Obscenity's Meaning Smut-Fighters and Contraception: 1872-1936

Elizabeth Hovey
Obscenity’s Meaning, Smut-fighters, and Contraception: 1872-1936

ELIZABETH HOVEY*

This Article challenges the perception that obscenity has only recently become a riddle for the legal community. The first regularly enforced federal and state obscenity laws were enacted in a context of increasing sexual expression and contraceptive availability — the 1870s. The statutes banned lewd materials and “articles for the prevention of conception.” Courts followed suit by according obscenity the broadest possible definition, one fully supported by the self-designated enforcers of the new laws. The forces of commerce and reform, however, challenged the smut-fighters, and by the 1930s, both state and federal courts began, albeit haltingly, to narrow the definition of obscenity to the point of allowing commerce in prescribed contraceptives.

Justice Potter Stewart’s 1964 definition of obscenity,1 “I know it when I see it,”2 continues to resonate in the jurisprudence of free expression. It suggests the inadequacy of current tests for obscenity because ultimately triers of fact and even appellate judges must rely partly on their gut impulses. Justice William Brennan, who wrote

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1. The 1957 Supreme Court ruling in Roth v. United States, 354 U.S. 476 (1957), explained that obscenity is not protected speech. For purposes of this article, “obscenity” is what the courts have deemed unfit for publication at any given point (Like strikes and balls in baseball, which are simply what the plate umpire rules they are, obscenity is what the courts say it is.). Pornography and obscenity are partially overlapping categories, for much of contemporary pornography is not considered obscene. Earlier in the twentieth century, courts found erotica obscene that would not be considered pornography today. See also GLORIA STEINEM, EROTICA AND PORNOGRAPHY: A CLEAR AND PRESENT DIFFERENCE in TAKE BACK THE NIGHT (Laura Lederer ed., 1980).

the 1957 decision\(^3\) which started the Supreme Court on its current search for an obscenity test, decided in 1973 that it was a hopeless task.\(^4\) Similarly, Justice John Paul Stevens declared in 1987 that the current “community standards” and “value” test is “solely the subjective view of jurors.”\(^5\)

Almost a hundred years ago Oliver Wendell Holmes, Jr. observed that the business of law is predicting what courts will do,\(^6\) but obscenity decisions have always been difficult, if not impossible to predict. A review of state and federal interpretations of obscenity statutes during the first sixty years they were enforced reveals that it has long been difficult to predict judicial reaction to sexually explicit material. From the 1870s to the 1930s, long before the contemporary conflicts between advocates for artistic and sexual freedom\(^7\) and opponents of pornography,\(^8\) courts could not clearly define obscenity. The effort taxed the courts, although few then doubted that at least some sexually explicit matters harmed society. Only after civil courts in commercial proceedings found it too sweeping did criminal courts haltingly modify a very broad initial definition of obscenity.

The criminal courts also helped start a judicial debate on obscenity which has continued to the present day, resulting in an ever-more complex definition. Two prominent aspects of the early judicial struggle over the definition of obscenity are startlingly contemporary: (1) the ongoing involvement of privately-funded opponents of sexual expression, and (2) the issue of reproductive rights. By both spearheading the drive for state and federal legislation against sexually explicit materials in the 1870s and by overseeing enforcement of such laws afterwards, private groups played a pivotal role in defining obscenity. These opponents of sexual expression drafted and later enforced laws which specifically banned contraceptive information and

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7. The 1990-1991 prosecutions of a Cincinnati museum’s artistic director for exhibiting works of the late photographer Robert Mapplethorpe and of a record producer for producing the Rap group 2 Live Crew brought this issue to the fore again. For feminist arguments for sexual expression, see CAUGHT LOOKING: FEMINISM, PORNOGRAPHY & CENSORSHIP (Feminist Anti-Censorship Task Force eds., limited ed. 1986).
8. For feminist opposition to pornography, see generally Andrea Dworkin, Pornography: Men Possessing Women (2d ed. 1989); Andrea Dworkin & Catherine MacKinnon, Pornography and Civil Rights (1988); Steinem, supra note 1. Other anti-pornography activists include Alan E. Sears, counsel to Citizens for Decency through Law, and Rev. Donald Wildmon, leader of the American Family Association. For scientific research regarding the effects of pornography, see PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS (Dolf Zillmann et al. eds., 1989).
contraceptive devices as obscene,

9 as well as literature, images, and figures on that subject. Obscenity's legal history in the late nineteenth and early twentieth century dealt not only with who was offended by what, but also with who could have sex without procreating. While all sexually explicit acts and representations—among them indecent exposure,10 spoken language,11 and private correspondence12—have been classified as obscenity in various contexts, in the 1870s, representations of sexuality in the arts and commerce, and contraception in all arenas, became the targets of the laws.

Mid-nineteenth century America seemed to be on the verge of open discourse on sexual topics. A booming industry in provocative novels,13 increasing availability of contraceptives,14 and a growing

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9. These obscenity laws were among the first to regulate the availability of contraceptive information and devices in any way. The Comstock law was the first federal law to ban contraceptives explicitly, and no earlier state laws against contraception resulted in reported cases.


11. Criminal charges for obscene language commonly appeared among reported cases and suggest gender dynamics worthy of further study. See Obscenity, 37 Am. Digest §§ 4, 8, 11, 12, 14 (Century ed. 1902); Obscenity, 17 Am. Digest §§ 4, 8, 13, 17, 19 (Decennial ed. 1910); Obscenity, 17 2nd Decennial Digest §§ 4, 8, 13, 17, 19 (Am. Digest ed. 1921); Obscenity, 21 3rd Decennial Digest §§ 4, 19 (Am. Digest ed. 1929); Obscenity, 24 4th Decennial Digest §§ 4, 11 (Am. Digest ed. 1938). A woman's presence could change a crass utterance into a crime: "From time immemorial it was an offense at common law to utter obscene language in public places, near a dwelling house, or in the presence of women." Knowles v. United States, 170 Fed. 409, 412 (8th Cir. 1909). Women who used obscene language shattered the apparent assumption that women especially needed protection from it, and they were prosecuted or sued for using it. Levert v. Katz & Besthoff, 115 So. 281 (1927); People v. Whitman, 157 N.Y.S. 1107 (1916), rev'd, 165 N.Y.S. 148 (App. Div. 1917); State v. Lowry, 153 N.W. 305 (Minn. 1915). In all reported criminal cases I found which referred to women using obscene language, they were being prosecuted specifically for using obscenities. By contrast almost all references to obscene language used by men were incidental to another crime which was being prosecuted. In divorce and other civil cases where evidence was introduced that women used obscene language, courts tended to rule against them. Benjamin v. Benjamin, 162 A. 612 (N.J. 1932); Doyle v. Doyle, 170 A. 623 (N.J. 1923); Ernst v. Eltgroth, 182 N.W. 709 (Minn. Ct. App. 1921); Wille v. Wille, 103 A. 74 (1918).

12. Sheila Burton, Obscenity in Victorian America: Struggles Over Definition and Concomitant Prosecutions in Chicago's Federal Court, 1873-1913 (1991) (unpublished Ph.D. dissertation, University of Illinois (Chicago)). Burton discusses "mail obscenity" at length, in addition to discussing obscene and commercial goods sent through the mails. See id. at 215, 217, 218, 221 (regarding the gender and occupations of defendants).


