South Carolina Law Review

Volume 21 | Issue 3 Article 4

1969

Obscenity an End to Weighing

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OBSCENITY

AN END TO WEIGHING?

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Inasmuch as the following book review also possesses the qualities of an article, it is being published as the latter.

THE END OF OBSCENITY: The Trials of Lady Chatterley, Tropic of Cancer and Fanny Hill, by Charles Rembar (Random House, 1968. Pp. 528. $8.95).

TROPIC OF CANCER ON TRIAL: A Case History of Censorship, by E. R. Hutchison (Grove Press, 1968. Pp. 300. $6.50).

I AM CURIOUS (YELLOW): A Film by Vilgot Sjöman, Translated from the Swedish by Martin Minow and Jenny Bohman (Grove Press—An Evergreen Black Cat Book. Pp. 254. $1.75).

Two recent books—*The End of Obscenity* by Charles Rembar and *Tropic of Cancer on Trial* by E. R. Hutchinson—trace the recent judicial development of the constitutional rule that, in the absence of pandering,[1] the social interest in protection from obscenity is outweighed by the slightest amount of any other social value in the work in question and that therefore courts are not to engage in weighing the two interests. The theme of these two books may be said to derive from sometime Grove Press counsel Rembar's decision not to follow precedent and argue that because a book had literary quality it was not lustful. Instead he "wanted to argue that because it had literary quality

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1. In Ginzburg v. United States, 383 U.S. 463 (1966), the United States Supreme Court held (Justices Black, Douglas, Harlan and Stewart dissenting) that, "[w]here an exploitation of interests in titilation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." Mr. Justice Brennan for the Court, 383 U.S. 463, 475-76 (1966). In Mishkin v. New York, 383 U.S. 502 (1966), the Court held per Brennan (Black, Douglas and Stewart dissenting) that, "[w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." 383 U.S. 502, 508 (1966). The *Ginzburg-Mishkin* rationale has been characterized as a *contextual* standard for obscenity by Professor John Semonche in *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation,* 13 U.C.L.A.L. REV. 1173 (1966); *see* Magrath, *The Obscenity Cases: Grapes of Roth,* 1966 SUP. CT. REV. 7, 25-40.

it should not be suppressed, and that it did not matter that it was lustful."[2] The litigation which followed the publication by Grove of Henry Miller's *Tropic of Cancer* is covered extensively by both books. Hutchison, an English professor and former journalist, describes the campaign involving more than sixty legal actions which were brought against those engaged in the publication, distribution, importation or sale of the Miller book. Rembar describes not only the *Tropic of Cancer* cases, but similar litigations with respect to D. H. Lawrence's *Lady Chatterley's Lover* and John Cleland's *Memoirs of a Woman of Pleasure (Fanny Hill)* from his vantage point as a participant in cases involving all three books.

Both the Rembar and Hutchison books present a survey of the law of obscenity in America before the recent cases of the late fifties and sixties. Going as far back as the seventeenth century licensing cases in England and the conviction of two Boston book dealers for selling an illustrated edition of *Fanny Hill* in 1821, the authors make the point that there was no Anglo-American judicial definition of obscenity prior to the test stated in the English case of *Queen v. Hicklin*.[3] That test, which was used subsequently by American courts in applying the Comstock Act of 1873 and anti-obscenity laws of the states, was formulated by the Lord Chief Justice Lord Cockburn as follows: "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." It was not until 1957 that the United States Supreme Court began paring down this broad standard. In *Butler v. Michigan*,[4] Justice Frankfurter wrote for a unanimous court

2. C. REMBAR, THE END OF OBSCENITY 25-26 (1968).

3. 3 Q.B. 360 (1868). The court here applied one of Lord Campbell's Acts (20 & 21 Vict. c. 83) in a case involving an anti-Catholic pamphlet entitled *The Confessional Unmasked: Showing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession.* The Boston case [Commonwealth v. Holmes, 17 Mass. 366 (1921)], is regarded as the first recorded suppression of a literary work in the United States on grounds of obscenity. *See* 383 U.S. 413, 425 (1966).

4. 352 U.S. 380 (1957). For an example of a statute defining obscenity on the basis of its appeal to minors under 17 which the Supreme Court found not to involve an invasion of such minors' constitutionally protected freedoms, see New York Penal Law § 484-h as enacted by L. 1965, c. 327 or McKinney's Consol. Laws, c. 40. The law is published as Appendix A to Mr. Justice Brennan's opinion for the Court in *Ginsberg v. New York* [390 U.S. 629, 645-647 (1968)], a case in which the validity of the Act was upheld with Justices Black, Douglas and Fortas dissenting.

