OBSCENITY IN THE COURTS*

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A recrudescence of Puritanism is again epidemic in the United States. As in the years following both the Civil War and World War I, books are once more under general attack because of their alleged obscenity, and Congress, state legislatures, and city councils from one end of the country to the other are besieged with demands for new legislation against obscene literature—though for years before the outbreak of the current epidemic, such legislation had been on the books of the United States, every state except New Mexico, and countless municipalities.

The statutory law of obscene literature is peculiar. Though obscenity is one of the most elusive and difficult concepts known to the law, legislative bodies have seldom made any effort to provide a workable definition of the term. Instead, the typical statute or ordinance begins with the word "obscene" and continues with a string of synonyms selected haphazardly from the following list: disgusting, filthy, immoral, improper, impure, indecent, lascivious, lewd, licentious, suggestive, and vulgar. But the additional epithets have made little or no difference in judicial interpretations of the statutes and ordinances; their draftsmen might just as well have contented themselves with the single word "obscene." And in the few instances in which legislatures have attempted statutory definitions of obscenity, the definitions they have devised are not likely to be any more useful than a string of synonyms.

In consequence, courts confronted with concrete cases for decision are left to work out for themselves their own meaning for obscenity, with little or no guidance from the legislature. They have no choice but to do the best they can with an extremely difficult and complex concept. What they have done and how well they have done it merits careful study.

In the United States before the Civil War, there were few reported decisions involving obscene literature. This, of course, is no indication that such literature was not in circulation at that time; the persistence of pornography is entirely too strong to warrant such an inference. Nor is it an indication that the people of the time were totally indifferent to the proprieties of the literature they read. In 1851, Nathaniel Hawthorne's The Scarlet Letter was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness. The lack of cases

*This article largely recapitulates portions of an earlier study, Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, esp. 324-50 (1954), to which the reader seeking more exhaustive and detailed treatment is directed.
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merely suggests that the problem of obscene literature was not thought to be of sufficient importance to justify arousing the forces of the state to censorship.

Following the Civil War, however, there was a sharp change in attitude. The financial scandals, the vulgar and lax social behavior, and the flagrant immorality of the years immediately after the war led to a powerful social reaction. "The voice of the reformer was heard in the land. The stage was set for a stern and rigorous revival of the spirit of the Puritan forefathers." This was the stage on which Anthony Comstock stepped to begin his forty-year campaign to purify the reading matter of the American public under the banner "MORALS, Not Art or Literature." It was on this stage, too, that a new legal definition of obscenity, imported from England, first appeared.

In England at about this time, the Protestant Electoral Union published a pamphlet entitled The Confessional Unmasked to further its program for advancing Protestantism and opposing Catholicism, particularly in the election of Protestants to Parliament. The pamphlets were seized, and in the case that arose out of the seizure—Regina v. Hicklin—a new legal definition of obscenity was framed for both England and the United States. In the course of his opinion, the Lord Chief Justice Cockburn said:

...I think the test of obscenity is this, 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.

This test was soon adopted by American courts. By 1913, it had become so well established that Judge Learned Hand, though he personally rejected the test, felt constrained to follow it. In United States v. Kennerley, Judge Hand overruled a demurrer to an indictment for mailing Daniel Carson Goodman's Hagar Revelly but added his now-famous protest against the Hicklin rule:

...I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time. ...I question whether in the end men will regard that as obscene which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its...
members. If there be no abstract definition, such as I have suggested, should not the word “obscene” be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

This protest, however, was not the only indication of judicial dissatisfaction with the harsh rule of the Hicklin case. In New York, long before Judge Hand’s protest was written, the courts had been quietly ignoring the rule, despite its early adoption by the Court of Appeals. But it was not until the early 1930’s that American courts generally began to reject the Hicklin rule. After a few preliminary skirmishes, the major attack on the rule came with the celebrated Ulysses cases of 1933 and 1934. In the Circuit Court of Appeals, Judge Augustus N. Hand explicitly and forcefully repudiated the Hicklin rule and, in its place, substituted a new standard for the determination of what is obscene:

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.

Thus, Ulysses effectively routed the old rule—which ignored literary and other social values, judged a whole book by passages taken out of context, and tested for obscenity by the tendency of the passages alone to deprave the minds of those open to such influence and into whose hands the book might come. In cases arising after Ulysses, most courts continued to reject the Hicklin rule and to apply the new standard of the Ulysses case. In Massachusetts, although the court refused to accept all of the implications of the Ulysses standard, the interpretation it placed upon its 1930 obscene literature law was not very different. In Commonwealth v. Isenstadt, the Supreme Judicial Court rejected the Hicklin rule and approved the Ulysses case, apart from its implication that a book is not obscene if sincerity and artistry are more prominent features of the book than obscenity and its approval of taking judicial notice of book reviews and literary criticism. On the latter point, the court expressed no opinion, though at the time of this decision, a statute had already been enacted which would authorize courts to receive evidence of the literary, cultural, and educational qualities of a book.

Though routed, the Hicklin rule was not finally defeated. A battle against it had been won—not the whole war. For Hicklin, from time to time, continued to appear in various guises in the decisions of some courts. But even if the war against Hicklin had been won, the problems inherent in any concept of obscenity would still remain.

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6 United States v. One Book Called “Ulysses,” 5 F. Supp. 182 (S.D.N.Y. 1933), aff’d, 72 F.2d 705 (2d Cir. 1934).
7 Id. at 708.
Courts commonly assume that the aim of obscenity legislation is to protect the moral standards of individual readers from the evil effects of "obscene" literature. This was the basic emphasis in the Hicklin case, where Lord Chief Justice Cockburn spoke of a book's tendency to deprave, debauch, and corrupt the minds and morals of its readers. But he did not explain what he meant by these words. The only clue he gave to their meaning was his conviction that the book in question "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." In the Hicklin view, then, the suggestion of impure and libidinous thoughts is the key to what depraves, debauches, and corrupts the minds and morals of readers—and so makes a book obscene.

