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gentleman whose life would have been virtuous if he had not read Aristophanes or Juvenal, will be vicious by reading them." Echoing Macaulay, "Jimmy" Walker remarked that he had never heard of a woman seduced by a book. New Mexico has never had an obscenity statute; there is no evidence that, in that state, sexual misconduct is proportionately greater than elsewhere.

Effect on conduct of young people

Most federal courts (as above noted) now hold that the test of obscenity is the effect on the "mind" of the average normal adult, that effect being determined by the "average conscience of the time," the current "sense of what is right"; and that the statute does not intend "to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few"; *U. S.* v. *Kennerley,* 209 F. 120, 121.

However, there is much pressure for legislation, designed to prevent juvenile delinquency, which will single out children, i.e., will prohibit the sale to young persons of "obscenity" or other designated matter. That problem does not present itself here, since the federal statute is not thus limited. The trial judge in his charge in the instant case told the jury that the "test" under that statute is not the effect of the mailed matter on "those comprising a particular segment of the community, the "young" or "the immature"; and see *U. S.* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2).

Therefore a discussion of such a children's protective statute is irrelevant here. But, since Judge Clark does discuss the alleged linkage of obscenity to juvenile delinquency, and since it may perhaps be thought that it has some bearing on the question of the effect of obscenity on adult conduct, I too shall discuss it.

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The following is a recent summary of studies of that subject: "(1) Scientific[33a] studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the

33a I, for one, deplore the use of the word "scientific" as applied to social studies. See, *e.g.*, Frank, 4 J. of Public Law (1955) 8.

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community sex standards. * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." [34]

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34 Novick, Superintendent of the New York Training School for Girls, writes: "In the public eye today juvenile delinquency is alternately the direct result of progressive education, horror comics, T. V. programs, and other pet peeves of our present society * * * This is not a new phenomenon. Each generation of adults has been concerned about the behavior of its children and has looked for a scapegoat on which to place the blame for its delinquency. At the same time, adults have always sought a panacea which would cure the problem. It is sufficient to note that delinquency has always risen during periods of stress and strain, and the era in which we are living is no exception * * * Neither do restrictive measures such as * * * censorship of reading matter * * * prevent delinquency. They merely have an effect upon the manner in which the delinquency will be expressed." Novick, Integrating the Delinquent and His Community, 20 Fed. Probation, 38, 40 (1956).

Charles Lamb (whose concern with children he manifested in his *Tales From Shakespeare*) had no belief that uncensored reading harmed children: In his *Essays of Elia* he wrote of the education of his cousin Bridget, "She was tumbled early into a spacious closet of good old English reading" (which included Elizabethen and Restoration dramas and 18th century novels) "without much selection or prohibition and browsed at will upon that fair and wholesome pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

Judge Curtis Bok, perhaps remembering Lamb's remarks, said of the publications before him in *Commonwealth* v. *Gordon,* 66 P. & D. 101 (1949): "It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every

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Judge Clark, however, speaks of "the strongly held views of those with competence in the premises as to the very direct connection" of obscenity "with the development of juvenile delinquency." In support of this statement, he cites and quotes from a recent opinion of the New York Court of Appeals and an article by Judge Vanderbilt, which in turn, cite the writings of persons thus described by Judge Clark as "those with competence in the premises." One of the cited writings is a report, by Dr. Jahoda and associates, entitled The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954).[35] I have read this report (which is a careful survey of all available studies and psychological theories). I think it expresses an attitude quite contrary to that indicated by Judge Clark. In order to avoid any possible bias in my

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day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior."

Watson writes similarly: "What innocent children most need is not a sterile environment from which all evidence of * * * lust * * * has been removed, but help in interpreting the evil which is an inescapable part of life. Home, school and church should cooperate not to create an artificial hot-house insulation for life's realities but to enable children to respond, "Ah, yes! I understand!" Most children in middle class homes alarm their parents by spells in which they overdo imaginative violence, sex talk, worry about death, listening to cowboy programs, reading inane comics, exchanging dirty stories, and most of them in time, with or without adult counsel, will work their way through to better standards of taste. Protection by censorship might leave such children weaker and more susceptible; some of these childhood interests, like measles, contribute to a later life of useful immunity." Watson, Some Effects on Censorship upon Society, in 5 Social Meaning of Legal Concepts (1953) 73, 83-85.

Said Milton: "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin." A renowned sinner declared that he "could resist everything but temptation."

