography.[5] However, it would b unthinkable for Americans, who have always felt a need to regulate obscenity, to cease and desist.

There are several such wrinkles in the battle over causative agents and influences. Randall notes that, while there is not much support for the fear that exposure leads to new or higher levels of sexual activity or to changes in an individual's established sexual behavior, in a reverse cause-and-effect relationship, sexual experience and higher levels of sexual activity may account for greater and more regular use of pornography. Real sex may be more addictive than pornographic representations.

On the immediate impact of pornography on criminal activity and antisocial behavior, the President's Commission concluded that there is "no evidence . . . that exposure to explicitly sexual materials pla a sizable role in the causation of delinquent or criminal behavior among youth or adults." Randall notes that ideological bias toward the question of pornography may also play a part in the entire effects debate. In the end, the various studiesretrospective surveys, aggregate-data analysis, and experimental researchare inconclusive on whether pornography is causally linked to antisocial or criminal behavior. "Pornography is in fact likely to be less

arousing than one's own imagination," posits Randall, who concludes:

> The capacity of the human mind to eroticize is nearly limitless, and almost any depiction, symbol, idea or object can be transformed into a source of pornographic or near-pornographic stimulation. Pornography may feed a prurient interest and is designed to do exactly that, but it neither creates that interest nor is vital to it. The attractiveness of pornography is precisely that it violates our taboos and norms. Such license is bound to portray the subordination and degradation of women and aggression about them. Our quarrel with the disturbing, mean-spirited, sometimes frightening, often infantile images of pornography is largely a quarrel with an eroticized human sexuality that creates a fantastical pornographic within, which, in turn, both invents and responds to a pornography without. 6

Restrictions on the public portrayal of sexuality"sexual expression," for clarityhad been lifting gradually since the turn of the century. By at least mid-twentieth century, American courts had steadily narrowed proscribable obscenity, and by the mid-1960s, few legal barriers remained against sexual expression. "The veil of nineteenth-century reticence was torn away, as sex was put on display."[7] The Puritan strain that runs through all of American historyfrom the apocalypse-fearing settlers and property-aspiring immigrants to freedom-seeking refugeesmay help to explain why Americans have always insisted on the surveillance of personal morality in order to regulate, if not outlaw, deviant behavior.

The varying degree of community involvement in the sexual lives of others is nowhere better reflecte than in the U.S. Supreme Court's persistent struggle, as this book discusses, with having to determine community standards by which obscenity may be measured. The Court is also expected to decide, of course, what is obscenity in the first place. The justices, individually and collectively, have tried on many occasions to describe what Justice John Marshall Harlan called the "intractable obscenity problem." William J. Brennan Jr. said obscenity was "utterly without redeeming

social importance." Harlan said it had to be "fundamentally offensive," "prurient," and "inherently sexually indecent." Potter Stewart always looked for "hard-core" pornography before he decided what was obscene and unprotected by the Constitution. Admitting his inability to formulate a coherent test for obscenity, Stewart claimed "I know it when I see it." Thurgood Marshall, who rejected the notion that watching obscene materials in the privacy of one's home might lead to criminal conduct, compared such illogic to the prohibition of chemistry books on the ground that they may lead to the making of homemade spirits. John Paul Stevens, proponent of the Court's sliding-scale theory of First Amendment values, believed that obscene expression is of a lesser magnitude than political debate, thus requiring less protection.

Before evolving its own framework, however, the Supreme Court first had to dismiss an old nemesis, the Hicklin Rule, so named from the nineteenth-century English case, *Regina v. Hicklin*, which stipulated that the test for deciding obscenity was "whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." [8] Applying this broad test, the court held obscene an old anti-Catholic tract entitled *The Confessional Unmasked; Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession*. There was no question that the treatise was political and religious, not sexual. Nevertheless, Lord Chief Justice Cockburn ruled it obscene because "it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." This work, he said, is circulated on street corners, where it falls into the hands of all classes, young and old, "and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains."[9]