14. Barriers similar to rimless diaphragms (called womb veils), pessaries, and douches were available for women, and condoms made of vulcanized rubber were mass produced beginning in the 1840s. Linda Gordon, Woman's Body, Woman's Right: A Social History of Birth Control in America 60-71 (2d ed. 1977). See generally
movement of feminists promoting sexual understanding\footnote{See William Leach, True Love and Perfect Union 50-57 (1989).} heralded such openness. At the same time, a Christian social purity movement called for greater moral control in many areas of social and recreational life. This movement projected a “Victorian” code of middle-class gentility which required silence on sexual matters, temperance, and quiet observation of the sabbath.\footnote{D’Emilio & Freedman, supra note 13, at 69-73, 150-60. A sexual double standard nevertheless prevailed which condoned premarital sexual relations for men while condemning them for women. \textit{Id.} at 130-38.} The Christian movement for social purity\footnote{See D.J. Pivar, The Purity Crusade: Sexual Morality and Social Control, 1868-1900 (1973).} encompassed everything from the Women’s Christian Temperance Union (WCTU)\footnote{D’Emilio \& Freedman, supra note 13, at 152-53. See WCTU’s reliance on the New York Society for the Suppression of Vice referred to in \textit{New York Society for the Suppression of Vice, Annual Report} 22 (1895) [hereinafter NYSSV with publication date indicating individual volume].} to urban committees, which fought prostitution and inspected dance halls.\footnote{The federal culmination of this movement was the 1910 Mann Act, which made transporting women across state lines for “immoral purposes” illegal. See D. Langum, Crossing the Line: Interstate Immorality, the Mann Act, and Changing Sexual Cultures (1992) (unpublished manuscript, on file with D. Langum, Cumberland School of Law, Birmingham, Alabama).} The most frightening specters for these morality advocates, who condemned sex other than for procreation, were members of the late nineteenth century free love movement. “Free lovers” were a relatively small and diverse group, but all agreed that marriage was a repressive institution, particularly for women.\footnote{H.D. Sears, The Sex Radicals: Free Love in High Victorian America (1977); D’Emilio \& Freedman, supra note 13, at 156, 160-66.} Free Lovers argued that United States laws were too closely tied to Christian dogma, inequitable to women generally, and irrational.\footnote{1821 Vt. Acts; 1834 Conn. Acts; 1835 Mass. Acts; 1862 Ohio Acts; 1962 Vt. Acts; 1869 Minn. Acts; Act of Mar. 16, 1870, No. 19, 1870 Pa. Laws 39 (prevention of publication of obscene advertisements and the sale of noxious medicines); John Paul Harper, ‘Be Fruitful and Multiply’: The Reactions to Family Limitation in Nineteenth Century America 119-20 (1975) (unpublished Ph.D. dissertation, Columbia University). The Federal Tariff Act of 1842 prohibited obscene goods, including “articles for immoral purposes,” a common euphemism for contraceptives. U.S. Stat. 1856. In 1865, Congress banned obscenity from the mail in response to the Postmaster General’s report that “great numbers” of titillating novels and other sexy materials were being sent to soldiers in the Union forces. James C.N. Paul \& Murray L. Schwartz, Federal Censorship: Obscenity in the Mail 17 (1961).} It was in this contentious context that a rash of obscenity statutes were enacted in the 1870s, supplementing the common law of obscenity and a few scattered earlier statutes.\footnote{19th-century obscenity statutes included: 1821 Vt. Acts; 1834 Conn. Acts; 1835 Mass. Acts; 1862 Ohio Acts; 1962 Vt. Acts; 1869 Minn. Acts; Act of Mar. 16, 1870, No. 19, 1870 Pa. Laws 39 (prevention of publication of obscene advertisements and the sale of noxious medicines); John Paul Harper, ‘Be Fruitful and Multiply’: The Reactions to Family Limitation in Nineteenth Century America 119-20 (1975) (unpublished Ph.D. dissertation, Columbia University). The Federal Tariff Act of 1842 prohibited obscene goods, including “articles for immoral purposes,” a common euphemism for contraceptives. U.S. Stat. 1856. In 1865, Congress banned obscenity from the mail in response to the Postmaster General’s report that “great numbers” of titillating novels and other sexy materials were being sent to soldiers in the Union forces. James C.N. Paul \& Murray L. Schwartz, Federal Censorship: Obscenity in the Mail 17 (1961).} The central figures of this process were Anthony Comstock and what would become the...
New York Society for the Suppression of Vice (NYSSV). Comstock became the leader of the anti-obscenity movement in 1872 when, as a private citizen, he brought a reporter along on his visit to a stationery store. After its employees sold Comstock what he called obscene literature, he directed a police officer to arrest them. Turning to the Young Men’s Christian Association (YMCA), which had in 1868 successfully lobbied for New York’s first obscenity statute, Comstock persuaded several of its patrons to form a YMCA committee for improving and enforcing that law. The committee paid for Comstock’s successful 1872 lobbying trip to Albany, where the New York legislature responded by stiffening penalties for obscenity. Then, in February of 1873, the group underwrote another journey, this time to Capitol Hill. Comstock drafted a bill which combined two bills already pending on the issue with a proposal of his own. New York Congressman Clinton L. Merriam introduced the bill, and Comstock lobbied for its passage with exhibits of contraceptive devices, lurid publications, and copies of advertisements.


24. Id. at xi. Four years earlier, as a young man shocked by the material read by fellow clerks, he had caused the arrest of vendors. Id.


26. Members included financier J. Pierpont Morgan, eventual millionaire Morris K. Jessup and industrialist William E. Dodge. The group’s first president would be Samuel Colgate, head of the soap-producing company. Paul S. Boyer, Purity in Print: The Vice Society Movement and Book Censorship in America 5 (1968). The exceptional wealth of the early vice-society patrons and the later impact of the society’s agents suggests that wealthy individuals attempted to direct American mores and social behavior through legal mechanisms. The leadership of what would become NYSSV was entirely Protestant. It included many Methodists, representing a denomination particularly active in the Christian social purity movement. Id. at ch. I. The conviction that eliminating sexually explicit materials was a sacred mission pervaded NYSSV rhetoric for more than 40 years. See NYSSV (1873-1915), supra note 18. Contemporaries of Anthony Comstock suggested he was ultimately inspired by his own sexual interests and a desire for power, a contention fully harmonious with the recent theories of Michael Foucault. Heywood Broun & Margaret Leech, Anthony Comstock, Roundman of the Lord (1927); 1 Michael Foucault, The History of Sexuality: An Introduction (R. Hurley trans., 2d ed. 1980).

27. Little Comstock Law, 1872 ch. 747, 1872 N.Y. Laws 1795. The Legislature banned articles of “immoral use” and threatened a thousand-dollar fine or six months in jail at the maximum.

28. Bremner, supra note 23, at xi-xiii; Mary W. Dennett, Birth Control Laws: Shall We Keep Them, Change Them or Abolish Them 25 (Da Capo Press
Disgraced by the Credit Mobilier scandal, Congress seized the opportunity to act for a conventional moral good and passed the proposal without debate in the final days of its 42nd session. The new law excluded sex-related materials, including contraceptive devices, from the mails and banned their importation. It became known as the Comstock Act.

Birth control proponents would later vilify Comstock as having singlehandedly banned contraception through federal law; Comstock's New York statute became a model for most states. Although the rhetoric reflected Comstock's early lobbying skill and


29. In the fall of 1872, the New York Sun broke the story that leading members of Congress had held stock in Credit Mobilier, a subsidiary of Union Pacific Railroad, when Congress awarded it magnificent federal subsidies to build the transcontinental railroad. The company gave the shares to the politicians. Two congressmen were censured for their involvement, but four others, among the most powerful Republicans of the time, were also implicated. The Reader's Companion to American History 248 (Eric Foner & John A. Garraty eds., 1991).


31. Every obscene, lewd, or lascivious, book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, . . . are hereby declared to be non-mailable matter; . . . and any persons who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable . . . shall be deemed guilty of a misdemeanor.