35 Cited in a passage in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. (2d) 639, quoted by Judge Clark.

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interpretation of that report, I thought it well to ask Dr. Jahoda to write her own summary of it, which, with her permission, I shall quote. (In doing so, I am following the example of Mr. Justice Jackson who, in *Fed. Trade Commission* v. *Ruberoid,* 343 U. S. 470, 485, acknowledged that he relied on "an unpublished treatise," i.e., one not available to the parties. If that practice is proper, I think it similarly proper to quote the author's unpublished interpretation of a published treatise.) Dr. Jahoda's summary reads as follows:

"Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to antisocial actions, particularly to juvenile delinquency. An examination of the pertinent psychological literature has led to the following conclusions:

"1. There exists no research evidence either to prove or to disprove this assumption definitively.

"2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.

"3. In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter.

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Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

"Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

"4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations.

"Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in

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children those qualities which drove them to the comic book world to begin with: an inability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

"It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

Most of the current discussion of the relation between children's reading and juvenile delinquency has to do with so-called "comic books" which center on violence (sometimes coupled with sex) rather than mere obscenity. Judge Vanderbilt, in an article from which Judge Clark quotes, cites Feder, Comic Book Regulation (University of California, Bureau of Public Administration, 1955 Legislative Problems No. 2).[36] Feder writes: "It has never been determined definitely whether or not comics portraying violence, crime and horror are a cause of juvenile delinquency."

Judge Vanderbilt, in the article from which Judge Clark quotes, also cites Wertham, Seduction of the Innocent (1954).[37] Dr. Wertham is the foremost proponent of the view that "comic books" do contribute to juvenile delinquency. The Jahoda Report takes issue with Dr. Wertham, who relies much on a variety of the *post-hoc-ergo-propter-hoc* variety of argument, i.e., youths who had read "comic books" became delinquents. The argument, at best, proves too much: Dr. Wertham points to the millions of young readers of such books; but only a fraction of these readers become delinquents. Many of the latter also chew gum,

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36 Vanderbilt, Impasse In Justice, Wash. U. L. Q. (1956), 267, 302.

37 *Ibid.*

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drink coca-cola, and wear soft-soled shoes. Moreover, Dr. Wertham specifically says (p. 298) that he is little concerned with allegedly obscene publications designed for reading by adults, and (pp. 303, 316, 348) that the legislation which he advocates would do no more than forbid the sale or display of "comic books" to minors. Since, as previously noted, the federal obscenity statute is not so restricted, even Dr. Wertham's book does not support Judge Clark's position.

Maybe some day we will have enough reliable data to show that obscene books and pictures do tend to influence children's sexual conduct adversely. Then a federal statute could be enacted which would avoid constitutional defects by authorizing punishment for using the mails or interstate shipments in the sale of such books and pictures to children.[38]

It is, however, not at all clear that children would be ignorant, in any considerable measure, of obscenity, if no obscene publications ever came into their hands. Youngsters get a vast deal of education in sexual smut from companions of their own age.[39] A verbatim report of conversations

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38 Such a statute was long ago suggested. See Ernst and Seagle, To the Pure (1928) 277.

39 Cf. *U. S.* v. *Dennett*, 39 F. 2d 564, 568 (C. A. 2).

Alpert (*loc. cit.* at 74) writes of the American Youth Commission study of the conditions and attitudes of young people in Maryland between the ages of sixteen and twenty-four, as reported in 1938: "For this study Maryland was deliberately picked as a 'typical' state, and, according to the Commission, the 13,528 young people personally interviewed in Maryland can speak for the two hundred and fifty thousand young people in Maryland and the twenty millions in the United States. 'The chief source of sex "education" for the youth of all ages and all religious groups was found to be the youth's contemporaries.' Sixty-six percent of the boys and forty percent of the girls reported that what they knew about sex was more or less limited to what their friends of their own age had told them. After 'contemporaries' and the youth's home, the source that is next in importance is the school, from which about 8 percent of the young people reported they had

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among young teen-age boys (from average respectable homes) will disclose their amazing proficiency in obscene language, learned from other boys.[40] Replying to the argument of the need for censorship to protect the young, Milton said: "Who shall regulate all the * * * conversation of our youth * * * appoint what shall be discussed * * * ?" Most judges who reject that view are long past their youth and have probably forgotten the conversational ways of that period of life: "I remember when I was a little boy," said Mr. Dooley, "but I don't remember how I was a little boy."

The obscenity statute and the reputable press.

