

Only forty years ago, in the classic case of Near v. Minnesota (1931), Chief Justice Hughes took for granted the following combination of principles: 1) that "liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action"; 2) that each State has the authority "to enact laws to promote the health, safety, morals and general welfare of its people"; 3) that government can not only punish abuses of the liberty of the press through posterior restraint but can even use prior restraint in what might be called exceptional areas of urgent public interest, including the enforcement of "the primary requirements of decency" against obscene publications.¹

Clearly, Chief Justice Hughes did not assume that the incorporation of the First Amendment's "freedom of the press" into the Fourteenth rendered unconstitutional all state restrictions of the press undertaken in the name of what used to be called the state's "police powers." On the contrary, he assumed as a matter of course that the states retained a necessary governmental authority to "promote" the morals of the people and to "enforce" the "primary requirements of decency" against obscenity. Nothing in the First or Fourteenth Amendments, it seems, could be interpreted as essentially barring the application of this authority. But by 1966, in Memoirs of a Woman of Pleasure v. Commonwealth of Massachusetts (better known as the Fanny Hill case), the very reference to a power to promote morals or to enforce the primary requirements of decency had disappeared from the Supreme Court's pronouncements. The Court took for granted that obscenity was still an evil that a government

¹283 U.S. 707, 716 (1931).
could subject to posterior restraint; but the importance of “morals” and “public decency” to a free society no longer received clear recognition. What appeared manifest, instead, was the importance of ideas and of literary values in printed works, regardless of their impact on what had hitherto been referred to as “morals” and “public decency.”

The principal champion, executor and celebrant of this momentous change—by his own account, and with some truth—was a little-known lawyer named Charles Rembar, who in 1959 accepted Grove Press’ invitation to defend D. H. Lawrence’s *Lady Chatterley’s Lover* and continued on in the defense of Henry Miller’s *Tropic of Cancer* (same press) and John Cleland’s *Fanny Hill* (G. P. Putnam) until final victory in 1966. Rembar recounts this forensic saga in *The End of Obscenity*—a five-hundred page work quite accurately described by the New York Times as “a tour de force to fascinate lawyers and laymen alike.” The title has a double denotation, as shown by the last sentence of the concluding chapter: “So far as writing is concerned, I have said there is no longer any law of obscenity. I would go further and add, so far as writing is concerned, that not only in our law but in our culture obscenity will soon be gone.”

Legal obscenity is already gone, and as for obscenity itself: “With the lifting of legal restraint, the kind of response in the reader—shocked or aroused or guilty—that marks what we are accustomed to call obscene will begin to disappear.”

It is not unfair to say that Rembar relishes the victory he won, and that, interestingly enough, he took his most dangerous legal opponents to be the Citizens for Decent Literature rather than government representatives in either the judiciaries or attorney generals’ offices. Nevertheless, he would have no difficulty granting that his greatest (but not his legally most dangerous) opponents were men who wrote no *amicus curiae* briefs (as did the Citizens), whose views were never fully represented in court, whose arguments may have been more comprehensive and telling than the very limited and even weak ones he usually faced in legal battle, and whose position must be weighed against his own in the ultimately important court—the court of the mind. In 1971 he referred to Father Harold Gardi-

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ner, S.J., as the author of “what to my mind was the best pro-censorship book, Catholic Viewpoint on Censorship (Doubleday, 1958), until the appearance of Harry Clor’s Obscenity and Public Morality.” We must agree with this judgment about Clor’s book, which in its very title (its subtitle is Censorship in a Liberal Society) severs the question of obscenity from any particular sectarian viewpoint and links it to “public morality” and “liberal society.”

The juxtaposition and comparison of Rembar’s book with Clor’s is therefore one that Rembar, at least, would seem to welcome. And it is apparently welcomed by Clor as well, who invited Rembar to contribute a chapter (“The Outrageously Immoral Fact”) to the volume he edited for the Rand McNally Public Affairs series on the problem of obscenity, and even placed it directly after the introductory excerpts from the Roth case. This volume also contains a re-statement of Clor’s own views, including an appended commentary on the Report of the Commission on Obscenity and Pornography (as well as essays by such other notable writers on obscenity as Walter Berns and Richard Kuh) and can therefore furnish further evidence for the juxtaposition of Clor and Rembar.

In order to compare the views of these two men, we shall need some logical organization of topics. Such an organization is more readily furnished by Clor’s book than by Rembar’s: the latter is mainly an historical and personal account of recent cases, the former a systematic analysis of the subject of obscenity. Clor presents, in this order, a history of legal obscenity before and after Roth, a consideration of libertarian and procensorship philosophies, and an elaboration of his own legal solution. But it will be useful to begin by piecing together Rembar’s position from various parts of both his book and his chapter.

I

Rembar’s approach to the intent of the framers and to the legal history of obscenity in this country is easily summarized. In direct opposition to Justice Brennan’s treatment of the subject in Roth, he thinks there is no evidence contemporaneous with the adoption of the Constitution itself that clearly justifies antiobscenity legis-

lation by either federal or state governments, and certainly not by the
former. Moreover: "By the time of Roth the Fourteenth Amend-
ment had been held to incorporate most of the Bill of Rights . . . , and
the free speech guaranty applied with equal force to state and federal
governments." 6 Rembar is aware of both the adoption of English
common law by our courts, including the rule that it was a crime
to publish an obscene book, and the first reported case under that
rule involving Fanny Hill in Boston (1821). 7 He draws attention to
the Comstock Act of 1873, and the anti-obscenity statutes adopted
thereafter by all states but one, and cites Brennan's reference to the
twenty obscenity laws adopted by Congress between 1842 and 1956.
He knows the degree to which the illegality of obscenity was taken
for granted in the Ulysses case, (1933) in Chaplinsky (1942), and
in Beauharnais (1952), previous to Brennan's historical reaffirmation
in Roth (1957).

But Rembar is unimpressed: taken together, the Supreme Court's
assumption that "... obscenity is not protected" and the legal history
prove nothing. 8 With Brennan he agrees that the First Amendment
(and hence the Fourteenth) protects the expression of any ideas, but
he tries to lend consistency to Brennan's historical conclusion by
rejecting obscenity as "utterly without redeeming social importance"
and by drawing from it the converse conclusion that whatever has
any social importance cannot legally be considered obscenity. 9 Only
this view, he claims, coheres with the view of both the framers and
Brennan protecting ideas—all ideas.