This is characteristic of the reasoning of even the most liberal modern opinions, despite their rejection of the strict Hicklin test, which would ban literature when any part of the book is thought to have a "tendency . . . to deprave and corrupt" its most susceptible readers. While the more liberal modern opinions consider the dominant effect of the book as a whole upon the normal reader, courts still largely follow the Hicklin approach concerning the effect they look for upon the reader. They still ask whether "the book as a whole has a libidinous effect," whether its "dominant effect" is "to promote lust," or whether "the likelihood that the work will so arouse the salacity of the reader" outweighs its merits.

These and countless other similar statements relating to the effect of literature appear to be concerned both with the effect upon the mind of the reader and the effect upon his behavior. They evidence no effort to consider the two separately; nor is there any clear indication in the typical statute or judicial decision whether the ultimate evil sought to be prevented is sexual behavior inconsistent with moral standards, or whether the prevention of lustful sex thoughts, independent of any risk of translating those thoughts into action, is also a purpose of obscenity censorship. In most opinions, courts simply talk loosely about corrupting or depraving the "morals" of the reader by suggesting or implanting impure thoughts and desires, and the opinions are obscure as to whether the reference to "morals" relates to the reader's behavior or to his thought and desires.

Effects on thoughts and desires: Despite this judicial obscurity, careful analysis requires separate consideration of the problems relating to the effects of reading upon the thoughts and desires of the reader as distinct from his external behavior. This is because courts seem generally to have been satisfied to rest their opinions upon a finding that the book under attack will or will not tend to have an ill-defined effect upon the reader's thoughts and desires, with no real attempt to consider whether it may affect his external behavior. It has never been satisfactorily demonstrated that

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8 L.R. 3 Q.B. at 371.
9 See United States v. One Book Called "Ulysses," 72 F.2d 705, 707, 708 (2d Cir. 1934).
10 See United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).
reading obscene books leads to behavior inconsistent with current moral standards. Hence, in actual practice, the obscenity decisions are largely based upon the conclusion that reading a book will or will not tend to have the required, but vaguely stated, effect upon the reader’s thoughts and desires without proof of anything more, whatever the underlying assumptions regarding resultant behavior may be. Therefore, this problem concerning the effect of an alleged obscene book on the thoughts and desires of the reader is probably the most critical issue in applying obscenity laws.

Despite the judicial emphasis upon the effect of a book on the thoughts, desires, and impulses of the reader, courts use a variety of vague terminology that never quite makes clear exactly what kind of thoughts and desires they would protect the reader against. The federal courts, for instance, have used such phrases as “tendency to suggest impure and libidinous thoughts,”12 “suggesting lewd thoughts and exciting sensual desires,”13 “stir the sex impulses,”14 “lead to sexually impure and lustful thoughts,”15 “arouse the salacity of the reader,”16 and “allowing or implanting . . . obscene, lewd or lascivious thoughts or desires.”17 In New York, the courts have employed almost as wide a variety of terminology; they have spoken of the tendency to “excite lustful and lecherous desire,”18 “to excite lustful desire and what has been rather fancifully called ‘impure imaginations,’”19 and “stir sex impulses or lead to sexually impure thoughts.”20 In Massachusetts, at least since the adoption of the 1930 statute, the Supreme Judicial Court has been a little more consistent; it speaks of “inciting lascivious thoughts or arousing lustful desires.”21

But what kinds of thoughts, desires, imaginations, and impulses are impure, lascivious, lecherous, libidinous, lustful, lecherous, sensual, or sexual—apart from the fact that these terms relate to sex? Do these words embrace thoughts of normal sexual intercourse? If so, within wedlock or only without? Or do they embrace only thoughts of sexual perversions?

The cases clearly answer the last question. Obscenity holdings include, but are not limited to, books that suggest thoughts of sexual perversion. Many books have been held obscene that deal only with normal sexual relations and that could not possibly suggest thoughts of perversion.

Whether a book that suggests thoughts of normal sexual intercourse is obscene only if it suggests such thoughts outside the marriage relationship is not so clear. Most obscenity holdings dealing with normal intercourse do involve extra-marital relations because sex problems usually arise only in a conflict situation, and fiction

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13 See United States v. Dinnell, 39 F.2d 564, 568 (2d Cir. 1930).
16 See United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).
17 See Burstein v. United States, 178 F.2d 665, 667 (9th Cir. 1949).
ordinarily deals with sex problems in that setting. But the opinions seldom suggest that the protection against sexual thoughts sought by obscenity legislation is limited to thoughts of intercourse out of wedlock, though such talk as "sexually impure thoughts" might possibly be so interpreted. Recently, a few decisions refusing to find sex instruction and birth control books obscene have emphasized that they were distributed restrictively to or by those having proper interest. Perhaps this indicates that the courts are beginning to arrive at the point where they distinguish between arousing sexual thoughts about proper marital relations and stimulating thoughts of extra-marital intercourse. But most opinions give no hint that the courts have even considered this basic question.

What degree of causal relationship is required between the literature and the sexual thought or desire? Is it enough that reading the book may cause the thought to arise or may suggest it? Or must the book stir, arouse, implant, excite, or incite the forbidden thought? Must the book have this effect by itself, or is it sufficient if the book is one of many factors leading to the sexual thought? So many non-literary stimuli to sex thoughts and desires are constantly thrown at mankind, and are ordinarily so much more powerful in arousing sex thoughts and desires, that in most cases literature is an exceedingly minor factor. But only a few decisions have recognized that there is any problem of causation, and no court has really grappled with it. In United States v. Dennett, the court remarked that the statute did not bar "everything which might stimulate sex impulses" and went on to hold that a book on sex instruction for adolescents was not obscene because "[a]ny incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect." In a subsequent case, the same court suggested that the degree of likelihood of sexual stimulation as well as the degree of intensity of the resulting sexual thought must outweigh the merits of the book. These decisions seemed primarily concerned with balancing the value of the book against the likelihood of harmful effect on the readers' sex thoughts; and in doing so, they recognized that some books dealing with sex are more stimulating than others. But even if the courts were more specific in stating the requisite causal relationship between the book and the thought, no formula can really help a court to determine when, in what ways, and how much the reading of a particular book will affect the sexual thoughts and desires of any reader. On this most difficult question, some courts have rejected the expert testimony of psychiatrists and appear to rely solely upon their own guess, with no basis for judgment except their own personal instincts and reactions to the book.