Let it be assumed, for the sake of the argument, that contemplation of published matter dealing with sex has a significant impact on children's conduct. On that assumption, we cannot overlook the fact that our most reputable newspapers and periodicals carry advertisements and photographs displaying women in what decidedly are sexually alluring postures,[41] and at times emphasizing the

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received most of their sex information. A few, about 4 percent, reported they owed most to books, while less than 1 percent asserted that they had acquired most of their information from movies. Exactly the same proportion specified the church as the chief source of their sex information. These statistical results are not offered as conclusive; but that they do more than cast doubt upon the assertion that 'immoral' books, corrupt and deprave must be admitted. These statistical results placed in the scale against the weight of the dogma upon which the law is founded lift the counterpane high. Add this: that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labor, barren lives, starved emotions, and unreasoning minds are far more dangerous to morals than any so-called obscene literature. True, this attack is tangential, but a social problem is here involved, and the weight of this approach should be felt." *Id.* at 74.

40 For such a report, slightly expurgated for adult readers, see Cleckley, The Mask of Sanity (1950) 135-137.

41 *Cf.* Larrabee, The Cultural Context of Sex Censorship, 20 L. & Contemp. Prob. (1955) 672, 684.

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importance of "sex appeal." That women are there shown scantily clad, increases "the mystery and allure of the bodies that are hidden," writes an eminent psychiatrist. "A leg covered by a silk stocking is much more attractive than a naked one; a bosom pushed into shape by a brassiere is more alluring than the pendant realities." [42] Either, then, the statute, must be sternly applied to prevent the mailing of many reputable newspapers and periodicals containing such ads and photographs, or else we must acknowledge that they have created a cultural atmosphere for children in which, at a maximum, only the most trifling additional effect can be imputed to children's perusal of the kind of matter mailed by the defendant.

The obscenity statute and the newspapers

Because of the contrary views of many competent persons, one may well be sceptical about Dr. Wertham's thesis. However, let us see what, logically, his crusade would do the daily press: After referring repeatedly to the descriptions, in "comic books" and other "mass media," of violence combined with sadistic sexual behavior, descriptions which he says contribute to juvenile delinquency, he writes, "Juvenile delinquency reflects the social values current in a society. Both adults and children absorb these social values in their daily lives, * * * and also in *all the communications through the mass media* * * * Juvenile delinquency holds up a mirror to society * * * It is self-understood that such a pattern in a mass medium does not come from nothing * * *

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42 Myerson, Speaking of Man (1950) 92. See also the well known chapter on clothes in Anatole France's Penguin Island.

Dr. Wertham discussing "comic books," makes much of the advertisements they carry. He speaks of their "breast ads," and also of their playing up of "glamour girls," their stress on the "sexy," their emphasis on women's "secondary sexual characteristics." Is not this also descriptive of the advertisements in our "best periodicals"?

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Comic books are not the disease, they are only a symptom * * * The same social forces that made comic books make other social evils, and the same social forces that keep comic crime books keep the other social evils the way they are." (Emphasis added.)

Now the daily newspapers, especially those with immense circulations, constitute an important part of the "mass media"; and each copy of a newspaper sells for much less than a "comic book." Virtually all the descriptions, of sex mingled with violence, which Dr. Wertham finds in the "comic books," can be found, often accompanied by gruesome photographs, in those daily journals. Even a newspaper which is considered unusually respectable, published prominently on its first page, on August 26, 1956, a true story of a "badly decomposed body" of a 24 year old woman school teacher, found in a clump of trees. The story reported that police had quoted a 29 year old salesman as saying that "he drove to the area" with the school teacher, that "the two had relations on the ground, and later got into an argument," after which he "struck her three times on the back of the head with a rock, and, leaving her there, drove away." One may suspect that such stories of sex and violence in the daily press have more impact on young readers than do those in the "comic books," since the daily press reports reality while the "comic books" largely confine themselves to avowed fiction or fantasy. Yet Dr. Wertham, and most others who propose legislation to curb the sale of "comic books" to children, propose that it should not extend to newspapers.[42a] Why not?

The question is relevant in reference to the application of the obscenity statute: Are our prosecutors ready to

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42a "No one would dare ask of a newspaper that it observe the same restraints that are constantly being demanded of * * * the comic book." Larrabee, The Cultural Context of Sex Censorship, 20 Law and Contemp. Problems (1955) 673, 679.

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prosecute reputable newspaper publishers under that Act? I think not. I do not at all urge such prosecutions. I do suggest that the invalidity of that statute has not been vigorously challenged because it has not been applied to important persons like those publishers but, instead, has been enforced principally against relatively inconspicuous men like the defendant here.

Da Capo: Available data seem wholly insufficient to show that the obscenity statutes comes within any exception to the First Amendment.

I repeat that, because that statute is not restricted to obscene publications mailed for sale to minors, its validity should be tested in terms of the evil effects of adult reading of obscenity on adult conduct.[43] With the present lack of evidence that publications probably have such effects, how can the government demonstrate sufficiently that the statute is within the narrow exceptions to the scope of the First Amendment? One would think that the mere possibility of a causal relation to misconduct ought surely not be enough.

