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Charles M. Stern

I. INTRODUCTION

Statutes aimed at suppressing "obscene" matter have created immense confusion.¹ In a narrow perspective the familiar judicial process, through which statutes slowly gather an accretion of meaning by interpretive gloss, has been inadequate to provide clarification of acceptable boundaries. In a broader perspective the legal process has produced embarrassments within the profession and cynicism without, not merely because of the ponderous mechanisms which are brought to bear on problems for which those mechanisms seem inappropriate, but also because of the bewildering results of the litigated cases, in which virtually no laymen (and few candid lawyers) can discern rational patterns of decision. As a result, it has become common to hear strong advocacy for the position that the only tolerable censor is a dead one, and that the sooner legislatures free the law from the futile and demeaning task of arbitrating tastes, the better for all concerned.²

The wisdom of such advocacy is not a concern of this Article. For our purposes here — and for the bar and bench today — obscenity statutes are the "given" in the problem. Whether or not obscene matter actually does have a deleterious influence on its readers, there abound spokesmen for religious, educational, and law enforcement organizations who positively assert the existence of such an influence.³ There are too many legislative findings that obscene mate-

¹ The most recent exploration of the difficulties may be found in R. Kuh, Foolish Figleaves? Pornography In — Out of — Court (1967).

² See, e.g., M. Ernst & W. Seagle, To the Pure . . . A Study of Obscenity and the Censor (1928).

³ See SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY, INTERIM REPORT TO THE COMM. ON THE JUDICIARY, S. REP. NO. 2381, 84th CONG., 2d sess. passim (1956).
rial causes crime to hope that legislators will become convinced otherwise and repeal obscenity statutes. During the first session of the 90th Congress, 19 bills were introduced citing the “grave national concern” in the traffic of obscenity and proposing a hodgepodge commission (the “Commission on Noxious and Obscene Matters and Materials,” or the “Commission for Elimination of Pornographic Materials”), composed of representatives from the professions and industries involved, to investigate and recommend more effective controls. “Of the national community’s contemporary standards we know only that contemporary American society rejects and will not tolerate the dissemination of hard-core pornography.”

Once one recognizes that public demand for at least nominal legal censorship makes repeal an academic (not a practical) question, one must turn to the challenge of intelligent application of the statutes. Police, administrative boards, prosecutors, courts, and citizens themselves all represent interdependent institutions which play a part in the application of obscenity laws. Only one facet of such application by a single institution, the judiciary, will be examined in this Article: the use of expert testimony in the course of obscenity litigation.

My thesis is that the word “obscene” cannot be defined, and that as a result, experts are called upon to provide specific information about the challenged work so that, under the guise of determining that the work is obscene, the court can legislate ad hoc by prohibiting further circulation. I wish to show, for a variety of reasons, that the only utility of expert testimony lies in providing information and that such testimony cannot be the sole basis for drawing legal conclusions that the challenged work is obscene — or, in other words, that such testimony merits legal proscription.

II. THE CONCEPTUAL ENIGMA

A. Variations on a Definitional Theme

At the outset, there must be some understanding of what one seeks expert testimony about in obscenity litigation. Definitions of obscenity have proven to be hopeless — as the synonymous stutterings of many statutes demonstrate. Nevertheless, the impossibility

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4 Id. at 2, 62.
of definition does not foreclose analysis of the reasons why various thinkers resort to concepts of the obscene. Emphasis in the preceding sentence should, of course, be placed on the plural concepts; for there is no single idea represented by the word obscene in all contexts. In a brilliant article exploring the kaleidoscopic nature of obscenity as an aesthetic concept, Abraham Kaplan has observed that "[j]udgments of obscenity vary because they are contextual. . . . [O]bscenity is to be found in words or pictures only in so far as these can be interpreted to have a certain meaning; and meaning itself is contextual."8

These differing contexts may be cultural: "Alice's Adventures in Wonderland was banned in Hunan province of China in 1911 on the ground that 'animals should not use human language, and that it was disastrous to put animals and human beings on the same level.' "9 A more pronounced example is that of the cultivated Chinese gentleman [who] . . . remarked that the pronounced and regular rhythms of the Sousa march, "The Stars and Stripes Forever," played by a Marine band, seemed to him almost unbearably lascivious and suggestive of coitus; Chinese classical music, even in dealing with love episodes, is quite discernibly different.10

However, culture and society should not be considered the sole — or even the major — lines of contextual demarcation. For within a given society, contexts will also differ historically;11 and within any given historical era of a society, the meaning of obscene may vary in the context of different intellectual disciplines. This is readily understandable in light of the varying purposes which value judg-

(1964) (non-mailable matter); KAN. STAT. ANN. § 12-1102 (1963) ("obscene, immoral, lewd, or lascivious"). Recent amendments to state statutes have followed the definition of the American Law Institute's Model Penal Code § 207.10 (2) (Tent. Draft No. 6, 1957): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits or candor in description or representation of such matters." See, e.g., ILL. ANN. STAT. ch. 38, § 11-20 (Smith-Hurd Supp. 1969; N.Y. PENAL LAW § 235.00 (McKinney 1967).

8 Kaplan, Obscenity as an Esthetic Category, 20 LAW & CONTEMP. PROB. 544, 545 (1955).

9 He Who Destroyes a Good Booke, Kills Reason It Selfe — An Exhibition of Books Which Have Survived Fire, the Sword and the Censors 27 (1955) (annotation on file in Kansas University Library).


11 For example, in 1923 Professor Bliss Perry of Harvard deemed it noteworthy that Harvard undergraduates — unlike their fathers and grandfathers — were being officially exposed to Fielding's Tom Jones. Perry, Pernicious Books, Address to The New England Watch and Ward Society at Old South Church, April 22, 1923, at 6. (The address, incidentally, was commendatory of the audience's activities.)
ments serve in the different disciplines. To the social scientist, the fact that given matter is perceived by his subjects as obscene may be quite telling. An excellent illustration is provided by anthropologist William La Barre:

[T]he existence of this segregated "reserved section" [in the museum of the University of San Marcos in Lima, Peru, where there is kept pottery decorated with scenes of sexual activity] is an ethnographic commentary on our own society, not that of the ancient Peruvians. The same principle holds for the Christian tourist viewing the "obscene" carvings on the famous Hindu temple at Benares; he may have met all these things before in Krafft-Ebing, but he finds them unexpected or out of context in a religious edifice.12

Similarly, the concept of the obscene may help psychologists to classify categories of human responses to stimuli presented in the form of prose or pictures,13 or to identify patterns of verbal intercourse, such as that described by Freud in his explanation of wit as a means "whereby forbidden sexual exhibition may obtain release without arousing disgust."14 Yet to Sir Herbert Read (Charles Eliot Norton Professor of Poetry at Harvard, 1953-54, and scholar of the fine arts) the concept is not so much a tool for classifying behavioral phenomena as it is a manifestation of massive societal maladjustments: "Pornography, like delinquency in general, is a social problem and it can only be solved by methods that involve social psychology — group analysis and group therapy . . . . Attempts to deal with the problem in any more isolated fashion are either ignorant or hypocritical."15

As one turns from the social sciences to the humanities, one finds obscenity to be an even more protean concept. To Anais Nin, who wrote the preface for Henry Miller's *Tropic of Cancer*, obscene did not mean socially corrupting or deserving of proscription. As was explained in court by several literary critics,16 the preface writer had employed the word subjectively in reference to "everything that is outrageous and brutal about life rather than in the sense that we [here in court] are thinking of obscenity in this trial of sexual

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12 La Barre, supra note 10, at 534.
license or corruption through sexual descriptions."\footnote{17} Other literary critics, however, question the very assumption that there is such a thing as obscenity in the realm of imaginative writing. William Phillips, a recent contributor to the \textit{Partisan Review}, sees pornography as an essentially non-literary concern: "[I]f there is a problem, it is legal and social, not literary."\footnote{18} Another critic, Susan Sontag, challenges the traditional antithesis between "pornography" and "literature" and conceives of art as a "dialectic or outrage."\footnote{19}

The conclusion must be that no meaning of obscene can emerge until the purpose underlying the use of the word is known.\footnote{20} As simple and obvious as this proposition may appear, it seems often overlooked in the process of interrogating expert witnesses in obscenity cases. The 1965 Massachusetts litigation over John Cleland's \textit{Memoirs of a Woman of Pleasure} (\textit{Fanny Hill}) offers a good example of such oversight. The Attorney General's first witness on opening was Dr. John E. Collins, Headmaster of the Newman Preparatory School.\footnote{21} With few preliminary questions to establish the witness's particular qualifications or to demonstrate the context in which the witness's evaluation of the book had been conducted, the prosecutor began: "In your opinion, is this book obscene, Doctor?"\footnote{22} The court was more perceptive than counsel when it observed immediately thereafter the underlying contextual dichotomy: "I can recognize that the legal concept of what obscene means is one thing; however, a concept of what obscene means in literature has some bearing on determining what the legal concept of obscene means."\footnote{23} Though the prosecutor failed to capitalize on the help afforded by the court's perception, the distinction seems to have persisted in the judge's mind throughout the course of his subsequent rulings on admissibility of evidence.\footnote{24} Interestingly, the

\footnote{17}Intervenor's Appeal, \textit{supra} note 16, at 99.\footnote{18}Phillips, \textit{Writing About Sex}, 34 \textit{PARTISAN REV.} 552, 557 (1967).\footnote{19}Sontag, \textit{The Pornographic Imagination}, 34 \textit{PARTISAN REV.} 181, 189 (1967).\footnote{20}This was grasped long ago by Lord Lyndhurst, who was troubled by the use of the word in the 1857 bill that became Lord Campbell's Act (Obscene Publications Act of 1857), 20 & 21 Vict., ch. 83 (1857). The learned peer asked his colleagues: "[W]hat is the interpretation which is to be put upon the word 'obscene'? I can easily conceive that two men will come to entirely different conclusions as to its meaning." Lord Lyndhurst went on to suggest that the word could be used as a tool for governmental destruction of art works such as Correggio's \textit{Jupiter and Antiope}. M. \textit{ERNST} & A. \textit{SCHWARTZ}, \textit{CENSORSHIP: THE SEARCH FOR THE OBSCENE} 23 (1964).\footnote{21}Record at 10, \textit{A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General}, 383 U.S. 413 (1966).\footnote{22}\textit{Id.} at 11.\footnote{23}\textit{Id.} \footnote{24}In response to intervenor's objection to the question whether the witness thought
same observation was made by the court in the widely-publicized 1960 litigation in London concerning D.H. Lawrence's novel *Lady Chatterly's Lover*. When the prosecutor asked an academic witness, "Would you think this was a proper book for people who attend your lectures and your classes to read and discuss?" Mr. Justice Byrne interrupted: "The word 'proper' is a little ambiguous... I take it you mean from the literary merit point of view... It might be 'proper' from another angle. That is the difficulty about this case. You have two separate compartments." To which the prosecutor responded: "Yes, my Lord."25

B. A Reconciliation

The first shaft of light illuminating the confusing word "obscene" emanates from the question: how and why is the label being used? As Abraham Kaplan comments: "To the question 'Who is to judge whether a work is obscene?' we can reply with the counterquestions, 'What is to be done with the judgment when it is made? And why is it being made at all?'"26 For the social scientist, the concept serves as a shorthand method for classifying certain manifestations of man's suppressed interests, or for convenient reference to certain classes of responses which are evoked because of suppressed matter. Whether or not matter or response should be termed obscene is merely of methodological concern. The label will be employed as a means of hypothetical identification; it will serve only to describe those observed phenomena which precede the invocation of the label. For example, in the passage taken from La Barre,27 it becomes clear that the Christian tourist's shocked perception of the Hindu carvings is the phenomenon upon which the anthropologist's attention is focused and that such observation would retain its significance for him regardless of the descriptive word used to identify the tourist's reaction. Nothing of consequence turns on the use of the word "obscene"; for the labeling follows, and is incidental to, the significant occurrence (the tourist's reaction to the carvings).

