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Books share with our citizens and taxpayers the habit of going to court. In the case of books the habit is less in-grained, but with considerable frequency in recent years they have been involved in litigation. They usually have the unenviable role of defendant, the charge being obscenity.[1]

This is a brief report on the constitutional problems relating to the censorship of books on the ground of obscenity. The subject of obscenity itself, in a legal sense, is discussed only insofar as necessary to illuminate the questions which arise under the federal Constitution. The literary merit or lack of it in a given book normally will affect any judgment on the issue of obscenity, but as an independent factor it is, of course, entirely beyond the scope of the present discussion.[2]

The conflicting legal doctrines which have so far remained unreconciled are these. On the one side is the constitutional principle of freedom of the press prescribed for the federal government by the First Amendment to the Constitution and for the states by the same amendment plus the Fourteenth. Allied on the same side is the requirement of the due process clauses of the Fifth and Fourteenth Amendments that statutory penalties and prohibitions shall be expressed in definite terms. Opposing the foregoing principles, which are designed for promoting the public good by protecting private liberties, is the rule, intended to promote the public safety or well-being in the opposite manner, of restraining license, that a publisher or seller of obscene literature may be punished or the publication itself destroyed or otherwise penalized (denied carriage by mail, for example).

In the great garden of art, according to the elegant expression of Victor Hugo, there is no forbidden fruit. It seems quite clear, at least for the present, that a comparable absolutism does not inhere in the constitutional indulgence of the written word. On a number of occasions the United States Supreme Court has declared that the constitutional guarantee of the free-

[1] There have been other charges, of course. For example, SHELLEY'S QUEEN MAB resulted in the bookseller being charged with a blasphemous publication. Queen v. Moxon, 4 St. Tr. (N. S.) 693 (1841). TOM PAINE'S RIGHTS OF MAN, which criticized the British government, led to the author's prosecution for seditious libel. Paine's Case, 22 How. St. Tr. 357 (1792).

[2] Books charged with obscenity may vary greatly in merit. Among the accepted authors, not mentioned in the text, who have had a work questioned are Tolstoy ((1890) 19 Op. Atty. Gen. 667); Flaubert (People v. Miller, (1935) 279 N. Y. S. 583); Gide (People v. Gotham Book Mart, ((1936) 285 N. Y. S. 563); Voltaire (St. Hubert Guild v. Quinn, ((1909) 118 N. Y. S. 582); and a number of classic authors (*In re* Worthington, ((1894) 30 N. Y. S. 361).

dom of the press is not absolute.[3] In a recent case concerning group libel, *Beauharnais v. Illinois*,[4] several justices of that tribunal urged an absolute protection of expression, but their views did not gain acceptance as law.

Back in 1948, a bold prophet might have dared to predict an authoritative determination by our highest court of the respective standings of the competing principles above mentioned. New York's Court of Appeals had upheld a conviction of the publishers of *Memoirs of Hecate County* on the ground that one of the stories in the book violated a state law forbidding the publication of obscene matter.[5] The New York court held that the freedom of press guaranteed by the federal constitution did not shield the publisher of the volume. The Supreme Court of the United States agreed to hear an appeal from the decision of New York's highest court, but, with one justice not participating, the remaining justices divided equally, four to four, and affirmed the state court's judgment without clarifying the law.[6]

In January of last year the United States Supreme Court again considered an appeal from a judgment of New York's Court if Appeals.[7] A motion picture rather than a book was involved. The film entitled *La Ronde* was censored as "immoral" rather than as "obscene" as in the case of the *Memoirs of Hecate County*. The censorship of the film prevented its exhibition and did not merely provide punishment after a showing. The Court did not enter into a discussion of the film, but merely cited and followed a prior judgment invalidating the advance censorship of a motion picture, *The Miracle*, as sacriligious.[8]

Some, at least, of the differences between the case of *La Ronde* and that of the *Memoirs of Hecate County* are legally inconsequential. There is no reason for supposing that motion pictures enjoy greater constitutional protection than books; until recently it was not certain they enjoyed as much. The freedom of the press embodied in the First Amendment and mirrored in the Fourteenth may have been intended primarily as a bulwark against that type of censorship which operates in advance to prevent the publication of the written word, but it also limits

[3] Terminiello v. City of Chicago, 337 U. S. 1 (1949); Chaplinsky v. State of New Hampshire, 315 U. S. 568 (1942); *Cf.* Justices Brandeis and Holmes concurring in Whitney v. California, 274 U. S. 357, 377 (1927).

[4] 343 U. S. 250 (1952).