For an example of an unconstitutional ordinance which provided for the

that "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence" is "to burn the house to roast the pig."[5]

That same year in affirming a federal and a state court conviction in *Roth v. United States* and *Alberts v. California*[6] respectively, the Supreme Court through Mr. Justice Brennan dismissed *Hicklin*, eschewed Clear and Present Danger,[7] and adopted this new test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[8] It was Rembar's refusal to accept this "prurient interest" test of *Roth-Alberts* as the single test of obscenity that formed the heart of the strategy he pursued in defending *Chatterley*, *Cancer* and *Memoirs*. For Brennan had also written in that same opinion that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[9] Seizing upon this "ad-

classification of films according to whether or not they were "suitable for young persons" under 16, see the Appendix to Mr. Justice Marshall's opinion for the Court in *Interstate Circuit, Inc. v. City of Dallas* [390 U.S. 676, 691-703 (1968)], a case in which the Dallas ordinance was struck down because of the "absence of narrowly drawn, reasonable and definite standards for the officials to follow"—citing *Niemotke v. Maryland* [340 U.S. 268 (1951)]. Mr. Justice Harlan dissented because "the Court has demanded greater precision of language from the City of Dallas than the Court can itself give, or even than can sensibly be expected in this area of the law." He complained that the Court's current approach to obscenity "has required us to spend an inordinant amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges." *Id.* at 707, 709. *Butler, Ginsberg* and *Interstate* dealt, respectively, with a book entitled *The Devil Rides Outside* by John Howard Griffin, "girlie magazines," and a motion picture entitled *Viva Maria; see* Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation,* 1968 SUP. CT. REV. 153; Comment, *For Adults Only: The Constitutionality of Governmental Film Censorship by Age Classification,* 69 YALE L.J. 141 (1959).

5. 352 U.S. 380, 383 (1957). Mr. Justice Black concurred in the result without opinion.

6. Roth v. United States, Alberts v. California, 354 U.S. 476 (1957). The issues were so framed that the Court decided the validity of each statute without passing on the merits of the attacked materials.

7. For a brief survey of the Clear and Present Danger Doctrine, see, Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 910-12 (1963).

8. 354 U.S. 476, 489 (1957).

9. *Id.* at 484-85. Brennan based this statement on a passage from Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words —those which by their very utterance inflict or tend to incite an

ventitious aside" of Brennan's, Rembar fashioned his basic argument that, to quote from one of his briefs, "[t]he mark of suppressible obscenity inheres in the constitutional justification of the suppressive legislation." In other words, "[i]f there is speech that may be suppressed only because it has no value, then it is only speech wanting in value that may be suppressed."[10]

Lady Chatterley's Lover

This strategy was originated in 1959 when Grove Press publisher Barney Rosset[11] asked Rembar to defend Grove's unexpurgated edition of *Lady Chatterley's Lover*. This story of an affair between the wife of a partially paralyzed baronet and his gamekeeper, Rembar says, "devoted more of its pages to the act of sex and dealt with it in greater detail than anything ever before sold over the counter [and] had language that had never been seen in a book openly circulated, except when used for tangential and occasional purposes."[12] At that time, Rembar writes, "[i]f there was great enough merit, and little enough sex, the court might decide that the reader's reaction would be intellectual or aesthetic, and not, as Father Gardiner[13] put it, a 'genital commotion'."[14] But the erotic passages were not "submerged" in *Chatterley* as they were found to be in *Ulysses* by the Second Circuit Court of Appeals. Writing for that court

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immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In this case the Court affirmed a conviction for addressing offensive, derisive, or annoying words to a person lawfully in a public place.

10. C. REMBAR, *supra* note 2, at 55. Rembar points out that this opening was not appreciated by leading commentators including Lockhart and McClure in their article, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). Brennan had cited in *Roth-Alberts* their earlier article, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954). The latter article is largely recapitulated in *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587 (1955).

11. For a biographical sketch of Barney Rosset, see *How to Publish 'Dirty Books' for Fun and Profit*, SATURDAY EVENING POST, Jan. 25, 1969, at 33.

12. C. REMBAR, *supra* note 2, at 55. For an account of the successful defense in 1961 of the publishers of the unexpurgated edition of *Lady Chatterley's Lover* in England, see C. ROLPH, THE TRIAL OF LADY CHATTERLEY: REGINA V. PENGUIN BOOKS LIMITED (1961). Those testifying for the defense included Dame Rebecca West, E. M. Forster, Dilys Powell, C. Day Lewis, Stephen Potter, and Norman St. John-Stevas. The latter is the author of the useful OBSCENITY AND THE LAW (1956).

13. Harold C. Gardiner, S. J., editor of AMERICA and author of *Moral Principles Towards A Definition of the Obscene*, 20 LAW & CONTEMP. PROB. 560 (1955).