Similarly, to the litterateur, the concept of obscenity serves as a

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26 Kaplan, supra note 8, at 546.

27 See note 12 supra & accompanying text.
comparative shorthand. The work labeled obscene seems to him less worthy of critical attention, perhaps less indicative of sustained artistic endeavor, than other works to which a reader may direct his attention. The critic presupposes the existence, past and future, of the labeled work and calls it obscene in an effort to provide a critical category within which the labeled work is to be regarded in relation to other works. The judgment here, too, exists independent of the phenomenon — a piece of writing among other writings — and the judgment goes to the question of how the work will be most intelligently thought of in its continued circulation, not to the question of whether it is to have any continued circulation at all. This is the crux of the distinction sensed by the *Fanny Hill* and *Lady Chatterly* courts in the remarks previously quoted. \(^{28}\) The critic's invocation of the label "obscene" involves no necessary judgment about the propriety of the work's continued circulation. However, the latter question is at the very core of litigation concerning allegedly obscene publications.

The analysis outlined above points to two important areas of exploration. If it is useful to conceive of not a single concept of obscenity but of various concepts, used for different ends in the social sciences and the humanities, it will also be useful to determine how these concepts can be utilized with greatest instruction and least confusion in the process of calling expert witnesses to testify in obscenity trials. Thus, the next portion of this Article will attempt to establish both perspective and workable goals for this testimonial process and to identify the theoretical and practical difficulties involved in achieving those goals. The second important area of exploration shall constitute the final portion of our rationale: not only does a heavy responsibility fall upon the shoulders of expert witnesses, whose value judgments must be directed at a disciplinary interpretation of the challenged publication rather than toward the legitimacy of its existence; but so also is there a heavy burden on the trier of fact, whose judgment alone must strike to the basic issue of the legitimate availability of the challenged work.

### III. Insight Into A Rationale

There is no satisfying rationale for expert testimony when it is presented in the form of a parade of opinions as to whether or not the challenged publication is obscene. Such a procedure fails to demonstrate that each witness uses the term in a way unique to his

\(^{28}\) See notes 22-25 *supra* & accompanying text.
intellectual discipline (and probably to his own tastes). Even if
the witness understands that he is to speak solely to the legal ques-
tion, whether the challenged work is obscene so as to merit legal
suppression, his response provides no help to the judge and jury in
their task of giving meaning to the words of the applicable statute.
Once, however, one perceives that the witnesses can offer a variety
of intellectual judgments, and not simply yes-or-no responses to a
single legal issue, the contours of the task begin to emerge.

In deciding if expert witnesses will be of use in applying a given
statute, it is necessary to arrive upon at least tentative conclusions
concerning what the applicable statute is meant to control. Due to
the similarity among obscenity statutes in American jurisdictions, it
is possible to generalize about statutory purpose.

A. From a Common Law to a Statutory Basis

Six years ago there appeared in the Columbia Law Review an
outstanding analysis by Professor Louis Henkin concerning the his-
torical and psychological sources of current obscenity statutes.29 The
thesis of his article is that:

[D]espite common assumptions and occasional rationalizations . . .
obscenity laws are not principally motivated by any conviction that
obscene materials inspire sexual offenses. Obscenity laws, rather,
are based on traditional notions, rooted in this country's religious
antecedents of governmental responsibility for communal and in-
dividual "decency" and "morality."30

Antecedents of current statutes were founded upon "aspirations to
holiness and propriety. Laws against obscenity have appeared con-
joined and cognate to laws against sacrilege and blasphemy, sug-
gest ing concern for the spiritual welfare of the person exposed to it
and for the moral well-being of the community."31

Henkin's thesis about the motivational origins of obscenity stat-
utes does have practical significance. It is clear, for example, that
inducement to evil thoughts (not to reprehensible action) was being
attacked in Commonwealth v. Holmes,32 the 1821 Fanny Hill litiga-
tion. The indictment alleged that:

[D]efendant, "being a scandalous and evil-disposed person, and
contriving, devising and intending, the morals as well of youth as

29 Henkin, Morals and the Constitution: The Sin of Obscenity, 63 COLUM. L. REV.
30 Id. at 391.
31 Id. at 393-94.
32 17 Mass. 336 (1821).
of other good citizens of said commonwealth to debauch and cor-
ruptr, and to raise and create in their minds inordinate and lustful
desires . . . did utter, publish and deliver . . . a certain lewd,
wicked, scandalous, infamous and obscene printed book . . . ."33

The indictment rested upon no statute but upon jurisdiction found
by the court to support prosecution for a common law misdemeanor.
Lord Radcliffe has explained the theory behind this common law
criminal jurisdiction:

So the Common Law, perhaps a little surprised to discover that it
was expected to have a doctrine about something which it had al-
ways supposed would be taken care of by other means, came for-
ward with the theory that, as the king's peace was broken by acts
against the constitution or against religion or against morality, it
was an offence at common law to corrupt the morals of the king's
subjects in other respects.34

When the common law jurisdiction to prosecute for obscene pub-
lications was replaced by statutory authorization, the language —
and the rationale — of the 1821 Fanny Hill indictment carried over
into later opinions. In 1945, for example, the Massachusetts Su-
preme Judicial Court upheld a conviction under its obscenity stat-
ute, explaining that the book Strange Fruit, by Lillian Smith, "con-
tains much that, even in this post-Victorian era, would tend to pro-
mote lascivious thoughts and to arouse lustful desire in the minds of
substantial numbers of that public into whose hands this book, ob-
viously intended for general sale, is likely to fall . . . ."35 What
readers would think, regardless of how they would be prompted to
act, had obviously become the primary issue in obscenity litigation.

B. The Psychology Behind Statutory Purpose

Henkin's thesis — of obscenity as sin rather than crime — sug-
gests that obscenity statutes emanate from profound psychological
compulsions within the law-making and law-enforcing elements of
our population, and differ significantly from other criminal stat-
utes which are more explicitly molded to meet specific societal dys-
functions. Thus, it appears appropriate to explore more fully the
psychological origins of obscenity law. For if a keener understand-
ing of statutory purpose emerges, the way will have been cleared to

33 Id. (emphasis added).
34 Lord Radcliffe, Censors 12 (The Rede Lectures, delivered at the University of
N.Y. 1947) ("sexually demoralizing").
more readily ascertain those constitutional boundaries which may circumscribe the intended operation of the statutes. Knowing what the draftsmen sought to suppress and how far the statutes constitutionally may go toward such suppression will make it possible to formulate more clearly the questions which are properly to be posed for expert opinion during the course of an obscenity trial. Hopefully, what shall emerge is the conclusion that Henkin's thesis is correct, that the first amendment — and, for purposes of state regulation, the 14th amendment — now circumscribes quite narrowly the permissible purpose and intended operation of obscenity statutes, and that only a certain area of questioning is relevant in deciding whether a given work is within the radius of proscription of the applicable statute.

Though Henkin was not concerned with the psychological underpinnings of his thesis, he suggested implicitly that obscenity statutes serve as legitimated formulations of certain psychological assertions. These propositions may be classified as follows: first, that "impure" thoughts are not the natural products of our minds but may be explained simply as products of corrupting forces originating outside our minds; second, that these corrupting forces are often purposive and may be directed by our enemies; and third, that, despite the first two notions, "we" are morally superior to "others" who are susceptible to corrupting forces and therefore "we" are obliged to provide "them” with legal protection from those forces.

(i) Outside Corrupting Forces.— The first assertion manifests an unconscious reluctance to recognize opprobrious thoughts as inherent in our own minds. Obscene matter is a scapegoat; it rationalizes our own impure thoughts and provides an easy explanation for those of others. But the utility of the concept necessarily depends upon an assumption that what one reads has more than a temporary effect on his mental processes. That this is so, as a general proposition of experience, seems undeniable; indeed, it is paradoxical that liberal opponents of censorship often argue that what one reads does not affect his character.

It would be, of course, a poor service to the cause of intellectual and artistic freedom . . . to assert that literature has no effect on conduct and morals. Indeed, one of the potential values of literature is that it does exercise a great influence; and the importance of freedom is that it allows the good to be distinguished from the bad.36

36 A. CRAIG, SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY
This experienced effect of what we read upon what we think affords two arguments for the advocates of censorship. The argument writ small concerns the corrupting effect which obscene matter is alleged to have on an otherwise unsullied mind. Anthony Comstock, architect and arch-spirit of the 19th century New York Society for the Suppression of Vice, went to ludicrous ends in urging the dangerous effects of objectionable reading matter: "[B]oys and girls have become so bedevilled by the trashy books and criminal stories upon which their minds have fed, that they have run away from home to fight Indians and joined themselves together in bandit bands to pillage and plunder." Comstock delighted in boasting of the confessions which supposedly came from the mouths of the corrupted themselves:

Our Agent arrested a young man nineteen years of age, for advertising and sending through the mails, under about a dozen aliases, the most obscene matter. While searching for this vile trash in his sleeping room in his father's house, the Agent found a mass of these Boys Papers piled up in one corner. No sooner had they been discovered than the prisoner started back, exclaiming with great force, "There, there's the cause of my ruin — that has cursed me and brought me to this!"