[5] People v. Doubleday & Company, 71 N. Y. S. 2d 736 (App. Div. 1947), affirmed by the Court of Appeals, 77 N. E. 2d 6 (1947).

[6] 335 U. S. 848 (1948).

[7] Commercial Pictures Corp. v. Regents of University of State of New York, 346 U. S. 587 (1954), which reversed 113 N. E. 2d 502 (N. Y., 1953).

[8] Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952). A state court has held that a censorship of the same film, *The Miracle*, on the ground of obscenity is constitutionally invulnerable. American Civil Liberies Union v. The City of Chicago, 121 N. E. 2d 585 (Ill. 1954). The court was not required to state whether or not it regarded the film as obscene; it directed the lower court to decide that question.

the punishment of publications already made.[9] Indeed, punishment, particularly if heavy as when each sale of a book is a separate offense, may be an effective deterrent and thus a form of advance censorship.

It is quite probable that the federal Supreme Court would disapprove the punishment of one who sold the book on which *La Ronde* was based if the seller were prosecuted under a state statute for selling an "immoral" book. Would it equally disapprove a punishment if imposed under a statute relating to "obscene" books? The highest court of New York sanctioned the imposition of just such a punishment on the seller of an English translation, *Hands Around,* of *Reigen,* the German-language book on which the French film, *La Ronde,* was based.[10] It did so more than twenty years ago, however, and much water has flown over the dam since then.

Judging from the legal propositions which the Supreme Court has developed in dealing with freedom of speech and press generally, the "risks" which are excepted from the general insurance coverage of the First and Fourteenth Amendments are those which present a substantial danger to the insurance company, i.e., the body politic, whether federal or state government. In many instances the Supreme Court has declared the danger to the government or society must be "clear and present."[11] It would not be wise to suppose, however, that no words other than those quoted can be used to express the exceptions from the policy insuring to each person the right to express his mind.[12] The important thing is that the danger must have been real, in the opinion of Congress or the state legislature, and sufficiently substantial to overbalance the great, nay vast, benefits which the Founding Fathers expected, as a general proposition, from freedom of speech and press.

Several times the Supreme Court has expressed the idea that obscene publications are beyond the scope of constitutional protection, are outlaws so to speak.[13] This would indicate a supposition of danger so formidable it can not be overcome by any words of contrary tendency, but only by such drastic remedies as silencing the publisher by previous restraint or subsequent punishment, destroying the publication, or by something relatively equivalent to those specific measures (denying the book importation into this country, for example). At the times of the respective utterances

[9] Compare Near v. State of Minnesota, 283 U. S. 697 (1931), with Chaplinsky v. State of New Hampshire, *supra,* note 3 at 572.

[10] People v. Pesky, 243 N. Y. S. 193 (App. Div. 1930), affirmed by the Court of Appeals, 173 N. E. 227 (1930).

[11] Terminiello v. City of Chicago, *supra,* note 3; West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943); Schenck v. United States, 249 U. S. 47, 52 (1919).

[12] See Justice Frankfurter's concurring opinion in Pennekamp v. Florida, 323 U. S. 516, 529-30 (1945).

[13] Chaplinsky v. State of New Hampshire, *supra,* at 572; and Near v. State of Minnesota, *supra,* at 716.

mentioned, however, the Supreme Court was not squarely confronted with the necessity of appraising the danger, if any, to be feared from books charged with being obscene. Under the circumstances, the remarks of the Court are obiter dictum and not entitled to the same respect as statments made with relation to points presented for decision.

The long history of prohibitions against and punishments for obscene "libel" would be considered evidence of danger which Congress and the state legislatures might credit. A case which occurred in England prior to the American Revolution is conspicuous in the history of this subject.[14] It dealt with the colorful character, John Wilkes, who was charged with publishing an obscene and impious libel entitled *An Essay on Woman.* Following his conviction, and his outlawry for flight from the country, Wilkes returned to England to be rewarded, on the one hand, by election to parliament and, on the other, punished for his offending essay.

In some matters of law a page of history is worth a volume of logic as Justice Holmes has remarked. It should not be supposed, however, that the long history of prohibitive legislation would be controlling with respect to the sufficiency in a constitutional sense of the danger or evil inherent in obscene publications. The history, though evidence of the existence of a danger, does not speak clearly with respect to the degree of it. In this situation, the proximity and degree of danger is of vital importance.

