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A JUSTIFICATION OF STATUTES BARRING PORNOGRAPHY FROM THE MAIL

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ON DECEMBER 18th, 1956, the United States Court of Appeals for the Second Circuit decided the case of *United States v. Roth.*[1] The trial of the case began January 3, 1956. It had been argued on June 6th, 1956, before Chief Judge Clark, and Circuit Judges Frank and Waterman. The defendant was convicted of violation of 18 U.S.C., section 1461.[2] The indictment had charged twenty-six counts, including the mailing of books, periodicals and photographs which were "obscene, lewd, lascivious, filthy and of an indecent character." On January 13, 1956, the jury found defendant guilty on four counts (counts 10, 13, 17 and 24) and not guilty on nineteen. Three counts had been dismissed. Accordingly, the trial judge sentenced the defendant to five years imprisonment and to a fine of $5,000 on one count while on each of the other three counts he gave a like term of imprisonment to run concurrently and a one dollar fine, remitted in each case. On appeal, the defendant alleged error in the conduct of the trial, and, more importantly, attacked the constitutionality of the statute which was applied.

"This statute, 18 U.S.C. § 1461, originally passed as Section 148 of the Act of June 8, 1872, 17 Stat. 302, revising, consolidating, and amending the statutes relating to the Post Office Department, and thence derived from Rev. Stat. § 3893, herein declares unmailable '[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character', and makes the knowing deposit for mailing of such unmailable matter subject to a fine of not more than $5,000 or imprisonment of not more than five years, or both."[3]

The facts presented to the appellate court were as follows. Appellant conducted a large mail order business dealing in various magazines, photographs and books in New York City. In conducting this enterprise appellant used various names. Appellant's principal method of adver-

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1. 237 F.2d 796 (2d Cir. 1956).

2. This section provides, in part:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character;

". . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof shall be fined not more than $5000 or imprisoned not more than 5 years or both."

3. 237 F.2d at 797.

tising was mailing large numbers of unsolicited circulars throughout the United States to persons whose names he acquired from rented mailing lists. Many of the recipients of these circulars complained to postal authorities. The first seventeen counts of the indictment in this case refer to this type of advertisement and circular which were alleged to be obscene on their face, and further nonmailable in that they gave information about where and how obscene matter might be obtained.

Since the recipients of these circulars who complained to the authorities seldom ordered the materials advertised, the postal authorities obtained samples of appellant's wares through a "test letter" technique. By this long established investigative technique the postal authorities set up fictitious post office boxes and names, and using appellant's circulars, sent away for the matter advertised by appellant.

Counts eighteen through twenty-five refer to magazines, color slides, photographs and books mailed by appellant in response to solicitation based on his advertisements. Count twenty-six charged appellant with conspiring with certain named co-conspirators to violate the obscene mailing laws.

With respect to the claim of unconstitutionality, the chief judge, writing for the full bench, said in part:

"In United States v. Rebhuhn, 2 Cir., 109 F.2d 512, 514, certiorari denied Rebhuhn v. United States, 310 U.S. 629 . . . , Judge Learned Hand . . . pointed out that it had been overruled in Rosen v. United States, 161 U.S. 29, . . . 'and many indictments have since been found, and many persons tried and convicted. . . . If the question is to be opened the Supreme Court must open it.' Since that decision many more cases have acknowledged the constitutionality of the statute, so much so that we feel it is not the part of responsible judicial administration for an inferior court such as ours, whatever our personal opinions, to initiate a new and uncharted course of overturn of a statute thus long regarded of vital social importance and a public policy of wide general support. It is easy, in matters touching the arts, to condescend to the poor troubled enforcement officials; but so to do will not carry us measurably nearer a permanent and generally acceptable solution of a continuing social problem."[4]

The federal court of appeals added that it had been impressed by the decision of the New York State Court of Appeals in *Brown v. Kingsley Books, Inc.*,[5] and the cases constituting controlling law cited and discussed by Judge Fuld in his opinion for the highest New York court.[6]

4. Ibid.

5. 1 N.Y.2d 177, 134 N.E.2d 461, probable jurisdiction noted, 352 U.S. 962 (1956).

6. The constitutionality of N.Y. Code Crim. Proc. § 22-a, which permits the supreme court to issue an injunction restraining the sale and distribution of books found to be obscene, was challenged upon the ground that it constituted a prior restraint upon publica-

Similarly, the court seemed to be influenced by language (which it quoted with approval) of L. P. Hand, J., in *United States v. Kennerley:*

". . . should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence."[7]

Be that as it may, in the *Roth* case, the federal court of appeals here affirmed the judgment below and in doing so made the following comment and drew the following conclusions:

"We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only saleable pornography. But even if we had more freedom to follow an impulse to strike down such legislation in the premises, we should need to pause because of our lack of knowledge of the social daring of this problem, or consequences of such an act; and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency. We conclude, therefore, that the attack on constitutionality of this statute must here fail.[8]

"As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely

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tion interfering with freedom of speech and of the press. In upholding the statute, Judge Fuld said:

"While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting.

"That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the applications of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court [citing cases] . . . and by the United States Supreme Court [citing cases]. . . ." 1 N.Y.2d 177, 181, 134 N.E.2d 461, 463.

7. 209 Fed. 119, 121 (S.D.N.Y. 1913). This decision overruled a demurrer to an indictment for sending obscene books through the mails. In referring to the wording of the statute, Judge L. Hand said: "Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent."

8. 237 F.2d at 798.

the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given to the defense. As the judge pointed out in imposing sentence, defendant has been convicted several times before under both state and federal law. Indeed this case and our discussions somewhat duplicate his earlier appearance in Roth v. Goldman, 2 Cir., 172 F.2d 788, certiorari denied 337 U.S. 938. . . ."[9]

The United States Supreme Court has granted certiorari; and as of the time that this article went to press argument was unscheduled.

THE "FRANKIAN" DOGMA

I have been at pains to set forth at some length the language of the federal court of appeals in affirming defendant's conviction because that language provoked a fifty-one page "concurring" opinion by Circuit Judge Jerome Frank[10] which for all practical purposes is a *dissent*. Its language and argument constitute the occasion for this article.

Judge Frank's remarkable and painstaking efforts in this lengthy concurring opinion take their origin from the following point of departure, couched in the judge's own language:

"This court, however, in United States v. Levine, 2 Cir., 83 F.2d 156 has held that the correct test is the effect on the sexual thoughts and desires, not of the 'young' or 'immature', but of the average, normal, adult persons. The trial judge here so instructed the jury.

"On the basis of that test, the jury could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which defendant mailed were obscene. Accordingly, I concur.

"I do so although I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation. The doctrine expressed in those opinions, as I understand it, may be summarized briefly as follows: Any statute authorizing governmental interference (whether by 'prior restraint' or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite a breach of peace, or with sufficient probability tend either to the overthrow of the government by illegal means or by some other overt anti-social conduct.

"The troublesome aspect of the federal obscenity statute . . . is that (a) no one can now show that, with any reasonable probability, obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt, dangerous or anti-social conduct, either actual or probable."[11]

9. Id. at 800.

10. Judge Frank died on January 13, 1957.

11. 237 F.2d at 801-02.

An unusual feature of Judge Jerome Frank's opinion is an Appendix of some forty-one pages by which he presents arguments and considerations which, according to his standards, demonstrate propositions (a) and (b) set forth in the last paragraph of the foregoing quotation.