Comstock Act, ch. 258, § 2, 17 Stat. 598-99 (prohibition and penalty for mailing obscene articles) as amended by Act of July 12, 1876, ch. 186, 19 Stat. 90 (R.S. 3893). The 1876 amendment included printed materials unrelated to contraception, previously omitted through oversight. H.R. 2575, 44th Cong. 1st Sess. 1876 (enacted); 4 Cong. Rec. 3656 (1876).

32. All persons are prohibited from importing into the United States, from any foreign country, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article or an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion . . . . All such prohibited articles . . . shall be detained by the officer of customs . . . .


33. Comstock's was the first specific mail prohibition on contraception, but a previous customs act could have been interpreted to forbid contraception. See Paul & Schwartz, supra note 22.

34. Dennett, supra note 28, at 9; Margaret Sanger, Margaret Sanger, An Autobiography 77-78 (2d ed. 1971).

35. A 1938 review of state statutes found that 45 states had obscenity statutes echoing New York's Little Comstock Law. Criminal Law—Applicability of Obscenity Statutes to Physicians, 16 N.Y.U. L.Q. 149, 149 n.3 (1938). New York City's prominence in commerce, publishing, arts, and importation, combined with the activity of the
later notoriety for enforcing the new laws, Comstock’s contribution was exaggerated. Comstock’s critics ignored the financial and political power of Comstock’s backers, as well as the broader support of the Christian social purity movement. The YMCA committee, which underwrote Comstock’s lobbying trips, became a visible part of that movement by incorporating the NYSSV, an independent organization. In a special charter, the New York state legislature granted to the NYSSV the assistance of all police organizations in the state in order to “suppress the trade” in all obscene matters. The power to direct the police, combined with Comstock’s federal appointment as a new (unpaid) postal inspector at large, made the group a privately-funded extension of both the state and federal governments. The NYSSV’s stated purpose was to enforce obscenity laws, including the enforcement of an 1873 amendment to the 1872 New York Act (the 1872 Act is known as the Little Comstock Law), which more than quadrupled the maximum penalties for obscenity.

NYSSV, meant that New York state courts would interpret “obscenity” much more often than those in other states.

36. See supra note 22 for earlier statutes.


40. The Society paid salaries to its agents while they combed the streets, scoured publications, and sent decoy letters to suspects in an effort to find transgressors. Although the NYSSV frequently asked the police to make an arrest, in New York City the public authorities deferred to the private group. For the years 1889-1910, for example, the society's total number of obscenity arrests within the city (including those with police assistance — 826 in all) exceeded by nearly 25% the number reported by the police (possibly including the arrests directed by the NYSSV — 615). Figures were tabulated from volumes of the NEW YORK CITY POLICE DEPARTMENT, ANNUAL REPORT (1889-1906 & 1908-1910) (the 1907 volume could not be located) and the manuscript arrest records of the NYSSV, located at the Library of Congress, Manuscript Division.

41. The object of said corporation [the Society] shall be the enforcement of the laws for the suppression of the trade in and circulation of obscene literature and illustrations, advertisements and articles of indecent and immoral use, as it is or may be forbidden by the laws of the State of New York, or by the United States.

Act of May 16, 1873, ch. 527 § 3, 1873 N.Y. Laws 828.

42. Act of June 14, 1873, ch. 777, 1873 N.Y. Laws 1183. This act modified § 317, some of which would eventually read:

shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend, or give away or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character . . . shall be sentenced
Soon there would be others in the crusade to enforce such laws.\textsuperscript{48}

The NYSSV was the first and most influential of several anti-smut societies established in cities from Boston to San Francisco in the 1870s and 1880s.\textsuperscript{44} Comstock served as both its founder and secretary for 42 years. He and other vice society agents oversaw the new laws' enforcement by collecting evidence, directing the police to make arrests, making citizen's arrests if necessary, drawing up complaints, appearing in court as witnesses or expert witnesses, and even acting occasionally as prosecuting counsel.\textsuperscript{45} Although scholars have described how private groups enforced the obscenity laws\textsuperscript{46} by initiating arrests, few have noted the role of these agencies in shaping judicial interpretation of obscenity. A near-constant presence in court, the NYSSV always argued for the destruction of sexual representations and the punishment of their purveyors.

The creation of this dedicated enforcement mechanism boded ill for women who wished to limit their family size.\textsuperscript{47} Contraceptives had become increasingly available by the mid-nineteenth century, and they had been popular.\textsuperscript{48} After passage of the Act, they could no longer be legally mailed, advertised in materials sent through the mail, or imported.\textsuperscript{49}

\begin{verbatim}
43. NYSSV (1879), supra note 18, at 17-18. A visit by Comstock was credited with helping to organize The New England Society for the Suppression of Vice, later dubbed the Watch & Ward Society, and new “societies” listed in Cincinnati, Cleveland, St. Louis, Louisville, and Chicago. In 1884, the California Society for the Suppression of Vice was established in San Francisco. NEW ENGLAND SOCIETY FOR THE SUPPRESSION OF VICE, ANNUAL REPORT 21-22 (1888).
44. SEARS, supra note 20; D’EMILIO & FREEDMAN, supra note 13, at 156, 160-66.
46. BOYER, supra note 26; GORDON, supra note 14, at 65, 69, 169.
47. The group assisted prosecutions as far away as San Francisco and Canada; consequently its impact was far from local.
48. See supra note 14.
49. In fact, through a mistake in phrasing they were the exclusive target of the federal law. Comstock Act, ch. 258, § 2, 17 Stat. 598-99 (prohibition of and penalty for
\end{verbatim}
Because they provided little statutory guidance, the new laws obliged both state and federal courts to formulate a definition of obscenity. These obscenity laws described contraceptives clearly, but described other obscene items circuitously, as “lewd and lascivious.” This vagueness added to the Comstock Laws’ potential for social control.69

American common law provided only three reported cases pertaining to obscenity prior to the enactment of the Comstock Laws.61 Instead of using or modifying the description of obscenity provided in one of these cases,62 state and federal courts adopted an 1868 English test set forth in *Regina v. Hicklin*.63 In the first reported prosecution under England’s first established obscenity law, Lord Campbell’s Act of 1857,64 *Hicklin* involved a pamphlet entitled “The Confession Unmasked: Showing the Depravity of the Roman Priesthood, the Iniquity of the Confessional and the Questions put to Females in Confession.”65 A magistrate found it obscene, but its publisher successfully appealed to Benjamin Hicklin, the Recorder of London.66 Hicklin found the pamphlet’s intent and theme worthy of publication.67 However, Chief Justice Alexander Cockburn of the Queen’s Bench reversed *Hicklin*. He ruled that regardless of the author’s intention or theme, the pamphlet was obscene if the “tendency mailing obscene articles). See *supra* note 31 for 1876 revision.


51. Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815) (making it an offense against common law to exhibit an obscene picture); Commonwealth v. Holmes, 17 Mass. 336 (1821) (publishing an obscene book or print is an indictable offense at common law); Commonwealth v. Landis, 8 Pa. 453 (1870) (a jury weighing the testimony of doctors as to the truthfulness of information in a sex manual may still find that it inflames passions). There are other obscenity cases cited by the Centennial Digest, but these dealt with either obscene spoken language or questions regarding adequacy of indictment issues.

52. Commonwealth v. Landis, 8 Pa. 453 (1870) (Whether or not something is obscene depends upon its tendency to inflame the passions and debauch society. Obscene items offend modesty, are indecent and lewd, and tend to the creation of lascivious desires.) This case allowed the consideration of expert testimony, unlike the *Hicklin* standard which would shortly be adopted in American jurisdictions.