Obscenity was to be decided on the basis of the impact of certain parts, or isolated passages, of the offending materialrather than the work as a wholeon susceptible individuals. The author's intent was irrelevant, but an improper

motive could be implied if the work itself was obscene. *Hick]in* meant that all readers, young and old were reduced to the level of the most intellectually and emotionally defenseless readers. Evaluation o a work was based on the work's possible effect on children, the mentally weak or immature, or "a particularly susceptible" subclass of the community. This is the waynot all that far removed from the present zealousness to rid the air of verbal impuritiesthat isolated passages became the criteria for censorship and the innocence of youth became the yardstick for determining a work's potential to corrupt. [10]

On this side of the Atlantic, meanwhile, another not-so-moral force was at work, "sexual commerce," which by the mid-1890s had become a disturbing (for some) part of the American way of life. The market for pornographycalled "cheap and licentious" literature in those dayshad been expanding sinc the Civil War. "The congregation of men in the army apart from families created a demand for sexua commerce and constituted an easy market for purveyors to target," surmise the historians John D'Emilio and Estelle B. Freedman.[11]

Almost as if they were destined to meet, two sides emerged in the sex wars of the late nineteenth century: the one, led by Anthony Comstock, called for direct government involvement in the suppression of obscenity; the other, led by anarchists and free lovers, called for exposing all sexual matters to the light of day. The question then, as now, was whether sex was best regulated by expanding or restricting its public discussion. Comstock's crusaders won most of the battles, but by the early twentieth century, the expansive mode, supported by free lovers, suffragists, and sex educators, would begin to win the war.[12]

D'Emilio and Freedman also note in their history of sexuality in America that an increasing commitment to freedom of the press as well as the limited circulation of obscene publications slowe any movement for censorship. Only rarely, they observed, did the states express concern about the potential of art and literature to corrupt the morals of youth.[13] Before 1800, governmental concern with immorality was limited largely to blasphemous and other antireligious mat-

ter, and it was not until 1815 that an American court upheld a conviction on a specific charge of obscenity. In that case, *Commonwealth v. Sharpless,* the Pennsylvania Supreme Court said that, in the absence of explicit legislation, "Any offence which in its nature and by its example tends to corruptio of morals, as the exhibition of an obscene picture, is indictable at common law." [14]

In 1821, a Massachusetts court sentenced a bookdealer to six months in jail for selling the eighteenth century English novel, John Cleland's *Memoirs of a Woman of Pleasure*, better known as *Fanny Hill*, to local farmers. The Customs Act of 1842, in effect our first federal obscenity law, prohibited the importation of "all indecent and obscene prints, paintings, lithographs, engravings and transparencies but excluded printed matter from regulation. In 1865, Congress passed the first statute prohibiting th shipment of obscene books and pictures through the mails. In 1873, Anthony Comstock, grocer's cler turned antipornography crusader was instrumental in getting through Congress an omnibus anti-obscenity bill, aided by the Committee for the Suppression of Vice. Congress amended the "Comstoc Act" in 1876 to label obscene publications "nonmailable." Comstock was recognized for his lobbying efforts with a special agent appointment by the postmaster general to enforce the new law, a post he held until his death in 1915. Walter Kendrick, in his study of pornography in modern culture, is mindful of Comstock's forty-year reign as one of the most striking oddities of American history, whe problems of public morality were entrusted almost wholly to the discretion of one man, an agent of the U.S. Post Office.[15]

In 1896, the U.S. Supreme Court first confronted the legal issue of obscenity when it reviewed two lower-court convictions. In the first, *Rosen v. United States*, the Court upheld the conviction of New York publisher Lew Rosen for mailing "indecent" pictures of females in violation of the Comstock Act. Justice John Marshall Harlan, the first, and grandfather of the second Justice Harlan to serve on the Court, reiterated the trial judge's use of Lord Cockburn's definition of obscenity in *Regina v. Hicklin* as that which has a tendency to deprave and corrupt the most susceptible person.[16]

In the second decision, handed down six weeks later, the Supreme Court *overturned* the conviction of Dan K. Swearingen, who had been found guilty in a federal district court in Kansas of mailing a newspaper that contained an "obscene, lewd and lascivious" article. The offending piece, which appeared in Swearingen's *Burlington* (Kansas) *Courier*, charged an unnamedbut apparently an easily identifiableperson as being "meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night," a "red headed mental and physical bastard," and a "black hearted coward" who woul "sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts on carrion." While agreeing that the language was extreme and "plainly libelous," the Court ruled that n obscenity had been committed. Obscenity, the Court said, does not apply to language that is simply "coarse and vulgar," but it does concern words that "signify that form of immortality which has relation to sexual impurity." [17]