The Relationship Between Pornography and Crime

Proposition "(a)" (that "no one can show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults") seems to come down ultimately to a contention that the rights of free speech and free communication may be defended by arguing that they are practically inefficacious. For I do not think that Judge Frank can have it both ways. Either all communication, pornographic as well as non-pornographic, is ineffective to a greater or lesser degree as a means for affecting character and as an inducement to human action or it is useful for these purposes. There would seem to be no reasonable basis for arguing that pornographic literature never or rarely induces pornographic attitudes and conduct, while arguing at the same time that good literature induces good conduct or helps to mold character. If the reading of great books, in the process of education, develops sound intellectual and moral habits which sooner or later will be, or tend to be, reflected in good character and conduct, it is a little difficult to understand why the reading of pornographic books and materials should be free from undesirable cultural and social effects proportionate to their occasion and influence.

In brief, if the evil culture of pornographic books has no negative influence on readers, why should good books be considered to have positive influence? Indeed, why should anyone want to read at all, if reading is a jejune and sterile experience? Why should there be any distinction between good and bad books, great and trivial books? All are equally futile and we are motivated to a lazy cult of ignorance. At the very least, books and other forms of communication can in Judge Frank's view never be practical. They can only be theoretical. They can serve to induce ideas but never actions. A person of average adult education and experience who has habituated himself to pornographic readings and thoughts will, according to this naked "Frankian" dogma, never, or hardly ever, translate thought into action. Ideas here have no consequences. The whole ideo-motor tendency of ideas, as emphasized by psychology and literature, is obstructed by an all but impassable barrier between thinking and acting. Corrupt "literature" will not corrupt Judge Frank's self-reliant, proud, self-sufficient, incorruptible man, who needs no law to educate or guide his conscience respecting obscenity.

All this, of course is a reversal of the deeply rooted Christian tradition exemplified by such words as:

"I say to you that if a man look after a woman and lust after her in his heart, he hath already committed adultery with her."

"For from the fulness of the heart, the mouth speaketh . . . by thy words shalt Thou be justified, and by thy words condemned."

It is a repudiation of the whole theory and practice of the Great Books, the classics, a theory and practice which have characterized civilization and culture as we know them in recorded history. Indeed, it contradicts every respectable theory of education which holds that knowledge is good for men; that its possession contributes to the happiness of men and the welfare of the state; that books help to build culture; that culture inseminates character; and that its pursuit by the individual and its cultivation by society should be facilitated by making education and books more readily available.

Judge Frank's dogma stultifies, too, the efforts of statesmen, scholars and scientists who write books or articles by which they seek to persuade men to courses of action. According to the dialectic inherent in Judge Frank's position, they will be successful in arousing at most certain thoughts or feelings within individual men. Reading merely creates subjective states of consciousness having no likely bearing on action. There is no practical probability that thoughts or states of consciousness will ever be reflected in human conduct bearing the impress of the persuasions of statesmen, scholars and scientists. Literature produces nothing more startling than practical soliloquy. Aquinas was wrong when he taught that "every form is accompanied by an inclination." Our thoughts, as forms, have no tension toward action.

For many centuries, there has been a long-standing dispute about the value of knowledge for its own sake, the goodness of pure knowledge, the stature of wisdom, without regard to its technical or moral utility. Judge Frank's argumentation cancels out this dispute by saying in effect that knowledge as communicated in literature can have no technical or moral utility. Its usefulness is at best confined to its role in inducing subjective states of knowledge cut off from action by every fair probability. The only value or goodness of knowledge is for its own sake. The ancient distinction between practical and speculative knowledge[12]

12. "The speculative intellect knows only for the sake of knowledge. It longs to see, and only to see. Truth, or the grasping of that which is, is its only goal, and its only life.

"The practical intellect knows for the sake of action. From the very start its object is not Being to be grasped, but human activity to be guided and human tasks to be achieved. It is immersed in creativity. To mold intellectually that which will be brought into be-

on which Aristotle discoursed so wisely is for all practical purposes an unrealistic and insignificant distinction for Judge Frank. Men are condemned only to theoretical knowledge. There is, simply, no practical knowledge, because practical knowledge always uses knowledge for action or to induce human conduct. According to Judge Frank, no one can show with any reasonable probability that theoretical knowledge will guide or suggest behavior for normal, average adults. Francis Bacon wrote that "truth and utility are perfectly identical, and the effects are more of value as pledges of truth than from the benefit they confer on men." Aristotle and Aquinas, who stressed contemplation, knew very well that contemplation overflowed into action; that teaching is the outward expression of inward contemplation. Judge Frank seems to break any probable relation between knowledge and action. He casts serious doubt on the value of the dissemination of knowledge or even on the value of freedom of discussion. According to his argument, it is a game of idiot's delight which has no meaning or significance for action. It must be limited purely to thought. Indeed, at the root of his argu-

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ing, to judge about ends and means, and to direct or even command our powers of execution—these are its very life. . . .

"[T]he difference between these two kinds of intellectual activity is so deep that neither the vital relation between the intellect and the appetite nor even what truth consists of are the same in the two cases in question.

"In the case of the speculative intellect, the appetite—that is to say, the will, but not in the sense of a mere power of decision, rather in the larger sense of man's energy of desire and love, intent on some existential good—the appetite intervenes only to bring the intellect to the exercise of its own power, say, to embark on and pursue a mathematical problem or an anthropological inquiry. But once the intellect is at work, the appetite has nothing to do with this work, which depends only, as far as normal knowledge through concepts is concerned, on the weapons of reason.

"On the other hand, in the case of the practical intellect, the appetite plays an essential part in the very work of knowledge. In one way or another, and to quite various degrees (for practicality admits of a vast scale of varying degrees), reason, then, operates in conjunction with the will. For the intellect taken in itself tends uniquely to grasp Being; and it is only as permeated, in one way or another, by the movement of the appetite toward its own ends that the intellect concerns itself, not with Being to be grasped, but with action to be brought about.

"As a result, truth, in speculative knowledge, is the adequation or conformity of the intellect with Being, with what things are. But in practical knowledge how could this be so? In practical or creative knowledge there is no previously existing thing with which the intellect can make itself consonant. The thing does not yet exist, it is to be brought into being. It is not with being, it is with the straight tendential dynamism of the human subject with regard to this thing not yet existing, but to be created, that the intellect must make itself consonant. In other words, truth, in practical knowledge, is the adequation or conformity of the intellect with the straight appetite, with the appetite as straightly tending to the ends with respect to which the thing that man is about to create will exist." Maritain, Creative Intuition in Art and Poetry 46-47 (1953).

ment there is even a serious doubt whether or why it should even be effective to provoke thought.

The authors of the Great Books were practically unanimous about the value which the dissemination of knowledge has for the fostering of conduct proportionate to that knowledge.[13]

Of course, reflecting on Judge Frank's arguments, one is puzzled why judges, who are supposed to take the law as they find it, unless it is unconstitutional, should attempt to voyage on uncharted seas of non-legal and non-statutory material such as Dr. Marie Jahoda's summary of non-scientific sociological speculation.[14] Actually, Judge Frank's Appendix is more like a brief to be submitted to a legislature than a decision by a court. It seems a little late in the day for judges to argue, as against the long-standing conclusions of legislatures in every state but one and in the federal jurisdiction, that "no one can show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults."

Let us suppose that someone dissents from Judge Frank's dogma in this connection. Could Judge Frank have taken the position that such dissent would on its face be quite irrational; that no reasonable man could hold such a dissenting opinion? Would he have argued that no legislature could rationally find any significant or substantial evidence to support its findings that obscene publications do tend to have harmful effects on the characters and behavior of normal, average adults, to say nothing of children? Would he have taken the position that the First Amendment must be construed as favoring his view as against those who dissent?