Strikingly absent from judicial opinions is any explanation as to why they reach the conclusion that literature stimulating sexual thoughts or desires is sufficiently harmful to the public interest to be labeled "obscene." Apart from the possibility that sexual thoughts may stimulate sexual behavior contrary to current moral stand-
ards, it is doubtful that any evils sufficiently serious to justify interference with freedom of expression can result from stimulating sexual thoughts. The creation of normal sexual thoughts and desires is neither immoral nor contrary to commonly accepted standards of behavior. Sexual thoughts are perfectly natural; without them, men and women would be abnormal. Indeed, the stimulation of thoughts and ideas about sex, even creating the desire for sexual intercourse, may often be in the public interest. For example, education in sexual practices that makes for more satisfying marital relations or an exposition of the delights that can come from the perfect mating of a man and wife in a physical and spiritual union may well make for more stable family relationships and encourage a young man to marry rather than to experiment in unmarried love.

Some of the religious advocates of censorship say that sex literature “darkens the mind” and “corrupts the heart,” but they do not attempt to indicate just what this harm is, apart from its effect on conduct. Basic to religious thinking is the emphasis that lustful thoughts are as great a sin as lustful acts; this talk of corrupting the mind probably is derived from the religious duty to think noble thoughts. Certainly, it is entirely appropriate for the church to discourage reading that turns the mind from spiritual to carnal thoughts; but under our constitutional system, the government can hardly claim authority to impose controls on literature for the purpose of directing men’s minds away from the physical interests of life toward more spiritual and worthy thoughts. Another possible evil is that excessive preoccupation with sex thoughts may perhaps divert the mind from more important and productive subjects; but to ban literature in order to turn the mind into more productive or useful channels would be unthinkable, and courts have never intimated such a purpose. Possibly, literature dealing with sex may further stimulate the abnormal thinking of those already mentally unbalanced on sex; but this cannot be the basis for the decisions since it is quite generally held today that censorship over the reading of the general public cannot be justified to protect the mentally unbalanced, who can be set off on abnormal tangents in innumerable ways.

Effects on behavior: For these reasons, it seems unlikely that many courts have consciously applied obscenity legislation for the purpose of protecting the reader against sexual thoughts and desires alone, independent of the possible stimulation of improper sexual behavior. Despite their failure to analyze the problem, it seems most likely that the ultimate aim of most courts, in applying obscenity legislation, has been to guard against the danger that, through stimulating sexual thoughts and desires, “obscene” literature may lead to sexual behavior that is illegal or otherwise inconsistent with current moral standards. This is fully consistent with the standard Hicklin approach, which tests for obscenity by the tendency of a book to “deprave and corrupt” the reader by suggesting “impure and libidinous thoughts.” While this is ambiguous, it does suggest a distinction between such thoughts and their depraving and corrupting consequences. A number of courts have been more explicit

in speaking of depraving and corrupting the *morals* of the reader by means of sexual thoughts, which seems to suggest that the words "deprave" and "corrupt" refer to the reader's behavior and not to his thoughts alone. Certainly, a great deal of the pressure for obscenity legislation and for strict enforcement of obscenity laws has been based on the assumption that "obscene" literature leads to immoral behavior.

But courts have not been explicit in indicating what they mean when they speak of depraving and corrupting the morals of the reader, even assuming that this refers to an effect on his behavior as distinct from his thoughts and desires. Since thoughts of sex are the key to this depravity, it seems apparent that the courts have in mind depravity or corruption that is sexual in nature. Beyond this point, the opinions become obscure. Is the reader depraved and corrupted when he engages in normal sexual intercourse—or only when he practices sexual perversion? While the opinions do not say, presumably the answer here must be the same as that reached above with respect to thoughts of sex. It is a fair conclusion that the courts, in applying the obscenity laws, are seeking to prevent the reading of books believed to lead to sexual conduct that is illegal or inconsistent with currently accepted moral standards. This probably includes both sexual perversion and normal sexual intercourse outside of wedlock.

If there were any dependable way to ascertain the probable effect of a particular book on the sexual behavior of the average or normal reader, most of the difficulties in applying obscenity legislation would be solved. Measuring the probable resultant behavior against current community standards in sexual matters would provide a rational and defensible criterion for applying the obscenity laws. Despite the importance of freedom of expression in literature, there could be little doubt of the constitutional validity of banning a book which demonstrably is likely to induce normal persons to engage in sexual behavior deviating from accepted community standards. But no method has yet been devised to forecast the probable effect of a book on the sexual behavior of a reader. All the courts can do in this area, in which they have no expertise, is to indulge in prophecy and guesswork, governed largely by the judge's individual literary and moralistic background. Thus far, psychologists and other students of human behavior have failed to provide the courts and society with any basis for determining what relationship, if any, there may be between reading about sex and engaging in sexual behavior. Hence, on what should be the most critical issue in applying and appraising the effect of obscenity laws, neither the courts nor their critics have any really dependable basis for judgment.