The *Rosen* and *Swearingen* decisions were not major cases, but they were important steps, as Thomas L. Tedford notes, in the evolutionary development of controls on sexual speech. In *Rosen*, the Court interpreted the Comstock Act as to make it illegal in the United States to mail anything that a jury might find sexually provocative to a child. And in *Swearingen*, the Court, perhaps without realizing i ended three centuries of evolution of the Anglo-American concept of the obscene. That which began as a seventeenth-century church punishment for the sin of communicating an immoral or blasphemou thought had now become the state crime of communicating an erotic one, according to Tedford.[18]

For life outside the legal sphere, meanwhile, sexual desire became a selling device not only for the popular entertainment industry but for mainstream businesses as well. "More and more of life . . . wa intent on keeping Americans in a state of constant sexual excitement," according to D'Emilio and Freedman.[19] Changes in literary styles moved even quicker, as, in the words of Cole Porter's Broadway parody,

"Good authors who once knew better words / Now only use four-letter words / Writing prose / Anything goes!" Older definitions of obscenity were being challenged at all levels of society, and in the courts, too, of course, where the Hicklin Rule had long been the standard for dealing with obscene matter.

Its armor showed signs of wear in 1913, when district court judge Learned Hand wrote that the Hicklin Rule, "however consonant it may be with mid-Victorian morals, does not . . . answer to the understanding and morality of the present time." He continued:

> I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interest of those most likely to pervert them to base uses. Indeed, it seems hardly that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. 20

A major break with the judicial past did not come, however, until 1933, when district judge John M. Woolsey suggested that a better test than that in *Hicklin* would be the impact or dominant effect of the whole book on the average reader of normal sensual responses and an evaluation of the author's intent. The book in question was James Joyce's *Ulysses*, which the judge went to great pains to study before giving his verdict. He revealed that for many weeks, including spare time and vacation time, he had read the book once in its entirety and parts of it several times, especially "those passages which the government particularly complains." In the end, the judge held that *Ulysses* "in spite of its unusual frankness," was not pornographic, that is, written for the purpose of exploiting obscenity.[21]

The meaning of the word *obscene*, Judge Woolsey said, had been defined by the courts in a number of cases as "tend-

ing to stir the sex impulses or to lead to sexually impure and lustful thoughts." Whether a particular book would tend to excite such impulses and thoughts, the judge said, must be tested by its effect on person with average sex instincts. "I am quite aware that owing to some of its scenes 'Ulysses' is a rather strong draught to ask some sensitive, though normal, person to take. But my considered opinion, after long reflection, is that, whilst in many places the effect . . . on the reader undoubtedly i somewhat emetic, nowhere does it tend to be an aphrodisiac." [22]

Judge Woolsey's opinion, remarkable for its clarity, was upheld by Judge Augustus Hand of the Second Circuit Court of Appeals and cousin of Learned Hand, who added to this newly evolving "wo as a whole" doctrine: "That numerous long passages in 'Ulysses' contain matter that is obscene under any fair definition of the word cannot be gainsaid; yet they are relevant to the purpose of depicting th thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lu or portray filth for its own sake."[23]

Literary critics seemed generally to rejoice over Judge Woolsey's decision that *Ulysses* was legal, an they applauded Attorney Morris Ernst's successful handling of the case, his latest score, as Ben Ray Redman put it, in the cause of enlightenment. But Redman, among others, did not believe that either the embattled lawyer or the learned judge had dug down to the roots of the obscenity problem. He sai that, despite the recent triumph over censorship, the situation remained precarious. Redman believed that the "black brood of censors" was in full retreat and that authors were enjoying a "liberty of expression" equal to, if not greater than, that enjoyed by a Petronius, a Chaucer, or a Wycherley. However, nothing less than a radical revision of certain widely held ideas would ensure a continuanc of literary freedom.[24]