Arguers for the existence of corrupting effects find particularly irresistible those metaphors which suggest infection, poisoning, and pollution. Discussions of the subject are peppered with phrases such as "keeping the roads clean and the air sweet," "pollution in the rivers," and "as dangerous as dope itself." Long ago, on the
floor of the Senate, one speaker observed that "deleterious literature" is comparable to "narcotic drugs," and another likened imported obscenity to hoof-and-mouth disease and "germs that kills [sic] the hog." Such imagery has led one student of the subject to assert that "[m]uch of the justification for intolerance derives its authority from false analogies, wrongfully carried over from physical relations into the realm of the psychic . . . ."

The argument writ large identifies obscenity as the symptom of a decaying society. In the recent Fanny Hill case, an amicus curiae brief presented to the United States Supreme Court argued that "the law's concern is with the more generally accepted [query] historical notion [citing Arnold Toynbee] that a society in which obscene material is readily available is not a healthy society and is heading downhill." The argument concluded with the ominous statement that Fanny Hill was evidence that "we are closing the gap on the community of Sodom and Gomorrah." For both those who fear others' impure thoughts and those who dread our collective historical demise, the mechanical suppression of obscenity seems to be a way of avoiding perplexing psychological explanations for the workings of the human mind, of exonerating the mind from responsibility for its own impurities, and of objectifying fears which can then be fought openly — with legal weapons. It is important to emphasize that despite the gray areas which lay between the black and white poles of thought and conduct, the concern here described is one solely for the mental (or moral) results alleged to follow from exposure to obscenity. The censorious concern seeks expression in statutory control aimed principally at thought, not action. Action comes too late.

(ii) Purposeful Enemy Direction.— The second psychological assertion which obscenity statutes may serve to legitimate is that the corrupting forces described above are often purposive and may be directed by our enemies. Underlying this assertion, of course, has been a high degree of anxiety concerning the quality of any given work. Such fear was best expressed by a minister when he

42 71 CONG. REC. 4438 (1929) (remarks of Senator Barkley of Kentucky). This comparison, however, prompted the immediate protest that "[t]here is no connection at all between opium and a book." Id. at 4470 (remarks of Senator Tydings of Maryland).
43 71 CONG. REC. 4470 (1929).
44 A. CRAIG, supra note 36, at 41 (footnote omitted).
46 Id.
testified that the better written an allegedly obscene book, so much the worse — for it is that much more insidious.\textsuperscript{47} Often, those works challenged as obscene are seen as set afloat upon pure American waters by agents of a communist conspiracy; or it may be less extremely asserted that the circulation of obscene matter gravely hinders the country in its cold war with communism. A church spokesman testifying before a congressional subcommittee investigating the mailing of obscene matter announced solemnly that "[w]hen all the hydrogen bombs and ICBM's are lined up — the free world facing the Communist world — survival will depend on the moral character of our men, women, and children."\textsuperscript{48} The testimony fell on the sympathetic ears of a Congressman who said, "I think that the commies would like to see this sort of thing go on."\textsuperscript{49}

Sometimes, however, this fear of the conspiratorial subversion of American morality can assume almost humorous forms. A volunteer reader from the National Organization for Decent Literature (a Catholic citizens' group which seeks to control community outlets of obscene literature) misconstrued the Organization's stringent criteria of appraisal and found offensive a pocket-book edition of Barnard Pares' Russia. "[T]he report . . . stated that passages in this book described conditions in Russia that were, according to the Committee's code, objectionable."\textsuperscript{50}

\textbf{(iii) Moral Superiority of the Standard-Bearer.} — The final assertion underlying motivation for enactment and enforcement of obscenity statutes is that "others," possessing less self-control than "we," require censorship for their own good. This subjective assertion of moral superiority, like the first assertion of cause and effect, has been applied in both the microcosm and the macrocosm. In the former instance, the asserter expresses fear that others, less well educated, less stable temperamentally, less judicious in judgment, will succumb to the debasing influence of obscene material. Not only has this feeling influenced the diligence of prosecutors,\textsuperscript{51} but,
as seen in the following striking example, so also has it affected
determinations by the jury:

After convicting *What Happens*, by John Herrman, in New York
City in 1927, several jurors came up and shook hands with the
defeated author. The jurors were in a good humor for they had
retained the exhibits, the copies of the condemned book. "And
why did you vote against my book?" queried the author. The
masculine answer was direct and typical, more honest than can
usually be expected. "You see, that book wouldn't hurt me. I
wasn't scared by the mention of masturbation. But then I felt it
might hurt some other people . . . ."52

In arguing for the defendant publisher in the London *Lady Chat-
terly* case, Mr. Gerald Gardner, Q.C., emphasized that, in obscenity
litigation, "[n]obody suggests the Judge or the Jury become de-
praved or corrupted. *It is always somebody else, it is never our-
selves.*"53 The attitude reaches its most extreme expression when
the arguer for censorship conceives of himself (as did Anthony
Comstock) as an agent of God, whose task is to cleanse the impure
and redeem the debauched.54

On the level of the macrocosm, the assertion of moral superior-
ity takes the form of a xenophobic comparison of national char-
acters. A witness before the Senate subcommittee investigating the
mailing of obscene matter testified that:

My experience, from my visits to foreign countries, is that the
standard is very high in the United States, that we are an extremely
moral people, and that in general our standard is considerably
higher than in other places where I have been.55

More vitriolically, a Senator asserted that customs censorship was
required because of the "unfit horde of foreigners that formerly
poured in here," bringing their sub-American cultures with them.56
Anthony Comstock reported the shock experienced by a New York
City gentleman who found, in a reputable Fifth Avenue bookstore,
"little French salesmen who will sell the stuff ["books in French

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52 M. ERNST & W. SEAGLE, supra note 2, at 6.
53 THE TRIAL OF LADY CHATTERLY, supra note 25, at 37. See also Gosling, Essay
54 NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE, supra note 37, at 27-33.
55 Hearings, supra note 40, at 40 (remarks of Mr. Abe Goff, General Counsel, Post
Office Department).
56 71 CONG. REC. 4470 (1929) (remarks of Senator Heflin of Alabama).
that are simply filthy""] to any married woman who will buy, and alas! these are not few . . . ."^67

The suspicions aroused by a book written in a foreign language produce some of the supreme ironies of censorship. "An English journalist said at a public dinner given to honor Anatole France in London that his countrymen were pleased to honor a master whom they undoubtedly would have put in jail if he had written in English."^68 On the other hand, Senator Bronson Cutting of New Mexico — while urging an end to the censorship imposed by administrative personnel (customs officials) — called the attention of his colleagues to the absurdity that the Arabian Nights was, in 1929, importable both in the original and in the literal English translations of Payne and Burton, but the French translation by Mardrus was excluded.^69 The spectacle presents itself as a Swiftian battle of the books on an international scale, in which "[w]e aver patriotically that the pornography which floods our country comes from France, and France accuses Germany of slandering its fair name by putting Parisian imprints upon its native smut, and Ireland accuses England and the United States."^60

C. The Utility of Psychology: From General to Particular

The foregoing has been an attempt to corroborate Henkin's thesis of obscenity as sin rather than crime. If Henkin is correct, obscenity statutes spring from concern with good and evil as well as concern with legal remedies more objectively fashioned to meet visible social dysfunctions. Once the hypothesized concern with good and evil is broken down into the three psychological manifestations (the desire for an exculpating explanation of impure thoughts; the

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^67 NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE, supra note 37, at 8.

^68 M. ERNST & W. SHAEGLE, supra note 2, at 58.

^69 71 CONG. REC. 4434 (1929) (debate over H.R. 2667, a tariff revision bill which became the Hawley-Smoot Act). Senator Cutting did not express opposition to all legal censorship. He wished only to put the issue to state legislatures and courts, for administrative officers seemed to him ill-suited to play the role of the censor. Cf. CANADIAN BAR ASSOCIATION, A REPORT OF THE SASKATCHEWAN SUB-COMM. ON CIVIL LIBERTIES ON CENSORSHIP AND OBSCENITY, JUNE, 1960, 25 SASK. BAR REV. 80 (1960); AMERICAN CIVIL LIBERTIES UNION, WHAT'S OBSCENE? (1944), both arguing against administrative censorship.

^60 M. ERNST & W. SHAEGLE, supra note 2, at 183. But see Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800, cert. denied, 375 U.S. 957 (1963), where the attitude was turned around in a decision denying governmental power to proscribe: "The danger of state censorship has been too graphically demonstrated by the current decadence of Soviet art for us to assume that either Roth or the Legislature intended to [impose upon the culture of society] such debilitation." 59 Cal. 2d at 922, 383 P.2d at 166, 31 Cal. Rptr. at 814.
desire to objectify, and thus combat more efficiently, threats perceived to emanate from hostile sources; and the desire to satisfy oneself of one’s own moral superiority), the validity of the thesis becomes susceptible to more specific demonstration. But this is not to suggest that concern with obscenity as sin takes only the three described manifestations. Individual purposiveness is always complex; group purposiveness, such as legislative intent, must therefore be complexity compounded many times over. It does suggest, however, that the statements offered, presumably in candor, by legislators, interested citizens, lawyers, and commentators in discussing obscenity law, all require explanation if the reasons for the existence of obscenity statutes are to be understood, and that Henkin’s thesis provides a very satisfying explanation. Still, having acknowledged the complexity of purposiveness underlying legislation, it would be dangerous to assume that concern with evil thought, independent of harmful conduct, is the sole justification which can be offered for obscenity laws. Recall, for example, the mention above of the numerous legislative findings which conclude that exposure to obscene matter is conducive not only to immoral thoughts, but to demonstrable social disorders as well. The obvious conclusion is that the kind of material proscribed under authority of obscenity legislation must necessarily vary depending upon which of these evils is seen as the primary target. Here we have arrived at the cross-roads of obscenity litigation. For such a conclusion raises the all-important issue of whether the first amendment allows censorship solely on the basis of the community’s moral sensibility.

IV. PROSCRIPTION AND THE CONSTITUTION

It is not necessary for our purposes here to trace the changes in first amendment doctrine since the 1821 banning of Fanny Hill in Massachusetts. Despite the historical truth and dimensions of the proposition that society “has traditionally concerned itself with the moral soundness of its people as well [as with their physical well-being],” the first amendment has nonetheless come to forbid enforcement by law of religious notions of morality or psychologically comforting notions of propriety. It is clear today, for example, that

61 See notes 3–4 supra & accompanying text. Arguably such findings are mere rationalizations for what is in reality morality legislation. However, it would be unacceptable for courts to psychoanalyze in this manner, thus giving less effect to a statute than that called for by legislative pronouncements and Supreme Court approval.