Recently the distinguished sociologist of Harvard University, Pitirim A. Sorokin, published a book entitled *The American Sex Revolution.* Here are some quotations from that book:

"Overdeveloped sexuality is one of the main forces of neuroses and functional psychoses. Mental disorders may be caused through chronic and excessive consumption of alcohol which usually accompanies promiscuity, or through syphilis and other venereal diseases contracted through illicit relations.

"More important, however, are the mental disturbances directly resulting from libertinism. Constitutional factors involving sexual excesses play a significant role in the development of manic-depressive, schizophrenic, and paranoid disorders. Furthermore, intense inner conflicts, violent emotions, and continuous mental strains and shocks result from the lack of integration of biological drives, emotions, wishes, ideas, moral commandments, and social values of the promiscuous."[15]

13. Citations of literature, generally accepted as great, are hardly necessary.

14. Judge Frank, in 237 F.2d at 814, sets forth Dr. Jahoda's summary of her work The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954).

15. Sorokin, The American Sex Revolution 62-63 (1956).

In discussing the "sexualization of American culture," Dr. Sorokin writes:

"When we turn to the sham literature of today, we find an atmosphere even more saturated by sex. For in this pulp writing, sexualization has gone much farther, and has assumed much uglier forms than in the serious literature. The sham literature of our age is designed for the commercial cultivation, propagation, and exploitation of the most degraded forms of behaviour. It is pornography that appeals to the basest propensities of that 'worst of the beast', as the demoralized human animal was named by Plato and Aristotle. The world of this popular literature is a sort of human zoo, inhabited by raped, mutilated, and murdered females, and by hemales outmatching in bestiality any caveman and outlusting the lustiest of animals; male and female alike are hardened in cynical contempt of human life and values. And what is especially symptomatic is that many of these human animals are made to seem to luxuriate in this way of life, just as, we must assume, the readers enjoy it. This cheap Dante's inferno of aphrodisiacs is painted in the most captivating colors. Instead of exhibiting its filth and rottenness, the pulp-sexualists daze the reader with the glamor of 'smartness', orgasmic curves, 'dynamic' lines, violent passions, and 'freedom unlimited' to do anything one wants to do.

"Giving detailed descriptions of various techniques of sexual approach, and vivid scenes of kissing, embracing, and copulating, and while brutally dramatizing rape and other sexual perversions, this pornographically illustrated pulp literature demoralizes and dehumanizes millions of readers. Its audience, as well as its quantity, is incomparably larger than that of serious literature. This pulp stuff is poured onto the market in hundreds of thousands of copies of dime and quarter novels, in millions of copies of various magazines, in many millions of erotic comics and periodical literature. In addition, some of this material is turned into popular movies, is brought into millions of homes by radio and television, and is even dramatized on the legitimate stage. All in all, this stuff has become omnipresent in our lives, and every one of us is incessantly and increasingly exposed to its deadly radiations . . . ."[16]

One more quotation from Sorokin:

"An intense sexualization of our popular press is strikingly obvious, both in the yellow journals and in more respectable publications . . . ."[17]

A variety of expressions are used by Judge Frank and others similarly minded to signify the real or imagined influence which books have on readers. Judge Frank, in the decision under review, talks of (a) the "effects . . . of reading," (b) attitudes which tend to "create" obscenity, (c) a "probable causal relation" between reading an obscene book and anti-social conduct, (d) a "demonstrable causal relation . . . between reading or seeing the obscene and anti-social conduct," (e) the tendency of obscene matter "to deprave and corrupt," (f) obscene literature as "a significant factor . . . causing sexual deviation." Similarly Lockhardt and McClure in their article, *Obscenity in the Courts*,[18] use the same

16. Sorokin, op. cit. supra note 15, at 24-25.

17. Sorokin, op. cit. supra note 15, at 35. See also id. at 54-55.

18. 20 Law & Contemp. Prob. 587 (1955).

cause-effect nomenclature in like contexts. The real meaning of such loose language ought to be clarified.

The words "cause" and "effect" in this connection are, of course, inaccurate and metaphorical. One man cannot really be the efficient cause of another man's sin, crime or corruption. This is a necessary corollary from the fact and legal postulate of man's freedom. Indeed, if one man could cause another man's sin, crime or corruption, the passive victim would be neither responsible nor culpable. The real criminal or sinner or corruptor would, in that case, be the one who causes.

The views of many modern psychologists are divided between the extremes of determinism and indeterminism. A physical determinist would be one who holds the idea of rigid, efficient causality in all natural events, even to the point of identifying the psychic with the physical. Strict application of such a theory of unbroken and universal causation amounts to complete and absolute determinism under which freedom of action on the part of the will is impossible. As a matter of fact, as revealed especially by post-Newtonian physics, even the operations of the cosmic universe known to our experimental science seem to exemplify only a relative sort of determinism. A biological determinist would subject all man's decisions, choices and options to the relentless necessity of obeying uncontrollable animal impulses. The behaviorists and Freudians would more or less agree in this respect. Yet it should be obvious to an elementary psychology that neither animal instincts, nor animal or vegetable reflexes represent the essential range of man's deliberate activities. A psychological determinist would argue that whenever the will is presented with two or more choices, it must accept the strongest motive or choose that value which is perceived to be the greatest. Leibnitz and Alfred Adler seem to fall in this category. By contrast, extreme indeterminism errs by excess in the other direction. The extreme indeterminist contends that the will is deprived of every remnant reason or motive for making its choices, so that it is left without any light or influence of intellect. In this theory, the will is entirely autonomous. There is no cognitional influx or insight, no rational judgment which precedes its operation. The French atheist existentialist, Sartre, seems to me to take this position. A more moderate view of man's freedom, midway between the extremes here briefly characterized, would recognize that some of man's actions proceed from free choice and others do not.

The first condition for free choice is manifestly a state of apprehension, attention, or consciousness; and the second is some form of intellectual deliberation, or elaboration, that is to say, a weighing of motives and reasons intellectually apprehended. Rightly understood, free-

dom of choice involves immunity of the agent from: external coaction or necessity; and internal coaction or necessity. This is not the same as saying that man is capable of motiveless volition. There is only one limitation set on the activity of man's free will: it must incline to everything it wills under the aspect of good. Man's free will is not free to choose evil for the sake of evil. The Schoolmen gave a time-honored definition of freedom of choice when they defined free will as "that endowment in virtue of which an agent, when all conditions requisite for the performance of an action are given, can perform the action or abstain from it, can perform this action or that." Though man must will what he wills under the aspect of good, it is his tragedy and misery that he sometimes, indeed often, chooses only the apparent good. Even when he sins most grievously, man does not wish evil for the sake of evil. At the warped roots of his motivation lies some apparent or real good. The roots of human sin are ignorance, malice and passion. These are so many obstacles to knowledge and therefore to that love of good which is dependent upon knowledge for recognition. Free will makes it impossible for one man to cause the sin or crime of another by any kind of efficient causality. But a metaphorical and accidental "causality," in the sense of giving scandal or exercising an influence essentially different from efficient causality, is possible. In this connection, Aquinas wrote, using "cause" loosely:

"One man's word or deed may be the cause of another's sin in two ways: directly and accidentally. Directly, when a man either intends, by his evil word or deed, to lead another man into sin, or, if he does not so intend, when his deed is of such a nature as to lead another into sin; for instance, when a man publicly commits a sin or does something that has an appearance of sin. In this case, he that does such an act does, properly speaking, afford an occasion of another's spiritual downfall; wherefore his act is called active scandal. One man's word or deed is the accidental "cause" of another's sin, when he neither intends to lead him into sin, nor does what is of a nature to lead him into sin, and yet this other one, through being ill-disposed, is led into sin; for instance, into envy of another's good, and then he who does this righteous act, does not, so far as he is concerned, afford an occasion of the other's downfall, but it is this other one who takes the occasion . . . wherefore this is passive, without active scandal, since he who acts rightly does not, for his own part, afford the occasion of the other's downfall."[19]

In other words, we can only "cause" another's crime or sin by either formal invitation, solicitation or temptation of evil addressed to man's intellect and free will on the one hand; or on the other hand, by presenting an occasion suggesting such evil without formal solicitation.