Even if Congress had made an express legislative finding of the probable evil influence, on adult conduct, of adult reading or seeing obscene publications, the courts would not be bound by that finding, if it were not justified in fact. See, e.g., *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, where the Court (per Holmes, *J.*) said of a statute (declaring the existence of an emergency) that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." And the Court there and elsewhere has held that the judiciary may use judicial notice in ascertaining the truth of such legislative declaration.[44]

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43 See *U. S.* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2) to the effect that "what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach."

44 Cf. *United States* v. *Rumely,* 345 U. S. 41, 44.

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If the obscenity statute is valid, why may Congress not validly provide punishment for mailing books which will provoke thoughts it considers undesirable about religion or politics?

If the statute is valid, then, considering the foregoing, it would seem that its validity must rest on this ground: Congress, by statute, may constitutionally provide punishment for the mailing of books evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds. If that be correct, it is hard to understand why, similarly, Congress may not constitutionally provide punishment for such distribution of books evoking mere thoughts or feelings, about religion or politics, which Congress considers socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially dangerous deeds.

2. The Judicial exception of the "classics"

As I have said, I have no doubt the jury could reasonably find, beyond a reasonable doubt, that many of the publications mailed by defendant were obscene within the current judicial definition of the term as explained by the trial judge in his charge to the jury. But so, too, are a multitude of recognized works of art found in public libraries. Compare, for instance, the books which are exhibits in this case with Montaigne's Essay on *Some Lines of Virgil* or with Chaucer. Or consider the many nude pictures which the defendant transmitted through the mails, and then turn to the reproductions in the articles on painting and sculpture in the Encyclopedia Britannica (14th edition):[45] Some of

45 See, *e.g.*, Vol. 17, p. 36, Plate 3, No. 4, reproducing Botticelli's "Birth of Venus"; p. 38, Plate VIII, No. 2, reproducing Titian's

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the latter are indistinguishably "obscene." Yet these Encyclopedia volumes are readily accessible to everyone, young or old, and, without let or hindrance, are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene." [46]

To the argument that such books (and such reproductions of famous paintings and works of sculpture) fall within the statutory ban, the courts have answered that they are "classics,"—books of "literary distinction" or works which have "an accepted place in the arts," including, so this court has held, Ovid's Art of Love and Boccacio's Decameron.[47] There is a "curious dilemma" involved in this answer that the statute condemns "only books which are dull and without merit," that in no event will the statute be applied to the "classics," i.e., books "of literary distinction." [48] The courts have not explained how they escape that dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns.

This dilemma would seem to show up the basic constitutional flaw in the statute: No one can reconcile the cur-

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"Woman on a Couch"; Vol. 20, p. 202, Plate V, No. 8, reproducing Clodion's "Nymph and Satyr"; p. 204, Plate VI, reproducing Rodin's "The Kiss."

See *Parmelee* v. *U. S.*, 113 F. 2d 729, 734 and note 19 (App. D. C.).

46 See, *e.g.*, Masterpieces of Painting From The National Gallery of Art (Cairns and Walker ed. 1944) 68, 72, 114; Catalogue of Pictures Collected by Yale Alumni (1956) 3, 15, 55, 134, 137, 195.

47 See, *e.g.*, *U. S.* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2); *U. S.* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (C. A. 2); *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

48 See *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

No one can argue with a straight face (1) that reading an obscene "classic" in a library has less harmful effects or (2) that, as the "classics" often are published in expensive volumes, they usually affect only persons who have large incomes, and that such persons' right to read is peculiarly privileged.

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rently accepted test of obscenity with the immunity of such "classics" as e.g., Aristophanes' *Lysistratra,* Chaucer's, *Canterbury Tales,* Rabelais', *Gargantua and Pantagruel,* Shakespeare's *Venus and Adonis,* Fielding's, *Tom Jones,* or Balzac's *Droll Stories.* For such "obscene" writings, just because of their great artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

It will not do to differentiate a "classic," published in the past, on the ground that it comported with the average moral attitudes at the time and place of its original publication. Often this was not true. It was not true, for instance, of Balzac's Droll Stories,[49] a "classic" now freely circulated by many public libraries, and which therefore must have been transported by mail (or in interstate commerce). More to the point, if the issue is whether a book meets the American common conscience of the present time, the question is how "average" Americans now regard the book, not how it was regarded when first published, here or abroad. Why should the age of an "obscene" book be relevant? After how many years—25 or 50 or 100—does such a writing qualify as a "classic"?

The truth is that the courts have excepted the "classics" from the federal obscenity statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment.