OBSCENITY

expressions may not be suppressed because they are sacrilegious.\textsuperscript{63} Nor may suppression be justified on the grounds that the expression challenges a traditional moral belief, such as the wrongfulness of adultery.\textsuperscript{64}

On the other hand, assuming the validity of Henkin's thesis, it has been demonstrated that a major historical reason underlying the enactment of obscenity statutes was the desire to impose a standard of morality upon those expressionists who sought to disseminate their materials for use by the general public. Unless reinterpreted, therefore, this thesis serves to defeat the constitutional permissibility of such legislative intent. As Henkin himself suggested,\textsuperscript{65} his rationale leads to the logical conclusion that obscenity statutes now rest upon constitutionally defective foundations. In short, we are faced with a situation in which a literal interpretation of the first amendment forbids morality legislation and an historical interpretation of obscenity statutes concludes that they are — at least in part — attempts to pontificate on moral questions.

Yet the Supreme Court, in \textit{Roth v. United States},\textsuperscript{66} has upheld the constitutionality of statutes which bar obscenity as determined by the following standard: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."\textsuperscript{67} Can an historically valid thesis which leads to a conclusion of impermissible statutory purpose be reconciled with a Supreme Court adjudication which compels a conclusion of permissible purpose?

\textbf{A. The Proper Reconciliation of Roth and the Henkin Analysis}

The \textit{Roth} test must be considered as both a "yes" and a "no" answer to the demands of the stringent censors. Proscription as a method of enforcing the psychological assertions which underlie a concern with obscenity as sin — the obscene poisons minds, emanates from hostile sources, and hence justifies protection of "others" from its effects — is \textit{not} constitutionally permissible. But in light of legislative findings that the circulation of some publications demonstrably contributes to social disorders,\textsuperscript{68} a challenged publica-

\begin{itemize}
\item\textsuperscript{63} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
\item\textsuperscript{64} Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684 (1959).
\item\textsuperscript{65} Henkin, \textit{supra} note 29, at 402.
\item\textsuperscript{67} Id. at 489.
\item\textsuperscript{68} See notes 3-4 \textit{supra} \& accompanying text.
\end{itemize}
tion may be proscribed, under the *Roth* test, if sufficient evidence can be presented to show that the challenged work might specifically contribute to these disorders.69 Thus there exists a necessary dichotomy between morality legislation and constitutionally permissible regulatory legislation, and the constant reminder which is provided by Henkin’s thesis plays no small part in drawing that fine line for purposes of obscenity litigation. Empirical evidence of a work’s potential contribution to social disorders must be presented primarily through expert testimony, and that evidence may not consist of mere repetitions under oath concerning an expert’s unsubstantiated psychological assertions in the form of expressions of agreement that the challenged matter is “immoral,” “harmful,” or even “obscene.” Such value judgments imply that the legislature intended only to impose standards of morality and do not help the trier of fact to answer the (constitutionally permissible) question of whether the work is so socially disruptive that it must be regulated by proscription.

This formulation of permissible statutory purpose takes account of the historical motivation behind obscenity legislation, the constitutional limitations which have come to impinge upon the original purposes, and *Roth’s* approval of proscription in a manner which observes the narrow standards demanded by the first amendment. Moreover, the formulation suggests the direction to be pursued in gathering the information required to determine whether or not the challenged material is “obscene” — or in more candid terms, whether as a matter of policy it should be banned. If the goal is to discover whether or not the publication at issue falls within the legislatively established category of the demonstrably dangerous, and not to discover how many “experts” are willing to agree or disagree with the general bias against “obscenity,” certain evidentiary conclusions naturally follow — for example, that no good purpose is served by introducing the testimony of average citizens concerning their personal opinions as to whether a challenged publication is decent or not.70 Presentation of lay opinion merely tells the judge and jury what is already known: that some in the community

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69 To be sure, such evidence need not show that there is a direct contribution to social disorders. Subsequent interpretation of the *Roth* test has illustrated that a work may be proscribed if it is "utterly without redeeming social value." See notes 114-15 infra & accompanying text.

find the material at hand objectionable and others do not. Such lay opinion speaks only for the individual on the stand and gives no notion of the extent to which the opinion is held in the community generally. Indeed, where the challenged matter is not esoteric but (adjudged) commonly apparent to average persons living in the community, "the ordinary judge or juror [is] able to recognize the nature of [its] appeal to the average man" and even "expert testimony" becomes unnecessary, if not meaningless.

Normally, however, experts should be called upon — as laymen are not — to help the court inform itself before deciding whether or not the matter at hand warrants the suppression authorized by the applicable statute. Lay opinion is superfluous because the very existence of the statute, along with the fact that a public prosecutor or administrator has seen fit to initiate legal action, establishes dis-taste for sexually frank publications. Expertise is necessary to help the court determine whether or not this adverse opinion can be focused, through the medium of the Roth test, into sufficiently specific and demonstrable evaluations to permit a judgment against the material at issue. Expert witnesses are, in this sense, called upon for the purpose of holding "hearings," once the latter are authorized by an obscenity statute. For an obscenity trial, as contrasted with a burglary trial, produces "legislative hearings" to make ad hoc law; indeed, this process is required by the broad language of the authorization. "A definition of burglary as breaking and entering in the nighttime for the purpose of committing a felony has a flatly tangible quality to it. There is going to be no equivalent in the law of obscenity." The adjective "obscene," then, simply expresses a decision made by an authorized tribunal that, on a balance of policy, a given publication should or should not enjoy continued circulation.

This notion of legislation through litigation is not unique to obscenity law. Wherever legislative proscriptions are expressed in intentionally vague words, courts must undertake to make law for each case as it is presented. A conspicuous example occurs in the

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71 Id. This was precisely the result in the case: two women testified pro, two others con.
72 Cf. J. WIGMORE, EVIDENCE § 1918 (3d ed. 1940) (real reason for opinion rule is superfluity of testimony).
75 Professors Hart and Sacks refer to this process as one of "Reasoned Elaboration
area of antitrust, where broad phrases such as "restraint of trade" and "every contract, combination ... or conspiracy" call for judicial exegesis in the course of litigation to determine whether or not a given business combination is socially desirable. Surely it involves no usurpation of legislative dominion to suggest that litigation is a necessary part of the "legislative" process where statutory language, such as "obscene," seems intentionally lacking in specificity and purportedly represents an attempt at generally understood and constitutionally permissible regulation. Judge Fuld of the New York Court of Appeals wrote in 1961: "[The Roth test] can only indicate the broad boundaries of any permissible definition of obscenity under the United States Constitution; [it does] not pretend to, and cannot, give specific content to the meaning of 'obscene' as it appears in [the New York] statute." Truly, it may be said that most statutes, in inverse proportion to the specificity of their language, include mandates for judicial definition case by case.

B. Expertise in Explication of Roth

Conceiving of obscenity litigation as part of the process of obscenity legislation can aid in formulating appropriate answers to the overriding question, "What do we wish to know before reaching a judgment on this challenged publication?" These answers will clarify the role which expertise can play in the process. Expert witnesses should be summoned for the purpose of gathering relevant information about the challenged work, not for the purpose of forcing jurors into awed acquiescence with the experts' conclusory opinions that the publication is or is not "obscene." The expert should strive to instruct the court in the ways of his work, whether it be psychology, literature, or whatever, and to explain the nature of the judgments made in that work. This instruction best allows the trier of fact to put the expert's particular observations into

of Avowedly Indeterminate Directions." H. HART & A. SACKS, THE LEGAL PROCESS 168 (tent. ed. 1958). Cf. Kuh, Obscenity: Prosecution Problems and Legislative Suggestions, 10 CATH. L. 285, 295 (1964): "Words like 'obscene, lewd, lascivious, filthy, indecent,' etc., contained in New York's present Section 1141 of the Penal Law [subsequently replaced by § 235.00 — see note 7 supra], have been often interpreted, and are constantly being molded, by the courts. Roughly speaking, they provide a medium for keeping pace with changes in community attitudes." Frank, supra note 74, at 633, compares the elusiveness of "obscenity" to that of "due process of law," "burden on interstate commerce," and "flash of genius."


proper perspective so that it can be ultimately determined whether the work might contribute to "social disorders." With this in mind, we can turn to a more particular explanation of how the legislative facts called for by the Roth test are best identified in a legislative obscenity trial.\textsuperscript{78}

\textbf{(i) Dominant Theme.}\textemdash{} The first branch of the Roth test focuses upon the dominant theme of the whole work, with a particular concern for the theme's appeal to a prurient interest in sex. It may, of course, be questioned whether a book or film has a dominant theme\textsuperscript{79} and further whether the notion of dominant theme has any real meaning in the cases of non-narrative material such as magazines or photographs. Yet there remains at least a limited role which expertise can play in determining not what the real meaning of a book or film may be, but whether some meanings are discernible to trained minds which may not be perceived by those who usually give less careful attention to such works.

In accordance with the command that the work be considered "as a whole," experts may illustrate that particular passages are significantly related to other less sensational passages which place the former in a cast otherwise unapparent when considered in isolation.\textsuperscript{80} This was the service performed by Professor Lionel Trilling in a trial challenging Edmund Wilson's \textit{Memoirs of Hecate County}.\textsuperscript{81} Similarly, a literary historian may be able to discern not only webs of connection between different parts of the book itself, but connections between the book and contemporaneous works which highlight a theme many readers might tend to overlook.\textsuperscript{82}

\textsuperscript{78} For discussions of the uses of expert testimony under the Roth test, see Comment, \textit{Expert Testimony in Obscenity Cases}, 18 HAST. L.J. 161 (1966); Note, \textit{The Use of Expert Testimony in Obscenity Litigation}, 1965 WIS. L. REV. 113.

\textsuperscript{79} R. Kuhn, \textit{supra} note 1, at 38. \textit{Cf.} United States v. One Carton Positive Motion Picture Film Entitled "491," 247 F. Supp. 450, 467 (S.D.N.Y. 1965): "The question of the recognition of the dominant theme is connected with the question as to who is to make the recognition."

\textsuperscript{80} See Tokikuni, \textit{Obscenity and the Japanese Constitution}, 51 KY. L.J. 703, 707 (1965): Expert opinions appear to be very effective in helping the court to decide "the relevancy of the specific objectionable portrayals to the development of the dominant theme of the material as a whole." It is not a question of the expert's reading in a prurient theme which the average man could not discern. For that average man has already become aware of the particularly sensational passages. Rather it is a question of the expert relating all passages so that the court may determine whether the dominant theme (if it exists at all) has breached the standards imposed by Roth. The less sensational passages may make the more sensational appear even worse, and at the same time dictate a dominant theme.