Mortimer Adler put it this way:

"Is a science of human behavior possible in the same sense in which the natural sciences now exist?

19. Summa Theologica, II-II, Quest. 43, Art. 2, Ans. to Obj. 4.

"The answer to the question is negative. The reason is that human behavior is a unique type of change. It is voluntary. Among corporeal creatures only man has free will, because only man is rational. By free will I do not mean the pleasant fiction that men act as if they had freedom even though their actions are as fully determined by natural causes as the motions of a stone. I mean that human behavior cannot be reduced to natural causes, that in human behavior reason is the first cause and that the operation of the will as rational appetite is uncaused except by God. Only Divine Providence is compatible with the freedom of the will. To assert what is usually called a thorough-going natural determinism is to deny that man is genuinely different from the rest of corporeal nature. If human emotions were caused in the same way as all other natural motions, man would not act freely."[20]

All this means that the only efficient cause of crime or sin is the free will of the criminal and the sinner. "For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false testimonies, blasphemies."[21] There is no sin or crime, without, or apart from, free will; and this man's sin or crime is his alone, until another man's will freely cooperates. No one can be involved against his own will in another's sin or crime except by unjust judgment. All the scandals, prejudices, false maxims, terrors, and seductions in the world shatter and splinter harmlessly against the armor of the determination and grace protecting the man who resolutely says "No" to temptation or occasion. Brainwashing may take from a man his interior and exterior freedom. If it does, it takes away his capacity for sin and crime in that respect—his responsibility and culpability.

Obviously those who argue for freedom of will and those who deny that freedom, will not engage in a precise issue if they have widely different conceptions of what the will is and how it operates; or if they have significantly divergent conceptions of freedom. The principles of sinning or committing crime are the same in man as the principles of all his deliberate activity; for sin and crime are deliberate acts. Now, in man, there are three principles of action: (1) the cognitive power, which directs; (2) the appetitive power, which commands; and (3) the motive power, which executes the command. For example, a man who determines to commit the crime of larceny first conceives his plan intellectually; then freely wills it; and finally he executes the plan thus conceived and willed by going to the place where the article to be stolen is located and by physically taking it away. If, for another example, a hypnotist causes someone to commit such an act of larceny by post-hypnotic suggestion, the apparent thief in such a case is not culpable nor responsible. The hypnotist is the one responsible for the larceny. If there is coercion at the point of a gun to perform such an act, the act is not free.

20. Adler, Art and Prudence 252 (1937).
21. Matt. XV, 19.

Obviously, in connection with obscene literature there is no question of such coercion or hypnosis. We are only concerned with invitations, suggestions, influences, persuasions, inducements, solicitations, temptations or occasions. This is not an area in which efficient causes, properly understood, work upon human beings, corrupting them against their wills. The difference between an occasion or temptation and a cause has long been recognized. Anything can occasion sin; nothing outside of a man can *cause* that man to sin. Aquinas in Question Ninety-two of the first part of the *Summa Theologica* presented himself with the following problem:

". . . occasions of sin should be cut off. But God foresaw that the woman would be an occasion of sin to man. Therefore he should not have made woman."[22]

The great theologian's reply to this objection has a bearing on the question of the occasion against cause of obscenity:

"If God had deprived the world of all those things which proved an occasion of sin, the universe would have been imperfect. Nor was it fitting for the common good to be destroyed in order that individual evil might be avoided; especially as God is so powerful that he can direct any evil to a good end."

Only a Puritanical approach which would seek to sterilize man from all the occasions of sin in literature or elsewhere. It is morally impossible for any man to avoid all the remote occasions of sin. It is a mark of prudence to avoid occasions of sin and crime which are, to borrow a phrase coined for other use, "clear and present dangers." That is why St. Paul counselled the Corinthians against keeping "company with fornicators—with the covetous, or the extortioners, or the servers of idols."[23] That is why parents are concerned with the company their children keep and the books they read.

Conceivably, pornographic "literature" could have one, some or all of the following effects (which, indeed, large numbers of persons, rightly or wrongly, do in fact attribute to such "literature"): (a) corruption or demoralization of children; (b) corruption or demoralization of adolescents; (c) corruption or demoralization of average, normal adults; (d) corruption or demoralization of non-average adults, such as persons who are extremely stupid or extremely brilliant; (e) corruption or demoralization of non-normal adults, such as weak-minded people; (f) deterioration of family life; and (g) development of socially harmful attitudes on sex and marriage.

22. Summa Theologica, I, Quest. 91, Art. 1, Obj. 3.
23. 1 Cor. V, 9, 10.

THE PURPOSES OF THE LEGISLATURES IN PROHIBITING OBSCENITY

Every state but one, and the federal government have long had laws aimed at the prohibition of pornographic "literature." All of these laws were obviously framed upon a theory that the dissemination of pornography is an evil per se and not merely a *malum prohibitum*. Most of the legislative debates or studies which concerned this type of statute are no longer available to research, but some still are.[24] Where they are available, the minutes of these debates indicate that one, some or all of the effects of pornographic "literature," as listed above, were prominently in the minds of the legislators. Certain it is that most legislatures which debated or considered statutes forbidding dissemination of pornographic materials operated on the theory that such materials were especially harmful to children and adolescents. Whatever the particular or specific motivation, all the legislatures concerned with this problem regarded the mephitic outpourings of venal scatologists as a social evil threatening perils to the individual and society.

Now it is true that most, if not all, legislatures which dealt with the problem of legislation on this subject did not call for extensive legislative hearings and did not invite the testimony and statistics of sociologists. In this respect they operated much as they do with respect to other moral evils. They needed no sociological research to determine that rape or murder or large-scale unemployment were evils which clamored for mitigation or suppression. Nor, in the main, were legislators living in the illusion that laws could be perfectly efficient instruments for the extirpation of any of the evil factors whose character as evil they took for granted, or explicitly recognized. The point is that all of the legislatures in the Anglo-American tradition more or less took for granted certain basic principles of the Judaeo-Christian tradition with respect to sex—the Sixth and Ninth Commandments and their religious and ethical commentary.

Yet the fundamentals of this tradition with respect to sex were not transplanted into our jurisprudence indiscriminately. Legislators realized that laws operate only in the external forum and that thought control by law is quite impossible. But printed promulgation of pornographic material is not mere thought. It is, rather, thought reduced to objective and unmistakable act and fact.

Quite apart from the effects of pornographic "literature," but obviously related to those effects, are the actual intentions of the legisla-

24. Report, New York State Joint Legislative Committee Studying the Publication and Dissemination of Objectionable and Obscene Materials, N.Y. Leg. Doc. No. 32 (1956); Report, New York State Joint Legislative Committee to Study the Publication of Comics, N.Y. Leg. Doc. No. 37 (1955).

tures which have formulated laws banning the dissemination of pornographic "literature." The various effects listed above are readily conceivable. But not all of them necessarily motivated particular legislators in the manner of a legislative intent. Legislative intent must be derived or inferred either from the statute or from the debates and discussions leading to passage of the statute. Surely, legislatures considering this matter could have intended mitigation or elimination of some or all the various effects listed above. They could, with a decent respect for free speech, seek to repress lurid sexological materials whose publication is corrupting, and is prompted only by prurient venality. They could have the legislative purposes of: (1) preventing detriment to the characters of citizens, young or old, normal or abnormal; (2) obstructing the development of unhealthy attitudes toward sex and marriage; (3) disciplining, by pedagogic effects of legislation, the citizen's inclinations and tendencies, such as the strong passion and instinct of sex might easily arouse, and thus seek to limit the occasions when they run amuck; (4) to prevent stimulation of sex maniacs and others toward crime and perversion; and (5) to restrict the evil activities of those who deliberately set out to tempt, in the manner of an *agent provocateur,* others toward immorality, such as prostitution, perversion, seduction, etc.