Specifically, Redman took issue with the legal definition of obscenity, as used by Judge Woolsey and implied by Judge Hand, though Woolsey said that *Ulysses* was not to be deemed obscene simply because the narrative may tend to stir the sex impulses or lead to sexually impure and lust-

ful thoughts. "To deny literature the right of stirring the sex impulses of man is to deny it one of its prime and proper functions; for these impulses are fundamental, necessary and energizing, and there are no strings within us more vital and more vitalizing upon which art can play." Redman's views are typical of those held by critics then and now. He concluded, prophetically: "Fashions fluctuate and manners change, laws come and go according to the dictates of embattled minorities or aroused majorities; but literature continues in beauty and in power." [25]

Meanwhile, it was Judge Learned Hand who put the Hicklin Rule to its final resting place. "This earlier doctrine," he wrote in 1936, "necessarily presupposed that the evil against which [a] statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatical puritanical would tolerate such an imposition, and we do not believe that the courts that have declare it, would ever have applied it consistently." He concluded, bluntly, that the isolated passages theory was dead and that an accused book or picture must be judged as a whole. "If it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like must be considered." What counts, Judge Hand said, is the work's effect, not upon any particular class, but upon all whom it is likely to reach.[26]

The next important Supreme Court decision affecting obscenity law was *Chaplinsky v. New Hampshire*, the famous "fighting words" case that had dealt with the weighing of social value against social order and morality. With *Chaplinsky* in 1941, it is said, the constitutional law of obscenity begins. Actually, *Near v. Minnesota* in 1930 had suggested that obscenity did not fall within the First Amendment. Chief Justice Charles E. Hughes said in that case that, while censorship of speech and press were generally prohibited, such freedoms did not constitute an absolute principle. One exception, he said, involved the "primary requirements of de-

cency," in other words, the problem of obscenity. The other exceptions involved national security and the endangerment of public order by the incitement to violence. [27]

With *Chaplinsky*, the Court established a rationale that distinguished unprotected from protected speech. Obscenity and lewdness, libel, and fighting words should not be protected by the Constitution because, in the words of Justice Frank Murphy, who wrote the Court's unanimous decision, "such expressions are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In upholding the conviction of Chaplinsky, a Jehovah's Witness who in anger cursed the police of Rochester, New Hampshire, the Court created a new two-level standard for judging protected expression, which eventually would help it deal specifically with sexual expression. At the first level is *worthwhile* speech, the "exposition of ideas," deserving of First Amendment protection. At the second level is *worthless* speech of "such slight social value" as not to deserve any protection. This distinction provided lower courts a strategy for dealing with erotic materials. Those judges who wanted to censor "worthless expression" could do so out of hand without having to prove any degree of threat to society. Others, such as Judge Curtis Bok in Pennsylvania, could demand more than a showing of appeal to lusts. In *Commonwealth v. Gordon*, Judge Bok found a number of books not obscene and said that, in addition to the excitement of sexual desire, a work to be legally obscene must create a danger of incitement to criminal conduct. "The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt," he wrote.[28]

So, while the isolated passages doctrine of *Hicklin* gave way to more liberal legal theories regarding speech and press, the Supreme Court was still not headlong on a journey of freeing up all kinds of speech. Nor were courts in general free from the moat of society surrounding them but not protecting them from their worst repressive instincts. "The *Ulysses* decision impressed the literary world, but not the other courts," Charles Rembar learned during his successful

defense of such literary works as *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Memoirs of a Woma of Pleasure* (*Fanny Hill*). [29]

On the other hand, despite the fact that the *Ulysses* decision had indicated that more open and frank fiction might survive the courts after 1933, literature did not change radically in the succeeding decade. Some four-letter words appeared as well as a few anatomical references that had not previously been seen outside of *Ulysses* and the classics. One study of literature and obscenity during the period reported that the sex act was seldom depicted, and then not at length. Characteristically, sexual acts were implied or reported as having taken place without being described. "After World Wa II," reports Felice Flanery Lewis, "a trend toward either an increased use of four-letter words and oth unusually frank language or a more detailed description of sexual relationships is noticeable in the fiction known to have been involved in obscenity litigation." Several books also depicted a much wider acceptance of extramarital liaisons. Thus, the sexual revolution in literature advanced on the heels of war, as it had many times before.[30]