This exception—nowhere to be found in the statute[50]—is a judge-made device invented to avoid that absurdity. The

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49 See discussion in *Roth* v. *Goldman,* 172 F. 2d at 797 (C. A. 2).

50 The importation statute relating to obscenity, 19 U. S. C. 1305, does make an explicit exception of the "so-called classics or books of recog-

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fact that the judges have felt the necessity of seeking that avoidance, serves to suggest forcibly that the statute, in its attempt to control what our citizens may read and see, violates the First Amendment. For no one can rationally justify the judge-made exception. The contention would scarcely pass as rational that the "classics" will be read or seen solely by an intellectual or artistic elite; for, even ignoring the snobbish, undemocratic, nature of this contention, there is no evidence that that elite has a moral fortitude (an immunity from moral corruption) superior to that of the "masses." And if the exception, to make it rational, were taken as meaning that a contemporary book is exempt if it equates in "literary distinction" with the "classics," the result would be amazing: Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digests for legal-artistic precedents; we would some day have a Legal Restatement of the Canons of Literary Taste.

The exception of the "classics" is therefore irrational. Consequently, it would seem that we should interpret the statute rationally—i.e., without that exception. If, however, the exception, as an exception, is irrational, then it would appear that, to render the statute valid, the standard applied to the "classics" should be applied to all books and pictures. The result would be that, in order to be constitutional, the statute must be wholly inefficacious.

3. How censorship under the statute actually operates:

(a) Prosecutors, as censors, actually exercise prior restraint.

Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practi-

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nized and established literary * * * merit," but only if they are "imported for non-commercial purposes"; if so, the Secretary of the Treasury has discretion to admit them.

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cally, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene,[51] a person threatened with prosecution if he mails (or otherwise sends in interstate commerce)[52] almost any book which deals in an unconventional, unorthodox, manner with sex,[53] may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion.[54] A statute would

51 See *infra* for further discussion of that vagueness.

52 As to interstate transportation, see 18 U. S. C. Section 1462 which contains substantially the same provisions as 18 U. S. C. Section 1461.

53 See Kaplan, Obscenity as An Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 551-552 as to "conventional obscenity," which he defines as "the quality of any work which attacks sexual patterns and practices. In essence, it is the presentation of a sexual heterodoxy, a rejection of accepted standards of sexual behavior. Zola, Ibsen and Shaw provide familiar examples. It surprises no one that the author of Nana also wrote J'Accuse; of Ghosts, An Enemy of the People; of Mrs. Warren's Profession, Saint Joan."

See also, Lockhart and McClure, Obscenity in the Courts, 20 Law & Contemp. Problems (1955) 586, 596-597 as to "ideological obscenity"; they note that the courts have generally refrained (at least explicitly) from basing their decisions on rulings that literally may be prescribed to guard against a change in accepted moral standards, "because any such ruling would fly squarely in the face of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions."

54 One court, at the suit of a publisher, enjoined a Chief of police—who went beyond threat of prosecution and ordered booksellers not to sell certain books—on the ground that the officer had exceeded his powers; *New American Library* v. *Allan*, 114 F. Supp. 823 (Ohio, D. C.). In another similar case, where a prosecutor was enjoined, the injunction order was much modified on appeal; *Bantam Book* v. *Melko*, 96 A. (2d) 47, modified 103 A. (2d) 256.

If, however, the prosecutor confines himself to a mere threat of prosecution, the traditional reluctance to restrain criminal prosecutions will

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be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike.[55] Yet, a federal prosecutor, under the federal obscenity statute, approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrarily. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects.[56] In that way,

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very probably make it difficult to obtain such an injunction. *Sunshine Book Co.* v. *McCaffrey,* 112 N. Y. S. (2d) 476; see also 22 U. of Chicago L. Rev. (1954) 216; 68 Harv. L. Rev. (1955) 489.

This may be particularly true with respect to a federal prosecutor. See Jackson, The Federal Prosecutor, 24 J. of Am. Jud. Soc. (1940) 18: "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard."

55 See, e.g., *Joseph Burstyn Co. Inc.* v. *Wilson,* 343 U. S. 495.

56 It is, therefore, doubtful whether, as suggested by Emerson (*loc. cit.* at 656-660), a statute calling for punishment involves very much less arbitrary conduct and very much less censorship than one calling for punishment. In actual fact, by his threats of prosecution, the prosecutor does exercise prior restraint. Much, therefore, that Emerson says of prior restraint authorized by statute applies as well to censorship through a prosecutor's threats of prosecution: The "procedural safeguards built around criminal prosecution" (the stronger burden of proof, the stricter rules of evidence, the tighter procedure) are likewise absent. The "decision rests with a single functionary," an executive official, rather than with the courts. The prosecutor, by threats of prosecution, accomplishes prior restraint "behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal" and entailing the "chance of discrimination and other abuse." The "policies and

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the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment.[57]

(b) Judges as censors.