Now, one of the astonishing characteristics of Judge Frank's reasoning is his bland disregard of all of the effects listed above except (c) which concerns the effect of pornographic "literature" on average, normal adults. Also, Judge Frank is stolidly neglectful of all legislative purposes except the one numbered four above, which concerns stimulation of sex maniacs and others to crime and illegal perversion. Stripped of its non-essentials, his argument seems to be: "No respectable sociological data or researches show that pornographic materials have any effect on average, normal adults or have ever stimulated sex maniacs or others to crime or unlawful action. The absence of such data and research deprives laws against obscenity of any rational basis for their existence and converts them into officious and gratuitous violations of free speech."

Certain dogmatic assumptions of principle are inherent in this argument. It is also an argument based upon serious errors of fact. A reliable body of empirical and logical evidence is available to support the principle and fact that all legislatures have taken for granted in this connection, namely, that pornographic "literature" is a social evil.

What Test for Recognition of Pornography?

Let me emphasize what I conceive to be Judge Frank's reason for neglecting all of the effects of pornographic "literature" listed above except the effect designated (c) and all the manifest legislative purposes

behind statutory bans on the dissemination of pornographic literature except the one numbered four. Judge Frank was betrayed into this neglect because he confused the test of pornography, as detailed in some cases for the guidance of judges and juries in criminal cases with the legislative intent behind obscenity statutes and with the individual or sociological effects of pornography as a matter of sociological research.

It is one thing to define the nature of pornography in terms of a practical test which judges and juries, lawyers and citizens need in actual criminal trials for the application and enforcement of the statute. It is quite a different thing to say that pornographic "literature" has certain effects on different classes of people which the legislatures intended to obviate and which the legislatures, exercising a prerogative judges may not usurp, deemed as the likely results of pornography. Judge Frank did not seem to see this difference. Some of the cases do make the test for the recognition of pornography in a criminal prosecution the impact or effect of the allegedly pornographic material upon the mind and morals of the average, normal adult. Judge Frank seems to conclude from this that the only thing intended by the legislature was to eliminate any harm which might come from the publication of pornographic materials to average, normal adults. His logic here is as bad as the logic of one who reasons that since the test for negligence is the prudence of the average, normal adult or the prudence of the ordinarily reasonable and careful man, therefore legislatures, when they ban excessive speeding or reckless driving, intend merely to protect the man who is ordinarily and reasonably prudent or careful. The test of negligence in a trial must be differentiated from legislative intent to protect all classes of people from negligence by means of statutes or ordinances prescribing rules of the road. Judge Frank confuses the two considerations in the analogous situation presented by the obscenity statutes.

Sociology?

What is more, Judge Frank, in dealing with the constitutional question, looked for his basic justification not to the Constitution, or to case law, or to statutory law, or to legal reasoning, but to a dubious and dogmatic sociology which on his own admission is debatable, and which does not even have the merit of being science or respectable research. It is, in addition, a violation of the whole constitutional theory of separation of powers for a court to address itself to the wisdom of a statute as gauged by sociological data. It has long been recognized, especially by the so-called liberal judges, that economic considerations should constitute no constitutional argument. If there is a choice between economic ideas competing for recognition in a case concerning the constitutionality of

state statutes, that choice would take a judge (in the language of Mr. Justice Harlan Fiske Stone) "from the judicial to the legislative field. The judicial function ends when it is determined that there is basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this court."[25] It is not for judges to decide upon the advisability of legislation. In these matters they are confined to a determination of the constitutionality of the legislation. If this doctrine deserves the wide recognition it has received in recent years with respect to the field of economics,[26] I see no reason why it should not apply with equal force to the often much more debatable field of sociology. If it does not, judges will constitute a super-legislature debating history and sociological data rather than law. Judge Frank's Appendix predominantly concerns a doubtful sociology, not constitutional law.

It happens, unfortunately, that even his sociology is unfounded in fact and highly questionable in reasoning. If he could have read Professor Sorokin's work entitled *The American Sex Revolution,* he would have found in the preface the following short paragraph:

"Since it [Sorokin's book] is written for the intelligent lay-reader, all the references to the sources of each statement are intentionally omitted. This does not mean, however, that the conclusions are mere speculations of an armchair philosopher. If need be, it can be shown that all of the main contentions of the book are based on a vast body of empirical and logical evidence available."

The main contentions of Sorokin's book contradict, in every important detail, Judge Frank's and Dr. Jahoda's questionable sociology. The main contentions urged by Sorokin fit squarely within the pattern of the

25. Tyson v. Banton, 273 U.S. 418, 454 (1927) (dissenting opinion).

26. The question of the wisdom or unwisdom of legislation is for the legislature and not for judges under a now almost universally acknowledged principle of judicial self-restraint. During the senatorial debates provoked by President Hoover's designation of Charles Evans Hughes as Chief Justice of the United States, Senator Carter Glass complained that "the Supreme Court in recent years has gone far afield from its original function and has constituted itself a court in economics and in the determination of social questions rather than in the interpretation of statutes passed with reference to the Constitution itself." 72 Cong. Rec. 3553 (1930). See also 72 Cong. Rec. 3449, 3516, 3566, 3642 (1930). In reference to these senatorial strictures, Judge Harlan F. Stone wrote to his sons on April 30th, 1930: "The debates really have, I think, a great deal more significance than many people think, and reflect the deep concern of a good many people over what they conceive to be the tendency of the Court to enlarge its powers, and to read into the Constitution and laws of the United States the social and economic philosophy of the Court or a majority of it." Mason, Harlan Fiske Stone: Pillar of the Law 301 (1956).

"Their duty [the courts] is simply to enforce the law as it is written, unless clearly unconstitutional." Chung Fook v. White, 264 U.S. 443, 446 (1924). See also Smith v. Kansas City Title Co., 255 U.S. 180, 210 (1921).

Judaeo-Christian tradition and the moral principles and facts taken for granted or expressly recognized by the many state and federal legislatures which have framed laws against obscenity.

Effect on Children?

Judge Frank was patently wrong when he wrote: "The reference in Judge Clark's opinion to juvenile delinquency might lead the casual reader to suppose that, under the statute, the test of what constitutes obscenity is its effect on minors, and that the defendant, Roth, has been convicted for mailing obscene writings . . . to children." Judge Clark's opinion does *not* challenge the "test of what constitutes obscenity" by stating or suggesting that the test is the effect, in the jury's opinion, of pornographic materials on minors. Judge Clark was addressing himself to Judge Frank's argument that the court should consider whether pornography has any discernible effect on children in appraising the constitutionality of obscenity legislation. Here is Judge Clark's sentence in this connection:

"But even if we had more freedom to follow an impulse to strike down such legislation in the premises, we should need to pause because of our own lack of knowledge of the social bearing of this problem, or the consequences of such an act; and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic [in commercialized obscenity or salable pornography] with the development of juvenile delinquency."[27]

Surely this sentence does not attempt to set up as the test of what constitutes obscenity, the effect of that obscenity on minors alone. Judge Clark is simply saying that legislators have a right (which courts may not challenge) to conclude from available knowledge of history, ethics, psychology and sociological research that there is a direct connection between traffic in salable pornography and the development of juvenile delinquency. Judge Clark's footnote here cites a few of the authorities which substantiate this opinion. The question is not whether Judge Clark or Judge Frank, as legislators, would have approved passage of the obscenity statutes. The real question, as Judge Clark indicates in his next sentence, is whether "the attack on constitutionality of this statute must here fail."