The philosophy underlying this apparent reversal of tradition can
be stated as follows: Rembar is devoted to democratic free society,
but he is not an absolute democrat. The majority, and the views of
the majority, should not be permitted to silence the free expression of
even a single man, and to accomplish this was the prime motive of
the speech and press sections of the First Amendment. The founding
fathers were "eighteenth century students of John Locke, divided on
many points but united in a rational libertarian philosophy." 10 In

6Rembar, End of Obscenity, p. 50, note.
7Ibid., p. 15.
8Ibid., p. 51.
9Ibid., pp. 46, 52.
10Ibid., p. 50; see also pp. 308, 333. Rembar seems unaware of exceptions
Locke made to religious toleration, several of which bear on freedom of expres-
50-2.
the First Amendment they wanted, above all, to protect thought and expression, thus rejecting prosecutions on the grounds of heresy, sedition and obscenity all at once, and in principle. But laws against obscenity are only an effort made by legislative majorities to inflict their view of sexual morality on the rest of the public. Somehow sexual taboos touch such majorities more deeply than other opinions, for “The outrageous immoral fact is that the only kind of immorality toward which all this is directed is sexual immorality. Nothing has ever been censored on the ground that it had a tendency to promote dishonesty or cruelty or cowardice.”

In spite of this peculiar self-limitation on the part of censors, Rembar believes that the urge to censor obscenity is part of a pattern inevitably gravitating toward political and religious as well as sexual orthodoxy. “The true censor,” he tells us, “has objectives beyond the masking of the erotic and the indecent. The end in view is an established principle of suppression, available anywhere in the world of the mind.” The censor is motivated by a “longing to preserve the common man from the ravages of intellect.” But control over the mind is antithetical to the First Amendment, which has at its root the view that freedom is essential for the individual as well as for society. Socially, freedom of expression is a means of achieving truth, a means of conducting the business of democracy, and a means of airing social defects. But it is also of direct value to the individual, not only for promoting the development of thought (in philosophy, science and art) but also for the pleasure each man derives from thinking and speaking. Thought is among the things that make life valuable, and “Each of us should have the right to speak his thoughts and to hear the thought of others. It makes us feel good.”

Nevertheless, Rembar does not share Justices Black and Douglas’ literal reading of the First Amendment. He acknowledges the legitimacy of laws against slander, libel and fraud. He admits that the need for privacy and the need for decency in public places may require limits on expression. He allows that expression mixed with action poses problems not found in action alone. He is willing to concede that different parts of the press—books as distinguished

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from movies and television—may elicit different legal treatment because of the varying conditions under which their communication is effected. And he grants that children may merit protection in a way that the First Amendment cannot concede to adults. Finally, while insisting that the printed medium, and books especially, deserve the fullest freedom, he is also able to accept the suppression of "worthless trash."  

The distinction between art and trash is crucial to Rembar's position. His main concern is to protect the serious creative writer, not the hack. But he identifies serious writing, or literature, by its manner of treating a subject rather than by its substance or content. One of its most obvious ingredients is good writing itself, simply as a technical matter, but the degree to which it exists in any given book must be left to the judgment of literary experts. If a work can be shown to have even a minimal amount of literary (or other social) value, it is protected by the First Amendment; if not, it can be banned as "worthless trash."

The artist, Rembar assumes, is often a critic of reality, particularly of current moral opinion. Rembar shows no direct legal concern for the preservation of current morality, which merely signifies the opinions of the majority, the preferred, prevailing or approved opinions, or the taboos. Implicit in his text, however, is a certain ethics, a certain view of the unchanging goods and evils of his own. As he conceives it, the natural endowment of man (taken to include not only thought in all its manifestations but sexual desire as well) should be given the freedom to satisfy and express itself, short of anti-social conduct. With D. H. Lawrence, he criticizes the pornographic mentality as "anti-sex"—i.e., as an obsession undesirable in itself and caused by the moral and legal repression of healthful natural desire. But the way to achieve this healthful condition, socially, is to remove the repression (Lawrence himself wanted to suppress pornography) even at the risk of encouraging, temporarily, a flow of literary excesses that still pander to a morbid prurience. The ultimate result of

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16Ibid., pp. 4, 501, 437-9, 301-3, 502.
17Ibid., pp. 380, 401, 439, 460.
18Ibid., pp. 259-61, 429, 449, 460.
19Ibid., pp. 119, 142, 219, 463-4.
this freedom, however, will be a "sounder morality," and the "end of obscenity." 

Nowhere in his book does Rembar give direct attention to the older arguments against obscenity deriving from the public need for "morals" and "public decency." In fact, even when the latter phrase is used in his appendix, it is deliberately shorn of its larger meaning and confined to things in public places that shock by assailing either the senses or the sensibilities. His chapter in the Rand McNally Affairs volume strikes a new note, however, in one of the few paragraphs not directly cribbed from his book:

Not that the law has no interest in moral behavior. It has a great interest in moral behavior. The law in one respect, indeed, is simply institutionalized ethics. Criminal law, and its civil counterpart, the law of torts, seek to prevent us from inflicting injury upon others. Family law urges us to honor our obligations as parents and spouses. The law of contracts tries to make us keep our promises. But in all of this the law deals with behavior, not with the communication of ideas or the creation of art...  

But Rembar does not explore the relation between behavior and ideas. In the book he admits that "Books have great influence, much of it bad." And he is even willing to admit, in the chapter, that the free exchange of ideas need not result in victory for truth—at least in the short run. He adds, however, that "over the long term, the likelihood is high. And certainly truth's chances are better with freedom than with repression." The chapter ends by again decrying the concentration of pro-censorship forces on sexual morality alone, but without acknowledging any necessary connection between what he calls "sexual convention" and the family law mentioned above:

Proponents of sexual censorship must take the position that conformity to sexual convention is more important than honesty, than kindness, than courage. Unless we are ready to embrace censorship with the idea or promoting all virtue—not just one of its meaner aspects—we cannot justify censorship at all. And if we undertake to promote all virtue by decree, and in prosecution of

20 Rembar, pp. 484, 486.
21 Ibid., p. 501; also, pp. 115, 239.
22 P. 47.
23 P. 384.
24 Op. cit., p. 44.
that end give power to the government to subdue expression (and with it thought as well), the most likely consequence will be the diminution of our virtue.  