When a prosecution is instituted and a trial begins, much censorship power passes to the trial judge: If he sits without a jury, he must decide whether a book is obscene. If the trial is by jury, then, if he thinks the book plainly not obscene, he directs a verdict for the accused or, after a verdict of guilt, enters a judgment of acquittal. How does the judge determine whether a book is obscene? Not by way of evidence introduced at the trial, but by way of some sort of judicial notice. Whence come the judicial notice data to inform him?

Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools,[58] tales are told fully as "obscene" as many of those distributed by men, like defendant, convicted for violation of the obscenity statute. Should not judges, then, set aside such convictions? If

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actions" of the prosecutor, in his censorship by threats of prosecution, are not "likely to be known or publicly debated; material and study and criticism" are not "readily available."

57 For startling instances of "prosecutor censorship" see Blanshard, The Right to Read (1955) 184-186, 190; 22 U. of Chicago L. Rev. (1954) 216.

58 See *Roth* v. *Goldman,* 172 F. 2d 788 at 796 (concurring opinion): "One thinks of the lyrics sung at many such gatherings by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts."

Aubrey's Lives, containing many "salacious" tales, delights some of our greatest judges.

Mr. Justice Holmes was a constant reader of "naughty French novels." See Bent, Justice W. O. Holmes (1932) 16, 134.

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they do not, are they not somewhat arrogantly concluding that lawyers are an exempt elite, unharmed by what will harm the multitude of other Americans? If lawyers are not such an elite then, since, in spite of the "obscene" tales lawyers frequently tell one another, data are lacking that lawyers as a group become singularly unusually addicted to depraved sexual conduct, should not judges conclude that "obscenity" does not importantly contribute to such misconduct, and that therefore the statute is unconstitutional?

(c) Jurors as Censors.

If, in a jury case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the average "common conscience" of the time. Yet no statistician would conceivably accept the views of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the "moral sentiments" of a generation ago, not of the present time.

Each jury verdict in an obscenity case has been sagaciously called "really a small bit of legislation ad hoc." [59] So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression? (I shall note, *infra,* the vast difference be-

59 *U. S.* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2).

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tween the applications by juries of the "reasonable man" standard and the "obscenity" standard.)

4. The dangerously infectious nature of governmental censorship of books

Governmental control of ideas or personal preferences is alien in a democracy. And the yearning to use governmental censorship of any kind is infectious. It may spread insidiously. Commencing with suppression of books as obscene, it is not unlikely to develop into official lust for the power of thought-control in the areas of religion, politics, and elsewhere. Milton observed that "licensing of books * * * necessarily pulls along with it so many other kinds of licensing." J. S. Mill noted that the "bounds of what may be called moral police" may easily extend "until it encroaches on the most unquestionably legitimate liberty of the individual." We should beware of a recrudescence of the undemocratic doctrine uttered in the 17th century by Berkeley, Governor of Virginia: "Thank God there are no free schools or preaching, for learning has brought disobedience into the world, and printing has divulged them. God keep us from both."

The people as self-guardians: censorship by public opinion, not by government

Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as "guardians" of the people, telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous.[60]

60 Plato furnished "an ideal blueprint for a totalitarian society"; Chroust, Book Rev., 1 Natural Law Forum (1956) 135, 141. See also Popper, The Open Society and Its Enemies (19); Frank, Courts on Trial (1949) 146-147, 158, 350, 360, 405-406; Frank, Fate and Freedom (1949) 119, 319, note 25, 365, note 10; Frank, If Men Were Angels (1942) 192; Fite, The Platonic Legend (1934); Catlin, The Story of

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Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent.[61] When our governmental officials act towards our citizens on the thesis that "Papa knows best what's good for you," they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature.

So have sagacious men often insisted. Milton, in his Areopagitica, denounced such paternalism: "We censure them for a giddy, vicious and unguided people, in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a licensor." "We both consider the people as our children," wrote Jefferson to Dupont de Nemours, "but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-government." Tocqueville sagely remarked: "No form or combination of social policy has yet been devised to make an energetic people of a community of pusillanimous and enfeebled citizens." "Man," warned Goethe, "is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him." Said Carl Becker, "Self-government, and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compulsion. This heavy responsibility is the price of freedom."[62] The "great art," according to Milton, "lies to discern in what the law is to bid restraint

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the Political Philosophers (1939) 52, 58, 65-66; Kallen, Ethical Aspects of Censorship, in Protection of Public Morals Through Censorship (1953) 34, 53-54.