In appraising the actual effect of literature upon the sexual behavior of the reader, there is a great deal of talk and very little factual data upon which to base a fair judgment. The advocates of obscenity censorship simply assume, with no attempt at proof, that reading about sex is a primary cause of sexual deviation. Those who oppose censorship point out that its advocates have "never proved their case," that censorship "scorns facts" and "substitutes guesses for findings." On both sides, there is much heat and little light on this critical question. Both grasp at straws for
lack of any dependable information on the effect of reading upon the sex conduct of the reader.

For example, advocates of strict obscenity censorship rely heavily upon the conclusions of prison wardens and law enforcement officers that "salacious material" is an important factor in the increase in sex crimes, although there is nothing to indicate that these conclusions are based upon anything other than bare conjecture from the fact that sex criminals also read sexy magazines. There is nothing even to suggest that their conclusions were based upon any careful study designed to separate the various factors that might contribute to sexual delinquency. So far as appears, these conclusions are guesses based on the fact that those with anti-social sexual desires do read sexy material, without any attempt to determine which is the cause and which the effect. On the other hand, neither do those who oppose this type of censorship rely on any scientific study of the possible causal relationship between sex literature and sexual behavior. Instead, they point to studies indicating that books stand very low among the various sources of sex knowledge. From these findings, it is reasonable to conclude that literature dealing with sex is not an important factor in most sexual behavior; but this does not necessarily mean that among those who read, such literature is a negative factor. Or they quote unnamed psychiatrists to the effect that pornographic literature does not lead to sex crimes, with no reference to any substantiating studies.

The unfortunate fact is that today relatively little information is available on the effect of sex literature on human behavior. A small amount of tangential information points toward the minor significance of literature as the source of sex knowledge or of sexual stimulation, but this is fragmentary and falls far short of relating the reading of sex literature to sexual behavior or misbehavior. For example, the Kinsey studies found that a slight majority of men and women reported some "erotic responses" from a variety of literature, some romantic, some more specifically sexual; but only 16 per cent of the women and 21 per cent of the men reported that such response was "definite" or "frequent." Obviously, this is too vague to be dependable in forecasting what kind of literature is likely to lead to sexual desire or arousal, and it gives no light whatever on the causal relationship between such arousal and actual sexual behavior inconsistent with the community standard. Although the whole structure of obscenity censorship hinges upon the unproved assumption that "obscene" literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior. Surely, methods of social investigation have now progressed to the point where this can and should be done.

But until dependable studies of this kind are made, literature will continue to be censored upon the hypothesis that so-called "obscene" literature is a significant factor in influencing substantial deviation from the community standard of values. There are a number of reasons for real and substantial doubts as to the soundness of that
hypothesis. (1) Scientific 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 non-active 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, 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 doubt concerning the basic hypothesis on which obscenity censorship is defended. (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 community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. 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.

The courts can hardly be expected to withhold enforcement and application of obscenity laws to literature until some dependable scientific studies have been made both establishing the relationship, if any, between reading about sex and sexual behavior, and demonstrating the kind of sex literature most likely to affect sexual behavior. The courts have the responsibility for giving some meaning and effect to this legislation, despite its lack of precision, and must rely upon their own intuition and judgment if nothing more objective is available to aid them. But the absence of any dependable information on the effect of sex literature on human behavior, coupled with real reasons to doubt that sex literature is a significant factor in sexual deviation, should at least make the courts cautious in assuming that a particular book will have a bad effect upon the sexual behavior of its readers.

**Effects on Community Moral Standards**

Apart from seeking to protect the reader's thoughts or behavior against deviation from currently accepted moral standards, censorship advocates also seek to pro-
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Protect society against literature that may, in time, bring about a change in the accepted moral standards through changing customs and laws.

Such ideological obscenity seldom explicitly appears in court opinions as the basis for decisions, but it appears to have influenced the result in some cases. Perhaps the clearest example is People v. Dial Press, in which a trial court construed the New York statute to prohibit "publication of a book which contravenes the moral law and which tends to subvert respect for decency and morality." D. H. Lawrence's The First Lady Chatterley, the court held, was clearly obscene because of its central theme, which the court interpreted to be that... it is dangerous to the physical and mental health of a young woman to remain continent and that the most important thing in her life, more important than any rule of law or morals, is the gratification of her sexual desire.

A more common expression in the opinions of the New York courts is whether a book tends to "lower the standards of right and wrong, specifically as to the sexual relation." Perhaps the courts have ordinarily refrained from basing their decisions on ideological obscenity because a ruling that literature may be proscribed to guard against a change in accepted moral standards would fly squarely in the face of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions. But even though courts have not often based their decisions squarely on ideological obscenity, there can be little doubt that it has exerted a powerful influence on the law of obscene literature.

Here, as in the case of effect on the individual reader's morals, the difficulties of framing an acceptable standard and then of applying it to a particular book would be enormous. Perhaps courts could, without excessive difficulty, frame a generally acceptable ideological standard concerning sexual behavior, despite the manifold social and religious groupings of a nation as large as ours. The chief difficulty lies in its application to literature. When does a book tend to subvert respect for decency and morality or to lower standards of right and wrong? If the causal relationship between a book and the sexual thought or sexual behavior of its reader is hard to determine, the causal relationship between a book and the community's future moral standards governing sexual relations is beyond rational forecast. For the factors that influence the growth and formulation of moral standards and their modification are so numerous and complex that it is impossible to say what effect a book might have.

It is, of course, possible to formulate a standard of obscenity that avoids the troublesome questions of causal relationship between the book and the reader's thoughts or behavior, or between the book and its effect upon the moral standards of the community. One such standard is the religious principle that, if sin is dis-

27 Id. at 417, 48 N.Y.S.2d at 481.
28 Id. at 418, 48 N.Y.S.2d at 483.
cussed or portrayed in a book, it must be recognized for what it is; another, is Havelock Ellis' definition of the obscene as that which is off the scene and not openly shown on the stage of life. Although these standards avoid the problem of casual relationship, they create new problems of a different kind. The religious principle, for example, raises such questions as these: What is sin? How and in what way must it be recognized? Who must recognize it—the author, the characters in the book, the reader, all readers? Havelock Ellis' definition of the obscene is even more troublesome. Both its desirability as a standard and its usefulness in application are doubtful, for it is a static standard that "might easily fetter American works of literary and artistic distinction," and it also "pretty much says, 'We will permit what we permit,' which is going around in a circle." And in addition to the difficulty of ascertaining what is off the scene and not openly shown on the stage of life, which is no mean task in itself, it squarely raises issues concerning vulgar and offensive language and scatological matters not customarily used or discussed in public.