Judge Frank admits that, in the instant case, the trial judge properly charged the jury as to the correct test, which the jury was to apply in identifying obscenity, namely, the effect of the obscenity (not on the young or immature, but) on average, normal, adult persons. That is why Judge Frank concludes that, "on the basis of that test, the jury

27. 237 F.2d at 799.

could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which the defendant mailed were obscene." If he makes this concession with respect to what the jury could properly find for justice in this case, I am astonished that he was unable to conclude, with respect to the larger question, that a legislature could reasonably and legally find that for the common good the ban on pornographic materials is advisable.

THE VALIDITY OF THE STATUTE

In this connection, Judge Frank indulges in a rather paltry sophism. He argues that one must draw a distinction between obscene matter and filthy matter; and that when one makes this distinction, the statute is inconsistent. Why? Because what is filthy really means "that which renders sexual desires 'disgusting' "; whereas what is obscene "arouses sexual desires by making sex attractive." Whatever the distinction that can properly or conceivably be made in this connection, it would seem that a legislature has as ample a right, constitutionally, to ban the obscene as the filthy. If the obscene is regarded as a social evil because of its tendency towards sexual excess, the filthy could with equal reason be regarded by a legislature as tending toward a disgust with what ought to be respected. Each reaction a legislator could reasonably and constitutionally regard as anti-social. On this basis, Judge Frank's footnote suggests an interpretation of the statute which would "avoid this seeming inconsistency." To avoid this alleged inconsistency, Judge Frank argues that the statute should be interpreted as follows: "The mailing of a 'filthy' matter is a crime if that matter tends to induce acts by the recipient which cause breaches of the peace." He tries to find support for this interpretation in a relatively unimportant case, *United States v. Limehouse*,[28] which held that filthy letters may be excluded from the mails under the same statutes which ban obscenity.

It ought to be clear that the same piece of obscenity could be regarded as filthy by some people and as obscene by others, using Judge Frank's distinction. There is no inconsistency in a statute which attributes such different efficacies to the same materials. What is filthy to some may be obscene to others. We are not dealing with machines or efficient causes which are determined inevitably to typed action, reaction or effect. We are dealing with human beings who, at times, characteristically and without moral or legal fault, appraise one and the same thing differently, according to the differences of people, background, education, experience, location, etc. This is not to suggest that one man will rationally regard fire as cold while another will say it is hot; or that a certain man will

28. 285 U.S. 424 (1932).

regard murder as right, while still another will condemn it. It does suggest that different people, according to their own mature or immature but idiosyncratic prudence, will make different "determinations"[29] or prudential decisions about one and the same moral principle which they all either take for granted or explicitly approve.

We find an analogy in the law of negligence. In a negligence action, juries and judges have the duty to find negligence where it exists. This does not mean that all juries and judges would make a determination of this duty in the same fashion, even when they start from the same abstract definition of negligence.[30]

Judge Frank has oversimplified the application of the First Amendment by saying that the Supreme Court's doctrine as a commentary on that Amendment "may be summarized briefly as follows: Any statute authorizing governmental interference . . . with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at *words which are likely to incite a breach of the peace,* or with sufficient probability tend either to overthrow the government by illegal means or by some other overt anti-social conduct."[31]

The whole point which Chief Judge Clark makes is that the obscenity statutes constitute a special category under the First Amendment not involving prior restraint or punishment nor the overthrow of government nor breach of peace. One cannot summarize a Constitutional Amendment and its detailed commentary over many years by a pat formula such as Judge Frank uses.

The founding fathers knew little about laws against pornography. In earlier English history obscene publications came under the jurisdiction of the ecclesiastical courts.[32] Yet, there is no credible evidence to suggest that they wanted sound obscenity statutes banned as unconstitutional. The English have long had as vital a respect for civil liberties as the Justices of our Supreme Court. There is nothing in the legal

29. Aquinas, Summa Theologica, I-II, Quest. 91, Art. 3; Quest. 91, Art. 3, Ans. to Obj. 1; Quest. 99, Art. 2.

30. Doucy, Recherche de la Famille 87 (1847): "Morality reveals itself without ambiguity in the specific occasions when its demands are clear, but it escapes it when we wish to comprehend it as a separate essence." Juries and judges can recognize a piece of pornography more readily than they can define what, in all future circumstances, will or should constitute pornography.

31. 237 F.2d at 802. (Emphasis added.)

32. Regina v. Read, Fortes. Rep. 98, 92 Eng. Rep. 777 (Q.B. 1708). This case was overruled, however, nineteen years later in Rex v. Curl, 2 Stra. 789, 93 Eng. Rep. 849 (K.B. 1727). Apparently, the earliest American decision on the subject of obscenity is Commonwealth v. Holmes, 17 Mass. 336 (1821), which held that publishing an obscene book was a common law crime.

matrix of present English law which suggests that statutes[33] aimed against pornography encroach upon civil liberties. English statutes on that subject are as valid in England as American statutes are, and should be under the law and cases cited by Chief Judge Clark. Courts and legislatures have long recognized that speech, just as any other human capacity, is subject at times to harmful abuses calling for legislation. We all agree that we should tolerate fewer restraints on speech than on most other human capacities. But that is no argument for utter license or anarchy in the matter of obscenity. For, if I undertsand the logic of Judge Frank at all, it comes down to a contention that pornography statutes are per se unconstitutional unless it can be proved that the specific pornography prosecuted in a particular case tends, with sufficient probability, to the commission of crime, the overthrow of the government, breach of peace, or that some overt anti-social conduct resulting from obscenity must be established in each particular case by sufficiently convincing sociological research. Judge Frank says, for the courts, that they cannot see eye to eye with legislatures which, perceiving a connection between pornography and social evil, generally ban pornography by legislation. If legislatures are satisfied with available sociological data showing this general connection, courts are not. And because they are not, they question the constitutionality of the obscenity statutes. When this view is linked with one of Judge Frank's main contentions (that "no one can now show that, with any reasonable probability, obscene publications tend to have any effects on the behaviour of normal average adults") the whole crucial test of what constitutes obscenity goes out the window as something radically irrational and therefore an affront to free speech and due process.

Judge Frank's Appendix is largely given over to the establishment of the purely negative conclusion that: *"No adequate knowledge is available concerning the effects on the conduct of normal adults of reading or seeing the 'obscene'."*[34] Such a statement, which Judge Frank himself italicized and used as a topical heading, is on its face quite irrational to anyone who has even rudimentary knowledge of human nature. By using the designation "adequate knowledge" he cannot fairly be construed to mean perfect knowledge, which is not always available to legislators and judges. They must often proceed on the basis of merely probable knowledge. What is probable knowledge is, itself, often a matter of dis-

33. See Obscene Publications Act, 1857, 20 & 21 Vict., c. 83; Post Office Act, 1953, 1 & 2 Eliz. 2, c. 36; Regina v. Reiter [1954] 2 Q.B. 16. See also Williams, Obscenity in Modern English Law, 20 Law & Contemp. Prob. 630 (1955); St. John-Stevas, Obscenity and the Law (1956).