53. People v. Muller, 96 N.Y. 408, 411 (1884) (citing Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868)).


55. People v. Muller, 96 N.Y. 408, 411 (1884) (citing Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868)).


57. This finding seems to have respected the spirit of the obscenity law at issue, Lord Campbell’s Act (1857), more than the subsequent ruling. Ernst & Seagle, *supra* note 37, at 114-129; N. ST. JOHN-STEVAS, OBSCENITY AND THE LAW 67 (1956) (citing 146 HANSARD PARL. DEB. (3d ser.) 327 (1857)). Recorder Hicklin’s ruling could also reflect long-standing anti-Catholicism in England.

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of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. 58 Eleven years later in United States v. Bennett, 59 Judge Blatchford adopted the Hicklin standard and in 1886, so did a New York Appellate Division court. 60 In the remainder of the century, the very few reported criminal cases which considered the meaning of obscenity concurred. 61 The Hicklin standard therefore became the first American test of obscenity, and it became the standard which Comstock and the NYSSV would refer to throughout their history.

The Comstock Laws' rare appearance in appellate court records during this time was deceptive. In 1901 the NYSSV boasted 2,457 cumulative arrests for the years from 1873 through 1900. 62 According to its published records, almost three-quarters of those arrests resulted in convictions or guilty pleas. 63 Of course, triers of fact determined what was and was not obscene 64 under the Hicklin standard. However, by deciding which vendors and publishers would be prosecuted, the privately-funded NYSSV also acted as the arbiter of obscenity. It may in fact have had a greater impact in this area than the courts did during this period.

After the turn of the century, criminal courts gave Hicklin closer scrutiny. They began to evaluate the content and context of an allegedly obscene work in order to find whether it inspired lust. They wrestled with the following questions in the course of hesitantly narrowing the scope of obscenity: (1) Should juries weigh such aspects of a work as its intent, artistry, or merit, or determine solely whether a possibly corrupting discussion of sex is presented? (2) Should a whole work or excerpts of it be considered in weighing its fitness for

58. People v. Muller, 96 N.Y. 408, 411 (1884) (citing Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868)).
59. 16 F. Cas. 362 (No. 14,571), aff'd, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571).
60. People v. Muller, 96 N.Y. at 412.
62. NYSSV (1901), supra note 18, at 6. Of these, 502 were arrested under federal law and 1,955 under state laws.
63. Id. The 1901 cumulative records counted 1,823 such outcomes, or 74.2% of all arrests.
64. In most trials, of course, juries were the triers of fact. During this time in New York City, a three-magistrate panel called a Court of Special Sessions judged facts in most indictment cases, although a jury trial could be applied for.
publication or display? (3) Should its impact on the most immature and vulnerable in the potential audience be the standard?

_Hicklin_ did not refer to contraception devices or information. However, since the Comstock Laws clearly covered contraceptives under the umbrella of obscenity, a related question arose during this period: Are contraceptive items and information obscene per se? In providing shifting answers to these questions, the courts found a narrower definition of obscenity; the NYSSV provided the occasion for many of these determinations.

**Elements of Allegedly Obscene Works: Intent, Value, and Experts' Opinions**

The first courts that applied postal obscenity law adopted the _Hicklin_ test, denying that the value or merits of a work excused its sexual references. Comstock arrested De Robigne Mortimer Bennett in 1878 for obscenity. Bennett had mailed the pamphlet _Cupid's Yokes_ by Ezra Heywood, which called for marriage reform. An exposition of many free love ideas, _Cupid's Yokes_ argued that bonds of affection, instead of marital regulations, should maintain monogamous relations. Calling sex “lovers’” exchange, the pamphlet urged that sexual relations be rationally controlled, “entered upon or refrained from as the mutual interests of both, or the separate good of either, requires.” Advising against sexual climax, it also referred to barrier methods of contraception and carefully described the “safe” nonovulatory period.

At trial, Bennett brought experts, including clergymen, to testify to the merits of the work. The trial court deemed their testimony inadmissible. By denying that either honest intent or merit mattered in obscenity cases, the court shielded juries from considering

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65. Sears, _supra_ note 20, at 166.
66. _Id._ at 159-64. Anthony Comstock had also solicited the pamphlet from the author by mail. Comstock arrested Heywood, who was successfully prosecuted in federal court in an unreported case. President Hayes eventually pardoned Heywood. _Id._ at 165-66, 170.
67. _Id._ at 161 (citing Ezra Heywood, _Cupid's Yokes_ 19 (1879)). In note 13, Sears comments that Heywood gave 1876 as the first publishing date of _Cupid's Yokes_, however, Sears had to rely on an 1879 edition.
68. _Id._
69. _Id._ at 162, 164-65 (citing Ezra Heywood, _Cupid's Yokes_ 19 (1879)).
the pamphlet's challenges to conventional morality. Comstock pursued Bennett's arrest\(^1\) ostensibly to silence someone he considered dangerous. Nevertheless if Comstock had intended to shock the federal bench into adopting Hicklin's broad disregard for merits and intent, the smut-fighter could not have found a target with ideas more challenging to convention.\(^2\)

Besides author Ezra Heywood,\(^3\) free love advocates Moses Harmon and Freeman T. Knowles were convicted in federal obscenity trials which, after Bennett, denied consideration of their arguments. Harmon published a doctor's letter that referred, among other behavior, to the sexual abuse of women by their husbands.\(^4\) In The Lantern, Freeman T. Knowles condemned the death of a young woman due to an abortion, which he attributed to societal condemnation of unwed motherhood.\(^5\) Under the Hicklin standard, all that mattered was the reference to sex.

Similarly, the New York Appellate Division denied the defendant in People v. Muller a chance to present expert testimony to praise the photographs of nude women he had sold.\(^6\) In a subsequent case involving a modest pantomime of a couple early on their wedding night, Hicklin foreclosed consideration that the prosecutive sexual behavior it alluded to was sanctified by marriage.\(^7\)

An 1894 bankruptcy case, however, would eventually undermine Hicklin's paramount definition of obscenity by considering the merits of disputed works. A New York judge decided that a receiver could sell expensive editions of several classic works of erotica, including Arabian Nights, Tom Jones, and Ovid's Art of Love,\(^8\) in order to pay creditors. Despite Comstock's argument that the books should be destroyed, Judge O'Brien found "[t]he very artistic character, the high qualities of style . . . make a place for books of the

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71. The postal agent used the device of a decoy letter to secure a copy of the disputed pamphlet. Sears, supra note 20, at 166.
72. In fact the court acknowledged in its jury instructions that Comstock might have made a special choice:
   The motives of the person who made complaint was not material here. Most infractions of the law are discovered and punished by reason of hostility or enmity in the community against that person . . . so you will dismiss from your consideration the question whether Mr. Comstock has hostile feelings against this man or not.
   Sears, supra note 20.
73. See Ezra Heywood, Cupid's Yoke (1879).
75. Knowles v. United States, 170 F. 409, 412 (8th Cir. 1909).
76. People v. Muller, 69 N.Y. 408, 410 (1884).
character in question." The bankruptcy court was willing to consider the merits of explicit works when property, not sexual expression, was at stake.

After the turn of the century, a progressive era penchant for shedding light on many aspects of life may have helped the criminal bench consider the tone and value of a work. A 1907 New York criminal case, People v. Eastman, marked a significant departure from Hicklin by weighing the intent and theme of a work with sexual references. Although striking in its similarity to the Hicklin material, Eastman's pamphlet condemning the Catholic confessional was not too lewd for publication. Later on, Comstock worked for the conviction of a shopkeeper who had displayed "September Morn," a Paul Chabas painting of a woman bathing in a placid landscape. However, an Illinois appellate court held that this depiction of a nude was not obscene. But it was not until a 1920 literary case involving an anonymous prostitute's autobiography entitled Madeline, a possible weapon against prostitution, that courts consistently began to weigh the non-sexual aspects of allegedly obscene works. Citing Eastman, the court in People v. Brainard found the book salable, not inciting "lustful and lecherous desire." The theme of the book—the wretchedness of the life of a prostitute—excused its

79. Id. at 362. Accord St. Hubert Guild v. Quinn, 118 N.Y.S. 582 (Sup. Ct. 1909). The court there denied that expertise was needed to determine the value of the volumes at issue. Nevertheless, it quoted "Dr. Lecky, author of Rationalism in Europe." Id. at 586.