While Rembar does not pretend to furnish an extended treatment of the philosophy and history of freedom of expression, he does, as we have seen, make forays into both, the net purpose of which is to supply a clear and definitive understanding of the First Amendment in principle. But throughout his book we become keenly conscious of the fact that he is first and foremost a lawyer, bent on persuading judges and juries and winning cases. Not that he will use false arguments to do so, but he will not furnish the other side with arguments unless it is to the longrange interest of the side he represents, and he will not voluntarily bring up points that might be embarrassing to his own cause. One salient interest of the book, in fact, derives from the candor, wit and acuity (not always free from a certain *amour-propre*) with which he discusses his tactical choices, the merits and demerits of the arguments presented by his opponents, and the weaker areas within his own defenses. But his mind is pre-set, unwaveringly, on the goal of intellectual freedom, and he demonstrates considerable astuteness in assessing just what he can or cannot say at any given point, given the audience he must persuade, to make progress toward this goal. He knows that *Lady Chatterly's Lover* dominantly appeals to lust: he must therefore underplay the degree to which lustfulness as such formed a part of *Roth*’s definition of prurience. He knows *Tropic of Cancer* appeals to a morbid prurience very different from the “normal” lust Lawrence thought natural: he must therefore save it through testimonials to its literary value. He knows *Fanny Hill* is a “classic of pornography”: again the literary experts must furnish its salvation.  

He knows Brennan’s original phrase characterizing obscene writings as “utterly without redeeming social importance” may be more demanding than “utterly without social value”: he must not express in court the difference between these phrases; but he displays a considerable talent for casuistry in admitting he was prepared to respond that “it would

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26 Rembar, p. 9.
27 *Ibid*, pp. 49, 128, 184; 175, 184, 186; 245, 482.
take more than an iota of merit to make up an iota of importance. But very little more.”

Such candor leaves us with the uneasy feeling that Rembar may not be entirely candid with his listeners or readers. The place where this possibility reveals itself most is in various discussions of how much, and what kind of, literary value a book would have to possess in order to escape prosecution for obscenity. Rembar knows that the existing Court “had not the slightest idea of granting complete freedom for everything that might be called expression”: therefore, while denying that he has any interest in suggesting candidates for censorship, he develops distinctions the Court might want to use to condemn some expression while freeing the rest. He does the same thing when he opines that, as of now, a “speck of value” will not immunize a work—at least not with “the present Court.”

For he had been asked point blank by Chief Justice Warren himself, in the *Fanny Hill* presentations, whether skilful writing would save an otherwise obscene work, and—after he had not directly replied—whether “very skilful and learned language” would. He answered that it would if it were “skilful and learned enough.” Yet he had just told the Justices in so many words that obscenity (legally) was “worthless trash,” and his brief had maintained quite explicitly that “Well-written obscenity was a contradiction in terms,” to which he adds, in the book, that he had not agreed that “good writing, even in this narrow sense, was a matter of no social importance.”

In short—though he did not want to admit it in face-to-face confrontation with the Court—a well-written but otherwise obscene work could not be constitutionally suppressed.

But must it be well-written? If only “worthless trash” is illegal, and if harm supposedly deriving from the work’s prurience is never admitted to be truly harmful, why should even “worthless trash” be banned? After all, it is, on Rembar’s account, only “worthless,” not “harmful.” Certainly some people, as he tells us, would go so far as to “argue the benefits of the pornographic experience”—a point made in the context of a general discussion showing that “intelligent voices” will be heard for and against the reading of anything, including the “trashiest” works (such as pornography). Rembar coun-

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ters this point with his own objections to pornography as “anti-sex, a diminution of better pleasures,” but he adds: “The question I address, however, is not a legal question. I would not argue that the law should interfere. I would argue the contrary.”

Here, we suspect, is Rembar’s deeply-felt conviction—one that he could not prudently voice in either his written or oral presentation to the Supreme Court or in his text (except in this one place). And it is the only logical conclusion, given his interpretation of the First Amendment and of so-called obscene writings. There is no constitutional right to suppress any book however obscene and however written: expression in books is completely free. Only in this way can the aim of the founders be realized to free men from all such prosecutions—whether grounded in heresy, sedition or obscenity; whether, that is, protecting orthodoxy in religion, government or morality. The realm of ideas, and the expression of ideas, must be completely untouched by the hands of government. For only through the free exchange of ideas can the greatest ultimate truth—and hence the greatest human happiness—be achieved.

II

This completes our portrayal of Rembar’s position, which apparently mixes elements derived from John Stuart Mill (on freedom) and D. H. Lawrence (on sex). But is it the view of the framers of our Constitution? Is this what they believed they wrote into the First Amendment? or what later framers wrote into the Fourteenth? Is it possible to dismiss so summarily the long tradition, in and out of the Supreme Court, placing “morals,” “the primary requirements of decency,” and hence obscenity within the jurisdiction of the states (if not of the federal government)? Was it sheer prejudice, or negligence, on the part of so many judges high and low for so long a period to regard obscene publications as harmful on their face? Was it “outrageously immoral” of them to single out written stimuli to sexual immorality but not to other forms of immorality? These questions must not only be put to Rembar: they must be put to the Roth Court and its successors as well. For it was Justice Brennan, in Roth, who first characterized obscenity “as utterly without redeeming social importance,” quoting Chaplinsky’s

Ibid., pp. 386-7.
view that the “social interest in order and morality” clearly out-
weighed “whatever slight social value as a step to truth” obscene
writings might have. But it was also Brennan who, nine years later,
voted with a majority of the Court to free Fanny Hill—a book
Rembar himself calls “that classic of pornography”—32—from the
verdict laid upon it by the Supreme Judicial Court of Massachusetts.
Why, in short, was the highest tribunal in the land persuaded to sac-
rifice “the social interest in order and morality” to what a handful of
professors and critics praised as literary merit? Does a free society, in
fact, have such an interest in “order and morality?” Some state
judges and attorney-generals still think so, but why did their argu-
ments have so little impact on the Supreme Court?