\textsuperscript{81} Lockhart \& McClure, \textit{Literature, the Law of Obscenity, and the Court}, 38 MINN. L. REV. 295, 298 (1954).

\textsuperscript{82} For example, "Richardson believed that chastity was the most important thing in
In such instances light can be shed on the publication at issue because, for purposes of interrogating the witnesses, the legal standards are, in the abstract formulation, put aside (to be applied later by the trier of fact) and the witnesses may discuss the publication in their own terms, much as if they were explaining to interested students in a classroom or to interested legislators in a subcommittee what this publication seems to be all about. These examples of experts' explanations should be contrasted to the testimony of an academic witness who told the court: "The dominant effect of [this] book taken as a whole is not an appeal to prurient interest nor shameful nor morbid interests in sex." Counsel who prepared the latter witness's presentation little understood what courts should properly seek to know in deciding whether given matter is to be proscribed. Aside from the fact that no expert is qualified to proffer legal conclusions, the tribunal probably understood less as a result of the witness's testimony.

Attempts at suggesting aspects of the challenged matter which may not occur to the juror can be helpful in other ways. Themes perceived and interests appealed to will vary according to audience and circumstances of exposure. Lockhart and McClure have suggested a notion of "variable obscenity" which draws upon specialized advertising and distribution techniques to permit greater understanding of the characteristics of probable purchasers and hence of probable effects. For example, where it can be shown that challenged photographs have been sent only to a scientific institute, and not to purchasers at large, the predictability of use and effect

the world; Cleland [whose Fanny Hill was being challenged] and Fielding obviously did not and thought there were more important and significant values." Testimony of Brandeis Assistant Professor Ira Konigsberg, Record, supra note 21, at 86.

83 Gertz, supra note 47, at 601. Similarly conclusory testimony was given in McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 146, 121 N.W.2d 545, 551 (1963), and in the Massachusetts Fanny Hill case. See Record, supra note 21, at 13, 61.

will vindicate the material.  

Similarly, psychological and psychiatric investigations may be presented through expert testimony to show that "the potential effect of a sexual stimulus is affected by the situation in which the material is presented, as well as the erotic content of the material observed." Indeed, it may be proven that apparently titillating material actually arouses disgust, shame, or other unpleasant reactions in the minds of some whose histories reflect certain patterns of experience. Showings both of special audience and of special conditions of exposure may emphasize the perception of Susan Sontag that "[t]here's a sense in which all knowledge is dangerous, the reason being that not everyone is in the same condition as knowers or potential knowers."

Counsel should present such data through expert witnesses not to obtain an opinion from the witness which expresses his legal judgment concerning the dominant theme's appeal to prurient interest, but to provide the trier of fact with a sufficiently full array of professional observations in order to render unlikely a hasty assumption that the publication at issue will affect everyone it reaches in the same way, under all circumstances. By suggesting multiplicity of effect, expert testimony of the kind here described is likely to plant proper doubts in the minds of judge and jury about the desirability of proscription in light of inconclusive "legislative facts." However, room is left for the discounting of expert testimony where the inconclusiveness of the data seems fabricated and the fact-finder is confidently prepared to say that the situations in which proscription is unnecessary are too few to stand in the way of a determination that the massive effect of the challenged material will be an appeal to prurient interest.

(ii) The Average Man.—The second branch of the Roth test requires the touchstone for prurient interest to be the average man. Publications may not be denied general circulation because of their

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86 Cairns, Paul & Wishner, supra note 13, at 1026.

87 Id. at 1032-33.

88 Sontag, supra note 19, at 211.

89 Cf. Larrabee, The Cultural Context of Sex Censorship, 20 LAW & CONTEMP. PROB. 672, 686 (1955): "The vanity of lawyers in assuming that the law has a significant effect on sexual habits is matched by the vanity of writers in assuming that literature has a comparable effect. Fortunately, there are other forces at work determining conduct." The assertion is reiterated in Larrabee, Pornography Is Not Enough, HARPER'S, Nov. 1960, at 87, 88.
probable effect on children\textsuperscript{90} or on the immature, irresponsible, or abnormally sensual.\textsuperscript{91} Here, the area for expertise would seem quite limited, for the jury has been convened precisely for the purpose of rendering its collective opinion as to the applicability of the relevant legal standard to the facts of the case.\textsuperscript{92} The trier of fact, not the witness, must decide whether the matter at issue has a given effect on the average man, who has been compared with the reasonable man of tort law;\textsuperscript{93} and at least one tribunal has held that the term needs no further explanation in the court’s charge.\textsuperscript{94}

The possibility does remain, however, that the fact-finder may be unaware of wide spread psychological characteristics which, if brought to his attention, would modify somewhat his notion of the average man. For example, though it may be improper to admit psychiatric testimony concerning effects of photographs on a test group which is deviant by definition,\textsuperscript{95} it will be proper to allow a psychiatrist to testify to the effects of a film upon the viewer’s unconscious.\textsuperscript{96} A sensible resolution would be to decide preliminarily whether the challenged work is of an esoteric nature, unfamiliar to average persons, or is of a kind commonly seen in the community. Only in the former case would expertise be required to lay the basis for a judgment of the effect on the average man.\textsuperscript{97}

Furthermore, where witnesses who have developed professional contacts with the public over a period of time are permitted to testify about the characteristics observed in those with whom they deal, the testimony should not be elicited to present the witness’s idea of the average man. Rather, as above, the testimony should be aimed at producing a more careful assessment by the fact-finder of his own idea concerning the average man, with slight modifications suggested by the special experiences of the witness. The remarks of

\textsuperscript{90} Butler v. Michigan, 352 U.S. 380 (1957). Note, however, the other side of the coin. The Supreme Court has recently held that the states may promulgate a separate and more restrictive definition of obscenity for minors, so as to prevent access by children to publications which are not considered obscene for adults. Ginsberg v. New York, 390 U.S. 629 (1968).


\textsuperscript{92} See 7 J. WIGMORE, EVIDENCE § 1917, at 7 (3d ed. 1940).


\textsuperscript{94} State v. Jungclaus, 176 Neb. 641, 126 N.W.2d 858 (1964).

\textsuperscript{95} Volanski v. United States, 246 F.2d 842 (6th Cir. 1957).


Dr. Robert Gosling, a psychoanalyst, are suggestive of the proper perspective in which to place direct and cross-examination of a witness who claims insight into the average man through professional confrontations:

One sort of information we are left with is derived from the anecdotal experience of a variety of observers, be they magistrates, social workers, ministers, psychiatrists or whatever. Each one comments on the experience he has had in his own limited field. . . . Apart from inaccurate observation the chief source of error in this method comes from the limitations of the field of experience, that is, from making generalizations from the relatively few particular cases that have been seen. Any such observer's field is limited by external circumstances, and his powers of observation are restricted by a variety of factors, such as his expectations, his conceptual framework and his personal bias. So whenever someone reports his findings in such an anecdotal way, particularly if he then propounds a firm conclusion that has widespread implications, it is important to inspect closely the selection of his data, how they were collected and what were left out. In particular in the problem under discussion one would question whether the particular selection of the people who came the observer's way and were prepared to disclose their sexual secrets was in any way representative of the population that enjoys pornography.

(iii) The Contemporary Community.— In any given case, the finder of fact must apply "contemporary community standards"; but this final facet of the (literal) Roth test does not appear susceptible to the introduction of expert testimony. Inevitably, much confusion concerning the relevance of such testimony shall flow from the inherent uncertainty as to the scope of the community whose standards are to be applied. Moreover, the absolute language of the majority opinion in Jacobellis v. Ohio seemingly negates the possibility that expert witnesses are necessary to assess the boundaries of any local community:

It has been suggested that the "contemporary community standard" aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. . . . [T]he concept of obscenity [has] "a varying meaning from time to time" — not from county to county, or town to town.

We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression.

98 Gosling, supra note 53, at 62-63 (emphasis added).
99 Cf. Note, Obscenity Prosecution: Artistic Value and the Concept of Immunity, 39 N.Y.U.L. REV. 1063, 1076 (1964): "The critic has no expertise in this area; in fact, his qualifications are suspect because his principal concern is the artistic merit of the work."
100 378 U.S. 184 (1964).
that is protected by the Federal Constitution. . . We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.101

True, the above portion of Mr. Justice Brennan's opinion may be considered dictum, and only one other Justice concurred in the substantive analysis set forth.102 But it represents a major premise in a Supreme Court syllogism which defeated proscription, and — even more significant — the precise question as to the scope of the community has yet to be ruled upon by the Court in a manner adverse to this "national standard" thesis.

Recent lower court opinions have also recognized the inappropriateness of parochial nets being cast in a nationwide stream of material,103 particularly where federal statutes have been involved.104 There are, however, rumblings of dissent in a number of decisions which have held admissible evidence of community standards;105 indeed, two cases have gone so far as to hold exclusion of such evidence a denial of due process of law.106 But this evidence is overwhelmingly of a kind not within the scope of the present discussion, for it places no real reliance on professional expertise. Rather it manifests an effort to demonstrate that matter equally or more objectionable than that at issue continues to circulate freely in the community.107 Evidence of this nature is usually garnered for the witness by counsel, who simply obtains locally sold publications similar to the one at issue and then seeks to put them into evidence.108

101 Id. at 192-95, citing Judge Learned Hand in United States v. Kennerley, 290 F. 119, 121 (S.D.N.Y. 1913).
102 378 U.S. at 197-98 (Goldberg, J., concurring). Mr. Chief Justice Warren specifically rejected the idea of a national community standard. Id. at 199, 200 (dissenting opinion).
108 Such extraneous literary material was held inadmissible in People v. Finkelman, 11 N.Y.2d 300, 183 N.E.2d 661, 229 N.Y.S.2d 367, cert. denied, 371 U.S. 863 (1962).
The only basis upon which one could arguably claim expertise in the matter of community standards would be through a statistical analysis of community opinion on a given matter by random sampling. Yet, even if it could be shown that non-distorting techniques had been employed to ascertain that the very matter at issue was considered unobjectionable by a significant majority of those queried, the circumstances under which those individual opinions had been given to the pollster or sociologist — lacking the focused solemnity of a judicial setting — would seem so informal, nonparticularized in purpose, and free from imposition of legal responsibility that they would perforce be rendered useless as an aid to the fact-finder in his application of contemporary community standards. An example is provided by the factual situation in McCauley v. Tropic of Cancer.