Offensiveness

Professor Chafee has suggested that one of the aims of obscenity laws is to prevent "offensiveness, which links indecency to profanity and public drunkenness." Amplifying this, he explains:22

... the law wants to prevent the senses of citizens from being offended by sights and sounds which would be seriously objectionable to a considerable majority and greatly interfere with their happiness. From this standpoint, a nasty word in a streetcar is treated like a lighted cigar—the law is interested in the immediate effect on the sensibilities of others.

Professor Chafee appears here to have been thinking of publicly spoken obscene or profane words of a shocking nature, sometimes prosecuted under obscenity laws, which are hardly analogous to shocking words voluntarily read. At another point, he suggests that a "valiant effort" could be made to justify some convictions for written obscenity on the ground that a state may "protect readers from ... serious shock to their sensibilities," but here he was speaking specifically of "grossly indecent" letters, not literature.

Few efforts, valiant or otherwise, have been made by the courts to justify convictions for literary obscenity on the ground of offensiveness. On the contrary, with rare exceptions, courts agree that the use of vulgar and offensive language does not in itself make a book obscene. Such language is not ordinarily sexually stimulating, nor does it tend to lower moral standards concerning sexual behavior, even though it is not customarily used in public.

Courts have wisely refused to add vulgarity and offensiveness to the types of literature that violate obscenity laws. The importance to society of complete fre-

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21 Id. at 211.
22 Id. at 196-97.
23 Id. at 56.
dom for authors to write with blunt realism on any subject, when that seems the
best way to make their point, and to portray their characters in vulgar and shocking
language, when that seems most appropriate for the author's purpose, far out-
weighs the relatively minor harm that might result from offending the sensitive
soul.

This harm—if it is a harm—is relatively minor for two reasons. In the first
place, few who read such literature are shocked or offended in any way, for the
sensitive will seldom read it—unless they are looking for the shock. Those who
are offended by such literature need not, and ordinarily do not, read it. If by acci-
dent, they start to read a book that turns out to be offensive, there is no obligation
to continue reading. In this respect, literature containing words, scenes, or ideas
likely to offend some readers is quite unlike publicly spoken obscenity from which
there may often be no escape. For the offensive materials are confined within the
covers of a book and need not be brought to life unless it is the reader's desire to
do so.

In the second place, for the relatively few readers who may be offended by what
they read, the shock to their sense of decency and propriety is really a very trivial
harm, standing by itself. Those who quite accidentally read a book containing un-
expected scenes or words of a nature shocking to them may, at the worst, become
momentarily embarrassed, or perhaps outraged or distressed that such a book should
be available to the innocent reader. But such an emotional reaction is of relatively
short duration and need not continue unless the reader chooses to prolong and
accentuate his outrage by looking for more vulgarity. In contrast, the local Com-
stock, who prowls the bookstores and magazine stands searching for "shocking
passages" to point at in horror and alarm, finds exactly what he is looking for and
would be disappointed if he did not. He cannot claim that offense to his sensitive
soul is a harm that justifies censorship, for he asks for it, and he insists that he, at
least, is immune from harm. Of course, most readers experience no offense at all,
for they know the general character of the book, and they read it because they want
to.

These considerations may explain why courts have not expanded the concept of
obscenity to include literature of an offensive nature to the average reader. But the
failure of the courts to make offensiveness a controlling criterion in finding obscenity
does not mean that some courts have not been influenced by the presence or absence
of offensive and vulgar words. In United States v. Dennett, for example, the court
emphasized the "decent" language of a booklet on sex instruction in finding it not
obscene. Conversely, in Besig v. United States,\(^4\) the language of Henry Miller's
Tropic of Cancer and Tropic of Capricorn so shocked the court that this was
undoubtedly the most important factor in its ruling that these two books were
obscene, even though the court tried to reconcile its emphasis upon the indecency of
the language with the traditional rule that the language must have a tendency to
\(^4\) 208 F.2d 142 (9th Cir. 1953).
deprave or corrupt the morals. On the other hand, James Joyce's *Ulysses*, James T. Farrell's *A World I Never Made*, and other books containing similar language have been held not obscene. Perhaps Massachusetts has arrived at as candid and satisfactory a solution to the problem as possible. In *Commonwealth v. Isenstadt*, the court held that realistically coarse scenes and vulgar words are not in themselves obscene, but may be considered in determining the effect of a book on its readers.

Some kinds of literature raise a similar but much more difficult problem. Such pieces of literature as Benjamin Franklin's *Letter to the Academy of Brussels* and Mark Twain's *1861*, for example, deal with matters not often discussed in polite society, but they are not sexually stimulating, and it is hard to see how either of them could have any substantial tendency to lower moral standards concerning sexual behavior. Yet, Benjamin Franklin's *Letter* was once held to be obscene, and Mark Twain's *1861* undoubtedly would be if a censor could ever find a suitable occasion for prosecution. Far below such literature as Franklin's *Letter* and Twain's *1861* are the dirty books that, lacking wit, are dull or even repulsive. They are not sexually stimulating, since they repel rather than attract the normal reader. At most, they pander to existing appetites for literature of that kind. Such a book, apparently, is *Waggish Tales from the Czechs*, which was before the Court of Appeals in *Roth v. Goldman*.