80. SAMUEL P. HAYES, THE RESPONSE TO INDUSTRIALISM: 1885-1914 at 89-92 (1957). It is certain that respectability for its own sake had lost its charm for many in the middle and upper classes, who sought excitement and release by turning to leisure activities long enjoyed by the working class. LEWIS A. ERENBERG, STEPPIN’ OUT: NEW YORK NIGHTLIFE AND THE TRANSFORMATION OF AMERICAN CULTURE (1981).


82. The court found that the language used was indecent and intemperate, but that the indecency banned by New York penal law was that relating to "lewd, lascivious, and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire." Since the intent was condemnation of the Catholic church, it did not cause sexual arousal and was not consequently obscene. The stinging dissent of O'Brien in this case did not fail to note the similarity of this material to the material seized in the original Hicklin case. Id. at 462. But see State v. Lowry, 130 Minn. 532, 153 N.W. 305 (1915) (quoting from one standard work of theology made the authors liable to prosecution for obscene language).

83. SANGER, supra note 34, at 78.

84. City of Chicago v. Jackson, 187 Ill. App. 243 (1914). Sanger's reference to this case suggests that it was one of the first where Comstock was subject to ridicule because he saw obscenity where others saw art. SANGER, supra note 34, at 78.


86. Id.

87. Id. The dissent by Dowling offers that the book contained many details of life
necessary references to trading in sex.

John S. Sumner, the new leader of the NYSSV, prosecuted a book vendor for selling Theophile Gautier's book *Mademoiselle de Maupin*. However, the vendor was acquitted and the case ultimately backfired on the NYSSV when a malicious prosecution case was filed against Sumner. In 1922, in *Halsey v. New York Society for the Suppression of Vice*, the court of appeals let stand a jury's determination that Sumner had maliciously prosecuted the vendor of Gautier's book. The *Halsey* decision hurt the foes of sexual expression in two ways: (1) it punished the NYSSV, financially and otherwise, for zealously prosecuting a wide range of sexual expression and (2) it asserted the importance of considering merits. The court allowed the expert opinions of critics to demonstrate that Sumner had lacked due cause. The focus of attention of triers of fact was thereby broadened to other aspects of a work besides its sexual explicitness.

Yet during the same period other criminal cases dismissed the relevance of intentions and merits. In *People v. Seltzer*, a 1924 decision, the New York Appellate Court relied upon *Hicklin* and found that a book's "[c]harm of language, subtlety of thought, faultless style, even distinction of authorship" could appeal to critics, but their reaction was inadmissible as evidence. The book *Hands Around* was at issue in *People v. Pesky*, a 1930 decision. It presented a series of sketches on sensual relations without relying on

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89. Id.
90. Theophile Gautier is conceded to be among the greatest French writers of the nineteenth century. When some of his earlier works were submitted to Sainte-Beuve, that distinguished critic was astonished by the variety and richness of his expression. Henry James refers to him as a man of genius . . . [and three well known critics] all speak of him with admiration.
Id. at 219. See also *People v. Baylinson*, 211 A.D. 40, 206 N.Y.S. 804 (1924) (an "offensive" depiction of prominent abolitionists trying to stop Christ from turning water into wine at Cana which hung in an art exhibit did not outrage public decency, although it tried to arouse a prejudice against prohibitionists, according to the court).
91. In Massachusetts, a court ruled that the veracity of contraceptive pamphlets was irrelevant. "Whatever may be said about that subject," the discussion was obscene, per se. *Commonwealth v. Allison*, 116 N.E. 265 (Mass. 1917).
92. 203 N.Y.S. 809 (1924).
93. Id. at 813.
graphic language.95 Hands Around had received worldwide acclaim.96 Yet the majority found that a single reference to a character's homosexuality sufficiently illustrated its obscene nature:

‘Poet: Then it’s your leading man—Benno—.
Actress: Nonsense. He doesn’t care for women at all—didn’t you know that? He carries on with the . . .’

“This last quotation stamps the author as a man whose thoughts thus expressed cannot escape being characterized as indecent.”97 However, early in the 1930s, New York high courts moved to acknowledge a production’s artistic merits in People v. Wendling.98 When the New York Court of Appeals appraised “Frankie and Johnie,” a play with language “of the barroom rather than the parlor,” it found that the young should be protected “but a theater goer could not . . . silence this rough hewn and profane representation.”99 Offering a new test, it declared that what mattered was not “whether it would tend to coarsen or vulgarize . . . but whether it would tend to lower . . . standards of right and wrong.”100

Federal courts moved toward considering merits and other aspects of works in a series of cases beginning around the turn of the century.101 As summarized by Tyomies Publishing Co. v. United States in 1914, “obscene, lewd and lascivious” meant showing “that form of

95. Id. at 198 (McAvoy, J., dissenting).
96. Id. at 198 (McAvoy, J., dissenting).
97. Id. at 197.
99. 180 N.E. at 170. This critical consideration of the work was respected by subsequent cases where experts’ praise for literary works was weighed. People v. Viking Press, Inc., 264 N.Y.S. 534 (Mag. Ct. 1933); People on Complaint of Savery v. Gotham Book Mart, Inc., 285 N.Y.S. 563 (Mag. Ct. 1933). The court’s weighing of the theatrical setting for these sexual references suggests the future course of time, place, and manner restrictions. Most recently the Supreme Court denied certiorari on March 3, 1992, to Federal Communications Comm’n v. Action of Children’s Television, 112 S. Ct. 1281 (1992). The Court of Appeals for the District of Columbia Circuit had ruled a round-the-clock ban on television and radio broadcasts of indecent language was unconstitutional and a “safe harbor” period for adult broadcasts should be established. 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992).
immorality which has relation to sexual impurity."102 In other words, sex could be discussed if the discussion did not relate to immoral sex.103 In the late 1920s the federal bench had to assess a book which discussed sex apart from any moral context in United States v. Dennett.104 Mary Ware Dennett wrote a pamphlet entitled The Sex Side of Life to educate her children in a straightforward manner about sex. In an opinion by Augustus Hand,105 the circuit court demonstrated a willingness to consider the merits of explicit works. It found the booklet could not reasonably be seen as obscene.106 The possibility the pamphlet might inspire lust, Hand wrote, was preferable to the alternative of "leaving adolescents in a state of inevitable curiosity, satisfied only by the casual gossip of ignorant playmates."107

With the Dennett precedent, and the New York example of People v. Wendling, it was a small step for federal courts to allow the importation of frank literature for adults.108 In United States v. One Book Called "Ulysses,"109 trier of fact District Judge John M. Woolsey praised James Joyce's artistry, acknowledged its intent, and found that the graphic phrases in it were not "dirt for dirt's sake."110 Henceforth, federal courts would consider the broader context and content of allegedly obscene works.