One dissenting judge had been overly impressed by the testimony of a witness who was manager of a local book distributor and examined books returned unsold from outlets where they had been on display; for the witness's testimony, that all of the 170 supermarkets and 98 percent of the drugstores involved refused to carry the challenged book was surely incompetent to show contemporary community standards. This dissenter obviously had overlooked the possibility — indeed, the near certainty — that the book's rejection by retailers resulted from fear of legal action, not an expression of substantive judgment on the part of the merchants. Also left unexplained was how a merchant who refuses to sell a book can be taken to speak for his customers regarding their collective standard of acceptable writing, for these same customers may well have taken the opportunity to purchase the book elsewhere or may have failed to exercise their prerogative to buy because of a myriad of unknown reasons.

The case was criticized in Note, Obscenity — Admissibility of Evidence of Contemporary Community Standards, 12 DePaul L. Rev. 337 (1963).

See American Civil Liberties Union, What's Obscene? 3 (1944), where there appears the result of a publisher's survey of opinion concerning the controversial Varga drawings in the old Esquire magazine.


20 Wis. 2d 134, 121 N.W.2d 545 (1963).

Id. at 158, 121 N.W.2d at 553 (Hallows, J., dissenting). Market surveys may reflect accurately consumer demand if a sufficient cross section of the geographical area is polled; but such surveys relate little concerning the consumer's evaluative judgment of a particular product or publication. Another problem raised by these statistics is the hearsay rule of evidence; yet the court in this case did not deem it necessary to delve into this "admissibility" enigma. See notes 140-44 infra & accompanying text.

If placed in the proper perspective, the issue of "contemporary community standards" will arise only after the gathering of information about the challenged work has been completed; and the expert can be of help to a court in the latter process alone. Once the experts have described and interpreted the effects of a given publication — albeit upon the "average man" — it becomes the task of the trier of fact to assess those descriptions and ask himself whether the probable effects thereof may bring the work into conflict with contemporary community standards. If the experts are not to be the assessors of their own explanations, their task must end with descriptions of the work's effects. The trier of fact bears the responsibility of deciding what legal conclusion — vindication or proscription — will be drawn from the testimony, and implicit in this determination as to legal conclusion is the requirement that the court must enunciate the (legal) standards of the community.


The issue upon which most expert testimony is presented has been identified by Mr. Justice Brennan (in Fanny Hill) as one of the three "coalescing elements" which constitute the Roth test in its current form: "Whether the material is utterly without redeeming social value." It is extremely important to note that under this test, obscenity has become a function of social value. In other words, whatever the word "obscene" may mean in American law, it implies at least in part a lack of social value. And absent this lack of social value, proscription is not constitutionally permissible:

A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.

On the other hand, the English notion of "obscenity" does not depend upon the existence or absence of social value; rather, the

114 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966). The other two coalescing elements, of course, are (1) whether "the dominant theme of the material taken as a whole appeals to a prurient interest in sex" and (2) whether "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Id.

115 383 U.S. at 419.
existence of such value is an independent defense for a work which may be concededly "obscene." The English have not succeeded any more than we in attempting to define "obscenity." Yet their analysis is extremely significant; for in the eyes of the English law, a publication can be both obscene and of social value. Our law denies that this is so; and it puritanically insists that whatever is obscene necessarily lacks social value. This insistence that legal obscenity and worth are mutually exclusive accounts for much of the critical dissatisfaction with our law's treatment of art, literature, and the less aspirant entertainments. More importantly, however, it accounts for much confusion in the assessment of the utility of expert testimony. Because the American defendant cannot put aside the perplexing task of explaining that his publication is not obscene, as can the English defendant by simply conceding the issue and proceeding to try only the defense of social value, the American defendant is constantly tempted to stray from the critical issue of social value and ask his expert witnesses to agree merely that his publication is not obscene. Some examples from trial records demonstrate this tendency:

Professor Harry Levin [testifying for the intervenor in the Tropic of Cancer case]: "I think one must distinguish between indecent things in a book and an indecent book. This book is about indecent modes of life. It is not an indecent book."

* * *

Q. "And yet you do not consider the book obscene. 'Yes' or 'No.'"

A. "I am afraid I will have to say more than 'Yes' or 'No.'"

* * *

Q. [Would Shakespeare's Rape of Lucrece be more likely to arouse lustful desire in the normal adult than Tropic of Cancer?]

A. "Mr. London, I am an expert in comparative literature, not in comparative lust."

And:

Professor John Bullitt [testifying for the intervenor in the Fanny Hill case]:

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117 See generally Alpert, Judicial Censorship of Obscene Literature, 52 HARV. L. REV. 40 (1938); Miller, Obscenity and the Law of Reflection, 51 KY. L.J. 577 (1963); Note, Obscenity Prosecution: Artistic Value and the Concept of Immunity, 39 N.Y.U.L. REV. 1063 (1964). See also M. ERNST & W. SEAGLE, supra note 2, at 229. No commentator has noted, however, that the American standard puts upon the prosecution the burden of showing absence of social value while the English independent defense puts upon the defendant the burden of showing social value.

118 Intervenor’s Appeal, supra note 16, at 227, 229, 244.
Q. "Do you believe that the reader of this book would have aroused in him or her prurient interest?"
A. "What reader?"
Q. "The average reader in the community to whom this book becomes available."
A. "Your Honor, do I have to answer that Yes or No when I find it very difficult? I am no sociologist, Your Honor; I am a professor of English."
Q. "Let me rephrase it."
A. "I am not a sexologist. I am not a professional in this matter."
* * *
Q. "Is the book obscene in your opinion?"
A. "I have no opinion on obscenity."
* * *

And:

Professor Robert W. Sproat [also testifying for the intervenor in Fanny Hill]:
Q. "Do you feel that the book arouses prurient interest in the reader?"
A. "Well, once again, I do feel that I cannot judge. I am not qualified to judge this matter. This is a matter for a sociologist."

Questions such as these, which are framed in conclusory legal terms, could be regarded as simply the product of counsel's failure to keep in mind the witness's particular competence. In the alternative, one might deem them proof of a mere failure to prepare a more searching interrogation; and either of these failures could be based upon a lack of understanding about the different concepts of obscenity likely to be employed by men of literature. But in the final analysis what appears is the all too obvious fact that no such justifications would be required if American law were not in its present complex and ambiguous state. There would be far less of this tendency to pull from the witness his opinion on the ultimate legal issue of obscenity if, as under the English law, the obscenity of the work could be conceded, or at least separated out in litigation, so that the question of particular value or merit could be explored on its own terms.

The English concept, despite its dissimilarity from the Roth and Fanny Hill notion of the inconsistency between obscenity and social value, does suggest a more useful way to present expert testimony. Implicit in the English rule is the premise that experts on the issue

119 Record, supra note 21, at 61-62, 65.
120 See notes 8-19 supra & accompanying text.
of social value shall have no concern with whether the publication is obscene, for the value which the experts may perceive in a work would vindicate it regardless of its obscenity. This same separation of concerns is appropriate, for evidentiary purposes, where an American court is searching for social value, even though the finding on that issue is crucial to the ultimate determination of obscene vel non. Under both the American and the English tests, demonstration of the existence of social value results in vindication of the challenged publication. In both schemata, therefore, experts on the issue of social value are best utilized by means of interrogation on that precise issue, with obscenity having been put aside as beyond the experts' concern.\footnote{1}

Once obsession with the expert's opinion about the material's obscenity has been overcome, specific and competence-related information can be evoked from that witness. An excellent example is offered by the testimony of a clinical psychologist in the case of Manual Enterprises, Inc. v. Day.\footnote{2} Using the standards of the American Psychological Association as his frame of reference, he testified that another psychologist's published answers to questions submitted by readers of the challenged magazine were unethical\footnote{3} and thus could not support a finding of social value.\footnote{4} Yet another example of helpful testimony was that of public health authorities, welfare workers, and educators to the effect that a widely circulated magazine's pictorial article, The Birth of a Baby, served a needed educational purpose, in light of widespread ignorance about childbirth.\footnote{5}

Particularly pertinent responses such as these, however, are not likely to result from questions by counsel which put the burden of

\footnote{1}See Frank, supra note 74, at 664. Experts, of course, may sometimes be employed on issues concerning the other two coalescing elements of the Roth test; but the social value issue is the crux of that test and, as such, the issue at which most expert testimony should be directed. As Mr. Justice Brennan has pointed out, without an absence of social value there can be no finding of obscenity. See note 115 supra & accompanying text.

\footnote{2}370 U.S. 478 (1962).


\footnote{4}Id. The defendant had sought to have the average homosexual deemed the sole class for whom the social value of this "male nudie" magazine was relevant. While the publication of answers to these readers in a widely distributed psychological journal may have been considered an attestation of (at least) minimum social value inherent in the magazine or even in homosexuality itself, the testimony of the clinical psychologist operated to defeat such presumptions and to disprove the possibility that there was any social value in the magazine even if the relevant class were narrowed to that of the average homosexual.

selection on the witness. When asked merely for an example of John Cleland's literary merit (in the *Fanny Hill* case), Professor John Bullitt responded:

There is a rather careful effort here to delineate this person. The early Phoebe, who is "red-faced, fat in her early 50's, who waddles into a room." She doesn't walk in, she waddles in.

This kind of writing is very skillfully done. It is a work of an artist.\(^{128}\)

Significantly, this rather trifling answer was seized upon (with some justification, I suggest) by Mr. Justice Clark, whose opinion was highly dubious of the light shed on the book by such testimony.\(^{127}\) In stark contrast to the seeming lack of preparation which contributed to this ultimately damaging piece of hit-and-miss interrogation was the thorough self-education process by which counsel informed himself in the *Ulysses* case.\(^{128}\) Counsel so effectively explained and drew from his expert the stream-of-consciousness style of the author, James Joyce, that Judge Woolsey confessed that, until counsel's explanation, the significance of Joyce's unusual style had escaped him.\(^{129}\)

The conclusion must be that the expert most successfully suggests social value when he is permitted (indeed, led by counsel) to discuss the publication at issue on his own terms, in light of the purposes and techniques applicable to his own field. From this particularized testimony, the trier of fact may select those indicators of usefulness which seem to him relevant to the "community" beyond the expert's. The expert should not be called upon for a substantive definition of "social value"; rather, he must offer specific observations which, if accepted, will help the trier of fact construct a more general notion of "social value."

\(^{126}\) Record, *supra* note 21, at 57.

\(^{127}\) *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 441-55 (dissenting opinion) (1966). Regarding Professor Bullitt's testimony which is quoted in the text, Judge Clark confined himself to one sarcastic reply: "Given this standard for 'skillful writing,' it is not surprising that he found the book to have merit." *Id.* at 449. He went further, however, in commenting on the free-flowing testimony of other experts who had attributed much historical, sociological, and literary appeal to the author's wordy descriptions of the sexual act and references to the male sexual organ as an engine. "How this adds social value to the book is beyond my comprehension. It only indicates the lengths to which these experts go in their effort to give the book some semblance of value." *Id.* at 449-50.