Harry Clor’s Obscenity and Public Morality tries to supply an-
swers to most of these questions, and through a mode of treatment
very different from Rembar’s. In Rembar the spirit of the lawyer,
partisan to a given position, never completely departs from the text.
In Clor we see the spirit of the judge at work, but a judge animated
by the detached search for truth and for the fullest presentation of
all sides of the issue before him. It is characteristic of such a judge
that he should look dispassionately at rival interpretations of the
deepest legal principles of his own society, not infrequently compos-
ing a more comprehensive and searching statement of those interpre-
tations than is made by their leading current spokesmen. He must be
able to weigh them against each other, understanding their ramifica-
tions in political philosophy and their broader implications for other
areas. He must apply his conclusions to the situation at hand, after
estimating the realities they presuppose and their likely consequences.
This is what constitutes judicial statesmanship of the highest order,
and this is what Clor’s book contains. The libertarian who reads this
book may not be persuaded by its conclusions, but he can hardly be
unaware of the fairness with which his views have been presented;
and he will find them stated with clarity and pursued with thorough-
ness.

Such praise of Clor is not intended to detract from the peculiar
value of Rembar’s work. Above all, Rembar uniquely conveys a
sense of the lawyer’s role in the judicial system, and of the part
played by lawyers (and judges) from the lowest judicial levels up-
wards in setting the stage for Supreme Court decisions. Unknown

32Ibid., p. 482.
to Clor, in fact (his book came out shortly after Rembar's), it was the fine hand of this particular lawyer that played an instrumental part in the Supreme Court's rulings on *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Fanny Hill*. And not only is it helpful to have Rembar's account of how this was accomplished, but his reflections on what he thought he was accomplishing, on his strategy, and on the workings of the judicial system itself are always perceptive and instructive. They remain, nevertheless, the reflections of a partisan advocate who gives little effort to making the best possible case for the fundamental position he opposes. Clor presents such a case for the regulation of the press, but he also presents the libertarian position with far more comprehensiveness than Rembar.

In treating the original meaning of the First Amendment, Rembar relegates to a footnote the information that in those days the people were worried about encroachments (on freedom) by the new central government and viewed encroachments by the state governments quite differently.34 He can do so because of his conviction that by the time of *Roth* the Fourteenth Amendment restricting encroachments by the states had been held to incorporate the freedom of the First. But the conclusion does not immediately follow (as we saw from the quotation from Chief Justice Hughes in 1931 with which this paper began) that state governments can place no restraints on the press whatsoever. So easy an inference is not likely to have escaped such men as Hughes, Hand, Woolsey, Murphy and Brennan and their supporters on the Court. For if the safety of individuals and the community can be protected by individual and group libel laws, and if the public morals and decency of a community can be thought no less vital to the well-being of its citizens than their health and safety (as the doctrine of police powers long assumed), there might well be a prima facie case for laws restraining obscene publications. If limits on the freedom of the press are acceptable in one case, they may be acceptable in others as well. And we have already seen how many exceptions to absolute freedom are admitted by Rembar himself.35 At the minimum, then, it is not at all obvious that state laws against obscenity are on their face unconstitutional simply because the First was incorporated into the Fourteenth Amendment.

34Ibid., p. 50.
35See note 15 above, and the paragraph to which it is affixed.
This matter may be pursued somewhat further. Clor gives evidence to show that Jefferson’s opposition to the Sedition Act assumed that the states could suppress political slander. Jefferson wrote:

Nor does the opinion of the unconstitutionality, and consequent nullity of that law [the Sedition Act], remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood, in the United States. The power to do that is fully possessed by the several State Legislatures. . . . While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States and their exclusive right to do so.36

While acknowledging that we have no direct evidence of the views of Jefferson and Madison on the control of obscenity, Clor does cite Leonard Levy’s historical study showing that the men who adopted the First Amendment (with the exception of Madison) “. . . did not even intend to abolish federal prosecution for seditious libel.”37 So it is not at all obvious, as Rembar presumes in interpreting the meaning of the First Amendment, that one can merely “fasten onto the language of the Amendment” and fathom its clear import.

Even if we followed Justices Black and Douglas (as Rembar does not) in interpreting the words of the First Amendment absolutely with reference to the powers of Congress, we may still entertain strong doubts as to whether it is possible to read the intention of the Fourteenth Amendment in such a way as to incorporate the First Amendment thus understood. The Fourteenth Amendment, broadly speaking, sought to extend to freedmen the rights already possessed by those who were never slaves, and to insure that states did not abuse these rights. Its framers could not reasonably be interpreted as intending to strip northern states of an authority they already possessed in their own internal affairs that had no bearing on the slavery issue. This does not mean that the clause “nor shall any State deprive any person of life, liberty or property without due process of law” excluded freedom of speech and press from the “liberty” mentioned. As the opening quotation from Near v.

36Clor, p. 97.
37Ibid., p. 101.
Minnesota suggests, that freedom would be assured to freedmen just as to whites within each individual state, but on principles long accepted within each state and hence consistent with the exercise of the police powers of each state. Only in this sense can it be validly claimed that these First Amendment freedoms have been incorporated into the Fourteenth, for the alternative (and current) interpretation would have the Fourteenth intending a removal of state powers about which its framers were not concerned. To avoid confusion, therefore, it would be more accurate to say that the Fourteenth includes, under “liberty,” the kinds of liberties long enjoyed by white citizens in the various states. “Freedom of speech and press,” in this setting, is undoubtedly quite a different thing from the version of the First Amendment Rembar (and—even more strictly—Justices Black and Douglas) read on its face. This conclusion is of considerable moment for Clor’s constitutional argument: it adds to what he says about the First Amendment, and clearly preserves the tradition, and the legitimacy, of state police power interventions in behalf of morals and public decency.

Not only do Clor and Rembar differ in interpreting the apparent simplicity of the First Amendment: they also portray the judicial history of obscenity somewhat differently. Rembar refers to the Comstock Act of 1873 as the “archetype of American anti-obscenity legislation” and heaps scorn on its author, who represents, in his eyes, the worst of Victorian repressiveness. But he forgets to describe it as essentially a postal regulation, and we must turn to Clor for an excerpt from Judge Blatchford’s decision in United States v. Bennett (1879) declaring that “... Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature”—a view later upheld in Roth. Unlike state obscenity statutes, in other words, the Comstock Act was not a regulation of the press as such. It stands in much the same relation to Congress’ postal power as the federal minimum wage law stands to its commerce power.