14. C. REMBAR, *supra* note 2, at 24.

Judge Augustus Hand concluded—without violence to the *Hicklin* test—that "[t]he erotic passages are submerged in the book as a whole and have little resultant effect."[15] With regard to *Chatterley* Rembar successfully persuaded the district and appellate courts in the case of *Grove Press, Inc. v. Christenberry*[16] that books which produce responses above the belt and those which get you in the groin are not necessarily in mutually exclusive categories. Rembar describes the significant development at the district court level as follows:

> [Judge] Bryan made something new of the "submerge" test. With a deft sleight of hand, he turned it around so fast one might think it was the same old test. The court of appeals had said *Ulysses* was not obscene because the rest of the book submerged the sex. Bryan said *Lady Chatterley's Lover* was not obscene because the sex failed to submerge the rest of the book: "Nor do these passages and this language submerge the dominant theme so as to make the book obscene even if they could be considered and found to be obscene in isolation."[17]

The district court judgment for the Grove Press was affirmed by the Second Circuit Court of Appeals in an opinion by Judge Clark who, though unprepared to agree that any social value would expiate obscenity, did decide that all the passages in *Chatterley* to which the Postmaster General took exception were "subordinate, but highly useful,[18] elements to the development

15. United States v. One Book Entitled Ulysses, 72 F.2d 705, 707 (2d Cir. 1934).

> The net effect even of portions most open to attack, such as the closing monologue of the wife of Leopold Bloom, is pitiful and tragic, rather than lustful. The book depicts the souls of men and women that are by turns bewildered and keenly apprehensive, sordid and aspiring, ugly and beautiful, hateful and loving. . . . Indeed, it may be questioned whether the obscene passages in Romeo and Juliet were as necessary to the development of the play as those in the monologue of Mrs. Bloom are to the depiction of the latter's tortured soul.

Judge A. Hand joined by his cousin Learned Hand (Judge Manton dissenting.) *Id.*

16. 276 F.2d 433 (2d Cir. 1960), *aff'g*, 175 F. Supp. 488 (S.D.N.Y. 1959). For description of work performed by the U. S. Post Office Department in the control of obscenity, see E. ROBERTS, JR., THE SMUT RAKERS 60-71 (1966). *See also* C. REMBAR, *supra* note 2, at 114-17, 126-27.

17. C. Rembar, *supra* note 2, at 16; 175 F. Supp. 488, 500-01 (S.D.N.Y. 1959).

18. The usefulness of Lawrence's novel was considered by *Field & Stream's* book reviewer:

> [T]his fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to outdoor-minded readers, as it contains many passages on pheasant raising, the apprehending of

of the author's central purpose"[19] and that that was not prurient.[20]

Tropic of Cancer

In June 1961 the Grove Press published *Tropic of Cancer* which had been excluded from the United States since its original publication in France in 1934 by the Obelisk Press of Jack Kahne who described it as "the most terrible, the most sordid, the most magnificent manuscript that had ever fallen into my hands."[21] Hutchison writes that as Hemingway presented in *The Sun Also Rises* the "high road of despair taken by the Lost Generation in Paris" in the twenties, so Miller gave us the low road trodden by the lice-ridden in that same time and place. Miller saw his book as "a glob of spit in the face of Art, a kick in the pants to God, [and] a bomb up the asshole of creation." In *Cancer*, the courts found eighty-five sex episodes described in "vulgar, vile, profane, and indecent words or language" on 112 pages. This frank treatment of sex, Hutchison contends is pertinent to the book's theme—and the theme of all Miller's work: the dehumanization of man for whose salvation Miller prescribes self-realization.[22] To defend this book in court, Grove chose as counsel Ephraim London who had successfully represented the distributors of the motion picture version of *Lady Chatterley's Lover* before the United States Supreme Court in a licensing case.[23] London was replaced by Rembar in the fall as

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poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately one is obliged to wade through many pages of extraneous material in order to discover and savor these sidelights on the management of a Midlands shooting estate, and in this reviewer's opinion this book cannot take the place of J. R. Miller's Practical Gamekeeper.

Zern, Book Review, FIELD & STREAM, Nov. 1959, at 142.

19. 276 F.2d 433, 439 (2d Cir. 1960). "Actually," Judge Clark wrote, "the book is a polemic against three things which Lawrence hated: the crass industrialization of the English Midlands, the British caste system, and inhibited sex relations between man and woman. . . . The rationale he seeks to establish is thus one surely arguable and open to a writer." *Id.* at 437-38.

20. C. REMBAR, *supra* note 2, at 149.

21. E. HUTCHISON, TROPIC OF CANCER ON TRIAL 33 (1968).

22. *Id.* at 12-19.

23. Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959). Rembar found this decision of "limited utility" in defending the book upon which the motion picture had been based. "There was no contention that the film contained indecent scenes or objectionable language." Rembar explained. C. REMBAR, *supra* note 2, at 145-46. It was decided in *Kingsley*—to quote Mr. Justice Stewart who spoke for a unanimous Court—that New York could not "prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." 360 U.S. 684, 688 (1959).

a result of a dispute over legal strategy between London and Grove publisher Rosset the nature of which is suggested by the following excerpts from a letter of September 25, 1961 as follows:

> Dear Ephraim:
>
> Unfortunately, a misunderstanding seems to have arisen as to how the Miller case should be conducted. Perhaps it would be a good idea if I briefly outlined the Grove Press position.
>
> The Supreme Court has now said that the protection of the First Amendment extends to works that have "the slightest redeeming social importance."
>
> . . . .
>
> Under the law as it now stands, inquiries as to whether a book is "erotic" or "lustful" or whether it has a "tendency to corrupt" in this context were never really meaningful—or in any case are no longer relevant. The question is whether Henry Miller wrote as a serious artist and produced in *Tropic of Cancer* a work which has some literary merit.
>
> . . . .
>
> Grove does not wish to be associated with any other type of defense and especially does not want to be a party to defending the book on the basis that it could not excite anyone to lascivious thoughts or actions [the Justice Department's feelings]. We will not hide behind a hypocritical position, one which will not fail to react unfavorably to us in the future.
>
> . . . .
>
> I hope that you can see your way to representing our position but if you cannot we should find another way to proceed.[24]