\(^{128}\) *United States v. One Book Called "Ulysses,"
5 F. Supp. 182 (S.D.N.Y. 1933),
aff'd sub nom. United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934).

\(^{129}\) M. ERNST & A. SCHWARTZ, *supra* note 20, at 95-96.
V. Pertinent Rules of Evidence

A. Relevancy and Due Process

At this point it becomes mandatory to ask whether the rules of evidence permit testimony which is several steps removed from the ultimate issue of obscenity and the component issues of the Roth test. Certain objections can be anticipated to testimony which discusses the challenged publication only in the expert's own terms, whether they be literary, psychological, or otherwise, and not in terms of "prurient interest," "social value," or "obscenity." Most of these objections will be made to admissibility on the grounds of relevance. The reason usually given is that the trained critic is, by definition, not an average man, and hence the critic's response is irrelevant to the question of what the average man's responses would be, or what community standards may be. In Grove Press, Inc. v. Christenberry, the concurring opinion stated:

I do not imply that the views of Jacques Barzun, Edmund Wilson, Archibald MacLeish, and other critics mentioned by the majority, are not entitled to consideration and respect. My point is simply that literary critics generally do not represent that hypothetical character, the average reader. It is this individual with whom a judge or administrative official must inevitably be concerned.

Unfortunately, such objections misconceive the function of the expert. He does not take the stand to speak for the average man — obviously, quite the contrary is the case. What the objections overlook is that the average man, while not as critically perceptive as the expert, may nevertheless be capable of some of the expert's perception. The continuously growing availability of higher education — along with the unprecedented communication of critical views through books, periodicals, and "educational" radio and television — surely indicates that the average man and the trained critic do not live in mutual incommunicado. The expert takes the stand

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180 For example, the views of so-called "literary experts" have been held to be irrelevant in proceedings under section 305 of the Tariff Act, 19 U.S.C.A. § 1305 (1965). See United States v. Two Obscene Books, 92 F. Supp. 934 (N.D. Cal. 1950) (motion to take depositions denied; obscenity can be determined from books themselves and any testimony concerning books' literary value would be irrelevant and immaterial); United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951) (books found to be obscene within the meaning of the statute). The two books involved were authored by Henry Miller and entitled Tropic of Cancer and Tropic of Capricorn. Note the conclusory caption which was given to the case.


182 276 F.2d 433 (2d Cir. 1960).

183 Id. at 439 n.1 (Moore, J., concurring).
not to embody the average man, but to suggest to the fact-finder that certain perceptions are possible and perhaps probable in light of an informed examination of the challenged work. It seems highly unlikely that either judge or juror will be so uncomplimentary to his own intelligence as to suppose the critic's observation about a given passage utterly beyond his (the judge's or juror's) grasp. But the fact-finder may easily suppose that a sensible interpretation is likely to occur to most sensible readers, though perhaps with less of the careful documentation or analysis supplied by the expert. Expertise, in other words, is a matter of degree; it is not the exclusive possession of the expert, whose perceptions would therefore be irrelevant to those of the average man. Rather, the observations of one concededly an expert are of aid in considering whether at least a portion of his perceptiveness is not shared by most educated persons.\(^{134}\)

As support for this analysis, the objection to admissibility of expert testimony on grounds of relevance has met with increased judicial and legislative disfavor since Mr. Justice Frankfurter, in a vigorous concurring opinion, argued that exclusion of such testimony in a criminal case constituted a violation of due process of law.\(^{135}\) The express provision in recent statutes for the admissibility of expert testimony\(^{136}\) has indicated that legislatures do, indeed, intend that courts hold hearings on the particular views of experts in order to bridge the gaps between the ambiguities of obscenity laws. Though such provisions sometimes meet with excessively narrow interpretation, as where it is reasoned in somewhat backward fashion that an obscene work does not become any less so by virtue of

\(^{134}\) There is no contradiction between this notion and the irrelevance of testimony dealing with responses of deviant individuals. See text accompanying note 95 supra. The response of the deviant is by definition outside the category of those responses by which materials may constitutionally be adjudged obscene. The response of the expert is one element in the total category of responses which make up the constitutional yardstick of "averageness," and may be considered to be shared, in varying lesser degrees, by many within the class of average men. Another way of pointing out the difference is to note that the deviant mind is the product of many forces which produce an abnormal susceptibility to obscenity — deviancy is an involuntary status; expertise, on the other hand, is voluntarily acquireable and, as we know, voluntarily acquired. One cannot assume that the deviant response, in contrast to the expert response, will be emulated by those within the range of the average.


\(^{136}\) See, e.g., MASS. ANN. LAWS ch. 272, § 28F (1956); ILL. ANN. STAT. ch. 38, § 11-20(c) (Smith-Hurd Supp. 1969). See also ALI MODEL PENAL CODE § 251.4 (Proposed Official Draft, 1962). The Illinois statute seems defective insofar as it makes its admissibility provision applicable to prosecutions, though the provision is apparently utilized in non-criminal cases as well. Cf. Gertz, supra note 47, at 594-95.
positive expert testimony,\textsuperscript{137} courts are undeniably becoming responsive to the need for professional non-legal help in adjudicating what is obscene. A recent federal court decision reversed a conviction in which the absence of any expert testimony on the issue of prurient appeal was held to give the jury impermissibly broad freedom to speculate as to probable effects:

"Due process of law" would be a meaningless cliche if the nonsensical trash that is the subject of this prosecution were allowed to be the basis of a conviction by judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry.\textsuperscript{138}

It would appear, then, that expert testimony is not only helpful in the course of obscenity litigation, but it is also required. Objections to the relevance of such testimony should be confined to those instances in which the witness offers speculations which go beyond the field of his particular competence. With well-planned questioning by counsel, moreover, these objections seldom need be made or sustained.\textsuperscript{139}

\subsection*{B. Less Frequent Evidentiary Obstacles}

Occasionally, other rules of evidence will provide stumbling blocks for the expert witness. For example, it was upon the absurd grounds of hearsay that Professor John Bullitt was prevented by the Court from referring to a critical remark by Fielding in \textit{Tom Jones}.\textsuperscript{140} Before applying this hearsay rule to out-of-court pronouncements by literary critics, judges would do well to recall Sir Philip Sidney's famous dictum, "the poet . . . nothing affirmeth and therefore never lieth."\textsuperscript{141} If the crux of the hearsay problem is the truth of the matter stated in these out-of-court assertions,\textsuperscript{142} it should be clear that the only relevant truth involved in garnering expert opinion about allegedly obscene material is the accuracy of the statement an expert not in court is said to have made. Thus, the sensible holding in this entire area should be similar to the treatment given

\begin{thebibliography}{99}
 \bibitem{138} United States v. Klaw, 350 F.2d 155, 170 (2d Cir. 1965).
 \bibitem{139} Cf. note 129 \textit{supra} & accompanying text.
 \bibitem{140} Record, \textit{supra} note 21, at 57. Worthy of note is the professor's meager response; he exclaimed simply: "Sorry." \textit{Id}.
 \bibitem{141} P. Sidney, The Defense of Poesy 35 (A. Cook ed. 1890).
 \bibitem{142} See Uniform Rule of Evidence 63.
\end{thebibliography}
published reviews by several lower courts. Operating under the logical premise that there is no good reason to suspect that the views expressed therein are untrue in the sense of misrepresenting the real opinion of the writer, these courts have held such reviews — and commentary thereon — admissible into evidence. One must take caution with this truth rationale, however. For hearsay objections may be validly raised to the admission of letters especially written and submitted for the purpose of influencing particular litigation.

There has also been occasional resort to the "best evidence" rule in an effort to prevent testimony by experts. Quite properly, the rule has been held inapplicable to the expert witness's narration of the book's contents. The rule should, however, provide proper grounds for objection to the witness's reliance upon a published opinion not produced in court, though the situation will ordinarily not arise due to the ready availability of published critiques. Finally, the courts must remember that it is not enough to adhere merely to the spirit of the rule. They must also recognize that, under the uniform mode of application, the best evidence rule may be applied only to writings. This apparently was forgotten by a state appellate tribunal which resorted to the rule in a case concerning a stage play, in order to let the judge and jury see the challenged skit actually performed in the theater rather than rely on witnesses' accounts of the production.

VI. PRACTICAL PROBLEMS WITH EXPERTS

There remain for discussion several practical difficulties in the presentation of expert testimony. These are often inevitable, but can be mitigated if, as has often been argued throughout this Article, the experts' role is carefully delimited. One major cause of concern is the summoning of famous critics for the purpose of utilizing their fame more than their criticism in an effort to offset the


144 Cf. People v. Viking Press, Inc., 147 Misc. 813, 264 N.Y.S. 534 (Magis. Ct. N.Y. 1933). There are also numerous hearsay problems inherent in evidence presented by experts in the form of statistical results from survey or opinion polls. See note 112 supra. Without delving deeply into technicalities, suffice it to say that such evidence should properly be excluded.


146 UNIFORM RULE OF EVIDENCE 70.

expertise of opposing witnesses in the eyes of the jury. For a widely acknowledged pundit is likely to command more lay respect simply by virtue of his "priestly aureole." A sterling example may be found in the *Jacobellis* litigation where the local critic and a small family-magazine critic were adverse to the challenged film. Bosley Crowther of "The New York Times" and Hollis Alpert of the "Saturday Review" upstaged the unknowns and won the reference to decisive expertise in the Supreme Court opinion.

At times, these prestigious men of letters may refuse to testify for the prosecution, even though they consider the challenged publication disgusting, on the grounds of distaste for legal censorship. But the renowned academic who does occasionally testify for the state may be utilized for his popularity rather than his particular perception. Ludwig Marcuse has described such an instance:

The prosecution [in *Smith v. California*] had its chief witness in the professor of literature, Frank Baxter. He was evidence of the popularity which television bestows upon a professor, rather than on learning. This genial man, sixty-six years old, had never wanted to be a scholar, but only to provide his students with instructive entertainment; and so he engaged in the important, praise-worthy trade of being a combination teacher and maître de plaisir. For many years he was the most popular man at his university . . .

Similarly, when famous academics testify for the defense, they may lend their own honor to the challenged work and lead the jury to ask how it can condemn a work spoken well of by such good people. Marcuse also comments on the 1960 London *Lady Chatterly* case:

[The defense witnesses'] professional and social glamour shone like anything. It might have been thought: the thirty-five had been accused — and now it was a matter of proving what wonderful experts, citizens and children of God they were . . . They are no Bohemians, no Casanovas, no poaching bachelors. These people giving evidence in favour of Lady C. are fathers and grandfathers of families.