Clor’s account of the introduction of the Hicklin rule and of the changes made in it is more complete and more balanced than Rem-
Rembar seeks less to improve the rule than to abandon it, less to develop a mode of weighing obscenities against positive value in a work than to make such value the sole criterion. His first immediate problem was to save Lady Chatterley's Lover, and he admits that Judge Woolsey's assessment of James Joyce's Ulysses (1933), to the effect that its treatment of sex was "emetic, not aphrodisiac," would not work with Lawrence's book. As Rembar candidly states: "I wanted to argue that because it had literary quality it should not be suppressed, and that it did not matter that it was lustful." Rembar seeks less to improve the rule than to abandon it, less to develop a mode of weighing obscenities against positive value in a work than to make such value the sole criterion. 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ently construing the issues. Chief Judge Conway had tried to consider movies as a special medium of communication directly affecting emotions and attitudes much more than the intellect; he drew attention to the problem posed by a particular movie that joined “alluring portrayals” to the approval of adultery; he was worried about “the corrosive effect upon the public sense of sexual morality” that the combination of approval and alluring portrayal would have. He was, indeed, struggling with a real problem to which Justice Stewart’s majority opinion simply did not address itself. What Rembar characterizes as “ridiculous” is the Regents’ (and Chief Judge Conway’s) concern about movies favoring adultery; what Clor might well have characterized as ridiculous, after his more careful exploration of the case, was the inability of Justice Stewart and the others to sense the seriousness of this concern in the context of this movie.

We need not enter upon the differing treatments Rembar and Clor accord the Manual Enterprises, Jacobellis, Fanny Hill and Ginzburg decisions (strangely, Clor takes no notice of Mishkin). Broadly speaking, we learn more about the anti-libertarian considerations in each from Clor, one exception being Rembar’s criticism of Harlan’s opinion in Manual Enterprises.\(^47\) Clor deplores the Court’s tendency in these cases to lose sight almost completely of the public interest in morality, making it ever more difficult to find magazines, movies and books legally obscene, regardless of their obscenity:

> While proclaiming its commitment to the concepts of Roth, the Court steadily undermined these concepts, rendering them increasingly ambiguous and unsuitable for censorship of anything—except, perhaps, hard-core pornography.\(^48\)

With this verdict Rembar would undoubtedly agree. It is interesting to note, however, that the amplification of “pandering” as an essential element in Ginzburg is more strongly criticized by Clor than by Rembar, who regards it as a negligible barrier for the future once Fanny Hill had allowed a book to be saved by even slight literary or other value.\(^49\) Once that case was concluded in 1966 it could be said that the libertarian effort to subject only overt conduct rather

\(^{47}\)Rembar, p. 187.
\(^{48}\)Clor, p. 80.
\(^{49}\)Clor, p. 80; Rembar, pp. 479-81.
than expression of any kind to legal regulation had well nigh succeeded. If hardcore pornography remained susceptible to suppression, it would still be without the Court having made clear to the nation what public harm, apart from offensiveness, it contained. The field was now almost completely open to anything that could be sold, whatever its appeal to either "normal" or "abnormal" lust. The "end of obscenity" might eventually come, as Rembar maintains, but in the short run the decline of prosecutions led to the appearance of an unparalleled flood of prurience in almost all media. And whether this "end of obscenity"—with its implied end to a sense of the forbidden, shameful, immodest and immoral in sexual relations—will improve man's condition is not as obvious as he supposes.

III

When Rembar was asked to defend *Lady Chatterley's Lover* in 1959, he stood alone, even among libertarians, in his interpretation of *Roth*, and the prospect that he might within a seven-year period persuade the Supreme Court to accept an independent "social value" test, emancipating obscenity from a shackling tradition at least a century old, looked absolutely negligible. In the Epilogue to his book, Clor admits that the trend of the Court makes it unlikely that his thesis or policy suggestions would be adopted in the near future. Nevertheless,

These developments need not be regarded, in the long run, as wholly irresistible, unmodifiable, and irreversible. When moderate men—both liberal and conservative—become aware of their basic agreement on certain principles and values, they can have an effect on events.

And Clor has a broader end in view as well, for the problem of obscenity is a prototype of other issues arising in a liberal society, where the moderation of liberty in the name of liberal society itself might be necessary. The quotation from Aristotle at the head of his last chapter is well-chosen:

The education of a citizen in the spirit of his constitution does not consist in his doing the actions in which the partisans of

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50 Rembar, p. 52-55.
51 Clor, p. 279. See also the rest of the Epilogue.
Let us see what this “moderation” means, and what kind of case Clor must make in applying it to our democracy. Every political order is animated by an end or set of ends related to its structure. Democracy has always been animated by the twin ends of liberty and equality, and the immoderate partisans of democracy have always been tempted to drive these principles to their extreme conclusions in the very name of democracy. But extreme liberty and extreme equality will destroy democracy. Democracy is a system of government that depends on the rule of the people through law. Laws, and particularly basic laws, are the standards by which the people regulate themselves in their common behalf. But to give themselves good laws, and to enforce the laws against themselves, require certain virtues among the people. There must first of all be a dedication to the common good, a loyalty to the country, a willingness to sacrifice in behalf of fellow citizens, an habitual inclination in the people to restrain those desires that do harm to others and to the public at large. To some degree, in short, the rulers in a democracy—the people—who are also the ruled, need some of the moral capacities that must characterize all good rulers and all good ruled. They must, to some extent, be wise, just, temperate and courageous as rulers; they must also, to a great extent, be obedient to the laws, and swayed in this direction by internalized rather than merely external pressures.

Now extreme liberty and extreme equality endanger these requirements of a durable democracy, and democracy, historically, exhibits so strong a tendency to follow these extremes that it has, for the most part, been a rare and short-lived form of government. Extreme liberty makes men insusceptible to citizen needs either as rulers or as ruled; it promotes too great a variety among citizens, too strong a sense of independence not only of one another but of the society itself, and therefore leads to a breakdown of common bonds and a common sense of responsibility. Extreme equality engenders

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52 Ibid., p. 272.
53 Aristotle, Politics, 1317b.
a dilution and deterioration of the inequalities democratic equality needs to sustain itself: inequalities between the talents needed for outstanding leadership and the talents shared by all; between the law and the citizens obeying the law; between the respect due to founders and the powers of the present generation; between elders and the young, parents and children, teacher and student.