EXCERPTS OR WHOLE WORKS

A practical dimension of the Hicklin test was its reliance on selected passages, "the matter charged to be obscene,"111 to determine obscenity. Criminal courts maintained this selective approach even after a 1909 New York civil case suggested that relying on excerpts

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102. 211 F. 385, 390 (6th Cir. 1914).
103. See also Dysart v. United States, 272 U.S. 655 (1926) (the Court found an advertisement for a home for single mothers fit to be mailed as not likely to undermine morals or induce delinquency).
104. 39 F.2d 564 (2d Cir. 1930).
105. Because Augustus and his better-known cousin Learned Hand both sat on the Second Circuit Court from the mid-1920s until the 1950s, the Hand name would be associated with a number of federal obscenity decisions.
106. 39 F.2d at 568.
107. Id.
110. 5 F. Supp. at 184. On appeal, Augustus Hand wrote that passages were "obscene under any fair definition of the word . . . yet they are relevant to the purpose." United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 706 (2d Cir. 1934).
111. People v. Muller, 96 N.Y. 408, 411 (1884) (citing Regina v. Hicklin, 3 L.R.-Q.B., 360, 369 (1868)).
was absurd.\footnote{112} An agreement to buy a collection of forty-two volumes of Voltaire could not be voided on the grounds that two of them included indecent passages.\footnote{113} In 1913, Learned Hand summarized the current case law regarding excerpts in a case initiated by the NYSSV, \textit{United States v. Kennerly}.\footnote{114} He stressed that excerpts were an appropriate basis upon which to judge obscenity.\footnote{116} But in the course of weighing other aspects of allegedly obscene material, courts began to observe that the whole work had to be evaluated. Citing the Voltaire contract case, the court in \textit{Halsey v. NYSSV} found it only reasonable of a jury to consider the whole work, not "paragraphs alone which are vulgar and indecent might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible" be indecent.\footnote{116}

The court in \textit{United States v. One Book Called "Ulysses"}\footnote{117} both respected literary merit and struck down Hicklin's reliance on excerpts. Citing \textit{Halsey} and \textit{St. Hubert Guild}, among others, Hand denied the adequacy of tests based on excerpts because "[t]hey would exclude much of the great works of literature."\footnote{118} Thus the Hicklin test for obscenity faced further erosion.

\footnote{112. St. Hubert Guild v. Quinn, 118 N.Y.S. 582 (Sup. Ct. 1909).}
\footnote{113. \textit{Id.} at 340. \textit{Accord In re Worthington Co.,} 30 N.Y.S. 361, 363 (Sup. Ct. 1894).}
\footnote{[A] seeker after the sensual and degrading parts of a narrative may find in all these works, as in those of other great authors, something to satisfy his prurience. But to condemn a standard literary work, because of a few of its episodes, would compel the exclusion from circulation of a very large proportion of the works of fiction of the most famous writers of the English language. \textit{Id. See also} State v. McKee, 46 A. 409 (Conn. 1900) (the jury had to consider the whole paper being prosecuted).}
\footnote{114. 209 F. 119 (S.D.N.Y. 1913).}
\footnote{115. \textit{Id. Accord} Tyomles Pub. Co. v. United States, 211 F. 385, 389 (6th Cir. 1914) (citing United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571); Burton v. United States, 142 F. 57, 64, 73 (8th Cir. 1906)). The high court in Massachusetts maintained this construction in \textit{Commonwealth v. Friede}, 271 Mass. 318, 171 N.E. 472 (1930).}
\footnote{116. 234 N.Y. 1, 136 N.E. 219 (1922), \textit{aff'd} 194 A.D. 961, 185 N.Y.S. 931 (1920). \textit{Accord} People v. Viking Press, 264 N.Y.S. 534 (Mag. Ct. 1933). Considering the whole work did not necessarily work to the advantage of the purveyors of graphic materials. \textit{In re} Goldwyn Distributing Company, 108 A. 816, 817 (Pa. 1919). Censors condemned a series of pictures as a whole, although independently they were not obscene. \textit{But see} People v. Gitter, 234 N.Y.S. 213 (Sup. Ct. 1929) (distributing excerpts of a published book was at issue; the defendant was not entitled to a jury trial).}
\footnote{117. 5 F. Supp. 182 (S.D.N.Y. 1933), \textit{aff'd sub nom.} United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934). \textit{See Lewis, supra} note 54, at 125-33.}
\footnote{118. 72 F.2d 705, 707 (2d Cir. 1933); \textit{see also} \textit{Commonwealth v. Havens}, 6 Pa. 545 (1888).}
State and federal courts deemed a work obscene according to the *Hicklin* standard if it might arouse lascivious thoughts on the part of the most weak-minded, particularly the young. Courts continued to apply the test by referring to youth until after World War I.\(^{119}\) In *United States v. Kennerly*,\(^ {120}\) the court expressed its concern that the book would potentially corrupt those most susceptible to demoralization.

Such parts of this book as pages 169 and 170 might be found obscene, because they certainly might tend to corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences. Indeed it would be just those who would be most likely to concern themselves with those parts alone, forgetting their setting and their relevance to the book as a whole.\(^ {121}\)

In *People v. Friede*,\(^ {122}\) the court upheld the conviction of two vendors of *The Well of Loneliness*, a book which sympathetically portrayed a lesbian's life. The 1929 opinion stressed the principle of protecting society's immature readers as the standard for determining a work's legality.\(^ {123}\) But the court in *People v. Pesky*\(^ {124}\) responded soon after that "[c]onditions would be deplorable if abnormal people were permitted to regulate [or be the standard for] such matters."\(^ {125}\)

In an effort to legislate *Hicklin*’s audience standard into the law, New York had amended section 1141 of its penal code to prohibit

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119. This issue had been dodged in *In re Worthington Co.* on the grounds that the rare books in question "rank with the higher literature, and would not be bought nor appreciated by the class of people from whom unclean publications ought to be withheld. They are not corrupting in their influence upon the young, for they are not likely to reach them." *In re Worthington Co.*, 30 N.Y.S. 361 (Sup. Ct. 1894).


121. *Id.* at 120. The opinion cited *United States v. Smith*, 45 F. 478 (Wis. 1891); *United States v. Harm*, 45 F. 414, 424 (D. Kan. 1891); *United States v. Clarke*, 38 F. 500 (D. Mo. 1889); and *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.N.Y. 1879) (No. 14,571). *See also* *MacFadden v. United States*, 165 F. 51, 52 (3d Cir. 1908), *error denied*, 213 U.S. 288, *cert. denied*, 214 U.S. 311 (1909) (a magazine was found capable of causing incalculable harm because it was "intended to circulate among and attract the young").


123. *Id.* at 568. City Magistrate Bushel warned against considering a reasonable person as the standard. The very difficulty of knowing who might be depraved by a sexually explicit work dictated that all published works should be pure enough that vulnerable people would not come in contact with them:

> [T]hose who are subject to perverted influences, and in whom that abnormality may be called into activity, and who might be aroused to lustful and lecherous practices are not limited to the young and immature, the moron, the mentally weak, or the intellectually impoverished, but may be found among those of mature age and of high intellectual development and professional attainment.


125. *Id.* at 197.
the publication of anything which was not fit for youth. Protecting youth from the effects of bawdy material remains a permitted objective of obscenity law, but applying this standard to prevent the availability of such matters to adults gave way long ago. Echoing Pesky, the Supreme Court declared it would not "reduce the adult population of Michigan to reading only what is fit for children."

**Contraceptives**

The 1870s laws explicitly put contraception under the umbrella of obscenity, but many took for granted that any information or item that could lead to sex without procreation was obscene. The code of reticence on all sexual matters projected by the Christian social purity movement certainly put contraception beyond the pale. One reported case illustrates the presumption of the late nineteenth century that contraception was obscene. A woman fired as school teacher on the suspicion that she had mailed advertisements for "female remedies" (a euphemism for contraceptives) sued her principal, who had accused her of mailing the letter, for defamation. The letter included an advertisement for "certain appliances for females" followed by the statement that "she, whoever the author was, had used them, and that they would accomplish the desired purpose." The court then observed: "Without further description, it is sufficient . . . to say that it was grossly obscene and indecent."