Also in point is Sybille Bedford's impression of the effect made upon the same London jury by the appearance of Helen Gardner, Reader of Renaissance Literature at Oxford:

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148 H. Kalven, *Indecency and the Seven Arts* 76-77 (1930).
150 378 U.S. at 196.
151 R. Kuh, *supra* note 1, at 204-06.
154 *Id.* at 239.
[This] witness . . . turned out to be one of the most effective and impressive witnesses of the whole case. One saw climbing onto the witness stand a woman of homely appearance with a pleasant, open face, the kind of person one is apt to think jury members would welcome as a forthright and respected aunt; and indeed some of them were lifting trusting faces at her entrance.\textsuperscript{155}

However, even the most expert of testimony can backfire if the well-known witness is made a victim of thorough cross-examination which arouses anti-intellectualism. A brilliant critic, known far less without academia than within, has had his qualifications challenged "on the grounds that he had not read the best seller, Exodus, did not know the author, and did not recognize the name of a college professor who gave television lectures on Shakespeare."\textsuperscript{156}

No doubt, these subtle attempts to persuade (or dissuade) by reputation rather than by analysis are built-in weaknesses of a system which leaves the advocates to ferret out their own respective compurgators.\textsuperscript{157} But if the experts are called to teach, not to pontificate, triers of fact may well discover what most students already know: the celebrated expert can be a poor teacher. Is it not realistic to assume that others, as well as Mr. Justice Clark, would in common sense question how instructive the professor may be who offers as an example of literary merit the description of a fat woman "waddling,"\textsuperscript{158} or who testifies with assumed authority that the dominant effect of the book is not an appeal to prurient interest?\textsuperscript{159} The eliciting of particularized reasoning, limited to the witness's area of competence — such as explanation why the work is prescribed reading for the students in the field — is the most effective way to avoid broad, dogmatic pronouncements, resting only on authority and conclusory generalizations which are intended to command acquiescence rather than to communicate understanding. The goal, properly conceived, was succinctly stated by Professor Mason Ladd: "[T]he examination should be conducted in such manner that a juror should be able to say, 'My conclusion is in accord with the opinion of the expert, not because he has expressed

\textsuperscript{155} Bedford, The Last Trial of Lady Chatterly, ESQUIRE, April 1961, at 132, 143.


\textsuperscript{157} See UNIFORM RULE OF EVIDENCE 59, which authorizes court selection of expert witnesses, but does not limit the parties in calling their own experts.

\textsuperscript{158} See notes 126-27 supra & accompanying text.

\textsuperscript{159} See note 83 supra & accompanying text.
the opinion, but because he made me understand the facts in such a way that my opinion is the same as his.' "160

One final problem of pragmatics deserves note: not all challenged works are novels of arguable merit. In fact, recent decisions more often concern unpretentious publications such as "girlie" magazines.161 In this area the use of expert testimony appears difficult, if not questionable. For these non-literary publications do not gather an accretion of professional criticism162. They are too tawdry, transitory, and typical to warrant serious analysis in the ordinary course of their circulation.

"[T]he study of law, case by case, tends to reduce the "problem" of obscenity to the problems posed in court proceedings of a rather specialized character, largely concerned with books and most often with books of a special kind — those that fall somewhere between the obvious trash and the invulnerable classic — whose publishers are sufficiently tenacious or self-confident to sustain litigation.163 This kind of material calls for some imaginativeness on the part of counsel who seeks to present special information. Recognizing that academics would have been of no use, the creative lawyer in Mishkin v. New York164 called to the stand the writers, artists, and printers of the pulp paperbacks which were under attack. The testimony there went far in providing the Court with some notion of the social value represented by Mishkin's sordid enterprise.165 There is a striking parallel between the Mishkin record and that of a Senate subcommittee which shows Samuel Roth testifying: "I would say that my exciting style of advertising is a net that I spread among people who have not had a chance for a very good education to get good books into their homes . . . ."166 Although such information may not be immediately probative toward the ultimate legal issue of obscenity, it provides a sound framework within which to begin the all-important search for social value; and thus this kind of expert testimony has been sanctioned by statute in states such as Illinois, where evidence is admissible to show the "[P]urpose of the author, creator, publisher or disseminator."167

161 See, e.g., Redrup v. United States, 386 U.S. 767 (1967) (per curiam) (magazines not found obscene under any Justice's test).
162 See Note, supra note 156, at 1073.
166 SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY, INTERIM REPORT TO THE COMM. ON THE JUDICIARY, S. REP. NO. 2381, 84th Cong., 2d Sess. 117 (1956).
VII. CONCLUSION: THE LIMITS OF EXPERTISE

In the preceding portions of this Article, I have tried to point out that many uses of expert testimony in obscenity trials cause more confusion than enlightenment, and to suggest why this is so. It is now appropriate to draw some general conclusions concerning the proper function of expert testimony in the litigating process.

Virtually all of the difficulties explored — conceptual, evidentiary, and practical — result from the questionable notion that all the evidence at trial must be directed to the ultimate yes-or-no issue of obscene vel non. In a broad sense, of course, this is true; for the dispute over the obscenity of the work at issue is the underlying reason for the presentation of any evidence whatsoever. But the misconception, more precisely, is that the experts are expected to help the fact-finder decide the ultimate issue by participating in essentially the same kind of analysis as the fact-finder himself — much as though the fact-finder were to say to the expert, "I must decide whether this work is 'obscene' within the meaning of our statute. What do you think?" Because the expert is welcomed to participate in the decisional process in the same way as the trier of fact, so that the latter's decision will somehow be bolstered by professional consultation with the former, the roles of fact-finder and expert witness have become fuzzy and overlapping.

Asking the expert whether or not he considers the challenged publication to be obscene is only the most superficial manifestation of the failure to differentiate between the roles of fact-finder and expert witness. Such failure is more graphically demonstrated by the phenomenon of "omniscient expertise," that is, the tendency of counsel and jury to overlook the particular competence of the witness and to regard him as a general expert whose wisdom will be summoned to join in the collective analysis of those less confident in judgment. This tendency was notable in the Lady Chatterly trial in London, where the list of cognoscenti testifying was awesome. "[T]here had appeared," reports one observer, "a tendency to stop treating the witnesses as literary experts, or ethical experts, or 'other merits' experts, and just treat them as experts."168 This merging of the fact-finder's and the expert's roles also underlies those warnings by commentators that important decisions concerning censor-

ship may soon be turned over to a collection of randomly chosen Ph.D.'s.\textsuperscript{169} The warning was well expressed by Ernst and Seagle:

At first glance, the critic as literary expert appears to have a great deal to recommend him. It seems absurd that a work of literary art should be judged not by literary standards but by the rules of the criminal law which for the most part exclude him. Nevertheless the remedy is worse than the disease. The fact that vice societies at times have signified their entire willingness to have a board of literary men pass on manuscripts in advance should alone make us suspicious. A gift horse is to be looked very closely in the mouth even when he happens to be Pegasus.\textsuperscript{170}

The response should be a clearer division of decisional responsibilities between experts and triers of fact. This division can best be dramatized by an analogy suggested earlier — that of the legislative hearing.\textsuperscript{171} When the analogue is posited alongside the obscenity trial, it appears that what previously may have been thought to be a one-step process — the summoning of experts to aid in the judgment of obscene \textit{vel non} — is more appropriately to be regarded as a two-step process: an initial gathering of information about the challenged publication, and a subsequent assessment of the witnesses' explanations and application of legal standards. The initial step requires the observations of specially trained experts. But the subsequent step requires that witnesses' opinions be excluded in order to give full scope to the responsibility of the triers of fact. This division of the litigation into two steps provides a means of summarizing, and synthesizing, the points raised in the course of this Article:

(1) The expert has his own concept of obscenity and it is different from the legal concept, of which the essence is proscription. The expert must be allowed to discuss the work at issue in his own terms, in order to utilize the educational value of his testimony and to avoid superfluous opinions which are ultimately not his to make.

(2) Unsubstantiated notions about the evils of obscene matter are not constitutionally permissible foundations for legal censorship; but where expert witnesses can provide specific information concerning the characteristics and effects of questionable publications, their professional observations may serve to provide an ad hoc

\textsuperscript{169} See, \textit{e.g.}, Chandos, \textit{Unicorns at Play}, in \textit{To Depave and Corrupt — Original Studies in the Nature and Definition of "Obscenity"} 207 (J. Chandos ed. 1962).

\textsuperscript{170} M. Ernst & W. Seagle, \textit{supra} note 2, at 213.

\textsuperscript{171} See notes 73-77 \textit{supra} & accompanying text.
determination of obscenity for the particular case at hand. Therefore, the goal of expert testimony is not to achieve a majority expert opinion on the question whether the work is objectionable, but to acquire an array of particularized perceptions which can be accepted or rejected by the trier of fact in his final task of applying the Roth test.

(3) Similarly, on issues such as the nature of the average person or the existence of social value, the expert should not be called upon to provide his own notions for acceptance by the trier of fact; for the expert is by definition not an average person and the meaning of social value extends far beyond literary merit, psychological benefit, or any other single-faceted element of social existence. The challenged work can be utterly lacking in literary merit, for example, and still possess social value. Rather, the expert should provide pieces of information with which the trier of fact is to construct his own idea of the average person or of social value.

(4) Statutory provisions for the admission of expert testimony, and common law rules of evidence, should work to allow a wide scope to the eliciting of specific information and no scope whatever to pronouncements which are either unconnected with the expert's particular competence or related to opinions concerning the ultimate legal issues.

(5) The undesirable side-effects of prestigious critics lining up on either side of the case are minimized by limiting their testimony to their respective areas of competence, by eliciting specific responses, and by purposefully avoiding dogmatic pronouncements which push rather than point the way.

The fact that judges and juries must bear the final responsibility for the decisions of legal censorship may, as has been asserted, "shackle genius to the average prejudices of the times." But if this is so, it is because juries and judges have been deemed by legislatures to be the proper bodies to determine, in Judge Learned Hand's words, "the present critical point in the compromise between candor and shame at which the community may have arrived here and now . . . ." I have tried to show that experts are not suitable participants in these decisions as to what is obscene, but are equipped to provide information upon which intelligent decisions can be made. Hopefully, this demarcation of roles shall keep

173 M. Ernst & W. Seagle, supra note 2, at 211.
all participants — experts, judges, and juries — within the confines of their respective abilities and appropriate functions. At the very least, the analysis should make clear that at the limits of expertise are the beginnings of the responsibilities of judge and jury.