These problems of democracy were known not only to Aristotle but to some modern political philosophers as well. According to Montesquieu—from whom our founding fathers learned much—virtue is the principle of democracy. But it is also true that liberal democracy as founded by Locke and represented in Montesquieu's portrayal of England was devised in such a way as to make liberty serve in place of virtue: the enlightened self-interest of the free individual will furnish a calculated patriotism, a calculated obedience to law, a common good arrived at through the straining of individuals and groups of individuals animated by a common interest against each other, and with little need for the elevated morality the word "virtue" suggests. In such a regime, thinkers and artists would receive a freedom more extensive than they had ever received before, but its chief protection would be the liberty shared by all in a society motivated by individual self-interest. Little moral training would be necessary for the citizens of such a democracy, little respect for old laws or elders, little direct sense of the common good. Government would be conducted at some remove from the people through representatives, and these representatives, while somewhat superior, would not be expected to be greatly superior in either wisdom or virtue to the people who chose them.54

In the context of such a liberal democracy, it is even more difficult to sustain the notion that liberty needs to be moderated, for a certain extreme of liberty has been built into the constitution itself. Particularly in America, isolated from immediate and direct threats from other nations, such a society would be impelled toward that systematic extension of liberty prescribed in such circumstances by John Stuart Mill, where anti-social conduct rather than expression might become the sole criterion for judging illegality, and where the free play of ideas might come to be regarded as the principal means

54Montesquieu, _The Spirit of the Laws_, III, 3; V, 2; XI, 6; XIX, 27; Locke, _Second Treatise of Civil Government_, XI, sects. 138 to end. _Federalist Papers_, #10, 51.
for achieving a progressive society. These facts explain, I believe, why our Supreme Court has been increasingly dominated, knowingly or unknowingly, by Mill's philosophy of freedom. But this philosophy has never been without its difficulties, and some of its presuppositions have been forgotten. Mill assumed (along with John Milton) that the young had always to be educated for liberty, and that what we today would consider a severe moral training was necessary to equip men for rational choice. The human individual, untrained for moral, social and intellectual ends, could not be the element of progressive society.

One can go beyond Mill not only in understanding the prerequisites of liberal society but in questioning precisely certain liberal fundamentals themselves. It was Madison who spoke of the need for sustaining a respectful popular prejudice approaching veneration in favor of the constitution. It was Tocqueville (whom Mill much admired) who emphasized the necessary role of the family, of female virtue and of religion in moderating the manners and restraining the selfishness characteristic of liberal democracy. It was Lincoln who went so far as to require a "political religion" inculcating reverence for the Constitution and the laws in our democracy, together with a "general intelligence" and "sound morality"—all derived from "cold, calculating, unimpassioned reason" and contending with "passion." It was Bryce who added:

It is an old saying that monarchies live by honour and republics by virtue. The more democratic republics become, the more the masses grow conscious of their own power, the more do they need to live, not only by patriotism, but by reverence and self-control, and the more essential to their well-being are those sources whence reverence and self-control flow.

And it was in the last testament of Marc Bloch, as he reflected on the amazingly rapid defeat of France in 1940, that we have Montesquieu's dictum for democracy repeated for liberal societies:

55Federalist Papers (Everyman Edition), #49 (pp. 257-8), #38 (p. 184), #35 (p. 124); cf. #14 (pp. 65-6). Madison is the probable author of #49.
57Writings (Lamb, New York, 1905), pp. 154-5, 160.
“A State founded on the People needs a mainspring; and that mainspring is virtue.”

The reasoning of these critical supporters of liberal democracy leads to a conclusion different from that of either its philosophic originators or its extreme present partisans: liberal democracy is still democracy, and still needs moral, religious and rational supports, embodied in common opinions and social institutions, that moderate it in the direction of virtue and thereby enable it to hold together and last as a system of governance. To illustrate how little we understand such needs, and how far we have moved toward a certain extreme of liberty and equality, we must have recourse to an excerpt from Justice Douglas’ dissent in Ginzberg quoted not in Rembar's book but in Clor’s:

Masochism is a desire to be punished or subdued . . . the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated. Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, non-conformist and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like “rock and roll.” Some are “normal,” some are masochistic, some deviant in other respects . . . When the Court today speaks of “social value,” does it mean a “value” to the majority? Why is not a minority “value” cognizable?

Clor’s comments on this passage are most appropriate. Justice Douglas cannot bring himself to mention sadism—the other side of masochism in psychiatric parlance—because of its obvious harm to others (however desired by them). But books, magazines or movies for sadists would still fall short of being so brigaded to criminal conduct as to warrant restriction on any ground admitted by Douglas, and sadists should therefore be entitled to their own most satisfying means of expression through the press. They should not have been omitted.

The deeper difficulty, however, stems from Douglas’ notion of liberal society, for it is no longer a community in any recognizable sense. Decomposed into a congeries of deviant groups, with “normality” in quotation marks and signifying only a kind of majority deviation, the human and political community has disappeared.

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60Clor, p. 124.
Nothing essential holds it together: no conception of human health or normality, no common bonds of political or moral dedication, no shared ideals, no durable interests. And yet, in this extremity of liberty and equality, these groups are expected to adhere to each other in some form of self-governing political union, to love that union, and to work through and for it. But can anything short of despotic power hold together groups essentially separated, once the remnants of the old idea of union, and the habits attendant thereon, have been loosened and destroyed? Will these groups love the very liberty that has spawned or nurtured them, or will they, in the aimlessness and despair of anomie, hate its permissive chaos and seek a higher purpose for their lives in movements dedicated to its overthrow?