Edward Bliss Foote, a New York doctor with a background in journalism, became the first person convicted under the federal laws against contraception. In the course of sending medical advice and nostrums to advice-seeking correspondents, he sent a pamphlet with contraceptive information to a NYSSV agent who had mailed a decoy letter. Foote’s attorney contested the enforcement of the clause

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129. *Id.* at 383. The decision was based on due process grounds.
131. *Id.* at 521. The letter was too obscene for the school teacher, as a woman, to inspect at a meeting of the school board at which she was dismissed for having sent it. The school’s procedure in this regard was noted without comment by the court. *Id.* at 521. The plaintiff lost the case on the ground that her superior had adequate proof against her when he sought her discharge.
132. *Id.* at 517.
against physicians, but the doctor was convicted and paid a fine of $3,000. The court responded to counsel’s claim of a medical exemption:

If the intention had been to exclude the communications of physicians from the operation of the act, it was, certainly, easy to say so. In the absence of any words of limitations, the language used must be given its full and natural significance... to exclude from the mails every form of notice whereby the prohibited information is conveyed.

This case seems to have had a “chilling effect” on doctors. Very few medical figures appeared in reported obscenity prosecutions until well into the twentieth century. The lack of cases may mean only that doctors refrained from publicly making contraception available. Many undoubtedly made “family limitation” materials available in response to their private patients’ requests. The NYSSV also may have been discouraged from arresting and prosecuting doctors.

The NYSSV included contraceptive manufacturers among those it arrested and prosecuted, although it focused its attention on printed materials, photographs, and exhibits. The producers of rubber barriers appear to have paid fines and served time rather than challenge the inclusion of such matter within the legal definition of obscenity.

It remained for Margaret Sanger to challenge the laws publicly and thereby cause the courts to reappraise the state and federal codes which forbade distributing contraceptive information. Sanger came to lead the “Birth Control” movement after getting

133. GORDON, supra note 14, at 168 (citing D.R.M. BENNETT, ANTHONY COM- STOCK, HIS CAREER OF CRUELTY AND CRIME 1036 (1878)).
134. United States v. Foote, 25 F. Cas. 1140, 1141 (S.D.N.Y. 1876) (No. 15,128).
135. United States v. K, 28 F. Cas. 591 (E.D. Mo. 1878) (No. 16,688); Bates v. United States, 10 F. 92 (N.D. Ill. 1881); United States v. Adams, 58 F. 674 (D. Or. 1894). In K, the conviction was reversed because the doctor’s response to a postal inspector’s decoy letter was lifted from the mails and thereby did not convey contraceptive information to a real person.
136. See GORDON, supra note 14, at 173 (citing a 1912 address to the American Medical Association by its then newly elected president, Abraham Jacobi). Jacobi endorsed making contraceptives legal, saying that the well-to-do retained access to them despite their contraband status. 23 AM. MED. A. 58 (June 8, 1942).
137. The published records of the NYSSV reveals that, on average, the group shut down four manufacturers of rubber “articles for immoral use” every five years (In 1918, they published this figure for the last time, showing 36 such closures since 1873.). NYSSV (1919), supra note 18, at 13.
138. There were no reported criminal cases involving contraceptive manufacturers. This was revealed through an extensive search using Centennial and Decennial Digests and Westlaw. The absence of cases indicates that there were at least no appellate cases.
139. She was following a radical tradition she learned from Emma Goldman. See GORDON, supra note 14, at 215-19.
141. It was a phrase she and associates coined in 1914. SANGER, supra note 34, at
public attention in four criminal cases involving Sanger and her family in the 1910s. The most important of the cases, from a legal standpoint, is People v. Sanger. In that case, the trial court responded to a defense contention that the state ban on contraception materials was unconstitutional because it forbade doctors from prescribing items with a medical function to married women. Despite the all-encompassing language of section 1142 of the New York Penal Law, Judge Crane found that it did not, in fact, apply to doctors. Section 1145 of the same chapter, which excused doctors from obscenity prosecution if the items at issue aided the “cure or prevention of disease,” provided the key. Crane declared that birth control information and devices were disease prevention.

The ruling created a legal foothold for birth control advocates who would establish clinics with medical supervision and make contraceptives openly available. The discovery of a New York medical exemption to contraception’s illegal status paved the way for another landmark case, Youngs Rubber Corp. v. C.I. Lee & Co., Inc. Citing People v. Sanger, the court in Youngs Rubber found Lee could not defend its use of Youngs’ Trojan trademark on its own condoms on the grounds that the manufacturing and shipping of contraceptives was illegal. Although the federal laws against mailing or shipping contraceptives would seem to be violated upon evidence that Youngs’ Trojans were sold outside of New York, where they were manufactured, the court found a federal medical exemption: “[t]he intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be

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142. She absconded to England via Canada rather than face prosecution for mail- ing her newspaper The Woman Rebel, the charges for which were later dropped. Her husband was prosecuted for selling a birth control pamphlet. It was one of Comstock’s last prosecutions. Comstock died later in 1915. Sanger and her sister, Ethel Byrne, were separately prosecuted for giving out birth control information in a Brooklyn clinic in 1916. GORDON, supra note 14, at ch. 9.

143. People v. Sanger, 222 N.Y. 193 (1918), appeal dismissed, 251 U.S. 537 (1919). The rest of the Sanger prosecutions were initiated by public authorities; however, the NYSSV, under John Sumner, did prosecute several dozen people on charges of selling contraceptives between 1915 and 1930. Tabulated from the manuscript records of the NYSSV, available at the Library of Congress, Manuscript Division.

144. N.Y. PENAL LAW § 1142.

145. See supra note 42.

146. People v. Sanger, 222 N.Y. at 194-95; THOMAS C. DIENES, LAW, POLITICS, AND BIRTH CONTROL 85-87 (1972). This interpretation did not excuse Sanger, who was not a doctor. However, it did answer her contention that the law was unreasonable.

147. 45 F.2d 103 (2d Cir. 1930) (on reargument).
ascribed to Congress. Manufacturing birth control products was deemed legal, as well as their shipping or mailing. Although not necessarily binding on criminal courts, a civil court decision had again narrowed the definition of obscenity before criminal courts did likewise.

After the manufacturing of contraceptive devices was ruled to be a legal business, writing about contraception stopped being obscene. In a 1931 case, United States v. One Book, Entitled “Contraception,” by Marie C. Stopes, Judge Woolsey, presiding over the Southern District of New York, declared that the book in question was not “any article whatever for the prevention of conception.” Then, referring only to a contemporary dictionary, he denied the book was obscene. By considering the two questions as separate issues, he moved contraception out from under the broader heading of obscenity, ignoring earlier classifications of contraception as obscene per se.

Finally, in United States v. One Package, a federal court established the legality of importing contraceptive devices into the United States. One Package was a 1936 test case in which D. Hannah Stone notified customs authorities that she was importing “rubber pessaries,” a barrier method of birth control. Customs seized the package as contrary to the tariff law. The district court dismissed the charge and its decision was upheld on appeal. The circuit court relied on Sanger, Young’s Rubber, and Bours v. United States, a case involving a letter from an abortionist, and found that as long as a doctor was to receive the contraceptives, they were legal. The case had an immediate impact.

In 1936, birth control stood apart and enjoyed the status of medicine. This departure from the category of obscenity was achieved exclusively through the courts. Petitions and lobbying efforts from the late 1870s through the 1940s fell short of convincing...
Congress and state legislatures to alter the prohibitions against contraception.\textsuperscript{156} Although the language of state and federal statutes seemed all-encompassing,\textsuperscript{157} and although a doctor was the defendant in the first reported federal contraceptive case, judges found a medical exception. After 1910, the courts allowed contraceptive goods to be made publicly available, so long as the devices and information were legally cleansed by association with a medical authority.