34. 237 F.2d at 811.

pute.[35] The dispute in such cases, however, is for legislators and not judges. The whole history of the obscenity statutes and their enforcement shows that reading or seeing the obscene does produce effects on the conduct of normal adults. We have a right to assume in this connection that most of our juries comprise normal adults. When they read and see the obscene in prosecutions under obscenity statutes they often find the defendant guilty. Are they dreaming when they do this? Are they operating from sheer subjectivity, arbitrariness or prejudice; or do they react to reality as they see it; and do they see it forthrightly? If they are incapable of realistic reaction here, why should they be capable anywhere else? They are often asked to probe into delicate and subtle questions of human motivation. What is it that characterizes murder in the first degree except premeditation? Is it not a difficult surgery that cuts away from a mass of trial evidence the existence of such a subjective psychological state as premeditation? Moreover, suppose some depraved producer were to reproduce on a New York stage some of the phallic and orgiastic rites and cults of decadent Grecian and Roman paganism. Would such debauchery have no effect whatever upon the conduct of normal adults? On Judge Frank's logic, I see no reason why acts of fornication and adultery could not be enacted in a motion picture (or on the stage as, Suetonius reports, they were enacted in some of the depraved Latin comedies).

These, of course, are exaggerated cases. But if Judge Frank's dialectic does not screen out such exaggerations, we must pause about regarding it as valid.

Coming away from hyperbole, let us assume for the sake of argument that Judge Frank's conclusion is correct, namely, that no adequate knowledge is available concerning the effect upon normal adults upon reading or seeing the obscene. Does that assumption make a contribution to the question of constitutionality of obscenity statutes? I do not think it is a valid assumption. At best, it is a purely negative assumption, based on one man's opinion, or on the opinion of a few questionable sociologists and dubious judges operating out of their element and purblind to the decadence of paganism. There are other sociologists, psychologists, judges, statesmen and ethicians who contradict this conclusion very vigorously. Must we poll the experts? Must a legislature take the court's opinion or the opinion of the court-preferred sociologists under penalty of having its statute dubbed unconstitutional? Where we assume that genuine experts are available and where they differ, is

35. Adler, op. cit. supra note 20, at 242. See also The Great Ideas, A Syntopicon of the Great Books 348-50 (Hutchins ed. 1952).

it unconstitutional for a legislature to agree with one group of experts as against another?

Obscenity in literature does not act like a chemical reaction. It does not in any accurate sense constitute a cause for some effect in human decision or conduct. At most, it would be an occasion or temptation. It does not determine. It invites. This derives from the fact that men are free and responsible in fact, and under our jurisprudence. They are not charged with sin or crime if they are not responsible or not free. One cannot gauge the effect of obscenity on adult conduct or on the conduct of young people as one would gauge the effect of some liquid in a test tube on some other chemicals in other test tubes. The assumption of Judge Frank and Dr. Jahoda, on whom he relies indiscriminately, is the false assumption of scientific positivism:[36] that only the methods of testing and verifying, appropriate to the empirical sciences, produce truth. It seems never to occur to those who make this argument expressly or by implication that the absence of sociological research constituting proof that obscenity causes crime or juvenile delinquency might derive from the fact that human beings are free and are not determined by causes to definite effects in those free interior decisions which give rise to genuine crime and juvenile delinquency. Our bodies are indeed subject to the stars in the sense that they may be affected by gravitational pulls, or to chemis-

36. Only those propositions which can be established by the methods of the experimental sciences are, in the view of the scientific positivist, meaningful for the scientist. Judge Frank seems to be affected by this error when he takes the position that it is impossible to affirm that the reading of obscene matter will have any effect on adults or children unless sociological research demonstrates a causal connection.

Maritain, Scholasticism and Politics 39 (1940), refutes the positivist position as follows:

"The objection has been justly raised against the Viennese position that if the meaning of a judgment consists in its method of [experimental] verification,—not only in the usage proper to experimental sciences, but in an absolute manner; if any judgment which cannot be thus verified is devoid of meaning; then this school's own theory has no meaning, because it is incapable of being verified in this manner. It is incapable, even in principle, of space-time verifications. The theory of the Viennese is, in fact, a philosophical theory, a philosophy of science . . . ."

When this positivism is extended to the field of ethics, the latter breaks down as a responsible and normative discipline. See Sellers and Hospers, Readings in Ethical Theory 397 (1952): "It is clear that there is nothing said which can be true or false . . . . I am merely expressing certain moral sentiments. And the man who is ostensibly contradicting me is merely expressing his moral sentiments. So that there is plainly no sense in asking which of us is right." In this regard see Wild, The Challenge of Existentialism 24 (1955), where the author comments on ". . . the intellectual arrogance with which this time-worn point of view is dogmatically asserted with no rational defense, except for an appeal to the authority of modern science, and with no careful consideration of opposed positions. This sterilization of ethics is a fourth . . . reason for the breakdown of philosophy."

try in the sense that poisons can disintegrate a stomach. But our minds and wills are not similarly subject to external cause. This is the root of human freedom.

Frank argues that the effects of obscenity must be clear, that is, identifiable and substantial to the courts. Yet, on his own admission, we are here dealing with a debatable question. He is certainly not arguing that only fools or rogues fail to agree with him. It apparently becomes unconstitutional when the effects of obscenity are clear and substantial for legislatures which have, presumably, debated the question on sociological and other grounds. For this reason, he argues, too, that "since the statute renders words punishable it is invalid unless those words tend, with a *fairly high degree of probability*, to incite to *overt conduct* which is *obviously* harmful."[37] A high degree of probability in whose estimation? Are the courts now to constitute themselves as censoring and higher legislators on matters that have been the unchallenged prerogative of legislatures for decades? Matters, indeed, which the courts have approved for the same number of decades? Will it be argued that one cannot find competent statesmen, psychologists, moralists and sociologists who could rationally hold the opinion that pornography, such as that of which the defendant was found guilty, does tend with a high degree of probability toward attitudes as well as conduct which are socially harmful? It would seem that the presumption is in favor of what legislators and courts have done without serious challenge these many years. If there are eager innovators, let them have the burden of proof. One does not shoulder the burden of proof with negative evidence such as Judge Frank adduced!

Of course, the question is not whether whatever is sinful in this respect should be banned by law. As experience with the obscenity statutes demonstrates, the real problem was to keep out of circulation the grosser forms of obscenity. The legal test is not a Puritan one, as the massive sex literature of our time, utterly unimpeded by statute or prosecution, illustrates. However, the courts have, Judge Clark correctly points out, left this matter "to the gradual development of notions about what is decent." Obscenity has been defined by case after case and the test for obscenity has been stated in language which even Judge Frank quotes with approval.

Judge Frank's reference to the Supreme Court's precedents amounts to a statement that the Supreme Court, when it on several occasions held the federal obscenity statute to be constitutional, did not really know what it was doing or did not give the matter sufficient reflection.[38]

37. 237 F.2d at 802. (Emphasis added.)

38. The statute has survived the following attacks upon its constitutionality: United

Another argument made by Judge Frank is that the obscenity statutes should be declared void for vagueness. To one who reads them for the first time, without the background of our jurisprudence, they will be no more vague than the words used as vehicles of thought. Words like "obscene," "lewd," "pornographic," alone or in combination, are no more vague or imprecise than many other words to be found in our dictionary or used in ordinary human parlance or in our courts. "Reasonable care" is scarcely precise. "Due process" is even less precise. The definition of "fair prices" is vague. Where is the precision in Judge Frank's concept of "the average, normal adult"? Even if the concept be precise, will its application be so? One could cite many legal formulae which lack precision which, nevertheless, are used and must be used.