The prevalence of federal and state statutes designed to prohibit or penalize obscene publications likewise points to danger and can not be dismissed lightly.[15] The importance of this factor, however, is offset wholly or partially by the haphazard manner in which such laws have been applied. For example, *An American Tragedy* and *Lady Chatterly's Lover* were struck down in Massachusetts, but do not seem to have created a feeling of impending disaster elsewhere.[16] *Hands Around,* as a book and as a movie (*La Ronde*), appears to have been regarded as more frightening in New York than in other jurisdictions. Joyce's *Ulysses,* unsuccessfully attacked in the federal courts, apparently was ignored by the various states.[17] *Forever Amber,* assailed without success in Massachusetts, caused even less alarm in other

[14] Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Repr. 327 (1770).

[15] Federal statutes include 19 U. S. C. A. 1305 (prohibiting the importation of obscene matter); 18 U. S. C. A. 1461 (exclusion of obscene matter from the mails). See also section 40-9-17 R. S. COLO. 1953; section 524 of PENNSYLVANIA PENAL CODE of 1939; section 1141 of NEW YORK PENAL LAW; and MASSACHUSETTS GENERAL LAWS, (Ter. ed.) Ch. 272, sec. 28C-28G.

[16] Commonwealth v. Friede, 171 N. E. 472 (Mass., 1930), and Commonwealth v. Delacey, 171 N. E. 455 (Mass., 1930).

[17] United States v. One Book Entitled "Ulysses," 72 F. 2d 705 (C. C. A. 2d 1934).

jurisdictions.[18] Moreover, in *Winters v. New York,* decided in 1948, the prevalence of similar statutes did not save the New York statute aimed at magazines which mass stories of crime.[19]

The Supreme Court will be able to derive from the opinions of the lower courts but little help or information concerning the evils of publications said to be obscene. Few contain any discussion of the constitutional point. Such as do, speak a various language. In upholding a judgment that the book, *Strange Fruit,* is obscene, the Supreme Judicial Court of Massachusetts merely remarked that the danger of corruption of the public mind is a sufficient danger to settle the constitutional question.[20] In Pennsylvania a trial judge could see no clear and present danger that *Raintree County* and *Never Love a Stranger* would incite readers to criminal behavior and accordingly held the books within the protection of the Constitution, a decision later affirmed by a superior court.[21]

In one interesting case a federal appellate judge concurred in the judgment of his colleagues that a certain book should be excluded from the mails as obscene, but expressed considerable bewilderment with respect to the general subject of obscenity, including the danger to be feared.[22] The judge wrote:

> Perhaps further research will disclose that, for most men, such reading diverts from, rather than stimulates to, anti-social conduct (which, I take it, is what is meant by expressions, used in the cases, such as "sexual impurity", "corrupt and debauch the mind and morals").

A similar suggestion has been made by a state court.[23]

It may well be that any obscenity in books intended for children, such as the so-called comics, would present a higher degree of danger than would similar matter in books intended for the general reading public. A distinction based on the intended user of a book (comparable to the distinction observed in permitting the sale of intoxicating beverages to adults, on the one hand, and forbidding the sale thereof to minors, on the other) may be developed. As several judges have remarked, in effect, the entire reading public should not be put at the mercy of the adolescent mind or the feeblest conscience.[24] Conversely, our children should be protected from any reading which would be harmful to them, if not to an adult.

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[18] Attorney General v. Book Named "Forever Amber," 81 N. E. 2d 663 (Mass., 1948).

[19] 333 U. S. 507 (1948).

[20] Commonwealth v. Isenstadt, 62 N. E. 2d 840 (Mass., 1945).

[21] Commnowealth v. Gordon, 66 D. & C. 101 (Pa. Q. S. 1949), affirmed sub. nom. Commonwealth v. Feigenbaum, 70 A. 2d 389 (Super. Ct., Pa. 1950).

[22] Roth v. Goldman, 172 F. 2d 788, 792-3 (C. A. 2d, 1949).

[23] Bantam Books v. Melko, 96 A. 2d 47, 61 (N. J.. 1953).

[24] See United States v. Kennerley, 209 Fed. 119 (S. D. N. Y., 1913), and Commonwealth v. Gordon, *supra,* note 21.

In the problematical future, therefore, the United States Supreme Court may be faced with a number of difficult questions. Do books such as those held obscene in the past—*God's Little Acre*, for example—actually present a danger?[25] If so, what is the danger—a vague, nebulous contamination of the public mind or a specific, direct incitement to illegal or immoral behavior? How great is the danger and how certain must it be in this connection before the publication forfeits constitutional protection, that is, becomes an excepted item from the insurance policy of the First and Fourteenth Amendments?