\textbf{ANTI-SMUT GROUPS}

The NYSSV, under the leadership of Comstock’s successor, John S. Sumner, remained a factor in the resolution of obscenity cases, even after the setback of the \textit{Halsey} case. Of the twenty-five New York state criminal obscenity cases which appeared in court reporters between 1915 (the year of Comstock’s death) and 1936, the NYSSV arrested or appeared in court to present the prosecution’s case in eighteen cases—over two-thirds of them.\textsuperscript{158} New York City’s prominence in publishing and importation accounts in part for the high frequency with which opinions defining obscenity emanated from its courts. But the very presence of the NYSSV also contributed to New York’s prominence in shaping obscenity law.\textsuperscript{159}

The society paid comparatively slight attention to contraceptive

\textsuperscript{156} In 1978, the National Liberal League presented to Congress a petition with 50,000 signatures demanding the repeal of the entire Comstock Act. PAUL & SCHWARTZ, supra note 22, at 29; DENNETT, supra note 28, at 66. The Birth Control League began its campaign for reform of the laws in 1915, but set it aside in the 1930s after judicial victories. In Massachusetts, where the courts had denied the medical exemption allowed elsewhere by the 1930s, two referendums failed to repeal criminal laws against buying and selling contraceptives and contraceptive information. Dienes, supra note 146, at ch. 5. Dennett in 1926 published a call for reforming anti-contraception laws through the legislature. A few years later, she won a landmark obscenity case, illustrating the great success the birth control movement had in the courts. See Dennett, supra note 28. See also supra text accompanying notes 104-10.

\textsuperscript{157} See supra note 42.

\textsuperscript{158} This figure is based on an inspection of all New York state criminal cases responding to a Westlaw query for obscene or obscenity (excluding one Long Island case regarding an obscene utterance) and the arrest records of the NYSSV (available in the Library of Congress, Manuscript Division). At least one defendant appearing in the manuscript arrest records of the NYSSV also appeared in at least one of sixteen reported cases. Sumner appeared as claimant or counsel for the prosecution in the others.

\textsuperscript{159} Other vice societies initiated prosecutions that contributed to the discourse on obscenity. Robert McAfee, the secretary of the Western Society for the Prevention of Vice, like Comstock, worked gratis as a postal inspector while drawing a salary from his organization. McAfee solicited a newspaper with the ads at issue in Dunlop v. United States, 165 U.S. 486, 493 (1897). An agent of Massachusetts’ Watch and Ward Society, acting on a tip from the NYSSV, convinced a bookseller to sell him \textit{Lady Chatterly’s}
peddlers, which seems to have contributed to the infrequency of reported judicial opinions regarding contraceptives, along with other factors. The Comstock Laws' specific and original ban on contraceptive devices and information suggests anti-smut groups were particularly concerned about sex without procreation. Yet the records of the NYSSV suggest contraceptive hunting held little enduring interest. Quite possibly the NYSSV may have found less support for pursuing these law breakers; although 1907 was the peak year for its contraceptive-related arrests, the volume of its other arrests continued to be high until the 1920s. Advocates of contraception, who organized in the wake of Margaret Sanger's arrest in 1916, had to create their own test cases.

CONCLUSION

Before the 1910s, the American judiciary paid very little attention to the meaning of obscenity. Since then courts have been uncertain about how to define obscenity. The few reported obscene libel judgments at common law before the mid-1870s essentially refrained from defining obscenity. Only after the enactment of statutes as part of a moral crusade did courts begin to justify obscenity convictions. The courts seized on an English standard which remained operative for more than forty years. The Hicklin obscenity test was an ideal tool for the NYSSV and other anti-smut organizations. These groups advanced a moral code of silence on all manners of sexuality, including reproductive control. With Hicklin as the test, triers of fact could find any sexual reference or item, taken out of context, demoralizing to an audience of those "most vulnerable to its influence." Privately-organized efforts to enforce state and local obscenity statutes continued without any judicial interference, or even much interpretation, until well into the twentieth century. The success of these

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Lover by D.H. Lawrence. The bookseller was later prosecuted. Commonwealth v. DeLacey, 171 N.E. 455, 456 (Mass. 1930). Both of these cases resulted in convictions, but according to Boyer, the latter case was a psychic victory for the Boston group because its tactics in the case prompted public outcry and a loss of contributions and directors. Boyer, supra note 26, at 196-97.

160. The burden of contraceptives' illegal status fell harder on women than men. Women’s de facto and de jure exclusion from law-making and adjudication has to be considered central to contraception’s illegal status prior to the 1920s.

161. Only a few rare references to the destruction of factories of "articles for immoral use" appear in the text of NYSSV annual reports. Arresting contraceptive peddlers may not have provided the same opportunities for heroics that Comstock seems to have relished; the Annual Reports featured colorful accounts of agents apprehending greedy vendors of smut.

162. There were 18 contraceptive-related arrests initiated by the NYSSV in 1907. The other years with relatively high numbers of arrests for contraception dealing were: 1916 (ten arrests), 1911 (nine arrests), and 1915 (nine arrests). These figures were tallied from the records of the NYSSV (Library of Congress, Manuscript Division).
smut-fighters appeared to run counter to Justice Holmes' stern observation that morality and the law are distinct systems.163

But morals and the law are distinct. Holmes' principle found new support as courts moved haltingly from the 1910s to the mid-1930s to refine the meaning of obscenity. Their interpretations grew in complexity, reflecting an increasingly sophisticated society. Despite the many precedents to the contrary, the courts declined to maintain a code of sexual silence throughout the twentieth century.

Civil litigation in the world of commerce led the way. In these cases courts weighed the arguments of 1) a receiver seeking funds to pay off a creditor,164 2) a bookseller whose contract for sale was threatened with nullification,165 and 3) an industry-leading company whose trademark was misappropriated.166 All these parties argued for a narrow definition of obscenity in the interests of property, and their appeals were granted. This pattern has several implications. The most compelling is that the legal dynamics of sexual expression change when commerce is at stake.

Case law in the 1930s buried most of the Hicklin definition of obscenity. In the future, in order to find a work obscene, juries and judges would have to consider all of its aspects and find that it corrupted the sexual morals of a reasonable adult. Yet trial courts were far from certain about the revised definition of obscenity. New York appellate courts in the mid-1930s, establishing a routine the United States Supreme Court would adopt later, frequently had to confirm the obscenity or non-obscenity of materials or exhibits at issue.167

Uncertainty remains as to how harmful expressions of sexuality can be sensitively distinguished, or whether any expression is so harmful that it needs to be kept even from adults who seek them out. This uncertainty is not surprising because courts have not recognized legitimate sexual expression for very long. The activities of the NYSSV and like organizations foreclosed the possibility of a more gradual shaping of the law.

Comstock and Sumner became symbols against which advocates

163. Holmes, supra note 6, at 169-79.
164. In re Worthington, 62 N.Y.S. 115 (1894); see supra text accompanying notes 78-79.
165. St. Hubert Guild v. Quinn, 118 N.Y.S. 582 (1909); see supra text accompanying notes 112-13.
166. Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103 (2d Cir. 1930); see supra text accompanying notes 147-48.
of sexual expression could fight during the 1920s and 1930s. Contraception advocates successfully used the smut-fighters as a negative example even though the law enforcers paid little attention to contraception after 1915. Reformers fighting prostitution similarly joined forces with emerging literary and artistic leaders to fight for public and legal support against “Comstockery”. Censorship of the all-inclusive type advocated and enforced for many years by the NYSSV appeared, for many, to be the only kind of obscenity regulation. The issue thus became a duel between the right of free expression and the censorship associated with Comstock’s crusades. Today’s ever-more-complex definition of obscenity developed under the influence of this dynamic. Whether harm caused by voluntary adult exposure to graphic sexual representations will be considered in the next legal development of the definition of obscenity remains to be seen.