Rembar then prepared a general brief for the guidance of those handling the details of the many pending *Tropic of Cancer* cases. Citing the *Roth-Alberts* opinion and a series of per curiam reversals,[25] Rembar ventured to argue that "[t]he law

24. E. HUTCHISON, *supra* note 21, at 70.
25. The per curiam reversals which dealt with the motion pictures *M* (Superior Films v. Department of Education, 346 U.S. 587 (1954)), *La Ronde* (Commercial Pictures Corp. v. Regents of University, 346 U.S. 587 (1954)), *The Moon Is Blue* (Holmby Production v. Vaughn, 350 U.S. 870 (1955)),

at present is that the Constitution will not permit the application of such [obscenity] statutes to works of literary value. It is on this evidence that the Court must decide the matter."[26]

On June 23, 1964, the United States Supreme Court filed a per curiam opinion in the case of *Grove Press, Inc. v. Gerstein*[27] in which it summarily reversed a Florida appellate court decision which had upheld an injunction against the sale and distribution there of *Tropic of Cancer*. It was an ironic victory for Rembar, however, as the book had been "saved on a review that had no briefs, no argument, and not even an opinion to call its own. . . . The storm did not end with a great thunder and lightning and a sequence of bright skies. It ended with a small discordant noise, an echo of another case."[28] To heighten the irony, counsel for that other case—*Jacobellis v. Ohio*[29]—was

The Game of Love (Times Film Corp. v. Chicago, 355 U.S. 35 (1957)) and certain periodicals (Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958)) and One, Inc. v. Olesen, 355 U.S. 371 (1958) were widely interpreted to mean that the prurient interest test was the equivalent of a "hard-core" pornography test. *See* I EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 664-67 (1967); Haimbaugh, *Film Censorship Since Roth-Alberts*, 51 KY. L.J. 656, 659-62 (1963).

26. E. HUTCHISON, *supra* note 21, at 73-74.

27. 378 U.S. 577 (1964).

28. C. REMBAR, *supra* note 2, at 204-08.

29. 378 U.S. 184 (1964). The decision reversed the conviction of Nico Jacobellis for possessing and exhibiting an obscene film at the Cleveland Heights, Ohio, theater of which he was manager. Chief Justice Warren and Justices Clark and Harlan dissented. Warren, writing for himself and Clark, expressed the belief that "when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued." *Id.* at 200. Harlan reiterated his conviction "that in permitting States wide, but not federally unrestricted scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws (cf. my dissenting opinion in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 77 . . . .) and protection of genuine rights of free expression." *Id.* at 203-04. The film in question was a French import entitled *Les Amants* or *The Lovers*. Mr. Justice Brennan writing for himself and Mr. Justice Goldberg described *The Lovers* as involving "a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film. . . ." *Id.* at 95-96. Goldberg concurred in the Brennan opinion and added "that the love scene deemed objectionable [by the state] is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed. Except for this rapid sequence the film concerns itself with the history of an ill-matched and unhappy marriage. . . ." *Id.* at 197-98. A local film critic wrote:

> I have read out-of-town reviews by the so-called cognoscenti and the intelligentsia who have declared "The Lovers" to be screen poetry. The verdict here: a dull picture until it turns to screen pornography, and then it becomes nauseous. Suppose for the moment I condone its pornographic sequences—which I do not!—there are other entirely

Ephraim London. In the *Tropic of Cancer* case, four members of the Court were of the opinion that certiorari should have been denied and the five voting for Grove did so for reasons stated in *Jacobellis* which was decided the same day. The Brennan opinion in the latter case, upon which Justices Brennan and Goldberg based their stand in *Cancer*, contained the following statement:

> Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be prescribed unless it is "utterly" without social importance.[30]

It is interesting to note that Brennan did not rely directly upon *Roth-Alberts* in stating this ban on weighing, but rather cited *Zeitlin v. Arnebergh*,[31] a decision of the California Supreme Court which found for *Tropic of Cancer* on the basis of the Rembar interpretation of the Brennan opinion in *Roth-Alberts*. By now the box score indicated that Rembar had won to his "social value or importance" theory all the members of the court of last resort in California,[32] a majority in Massachusetts,[33] a

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> destructive moral issues which are almost as unacceptable, or will be unacceptable to people who consider themselves decent folk. . . . Now aside from the chamber scene which is at once disgusting and revolting, adultery is more than pardoned . . . .