There the court recognized "the curious dilemma involved in a view that the duller the book, the more its lewdness is to be excused or at least accepted." The majority of the court, to Judge Frank's bewilderment, sought to avoid the dilemma by hiding behind the limited scope of judicial review and by the argument that

...within limits it perhaps is not unreasonable to stifle compositions that clearly have little excuse for being beyond their provocative obscenity and to allow those of literary distinction to survive.

A better and more candid solution to the dilemma was found by the same court a few years earlier in *United States v. Rebuhn*, which held that books of this kind were obscene when sold in such a way as to appeal to the "salaciously disposed" and "to gratify their lewdness," thus returning to something akin to Margaret Mead's analysis of pornography.

**Effect on Whom: the Probable Audience**

Inherent in all definitions of obscenity and in the standards for determining what is obscene is a reference to the effect of a book upon its readers or the moral standards of the community or to a community concept of what is not properly exposed to public view. This reference, particularly to the effect of a book upon its readers, has caused trouble ever since the decision of *Regina v. Hicklin* in 1868. The question raised is whether the effect of a book upon its readers is to be judged by reference to normal adults, abnormal adults, or children.

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56 172 F.2d 788 (2d Cir. 1949).
58 *Id.* at 789.
59 109 F.2d 512 (2d Cir. 1940).
OBSCENITY IN THE COURTS

Many courts, following an unduly restrictive interpretation of the Hicklin rule, rejected the normal adult as the standard by which to judge the effect of a book upon its readers; they read into the obscene literature statutes a desire to protect the young and the weak. In some jurisdictions, legislatures enacted statutes explicitly aimed at the protection of the young. The typical statute, in addition to the usual terminology, speaks of books that tend or manifestly tend to corrupt the morals of youth. This view, in fact, became so well established that Judge Learned Hand, as we have seen, felt impelled to follow it in the Kennerley case, although he personally objected to it.

But Judge Hand's objections to this view of the Hicklin rule had greater influence than his compulsion to follow it. Courts soon began to look to the normal person as the standard for determining the effect of a book on its readers, instead of the young or weak. Now, most courts at least start from the premise that the normal or average person in the community is the proper touchstone, though some still speak of the young and weak as part of the reading public.

The normal person, however, is not always a suitable hypothetical individual for testing the effect of a book on its readers. Books, like other things, are sometimes distributed in channels that reach certain kinds or classes of people. A book that is advertised and more or less surreptitiously distributed as pornography, for instance, normally reaches those who have an appetite for literature of that kind. In these circumstances, the normal person is hardly the proper person to serve as a standard for determining the effect of the book. Faced with this problem, many courts take into account what may be called the probable audience of the book. If the book is advertised and distributed in such a way as to reach those upon whom it is not likely to have undesirable effects, it is not obscene. But if, on the other hand, the book is so advertised and distributed as to reach those upon whom it is likely to have undesirable effects, it is obscene. And in ascertaining the probable audience of a book, courts take into account the circumstances of its publication. Among the circumstances sometimes considered are: the nature of the advertising and promotional material, the reputation of the publisher, the channels of distribution, and the price and quality of the edition.

Reference to the probable audience of a book to determine its effect upon readers introduces a new variable into a problem that is already full of them. In this view, a book is not obscene as such. A book may be obscene when distributed to one class of persons but not when distributed to another. Indeed, in some cases, there is even language susceptible of an interpretation that would make the obscene nature of a book turn upon its effect on a single individual.

Although most courts have at least approached a reasonably satisfactory solution to the audience problem, the old issue seems likely to become hotly contested again. With the public concern over why Johnny cannot read is an equal concern over what will happen to him if he does. And there is renewed pressure for legislation that would, in the interest of protecting children from literature thought to be un-
desirable for them, effectively restrict to a juvenile standard books offered for sale to the general public.

In New York, a joint legislative committee not long ago proposed the enactment of a bill that would make it a criminal offense to sell or to possess with intent to sell to "any person actually or apparently a minor ... [any book] which, for a minor, is obscene." Similar bills have been introduced in the Minnesota and New Jersey legislatures; and the city council of St. Paul, Minnesota, has adopted an ordinance patterned after the New York proposal.

Legislation of this kind would go far to restrict to a juvenile standard books offered for sale to the general public. Booksellers, particularly the druggists and newsstand dealers who handle paper-bound books, cannot possibly know the contents of every book they handle. And even if they could, they would be faced with the impossible task of determining at their peril what is obscene for one age group but not another, a task which dealers in paper-bound books in particular are hardly equipped to perform. Faced with the complexities of the obscenity law and the practical impossibility of knowing the content of every book he handles, every bookseller would become easy prey for those who come to him with a list of books thought to be undesirable for minors. And since booksellers cannot set up special book racks marked "For Adults Only," the inevitable consequence would be to withdraw from sale altogether all books believed to be unsuitable for juvenile readers by any policeman or prosecutor or any group of determined citizens.

Clearly, the desire to protect children from literature at all costs can be carried too far. What is needed here is a refinement of the concepts already well developed by the courts. It would simply make clear that the effect of a book upon its readers is to be determined by reference to readers who are typical of the class of persons to whom the book is primarily directed by reason of its nature and the manner of its publication, advertisement, distribution, and sale. Under such a standard as this, persons typical of the class at which the book is aimed would not be deprived of literature simply because some reader outside that class of persons might conceivably be adversely affected.

**LITERARY, SCIENTIFIC, AND EDUCATIONAL VALUES: PARTLY AND WHOLLY OBSCENE**

The weight to be given to literary, scientific, and educational values in the determination of what is obscene has engendered more bitterness and emotional disturbance than any other problem inherent in the various concepts of obscenity. This is particularly true of literary values. To those who place a high value upon literary qualities, the censorious are philistines. To the censorious, on the other hand, literary qualities are suspect—they serve only to make the obscene palatable and, therefore, all the more insidious and dangerous.