Liberal democracy has tried to minimize the degree to which men sense themselves to be subordinate elements of a political society. But how far can one safely go in this direction? What, in fact, are the prerequisites of such a society remaining a society that is free? This question is not even raised by Charles Rembar, who, in typical libertarian fashion, takes for granted the durability, and even the necessary progress, of the political union whose members are given the expanded freedom he seeks. For Clor, however, it is one of two central questions. The other concerns the human stature of the citizens of liberal society: their capacity for high intellectual and moral attainment. But here the views of Rembar and Clor, while divergent in important respects, sometimes converge. Rembar retains some notion of intellectual excellence, some sense of the intrinsic value of human thought, some grasp of the distinction between serious art and trash. Nevertheless, his understanding of moral excellence is halting and unclear. While far from denying the status of certain traditional moral virtues, he cannot refrain from coupling them all under the head of merely "approved," "preferred" or majority moral opinion, and he certainly has a new understanding of sexual morality. Unlike Justice Douglas, he shows no special sympathy for deviants, or any sense that they are healthy or normal. But he seems to accept D. H. Lawrence's view of the natural goodness of lust, or of lust and love taken together, and this acceptance does not bring with it any clear view of a sexual virtue independent of the natural course of passion and sentiment, let alone of the consequences this doctrine must have for the status of the family. It is important to note, however, that Rembar can use the
term “virtue” in some meaningful traditional sense when he claims (at the end of his chapter in Clor’s volume) that promoting virtue through governmental restrictions on expression (and thought) will probably lead to “the diminution of our virtue.” This problem raised by Rembar is a serious one, but arguing the issues with him should prove to be less difficult than arguing them with one (like Justice Douglas) for whom the term “virtue” disappears because its content has been lost.

IV

Now let us see the kind of case Clor must present in order to support a regulation of the press in liberal society. First, he must show that the Constitution is not directly opposed to it, and also that there is something in our constitutional tradition favoring it. In short, it would be important to know that it is not intruded now as an alien object but has been here in some form for a long time. This, as we have already seen, he partly does, and would do even more completely had he further examined the Fourteenth Amendment and the doctrine of police powers. But the tradition, while prima facie evidence of a sort, does not suffice: there must be reasons for safeguarding “morals” and “public decency,” and also—to meet Rembar’s entirely proper question—reasons for concentrating on sexual morality if that is the recommendation. Sound arguments must be presented for believing that obscenity is pernicious, that the harm it does is substantial rather than peripheral, and that no sufficient remedy for this harm can be expected from sources other than the law. Finally, Clor must show that obscenity is capable of clear (if not precise) legal definition and suitable legal application, thus providing adequate safeguards for expression that is not obscene.

In my judgment, Clor goes a long way, if not every inch of the way, toward proving his case. Following the sequence he himself embarks upon after his historical and constitutional chapters, we may begin with the question of obscenity’s harmfulness. In addressing this question Clor makes a crucial and necessary distinction between 1) evidence that obscenity is the direct cause of anti-social conduct and 2) grounds for thinking that its longrange and more subtle influences are substantially harmful. After carefully surveying available studies on both sides of the former issue, he decides that the evidence is inconclusive. In connection with the latter issue, he asks
us to consult the only available (and only possible) source of evidence—"The common sense of the matter"—which is another way of saying "experience informed by reflection." 61

That writings, including obscene writings, can affect the people who read them (leaving aside such visual media as the movies), is plainly admitted by Rembar:

I do not agree with those who say books can work no evil. The assertion is an affront to intellect. Books have great influence, much of it bad. But the risk that inheres in reading books is precisely the risk that the First Amendment contemplates. All the conflict is in the mind itself, and this is the conflict we cherish. 62

The point at which Clor differs with Rembar here occurs in the last sentence: "the conflict is in the mind." The scope Rembar gives to the term "mind" can be gathered from an early passage in his work:

Among the things that make life valuable is the kind of internal activity that can roughly be called thought. This includes both thought in the strict sense, whose higher products are philosophy and science, and thought in its emotive aspects, whose higher product is art. But thought is frustrated and tends to rot if it must be contained within the individual. In Areopagitica, Milton's general arguments became intensely personal at one point: 'Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.' 63

Evidently Rembar uses "thought" in the same way he uses "mind." Mind and thought "in the strict sense" lead to philosophy and science, in the "emotive" sense to art. But this suggests that emotions are part of thought, when it is clear that in some ways they are different from and opposed to thought. From Milton to Mill the main justification for freedom of expression was its promotion of truth and the scope it gave for the exercise of virtue, but in each of these cases the emotions are meant to be subject to the constraint of intellectual and moral principles. The word "argue" suggests this difference: men "argue" different positions in philosophical works, and they "argue" different positions in ethics and politics, but do

61Ibid., p. 167. See also the appendix to Clor's chapter in the Rand McNally volume (pp. 119-29).
62Rembar, p. 384.
63Ibid., p. 10.
they "argue" in art? Do appeals to emotion in poetry, drama and the novel "argue?" Clor makes the same point with respect to Jefferson:

Whenever Jefferson spoke of freedom of press, speech and conscience he spoke in terms of truth and falsehood; that is, in terms of arguments addressed to the rational or spiritual faculties of man. 64

The practical problem is that obscene literature does not "argue." It does not clearly set forth reasonings that may be weighed by the intellect, and that, in this sense, raise a "conflict" within the mind of the reader. On the contrary, it works directly on the reader's emotions and attitudes, sometimes through shock, sometimes through insinuation, and its appeal is not to the intellect, or to conscience, but to the grosser physical passions that, taken by themselves, constitute (we will now presume) constant threats to society and civilization. This does not mean that Milton, Jefferson or Mill excluded art from the freedom of the press, but, in Milton at least, this ample freedom for philosophy and art required two additional conditions, one a foundation, the other a limit. The limit is quoted by Clor: "That also which is impious or evil absolutely, either against faith or manners, no law can possibly permit, that tends not to unlaw itself." 66 Not censorship in the original sense (licensing, or prior restraint) but subsequent restraint would be necessary to protect faith and manners against the most excessive attacks on them. Milton attaches even more importance, however, to moral education as the foundation of freedom. What is necessary is not "Plato's licensing of books,"

64 Clor, p. 100.
65 Ibid., p. 129.
The aim of education, according to Milton, is to provide citizens with those qualities essential to their conduct as men and citizens. In fact, his very definition of education shows that he uses the term itself to mean moral and political training:

I call therefore a complete and generous education, that which fits a man to perform justly, skilfully, and magnanimously all the offices, both private and public, of peace and war. 67

Quite clearly, civic education is not something conducted merely through formal schooling, and certainly not through books alone. The home, the community, the church all have a hand in forming the soul of the child—in setting, for him, the standards of right and good conduct—and this process necessarily entails placing blame on the dispositions and actions he should avoid and giving praise to the high ideals he should seek to embody in himself. As Mill himself puts it: “The existing generation is master both of the training and the entire circumstances of the generation to come. . . .” 68 But the most powerful and most authoritative standards of praise and blame are set by the political community as a whole so far as the conduct of most of its citizens is concerned, and the political community acts through both written and unwritten law—through legal stipulation and the power of “received opinion” broadly accepted.