Let us assume that sociological data, research and proof, of the kind Judge Frank demands for obscenity statutes, should be required for other, analogous legislation. What data showed or could show Congress in 1935 that the Wagner Act was going to lessen the number of strikes and labor disputes? Actually, such disputes and work stoppages increased vastly after the National Labor Relations Act was passed. Do the carefully compiled statistics on this point justify judges in questioning the constitutionality of such legislation?

The Appendix contains a series of assumptions on which Judge Frank inconsistently rests his argument without the benefit of the kind of scientific research or sociological data which he demands for obscenity stat-

States v. Rebhuhn, 109 F.2d 512 (2d Cir.), cert. denied, 310 U.S. 629 (1940) (vagueness); Coomer v. United States, 213 Fed. 1 (8th Cir. 1914) (due process of law); Tyomies Publishing Co. v. United States, 211 Fed. 385 (6th Cir. 1914) (freedom of the press); Rinker v. United States, 151 Fed. 755 (8th Cir. 1907) (cruel and unusual punishment).

In ruling on the constitutionality of a state statute in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Mr. Justice Murphy said at 571-72:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

That the Congress may make it a criminal offense to introduce obscene matter into the mails was made clear in Rinder v. United States, supra, where Judge Van Devanter stated at 760:

"The dissemination of that which makes against decency, purity, and chastity in private life is infinitely more dangerous to society than are many offenses, the authorized and commonly approved punishment for which is more severe. And no other agency is so well adapted to the inexpensive, extensive and effective dissemination of such indecent matter as are the mails."

utes. Where, for example, can one exhume an unputrified sociology which demonstrates "causal connections" such as the following, which the Judge took for granted: that juries can be affected by erroneous judicial charges; that even tyrrannous "governmental interference with free speech" produces anti-social results; that a Victorian "attitude . . . tends to 'create' obscenity"; that "the foundation of obscenity" can be found in "secrecy or shame"; that "postures" can become "sexually alluring"; or that "government censorship of books" has potentialities which are "dangerously infectious"?

In these respects, Judge Frank contradicted himself. The fact is that such sociological research and data are neither possible nor necessary for valid, reasonable and constitutional legislation.

On Judge Frank's own admission, some experts such as Dr. Wertheim (and many moral philosophers, ethicians, sociologists and moral theologians to whom Judge Frank does not refer) are of the firm opinion that pornography and obscenity are social evils. It will not do to say that such experts are untrustworthy because Judge Frank finds some reason to criticize them. If Class *A* represents all of the experts who agree with Dr. Jahoda and Judge Frank, and Class *B* represents contrary-minded experts, there is no reason why legislatures, state and federal, may not constitutionally prefer the experts in Class *B* rather than the experts in Class *A*. Only on the assumption that no rational man could prefer Class *B* over Class *A* would the courts have any conceivable basis for examining the relative merits of *B* and *A*.

Conclusion

Even if we rephrase more accurately Judge Frank's argument so as to avoid the manifestly erroneous and misleading metaphor about causal relationship, nothing very cogent on behalf of Judge Frank's thesis evolves. It is simply not true that "no adequate knowledge is available concerning the influence, as occasions or temptations on the conduct of normal adults or of children of reading or seeing the obscene." Whatever is a genuinely pornographic occasion or temptation towards sin or crime or unhealthy attitudes (whose very existence the state has a right to discourage) must, by definition and in fact, incite or entice toward thoughts or subjective attitudes of some kind, or toward both thoughts and attitudes as well as deliberate conduct suggested by such thoughts and attitudes. The probabilities that such incitements and enticements will prompt (not cause) thoughts and conduct is roughly proportionate to the strength of the enticement.

It is an unmistakable fact of introspection and of psychology that all overt, deliberate conduct pre-exists at first intentionally in the mind, as

a purpose. Of course, thoughts and subjective attitudes as such are not the proper sphere of government. But where they are suggestive of crime or a special degree of crime or some social disorder against which the state has a right to guard its citizens, they do come within that sphere. For example, premeditation is an essential element of murder in the first degree; felonious intent is an essential element of many crimes; intention to deceive is an element of the tort of fraud and deceit; etc.

Nor are the courts impervious to the impact of occasions of misdoing. In most divorce cases, proof of adultery amounts to no more than the proof of an occasion for adultery; for example, the man and woman spent the night in a hotel room.

The opinions and arguments of educators and thinkers as to the influence of books on adult conduct are not to be construed as statements that books are causes of adult intellectual improvement. They are mere instruments or occasions of such improvement. The efficient cause for intellectual improvement is always the person himself. A teacher cannot make a pupil learn. The pupil must do that for himself. The pupil is the efficient cause of learning, the teacher is merely the instrumental cause, or the occasion, or the opportunity.

The very fact that every state, except one, as well as the federal government have passed some form of censorship law with respect to pornography is itself testimony independently given by many people over a long period of time that pornography does have some sort of influence. Men like Sorokin would be able to refer to psychological and sociological studies showing change of adult conduct following exposure to books and reading, even if a Dr. Jahoda was unable to do this. In addition to the legislative testimony of law makers who have concluded that some sort of censorship is necessary to guard against the extreme forms of pornography, we have the decisional rules and dicta of many judges respecting the influence of literature, especially the pernicious influence of obscenity.

Nor are such testimonies confined to American constitutional history. In Plato's *Republic,* Socrates says:

> ". . . these tales must not be admitted into our state, whether they are supposed to have an allegorical meaning or not. For the young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable, and therefore it is important that the tales which the young first hear should be models of virtuous thoughts."

Many other passages in Plato's *Republic* and in *The Statesman* and in *The Laws* could be quoted to the same end. They are not all limited, either, to the effect of tales or narrations on youth.

On the very first page of his *Nicomachean Ethics,* Aristotle discussing

the master art of politics states that:

"[It] ordains which of the sciences should be studied in a state, and which each class of citizens should learn and up to what point they should learn . . . and legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good of man."

Later he adds:

"Indeed there is nothing which the legislator should be more careful to drive away than indecency of speech; for the light utterance of shameful words leads soon to shameful actions. . . . A free man who is found saying or doing what is forbidden . . . should be disgraced or beaten, and an elder person degraded as his slavish conduct deserves. . . ."

Here Aristotle's main concern is the welfare of the youth but he extends his observations to adults.

Even Milton in his *Areopagitica,* from which Judge Frank frequently and approvingly quotes, does not leave the following excerpt unqualified:

"And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength."

For a few pages afterwards he shows clearly the limits of his tolerance:

"I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpated, provided first that all charitable and compassionate means be used to win and regain the weak and misled: that also which is impious or evil absolutely either against faith or manners no law can possibly permit, that intends not to unlaw itself. . . ."[39]

39. Since this article was written, the Supreme Court of the United States, in Butler v. Michigan, 25 U.S.L. Week 4165 (U.S. Feb. 25, 1957), held Mich. Penal Code Section 343 to be unconstitutional as violating the Due Process Clause of the Fourteenth Amendment. This section provided, "Any person who shall import, print, publish, sell, . . . any book, magazine, . . . containing obscene, immoral, lewd or lascivious language . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor." The Court said that the legislation was not reasonably restricted to the evil which the State legislature sought to obviate, because it banned to the general reading public a book found to have a potentially deleterious influence upon youth. Said the Court, too inclusively: "The incidence of this enactment is to reduce the adult population of Michigan to reading what is fit for children." This sentence makes sense only if it is limited to writings which could be called obscene. Surely the Michigan statute did not forbid adults from reading, for example, Aristotle simply because Aristotle is not suitable for children.