In the fight between the literati and the philistines, the philistines were at first on top. They got there by means of a rule of law that called for judging a book

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by the obscenity of passages taken out of context—the so-called partly-obscene test. Where this rule came from is not wholly clear. Probably it developed out of an old rule of pleading that required the indictment to specify the parts of a book alleged to be obscene. At any rate, the rule became firmly imbedded in American law and was inserted in the obscene literature statutes of a number of states.

Yet, some courts, even at an early date, refused to apply the rule to literary classics, to what they called “standard literature,” and thus left open a means of escape from a rule that totally ignored literary values. But it was not until Massachusetts in 1930 tripped and fell over Theodore Dreiser’s *An American Tragedy* that courts generally began to reject the partly-obscene rule and to substitute in its place the requirement that a book must be judged as a whole.

In *Commonwealth v. Friede*, the trial court, despite the defendant’s repeated efforts, refused to admit in evidence, for the jury’s consideration, the two volumes which then comprised *An American Tragedy* and permitted the jury to consider the allegedly objectionable passages together with some pages and chapters in which they appeared. Exceptions to the trial court’s rulings were overruled on appeal because, as the Supreme Judicial Court said,

\[\text{[E]ven assuming great literary excellence, artistic worth and an impelling moral lesson in the story, there is nothing essential to the history of the life of its principal character that would be lost if these passages were omitted.}\]

The court added, for good measure, that,\[43\]

\[\text{The seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obnoxious passages or that if they should read them would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of a tale.}\]

This was too much, even for Massachusetts. Within the year, it amended its statute to eliminate the partly-obscene rule.

Since then, the courts of Massachusetts and of most other jurisdictions in which the question has been considered have explicitly adopted the requirement that a book must be judged as a whole, not by its parts taken out of context. Only the United States Court of Appeals for the Ninth Circuit retains any vestige of the old partly-obscene rule.

The tremendous importance of judging a book as a whole, rather than by isolated words or passages, cannot be over-estimated. For it is not possible for a court to give the requisite consideration to the value of a book, or to the effect of suppressing the book upon freedom of expression in literature, without considering the entire book and the relationship of the disputed passages to its theme. To permit a book to be condemned as obscene solely because of isolated words or passages ripped from the total structure of the work would result in depriving society of the value of the

\[41\text{271 Mass. 318, 171 N.E. 472 (1930).}\]
\[42\text{Id. at 322, 171 N.E. at 474.}\]
particular book and the value of a free literature without judicial consideration of
the value of what is being destroyed.

Both the writer and publisher need assurance that their books will be judged
as a whole; for only in this way can the values of a free literature be protected. The
censor is rarely a well-balanced and literate person; he usually is compulsively in-
terested only in finding what he seeks and in its merciless and indiscriminate sup-
pression once he finds it. To put a writer's months or even years of creative work
and a publisher's capital investment in a new publication at the mercy of such a
person without an obligation on the courts to evaluate the book as a whole is to
invite timidity and restraint in both author and publisher—a sure way to destroy the
value to society of free literature.

Society also needs the same protection to preserve the values of the particular
book under attack. If the now-discredited standard that called for condemnation of
a book solely because of its isolated passages were ever literally and rigorously
applied, much of the world's great literature would have to be suppressed as ob-
scene, or at least bowdlerized as Shakespeare and others were in Victorian England.
Even if exceptions to censorship be made for recognized classics, equally great lit-
erature of tomorrow may well be suppressed today if a book may be condemned
on the basis of isolated passages. We know what such an irrational viewpoint
accomplished in Massachusetts, where suppression of Theodore Dreiser's *An Ameri-
can Tragedy* on this ground made Massachusetts the laughing stock of the nation.
It also demonstrated, even to the people of that state, that society cannot tolerate
such an absurd standard.

But the requirement that a book must be judged as a whole does not mean that
a book is obscene only if it meets Mark Twain's description of his *1601*: "[I]f there
is a decent word in it, it is because I overlooked it." A book is obscene if that is
its "dominant effect" or its "main purpose" or if it "contains prohibited matter
in such quantity or of such a nature as to flavor the whole and impart to the whole
any of the qualities mentioned in the statute, so that the book as a whole can fairly
be described" as obscene.

And in applying the requirement that a book be judged as a whole, courts often
speak of the relevance of the passages claimed to be obscene. In the *Ulysses*
case, for instance, the court said that, in determining the "dominant effect" of a book,
"the relevancy of the objectionable parts to the theme" is a persuasive piece of evi-
dence. If the objectionable parts are relevant to the theme, courts tend to find
the book not obscene; if, on the other hand, the parts are irrelevant, the book is
usually found to be obscene.

But what is "relevant" in this context? And how is it to be determined? In

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44 *Letter of Samuel Clemens to a Mr. Orr, of Cleveland, July 30, 1906.*
45 *United States v. One Book Called "Ulysses,"* 72 F.2d 705, 708 (2d Cir. 1934).
48 72 F.2d at 708.
Massachusetts, the Supreme Judicial Court tests relevance by the *necessity* of the passages to convey the sincere message of the book. In New York, however, courts sometimes determine the relevancy of the passages by the author's sincerity of purpose—a far more satisfactory standard of relevance than that employed by the Massachusetts courts, for it recognizes what is sometimes called "literary necessity"—the author's need to use whatever words and passages will produce the effect he intends. It also calls for a livelier appreciation of the nature and function of literature.

Although the now generally accepted requirement of judging a book as a whole permits courts to weigh the merits of a book against its alleged demerits (which the old partly-obscene rule did not), not all courts have taken advantage of the opportunity. Despite their acceptance of the whole-book requirement, a few courts still cling to the notion that literary values are irrelevant. Most courts, however, do consider the literary qualities of a book under attack. In Massachusetts, the literary qualities of a book are not very important, but they are no longer totally ignored. At the opposite extreme, New York courts have occasionally held that the obscene literature law is totally inapplicable to works of genuine literary value. To most courts, however, the literary qualities of a book are important, but not conclusive. The same observations apply to educational and scientific works. If a book has literary, educational, or scientific values, these values are weighed in determining whether the book is obscene, and their weight is usually enough to bring about a decision favorable to the book. On the other hand, if a book with obscene tendencies lacks these values, courts are likely to condemn it.