W. Ward Marsh, *Full Condemnation for 'The Lovers,'* CLEVELAND PLAIN DEALER, Nov. 13, 1959.

30. 378 U.S. 184, 191 (1964). The other three votes for Grove were cast by speech absolutists Black and Douglas and by Mr. Justice Stewart who described obscenity or pornography as an undefinable something which he knows when he sees. *Id.* at 197. In a dissenting opinion in the *Memoirs* case, Mr. Justice Clark points out that "[s]ignificantly no opinion in *Jacobellis*, other than that of my Brother Brennan, mentioned the 'utterly without redeeming social importance' test which he there introduced into our many and varied opinions in obscenity cases. Indeed, rather than recognize the 'utterly without social importance' test," he continued, "[t]he Chief Justice in his dissent in *Jacobellis*, which I joined, specifically" reiterated his acceptance of the original *Roth* test. 383 U.S. 413, 443 (1966).

31. 59 Cal. 2d 901, 383 P.2d 152, 159 (1963). Justice Tobriner wrote: "Mr. Justice Brennan, writing the majority opinion, held that 'obscenity is not within the area of constitutionally protected speech or press' (354 U.S. p. 485, 77 S.Ct. p. 1309.) because, in the words that were later incorporated in the California statute, obscenity is 'utterly without redeeming social importance.' (354 U.S. p. 484, 77 S.Ct. p. 1308.)"

32. *See* note 31 *supra*.

33. Attorney-General v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962). Justice Cutter wrote for the court that "only predominantly 'hard-core' pornography, without redeeming social significance, is obscene in the constitutional sense."

minority in New York[34] and two members of the Supreme Court of the United States including the author of the majority opinion in *Roth-Alberts*.

Memoirs of a Woman of Pleasure

Rembar also describes in detail his defense in several states of the concededly erotic *Memoirs of A Woman of Pleasure* following its publication by G. P. Putnam's Sons in 1963 more than two centuries after its original publication in England. The campaign to establish the "social importance" of *Fanny Hill*[35] culminated successfully enough in 1966 when the United States Supreme Court decided six to three in *A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*[36] that the book was not obscene. To three members of the Court, "the considerable and impressive testimony to the effect that this was a work of literary, historical and social importance,"[37] was controlling. To dissenting Justices Clark, Harlan and White, this was not enough. A study of *Memoirs* led Clark "to think that it ha[d] no conceivable 'social importance.' The author's obsession with sex," he continued,

34. People v. Fritch, 13 N.Y.2d 119, 243 N.Y.S.2d 1 (1963). Voting four to three the New York Court of Appeals found that *Tropic of Cancer* was not within the area of constitutional protection. Judge Dye, in a dissenting opinion in which he was joined by Judges Fuld and Van Voorhis, stated: "Since 'Tropic' is a serious expression of views and reactions toward life, however alien they may be to the reader's philosophy or experience, and since the book is not without literary importance as attested by recognized critics and scholars, the First Amendment does not permit its suppression." Judge Dye cited Zeitlin v. Arnebergh, 59 Cal. 2d 901, 921-22, for an analysis and critique of the book, *Tropic of Cancer*. *Id.*, 243 N.Y.S.2d at 14.

35. *Fanny Hill* appeared differently to different Justices. To Mr. Justice Clark, for example, "[s]he was nothing but a harlot—a sensationalist—exploiting her sexual attractions which she sold for fun, for money, for lodging and keep, for an inheritance, and finally for a husband," 383 U.S. 413, 448 (1966) (dissenting opinion). Quoting the Reverend John R. Graham of Denver, Mr. Justice Douglas answered that "[a]t no time were her 'clients' looked upon as means to an end. She tried and did understand them and she was concerned about them as persons. When her lover, Charles, returned she . . . accepted herself as she was and was able to offer him her love and devotion." 383 U.S. 413, 437 (1966) (concurring opinion). Clark acknowledged that, "[i]t is true that Fanny's perverse experiences finally bring from her the observation that 'the height of [sexual] enjoyment cannot be achieved until true affection prepares the bed of passion.' But," he added, "this merely emphasizes that sex, wherever and however found, remains the sole theme of *Memoirs*. In my view, the book's repeated and unrelieved appeals to the prurient interest of the average reader leave it utterly without redeeming social importance." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 450 (1966).

36. 383 U.S. 413 (1966). Rembar wrote: "Memoirs is, legally, a more vulnerable book than [*Chatterley* or *Cancer*]. Had it been the first to be tried, the prospect would have been hopeless." C. REMBAR, *supra* note 2, at 222.

37. 383 U.S. 413, 425-26 (Douglas concurring).