A further difficulty will confront the Court from another direction. Is a legislative or congressional reference to "obscene" writings sufficiently definite to warn writers, publishers, booksellers, and other of the risk of criminal penalties or other adverse consequences in dealing with books? The provisions and spirit of the "due process" clauses of the Constitution require that state and federal statutes prescribing penalties do so in fairly definite terms. Thus, a statute prohibiting the sale of magazines of "massed crime" is not sufficiently definite to be valid, as the Supreme Court held in the *Winters* case mentioned earlier.[26] Other concepts which have been judicially labelled as too indefinite when standing alone are "sacreligious" (*The Miracle*) and "immoral" (*La Ronde*).[27]

When a state or federal statute uses the word "obscene", it usually does so in conjunction with other terms, such as "lewd, lascivious, indecent." Even so, the various combinations of words are far from conveying a wholly crtain meaning. True, it can be said that they relate to sex and sexual desire and not to such other human interests or desires as, say, the desire for property or the lust for gain. It has been held, however, that books are not ipso facto obscene or indecent by reason of episodes such as narrated in *Forever Amber* or discussions such as contained in *Preparing for Marriage*.[28] To what, then, does the term "obscene" apply?

A state court decision handed down last year with respect to a film, *The Miracle*, summed up obscenity as that having as its calculated purpose or dominant effect the rousing of sexual desires without compensating artistic or other merit.[29] The same decision, however, equated the obscene with the immoral, and the latter concept, as above mentioned, has been held too indefinite to satisfy constitutional requirements. In the case of *Bantam*

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[25] Attorney General v. Book Named "God's Little Acre," 93 N.E. 2d 819 (Mass., 1950). In New York the same book was not held obscene. People v. Viking Press, 264 N. Y. S. 534 (1933).

[26] Note 19, *supra*.

[27] Cases cited in footnotes 8 and 7, respectively.

[28] Attorney General v. Book Named "Forever Amber," *supra*, note 18; Walker v. Popenoe, 149 F. 2d 511 (D. C. App., 1945), and United States v. Dennett, 39 F. 2d 564 (C.C.A. 2d, 1930).

[29] American Civil Liberties Union v. City of Chicago, *supra*, note 8.

Books v. Melko, the court declared, "The definitions all lead to the dead end of subjective determination," a view akin to that expressed by Mr. Justice Black in his dissent in *United States v. Alpers,* a case which involved phonograph records conceded to be obscene.[30]

The federal Court of Appeals for the Second District has referred to the "imprecise judicial meaning of the statutory terms," and Judge Frank's concurring opinion elaborates on the point.[31] Another federal court, the Court of Appeals for the District of Columbia declared, "obscenity is not a technical term of the law and is not susceptible of exact definition." That court, with Judge, later Chief Justice, Vinson dissenting, refused to become alarmed at a book by reason of the nudity of certain human figures represented at an approximate height of one and a half inches.[32] On the West Coast a federal Court of Appeals found the concept of obscenity sufficiently definite, declaring it observed no contradiction in testing obscenity by its tendency either to repel or seduce.[33]

Judge Learned Hand has compared a jury verdict of obscenity to "a small bit of legislation ad hoc," but it is difficult to find a guiding standard in this relation which is comparable in its definiteness even to the rough standard of due care so much relied upon in civil, accident litigation.[34] More definiteness would seem necessary in criminal cases which involve a person's constitutional right of expression.

In view of all the foregoing, the fate of various state and federal statutes is shrouded in doubt, a factor which may dampen the ardor of zealous prosecutors and postpone the eventual clarification of this branch of the law. Those censorious citizens who are mindful of the damages later awarded against a complainant whose charges against Madamoiselle de Maupin were turned down by a jury, also may be expected to proceed with caution in making complaints.[35]

In the meantime, it would be foolhardy to predict the manner in which the foregoing questions eventually will be answered. It would be inappropriate in an explanatory article of this nature, as well as rash, to advocate a particular course as the one offering the best reconciliation of individual liberty and public security. Likewise there is no intention to advocate that in the constitutional scheme of things the public welfare is best served by unrestricted individual freedom and that, therefore, there is no conflict of public and private interest to be resolved. In this situation, advocacy is best left for the briefs of counsel when the questions are raised in litigation.

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[30] See note 23, and 338 U. S. 680 (1949).
[31] Roth v. Goldman, *supra,* note 22.
[32] Parmelee v. United States, 113 F. 2d 729 (D. C. App. 1940).
[33] Besig v. United States, 208 F. 2d 142 (C. A. 9th, 1953).
[34] United States v. Levine, 83 F. 2d 156 (C. C. A. 2d, 1936).
[35] Halsey v. New York Society for Suppression of Vice, 136 N. E. 219 (1922),