But in weighing the value of a particular book, the requirement that the book be judged as a whole is not alone enough to give adequate protection to society's interest in literature, or to insure adequate consideration and understanding by the courts of the value of the book in question. Something more is required to give sufficient emphasis to the aesthetic, scientific, educational, and other social values of the book and to enable the courts to appraise these values intelligently. If, for instance, the particular book is a work of fiction or poetry, it is important that it be viewed with a sympathetic appreciation and understanding of the nature and function of imaginative literature. Here, the appraisal of literary critics is indispensable, for without it, judges are forced to assume the role of literary critics themselves—a role that few courts, if any, are competent to play. Much the same observation applies to non-imaginative literature as well. In considering the values of such works as Mary Ware Dennett's *The Sex Side of Life* or Dr. Marie C. Stopes's *Married Love*, the testimony of experts appraising the value of the particular book in satisfying a social need is equally indispensable.

Yet, some judges refuse to recognize their limitations. To them, the obscene is self-evident, and they neither need nor want the help of experts in appraising the literary, educational, and scientific values of a book. Fortunately, however, most courts today readily consider some form of evidence of these values of a book, but they do not always agree on what kinds of evidence it is proper to consider. Some
of them take into consideration the published reviews and appraisals of competent critics. Others admit the testimony of expert witnesses. And one court has received and considered the solicited letters of persons qualified to appraise the book.

**Author's Purpose**

The final major problem inherent in the concept of obscenity concerns the author's purpose and its bearing upon the determinations of what is obscene. Is the author's purpose relevant in any way? If so, is it relevant to the literary, educational, or scientific values of a particular book? Or is it directly relevant to the issue of obscenity itself?

This problem arose early in the development of the law of obscene literature. In the *Hicklin* case, the defendant conceded that the book was obscene but argued that he was not guilty of a crime because his intention was honest and lacked the requisite criminal animus. The court, however, rejected the argument and ruled that the defendant's motives, however honest or even laudable, were no defense to the action. This decision was carried a step further in *United States v. Bennett*,49 where the court suggested that the author's purpose is totally irrelevant. This is the view apparently accepted in the *Dennett* and *Ulysses* cases.

Yet, in both *Dennett* and *Ulysses*, the court spoke of the authors' sincerity as a point in favor of the books involved in those cases. Many other courts, holding a book not obscene, have also emphasized the sincerity of the author. The reverse is also true: when a court finds, or thinks it finds, an insincere author whose intent is obscene, it readily holds the book obscene too. Some courts even go so far as to suggest that a book cannot be obscene unless it is written with a pornographic purpose.

But how can a court ascertain the nature of the author's purpose? In two recent cases, the author himself testified as a witness, describing his objects and purposes in writing the book. More frequently, courts resort to the book itself and to the testimony of expert witnesses as evidence of the author's purpose. Yet, however the court ascertains the author's purpose, it usually is regarded as only one of several factors to be considered and therefore not conclusive on the issue of obscenity.

Within the wide leeway afforded by typical obscene literature legislation, most courts have developed a reasonably satisfactory body of doctrine to guide them in the determination of obscene literature cases. Such an antedeluvian point of view as that recently displayed by the Missouri Supreme Court in *State v. Becker*50 is, fortunately, nowadays extremely rare. Today, most courts at least approach the problem from a rational viewpoint and with a willingness to consider most of the factors relevant to a determination of whether a given piece of literature is to be suppressed as obscene.

There still remains, however, some room for improvement and refinement—for

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50 272 S.W.2d 283 (Mo. 1954).
changes that will have to be made if we are to discriminate intelligently the obscene from that which is not and to beat off the dogs who are baying at literature again.

Perhaps the most important of the needed changes in the law of obscene literature is an amendment to obscene literature statutes making it clear that the dealer's knowledge of the obscene character of the literature he handles is an essential element of the offense. But if such an amendment were added to the statutes, some other procedure might well be established for adjudicating the obscenity of publications outside the criminal courts, with such an adjudication constituting adequate proof of the dealer's requisite knowledge. Here, the experience of Massachusetts with a declaratory action against the publication instead of the dealer and of the United States Customs with a forfeiture action suggests the desirability of establishing a similar procedure in all jurisdictions. Certainly, a judicial procedure of this kind is far preferable to the establishment of an official board of censors—for the performance of censorship boards in the past is not one to inspire confidence in their operations.

Beyond the clarification of the basic criminal law to require knowledge of the obscene character of the publication and the establishment of a declaratory judicial action for the determination of whether a publication should be suppressed as obscene, there is need only for refinement and restatement of the factors that are indispensable in making such a determination. In the statute establishing the declaratory action, there might well be provisions requiring the court to consider the following points: (a) the class of persons comprising the audience to which the publication is directed by its nature and the manner of its publication, advertisement, distribution, and sale; (b) the effect of the publication, considered as a whole, upon the sexual behavior of readers typical of that class; (c) the artistic, literary, scientific, and educational values of the publication, again considered as a whole; and (d) the intent of the author and publisher. In addition, the statute should clearly specify that all evidence relevant to these points, including the testimony of experts, is admissible.

Such changes in the law of obscene literature as these should help to clarify an exceedingly vague and complex legal problem and to insure that rational consideration will be given to the factors that are truly relevant in a determination of whether a given publication should be suppressed as obscene. These changes should also encourage dealers and publishers to resist when private groups or public officials distribute secret lists of books coupled with threats of criminal prosecution unless the books are withdrawn from circulation.