"his minute description of phalli, and his repetitious accounts of bawdy sexual experiences and deviant sexual behavior indicate the book was designed solely to appeal to the prurient interest."[38] As in *Jacobellis*, there was no majority opinion. Justice Goldberg had resigned since *Jacobellis* but his successor, Mr. Justice Fortas, and the Chief Justice joined Mr. Justice Brennan in an opinion in which the latter stated that under the *Roth-Alberts* definition of obscenity

> as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[39]

Dissenting in *Memoirs*, Justice Clark strenuously objected to Brennan's engrafting upon *Roth-Alberts* seven years after that decision a new requirement that material may not be suppressed unless it is "utterly without redeeming social value." To say that this follows from the recognition in *Roth* that obscenity is excluded from constitutional protection only because it is "utterly without redeeming social importance," Clark wrote, is a non sequitur. "My vote in that case—which was the deciding one for the majority opinion," he explained,

> was cast solely because . . . I understand [the Court's test] to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards. Indeed, obscenity was denoted in Roth as having "*such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality.*"[40]

The same point was made by Mr. Justice White also dissenting in *Memoirs*:

38. *Id.* at 454.
39. *Id.* at 419.
40. *Id.* at 441-43, 451. The italicized words which were quoted by Brennan in *Roth* are from Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *See* note 9 *supra.*

> To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently and utterly without social value. . . . Nor does it mean that if books like *Fanny Hill* are unprotected, their nonprurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure.[41]

Nevertheless, three members of the Court had agreed with Rembar's contention that the absence of "social value" should be an independent test of obscenity.[42] With speech absolutionist Black[43] (who regards that standard as about as uncertain as "the unknown substance of the Milky Way") and Douglas[44] on the Court, that was all one needed. The resignation of Mr. Justice Fortas and the retirement of Chief Justice Warren in the spring of 1969, however, cast doubt on the durability of the trivalent obscenity standard formulated by Brennan in *Memoirs*.

41. *Id.* at 461. Compare with the following from Clark's dissenting opinion in *Memoirs*: "If a book deals solely with erotic material in a manner calculated to appeal to the prurient interest, it matters not that it may be expressed in beautiful prose." *Id.* at 450.

42. The dissenting opinion of Mr. Justice Stewart in *Ginzburg* might be interpreted as indicating that he has accepted the lack of "social importance" as an independent test of obscenity. 383 U.S. 463, 498-99.

43. Ginzburg v. United States, 383 U.S. 463, 480 (1966). Mr. Justice Black concurred in the reversal in *Memoirs* for reasons stated in his dissenting opinion in *Ginzburg* which contained the following passages: "My conclusion is that certainly after the fourteen separate opinions handed down in these three cases [*Ginzburg, Memoirs* and *Mishkin*] today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision of his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today . . . . I close this part of my dissent by saying once again that I think the First Amendment forbids any kind or type or nature of governmental censorship over views as distinguished from conduct." *Id.* at 480-81. Compare with the sentence with which Mr. Justice Clark began his dissenting opinion in *Memoirs*: "The central development that emerges from the aftermath of *Roth v. United States* . . . is that no stable approach to the obscenity problem has yet been devised by this Court." 383 U.S. 413, 414 (1966).

44. Mr. Justice Douglas concluded his concurring opinion in *Memoirs* as follows: "Whatever may be the reach of the power to regulate *conduct,* I stand by my view in Roth v. United States . . . that the First Amendment leaves no power in government over *expression of ideas.*" 383 U.S. 413, 433 (1966).

Since *Memoirs*, it may be noted, the members of the Supreme Court appear to have stuck to their positions in that case and in *Ginsberg* which was decided at the same time. In *Redrup v. New York*,[45] two state convictions for selling or offering to sell obscene literature and an injunction against the distribution of such matter were reversed by the Supreme Court. The books in question were two paperbacks entitled *Lust Pool* and *Shame Agent* and the following magazines: *High Heels*, *Spree*, *Gent*, *Swank*, *Bachelor*, *Modern Man*, *Cavalcade*, *Gentleman*, *Ace* and *Sir*. The Court's opinion was per curiam but the footnotes indicated that each member of the Court (except Justices Harlan and Clark who dissented on procedural grounds) held to the standard he had espoused in *Ginsberg* and *Memoirs*. The concluding paragraph of the brief opinion in *Redrup* states that the reversal in each case was called for regardless of whether the "social value" element is viewed as an independent factor in the judgment of obscenity.[46] A month after *Redrup*, the Supreme Court reversed per curiam and without opinion nine state and two federal obscenity convictions or injunctions with *Redrup* cited by the majority of the Court as controlling authority.[47] Books involved in these cases included *The Sex Life of a Cop*, *Orgy Club*, *Sin Hooked*, *Bayou Sinners*, *Lust Hungry*, *Shame Shop*, *Fleshpot*, *Sinners Seance*, *Passion Priestess*, *Penthouse Pagans*, *Shame Market*, *Sin Warden* and *Flesh Avenger*. The recent case of *Stanley v. Georgia*,[48] in which the Supreme Court held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," is not relevant to the "social value" issue as the Court there assumed for the purpose of the opinion that the films in

45. 386 U.S. 767 (1967).
46. In his dissenting opinion, Mr. Justice Harlan noted that the disposition of the *Redrup* case did not reflect well on the processes of the Court since the case had been "taken to consider the standards governing the application of the *scienter* requirement announced in Smith v. California [361 U.S. 147, . . .] for obscenity prosecutions. There it was held," he added, "that a defendant criminally charged with purveying obscene material must be shown to have had some kind of knowledge of the character of such material: the quality of that knowledge, however, was not defined." 386 U.S. 767, 771-72 (1967). For description of work performed by the U. S. Bureau of Customs in the control of obscenity, see E. ROBERTS, JR., THE SMUT RAKERS 72-79 (1966).
47. 388 U.S. 440-54 (1967).
48. 89 S. Ct. 1243 (1969). The films found at the home of the defendant in the *Stanley* case were described by the State Supreme Court as "depicting nude men and women engaged in acts of sexual intercourse and sodomy." 161 S.E.2d 309, 310 (Ga. 1968).