Following the war, according to D'Emilio and Freedman, pornography, as well as other media products that titillated males by "sexually objectifying women's bodies," moved beyond its customar place in a marginal underground world. Soldiers carried pornography home from Europe and Asia, ar their acquired tastes were soon satisfied by a new genre of pulp literature, *Playboy*, for example, and scandal magazines such as *Confidential* and *Keyhole*. *Playboy*'s first issue appeared in December 195 with Marilyn Monroe's barely concealed breasts on the cover, announcing, in effect, the dawning of a new voyeuristic age. After Pocket Books initiated the "paperback revolution" in 1939, Bantam issued its first "beefcake" cover in 1948, and by the 1950s "lurid designs and suggestive copy" dominated th paperback field. While World War II may have diverted the attention of purity crusaders, its afterma provoked a resurgence of resistance to sexual frankness. Antismut campaigns emerged in a number o cities, including New York City, where police raided distributors of "girlie" magazines and pulp novels; cam-

paigns were directed against retail outlets in Times Square as well. By the end of the 1950s, fourteen states had tightened their obscenity laws to prohibit the sale and distribution of sexually suggestive comic books. [31]

"The rhetoric of the purity campaigns of the 1950s reveal both continuity and change in America's sexual history," D'Emilio and Freedman note. "Like the anti-vice crusaders at the turn of the century, opponents of pornography tended to ascribe all manner of evil to sex." But also by the 1950s, with th mores of the middle class having changed profoundly since Anthony Comstock's successes in the lat nineteenth century, purity crusaders were more and more operating outside the mainstream. Their victories, though effective from time to time, were fewer. Ironically, the battlefield shifted from the neighborhoods to the courtrooms. Zealous law enforcement efforts to suppress pornography provoke wave after wave of litigation, which in turn forced the U.S. Supreme Court near the end of the 1950s to address the obscenity question directly.[32]

Edmund Wilson's *Memoirs of Hecate County* was among the more famous fictional works prosecute during the decade or so after the war. The book, a series of six interrelated stories told by the same unnamed male protagonist, is noteworthy for its graphic sexual descriptions and for the legal decisions that followed its publication in 1946. While it represented the last vestige of Comstockery America, it also served pointedly as a harbinger of the thorniest problem ever to face the country's highest judicial body.

Almost immediately upon publication, the book was banned in Boston in April 1946. One hundred ar thirty copies were confiscated by the police from four bookstores owned by Doubleday, the publishe after the New York Society for the Suppression of Vice, Comstock's old group, charged that it was salacious and lascivious. The New York Public Library removed it from circulation. Yet fifty thousand copies had been sold in the four months since publication. The Court of Special Sessions of the City of New York, a now-defunct municipal court which heard such misdemeanor cases, found th book obscene in a two-to-one decision and fined the publisher and its local shops $1,000. The

district attorney warned that anyone who sold a copy could be sentenced to a year in prison. [33]

In Los Angeles, merchants were fined for selling the book. A San Francisco bookseller who had sold the book was acquitted on a second trial after the first had resulted in a hung jury. Police in Philadelphia confiscated copies, and the publisher stopped shipments to Massachusetts because of th state's strict censorship law. Nationwide, the Hearst newspaper chain used *Memoirs of Hecate County* as the focus of its ongoing campaign against indecent books. Lionel Trilling, English professor at Columbia University and a leading literary critic and essayist, testified at the nonjury trial that the stories were not only related but that together they constituted a study of good and evil. He said that the sexually frank passages in "The Princess with the Golden Hair" contributed to the "very moral" theme of the book, a view shared by other notable critics. But it appears that neither literary merit no judgment of the book as a whole were given serious consideration in reaching a decision.

Significantly, the three-judge panel determined, but without writing an opinion, that Doubleday and Wilson had violated the New York Penal Code, Section 1141 of which provided:

> A person who sells . . . or has in his possession with intent to sell, lend, distribute or give away, or to show . . . any obscene, lewd, lascivious, filthy, indecent or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . is guilty of a misdemeanor.[34]

The New York statute, prohibiting mainly the circulation of obscene matter, recited a number of synonyms for *obscene* but failed to even suggest an obscenity test and gave no hint of pornographic intent. Perhaps it was the vagueness of the law and the uncertainty of the judicial tests of obscenity that caused the dearth of opinions. Apparently, the judges were unwilling to hazard a guess as to wha standard should apply. They settled for a "personal taste" standard that, however conscientious it may have been, put publishers and authors