61 See Frank, Self Guardianship and Democracy, 16 Am. Scholar (1947) 265.

62 Becker, Freedom and Responsibility in the American Way of Life (1945) 42.

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and punishment, and in what things persuasion only is to work." *So we come back, once more, to Jefferson's advice: The only completely democratic way to control publications is through non-governmental censorship by public opinion.*

5. The seeming paradox of the First Amendment.

Here we encounter an apparent paradox: The First Amendment, judicially enforced, curbs public opinion when translated into a statute which restricts freedom of expression (except that which will probably induce undesirable conduct). The paradox is unreal: *The Amendment ensures that public opinion—the "common conscience of the time"—shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow.*

Private persons or groups, may validly try to influence public opinion.

The First Amendment obviously has nothing to do with the way persons or groups, not a part of government, influence public opinion as to what constitutes "decency" or "obscenity." The Catholic Church, for example, has a constitutional right to persuade or instruct its adherents not to read designated books or kinds of books.

6. The fine arts are within the First Amendment's protection.

"The framers of the First Amendment," writes Chafee, "must have had literature and art in mind, because our first national statement on the subject of 'freedom of the press,' the 1774 address of the Continental Congress to the inhabitants of Quebec, declared, 'The importance of this (freedom of the press) consists, beside the advancement of truth, science, morality and *arts* in general, in its diffusion of

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liberal sentiments on the administration of government." [63] 165 years later, President Franklin Roosevelt said, "The arts cannot thrive except where men are free to be themselves and to be in charge of the discipline of their own energies and ardors. The conditions for democracy and for art are one and the same. What we call liberty in politics results in freedom of the arts." [64] The converse is also true.

In our industrial era when, perforce, economic pursuits must be, increasingly, governmentally regulated, it is especially important that the realm of art—the non-economic realm—should remain free, unregimented, the domain of free enterprise, of unhampered competition at its maximum.[65] An individual's taste is his own, private, concern. *De gustibus non disputandum* represents a valued democratic maxim.

Milton wrote: "For though a licenser should happen to be judicious more than the ordinary, yet his very office * * * enjoins him to let pass nothing but what is vulgarly received already." He asked, "What a fine conformity would it starch us all into? * * * We may fall * * * into a gross conformity stupidly * * * " In 1859, J. S. Mill, in his essay on *Liberty,* maintained that conformity in taste is not a virtue but a vice. "The danger," he wrote, "is not the excess but the deficiency of personal impulses and preferences. By dint of not following their own nature (men) have no nature to follow * * * Individual spontaneity is entitled to free exercise * * * That so few men dare to be eccentric marks the chief danger of the time." Pressed by the demand for conformity, a people degenerate into "the deep slumber of a decided opinion," yield a "dull and torpid consent" to the ac-

63 Chafee, Government and Mass Communication (1947) 53.

64 Message at dedicating exercises of the New York Museum of Modern Art, May 8, 1939.

65 Frank, Fate and Freedom (1945) 194-202.

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customed. "Mental despotism" ensues. For "whatever crushes individuality is despotism by whatever name it be called * * * It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating * * * In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them."

To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a "moral police," is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans.[66]

Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail those few, the community may appear to have suffered nothing. The appear-

66 Milton remarked that "not to count him fit to print his mind without a tutor or examiner, lest he should drop * * * something of corruption, is the greatest * * * indignity to a free and knowing spirit that can be put upon him."

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ance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight. What, as a result, they do not write might have been major literary contributions.[67] "Suppression," Spinoza said, "is paring down the state till it is too small to harbor men of talent."

7. The motive or intention of the author, publisher or distributor cannot be the test.

Some courts once held that the motive or intention of the author, painter, publisher or distributor constituted the test of obscenity. That test, the courts have abandoned: That a man who mails a book or picture believes it entirely "pure" is no defense if the court finds it obscene.[68] *U. S.* v. *One Book Entitled Ulysses,* 72 F. 2d 705, 708 (C. A. 2). Nor, conversely, will he be criminally liable for mailing a "pure" publication—Stevenson's Child's Garden of Verse or a simple photograph of the Washington Monument—he believes obscene. Most courts now look to the "objective" intention, which can only mean the effect on those who read the book or see the picture;[69] the motive of the mailer is irrelevant because it cannot affect that effect.

8. Judge Bok's decision as to the causal relation to anti-social conduct.

In *Commonwealth* v. *Gordon,* 66 Pa. D & C 101 (1949), Judge Bok said: "A book, however sexually impure and

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67 *Cf.* Chafee, The Blessings of Liberty (1956) 113.
Milton said that the "sense" of a great man may "to all posterity be lost for the fearfulness, or the presumptuous rashness of a perfunctory licenser."