question were "obscene under any of the tests advanced by members of this Court," citing *Redrup* apparently for its brief descriptions of those various tests.[49]

Although alike in subject matter, the Rembar and Hutchison books differ in tone. Rembar writes as a legal strategist; Hutchison as a crusader. Indeed, *Tropic of Cancer on Trial* is a kind of *Yellow Submarine* without pictures. The latter book like the movie upon which it is based depicts in word and cartoon how the Lord Mayor and his naval aid and a gallant crew of Beatles accomplish the liberation of a paradise called Pepperland from the Blue Meanies and their music-loathing mercenary allies the Snapping Turtle Turks, the Hidden Persuaders, the Butterfly Stompers, etc. Hutchison describes how Rosset and his lieuten-

49. Believing that another issue should have been taken up first, Justices Stewart, Brennan and White preferred to rest their concurrence in the result in *Stanley* on their finding that the films were seized in violation of the fourth and fourteenth amendments and so were inadmissible in evidence under the rule in Mapp v. Ohio, 367 U.S. 643 (1961).

Redrup was cited by Mr. Justice Stewart as the basis of his concurrence in the Court's judgment in *Teital Film Corporation v. Cusack* [390 U.S. 139 (1968)], which reversed a permanent injunction by the Cook County (Illinois) Circuit Court against the showing of a film which it and the local film censors had found to be obscene. Justices Black and Douglas felt that reversal was required by either *Redrup* or Freedman v. Maryland, 380 U.S. 51 (1965). The majority stated, per curiam, that the Chicago motion picture censorship procedure did not assure "a *prompt final decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license" and therefore did not meet the standard which the Court had announced in *Freedman*. 390 U.S. 139, 141 (1968).

Redrup was also cited by Justices Stewart, Black and Douglas as the basis of their concurrence in the Court's judgment in *Lee Art Theatre, Inc. v. Virginia* [392 U.S. 636 (1968)] which reversed a conviction for possessing and exhibiting lewd and obscene motion pictures. Citing *Marcus v. Search Warrants of Property at 105 East Tenth St.*, [367 U.S. 717 (1961)], the majority stated that "[t]he procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' *Id.* at 732 . . . ., and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. State of Maryland, 380 U.S. 51, 58-59 . . ." *Id.* at 637. Dissenting, Mr. Justice Harlan distinguished *Lee Art Theatre* from the *Marcus* case in which officers used a general warrant to seize 11,000 copies of 280 publications most of which were later found to be nonobscene. "Police officers may not be given *carte blanche* to seize," Harlan wrote, "but they may certainly seize a specifically named item on the probable cause, before the work 'taken as a whole' has been adjudicated obscene. Any other rule would make adjudication . . . quite impossible. If the Court meant only that the officer should not merely say that he has seen a movie and considers it obscene, but should offer something in the way of a box score of what transpires therein, I consider it absurd to think that a magistrate, armed with the luminous guidance this Court has afforded, will be thus able to make a better judgment of probable obscenity." *Id.* at 638. *Body of a Female* and *Rent-a-girl* were the films involved in the *Teitel Film Corp.* case.

ant Rembar and a battery of lawyers defend a beleaguered Grove of "erotic realism"[50] from police, customs officials, censors, judges and the Milwaukee District Attorney who is the Chief Blue Meanie of Hutchison's book. The epilogue of *Yellow Submarine* contains the following statement:

> For every Pepperland you encounter—
>
> You can also be sure there are Meanies in the vicinity.[51]

A similar warning is found on the last page of *Tropic of Cancer on Trial*:

> Henry Miller's lament seems entirely justified. He wrote me on October 20, 1964: "This battle with negative forces will go on perpetually."[52]

I Am Curious Yellow

These predictions of future litigation were soon realized when a Swedish film which Grove Press imported was seized by the Bureau of Customs.[53] Grove has had little or no trouble, however, with the book, *I Am Curious (Yellow)*, which contains the complete scenario of the motion picture profusely illustrated with still photographs from the film and sixty-five pages of excerpts from the transcript of the trial. The contents of the film—and scenario—is described in the opinion of federal district court Judge Murphy in the case of *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow"*:

> These sexual scenes ranged from copulating in a tree; copulating astride a balustrade of a public building and in the nude in a room; with other scenes of buggery, cunnilinction and fellatio, all in the nude. The final scene, in conformity to the dominant theme, shows the female lead performing an orchiechtomy or peotomy [castration] or both on her murdered lover with a kitchen carving knife.[54]

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50. Hutchison prefers the term "erotic realism" to "obscenity" or "pornography" to describe "the frank and realistic treatment of sex in literature." The term is borrowed from the book PORNOGRAPHY AND THE LAW by Phyllis and Eberhard Kronhausen. E. HUTCHISON, *supra* note 21, at 12.