68 *Rosen* v. *U. S.,* 161 U. S. 29, 41-42; cf. *U. S.* v. *One Book Entitled Ulysses,* 72 F. 2d 705, 708 (C. A. 2).

69 *U. S.* v. *Levine,* 83 F. 2d 156 (C. A. 2); *Parmelee* v. *U. S.,* 113 F. 2d 729 (App. D. C.).

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pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place * * * The only clear and present danger * * * that will satisfy * * * the Constitution * * * is the commission or the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic effect." The constitutional operation of "the statute," Judge Bok continued, thus "rests on narrow ground * * * I hold that (the statute) may constitutionally be applied * * * only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt."

I confess that I incline to agree with Judge Bok's opinion. But I think it should be modified in a few respects: (a) Because of the Supreme Court's opinion in the *Dennis* case, 341 U. S. 494 (1951), decided since Judge Bok wrote, I would stress the element of probability in speaking of a "clear danger." (b) I think the danger need not be that of probably inducing behavior which has already been made criminal at common law or by statute, but rather of probably inducing any seriously anti-social conduct (i.e., conduct which, by statute, could validly be made a state or federal crime). (c) I think that the causal relation need not be between such anti-social conduct and a particular book

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involved in the case on trial, but rather between such conduct and a book of the kind or type involved in the case.[70]

9. The void-for-vagueness argument

There is another reason for doubting the constitutionality of the obscenity statute. The exquisite vagueness of the word "obscenity" is apparent from the way the judicial definition of that word has kept shifting: Once (as we saw) the courts held a work obscene if it would probably stimulate improper thoughts or desires in abnormal persons; now most courts consider only the assumed impact on the thoughts or desires of the adult "normal" or average human being. A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, e.g., *International Harvester* v. *Kentucky,* 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.,* 244 U. S. 81; *Connally* v. *General Construction Co.,* 269 U. S. 885; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445; *Champlin Refining Co.* v. *Commission,* 286 U. S. 120; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Musser* v. *Utah,* 333 U. S. 95; *Winters* v. *N. Y.,* 333 U. S. 507; cf. *U. S.* v. *Cardiff,* 343 U. S. 169.

If we accept as correct the generally current judicial standard of obscenity—the "average conscience of the time" —that standard still remains markedly uncertain as a guide to judges or jurors—and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the "reasonable man" standard in prosecutions for criminal negligence (or the like); a man has to take his chances on jury verdicts in

70 According to Judge Bok, an obscenity statute may be validly enforced when there is proof of a causal relation between a particular book and undesirable conduct. Almost surely, such proof cannot ever be adduced. In the instant case, the government did not attempt to prove it.

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such a case, with no certainty that a jury will not convict him although another jury may acquit another man on the same evidence.[71] But that standard has nothing remotely resembling the looseness of the "obscenity" standard.

There is a stronger argument against the analogy of the "reasonable man" test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See *Stromberg* v. *California,* 283 U. S. 359; *Herndon* v. *Lowry,* 301 U. S. 242; *Winters* v. *New York,* 333 U. S. 507; *Kunz* v. *New York,* 340 U. S. 290; *Burstyn Inc.* v. *Wilson,* 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218.[72]

WATERMAN, *Circuit Judge,* concurring:

I concur with my colleagues in affirming the judgment below. I would dispose in one sentence of the claim advanced that the applicable statute, 18 U. S. C. A. §1461, is unconstitutional, for I believe the constitutionality of such legislation is so well settled that: "If the question is to be reopened the Supreme Court must open it. *Tyomies Publishing Company* v. *United States,* 6 Cir., 211 Fed. 385."—quoting Learned Hand, *C.J.,* in *U. S.* v. *Rebhuhn,* 2 Cir. 1940, 109 F. 2d 512 at 514, cert. denied 310 U. S. 629. I concur with Chief Judge Clark in his disposition of the remaining issues.

71 *Nash* v. *U. S.,* 229 U. S. 373, 377; *U. S.* v. *Wurzbach,* 280 U. S. 396, 399; *U. S.* v. *Ragen,* 314 U. S. 513, 523.

72 In *U. S.* v. *Rebhuhun,* 109 F. 2d 512, 514 (C. A. 2), the court tersely rejected the contention that the obscenity statute is too vague, citing and relying on *Rosen* v. *U. S.,* 161 U. S. 29. But the *Rosen* case did not deal with that subject but merely with the sufficiency of the wording of an indictment under that statute.

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Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of September, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. HENRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL ROTH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.