51. M. WILK, YELLOW SUBMARINE 119 (1968).

52. E. HUTCHISON, *supra* note 21, at 251. The book contains an additional 36 pages of notes, appendix and bibliography. It is strange that the latter does not include Henry Miller's "Obscenity and the Law of Reflection," which is the lead article in *The Offense of Obscenity: A Symposium of Views*, 51 KY. L.J. 577-710 (1963). D. H. Lawrence also expressed himself on the subject of censorship. Eight of his essays, edited by Harry T. Moore were published in 1953 under the title, SEX, LITERATURE AND CENSORSHIP.

53. The confiscation was pursuant to the Tariff Act of 1930, § 305, 19 U.S.C. § 1305 (1964).

54. 285 F. Supp. 465, 472 (1968). The name in full: United States of Amer-

The published transcript contains statements by novelists Norman Mailer and Stanley Kauffman, film critics Hollis Alpert, Paul D. Zimmerman and John Simon, producer Andy Warhol, and various sociologists, psychiatrists, and clergymen who appeared to testify as to the interrelationships between the sexual scenes and the political and moral themes. The defense also called the Commissioner of Customs in New York and asked him whether or not he weighed "the social values that you find in a work against what you consider its prurient appeal in reaching your judgment of whether or not to seize." He answered that he did but that the ideas expounded in this film "conveyed no real social import to me."[55]

Mailer, in his testimony, stated that he was bothered before he saw the movie because everything in the history of movie-making shows that it is moving to the point of showing sexual intercourse on the screen. When he saw the film, however, he reported:

> I felt it was one of the most important motion pictures I have ever seen in my life because it attempted to deal with the nature of modern reality, the extraordinary complexity of modern reality.[56]

The exchange with the Reverend Howard Moody, Senior Minister of the Judson Memorial Church in New York City included, for example, questions about the scene on the balcony of the royal palace in Stockholm:

> Q. In other words, the balcony or the balustrade scene involves Lena and her boyfriend in expressing a point of view about the authority of the government or the palace?
>
> A. Yes . . . .
>
> THE COURT: What point of view were they expressing, in your opinion?
>
> THE WITNESS: Well, I would say that they were saying in a sense, "Screw the Government."[57]

"If the film has a message," Judge Murphy concluded, "whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Fran-

ica, Plaintiff, v. A Motion Picture Film Entitled "I Am Curious—Yellow" ("Jag Ar Nyfigen-Gul") (35 mm. Black and White, 6 Double Reels, 11,746 ft. Swedish soundtrack with English subtitles) Grove Press, Inc., Claimant.

55. V. SJOMAN, I AM CURIOUS (YELLOW) 226-27 (1968).

56. *Id.* at 245-46, 249.

57. *Id. at* 206.

coism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hard core pornography."[58]

The jury felt the same way. But in the Court of Appeals it was decided that "obscenity vel non is not an issue of fact with respect to which the Jury's finding has its usual conclusive effect. It is rather," Judge Hays wrote in an opinion reversing the trial court, "an issue of constitutional law that must eventually be decided by the court."[59] He and a reluctant Judge Friendly (who stated that he might well have joined Chief Judge Lumbard in dissent "if the governing rule were still what Mr. Justice Brennan stated in Roth v. United States"[60]) decided that *I Am Curious (Yellow)* is not obscene.[61] They applied as the test of obscenity the more recent rule stated by Brennan in *Memoirs* (quoted above) which requires the coalescence of three elements including the absence of any social value.

Today the central constitutional question concerning obscenity can be stated as follows: Is the pornographic matter complained of obscene because it is utterly without redeeming social importance, or is it utterly without redeeming social importance because it is obscene? For those who would attempt to understand the current but possibly temporary ascendancy of the former of these two interpretations of the rule in *Roth* and the resultant prohibition of the weighing of social value against pornography, *The End of Obscenity*, *Tropic of Cancer on Trial* and, to a lesser extent, *I Am Curious (Yellow)* provide a valuable look behind the reported decisions.

58. 285 F. Supp. 465, 472 (1968). Compare with the dissenting opinion of Chief Justice Lumbard of the Second Circuit Court of Appeals:

> As my brother Hays says, 'It seems to be conceded that the sexual content of the film is presented with greater explictness than has been seen in any other film produced for general viewing.' The sexual aspect of the film does not arise from the plot, as that is non-existent; it arises from a decision by the director, Vilgot Sjöman, to produce a film which would shock the audience.

United States v. A Motion Piction Entitled "I Am Curious—Yellow," 404 F.2d 196, 203 (1968).

59. 404 F.2d 196, 199 (1968). In his dissent, Chief Judge Lumbard stated, "I see no good reason why that jury verdict should be disturbed. My colleagues give no satisfactory explanation why jurors are not as qualified as they to pass upon such questions." *Id.* at 203.

60. *Id.* at 200.

61. *Id.* at 199.