What the community either tolerates without blame or positively encourages must therefore affect the thought, sentiments, attitudes and ultimately the conduct of citizens. Now when the direction of the public’s stand on obscenity moves from one of blame to one of toleration, the net effect is almost the same as granting public approval. It is as much as to tell readers and viewers that the old disapproval was mistaken, and to open them to complete acceptance. More and more they will come to accept sensuality and brutality as normal and good; more and more they will accept the reduction of love to sex; more and more they will regard intimacies previously thought sacred or private as open to public exposure. 69 The result will be not only to influence the moral opinions and sentiments of solitary individuals here and there, but to alter the moral capacities and habits of large numbers of individuals, and to change com-

68On Liberty (Crofts Classics), p. 83.
69Clor, p. 170.
community standards of right and wrong, elevation and degradation, on a matter of central importance.

If these concerns are generally well-founded, their urgency becomes infinitely greater in the age of mass media. Grown used to immersion in cheap printed material, records, radio, movies, and now, television, we easily underestimate their capacity for influencing and altering the public mores. This is particularly true of the movies, not only because of their visual impact, but because they come closest to having the status of a public (and publicly approved) source. When one compares the means of affecting the attitudes and ideals of all members of society, young and old, as late as 1920 with those of today, and examines the content of what is communicated through the media as well, one can only conclude that the capacity to change men’s souls at an accelerated rate has been transformed in a manner roughly comparable to the shift in warfare from handguns to nuclear missiles. The difference is that nuclear weapons have been used but once, and retain their dread threat only in potency, while the mass media inundate the public without surcease.

The change in sexual stimulation, particularly through the movies, can be seen by comparing films prior to World War II with those after it, and those prior to 1966 with those since. In this most recent period, what sexual immorality has not been favorably portrayed on the screen? Even within the area of what was once considered the sexual abnormal, what short of bestiality and the worst forms of incest has not appeared in acceptable, if not approved, garb? What remains of the virtues of modesty, fidelity and moderation, let alone of the institution of marriage? What has come through to the viewing public if not the notion that fornication, adultery and even homosexuality are perfectly normal outlets for the passions? And if adults have been bombarded with such fare, to what extent has the self-imposed system of movie classification kept it from the young?

But what precisely is the community interest in morality? Clor distinguishes three distinct rationale supporting a moral regulation of the press. One, traceable to classical political philosophy, looks upon moral virtue as a perfection of human nature and the principal object of political society. A second stresses the need of every com-
munity for common or broadly shared values, regardless of their content and worth. The third stresses the minimal moral requirements of political society, particularly where public participation and citizen responsibility are expected to play a salient role. Clor chooses the third as most consistent with liberal society, and sums up its object as decency and civility rather than virtue. The highest cultivation of character cannot be the object of government in liberal society, though a public interest in character (expressed perhaps more through education than through legal restraint) should receive broad and continuous public recognition. And while there is truth in the view that even (and perhaps especially) liberal society requires a broadly shared foundation in common moral values, the content of these values is as important as their having general support.  

Clor does give reasons why sexual morality must be a special object of public concern. We may begin from the polar opposite expressed by two recent authors in the form of a human or natural right: “Man’s right to use his body and his sexual organs in complete freedom as long as this occurs without violence, constraint or fraud against another person.” According to this view, only the use of violence and deception in sexual matters enters the purview of government: all else is private. This novel emancipation of the organs would make fornication, adultery, bigamy, incest, prostitution, sodomy and bestiality the rightful and wholly legal activities of individuals. Clor’s response is that society, civilization and liberal democracy cannot endure without a patterning of sexual relationships going far beyond a mere attention to violence and deception. Society will always require some authoritative pronouncements on such subjects as: the proper character of the family, the nature of the marriage bond, the duties and rights of married persons, the human meaning of sex and its relation to love, and the extent to which the human body and its various functions should be revealed or concealed in public.  

We may add, in the spirit of Clor’s remarks on the subject of civilization (as distinguished from more primitive human conditions), that

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70 Ibid., pp. 182-9.
71 Ibid., p. 198: quotation from Eberhard and Phyllis Kronhausen, Pornography and the Law.
72 Ibid., p. 191.
civilized values entail the cultivation, and, in some respects, the subjugation of human nature. The components of civilization are historically the product of long and difficult developments, and they are directly conveyed to each individual through the informal and formal education to which a civilized society exposes him. Left to itself, therefore, the natural instinct of individuals is antagonistic to, not supportive of, the values of civilization. And it is wholly mistaken to suppose that the various civilized qualities—moral, esthetic, intellectual and political—still prized by liberals and supposed natural to the individual can be retained once primordial sexuality is released from almost all bonds. For these qualities, and the institutions (such as the family and the community) built on them, cannot long remain once sexuality itself is shorn of the elevation and limits developed over centuries. It is, in short, chimerical to assume that a return to primordial nature in the midst of civilization will leave civilization itself intact.

A society that is not only a community, and civilized in the broad sense, but a political democracy as well, has certain additional requirements:

The enterprise of self-government requires mutual respect and certain capacities for self-restraint, or, as these things used to be called, 'civility.' It depends on a citizen body the members of which will devote their energies to long-range public interests and who can, when necessary, sacrifice personal comforts and personal satisfactions, perhaps personal happiness, for vital public interests. A people devoted exclusively to the satisfaction of sensual appetites is not, strictly speaking, a citizen body at all. It is a collection of private individuals, each concerned with his private gratifications.

If this is so, the sheer indulgence of the appetites is not a merely private matter, as at first appears, but a matter of vast public consequence. For this reason, something short of virtue full strength—something Clor calls "civility"—is a necessary element of modern liberal democracy. The term "civility" is often used to denote a certain courtesy, a certain gentlemanliness, a certain taste for higher things characteristic of the educated aristocrat. Clor uses it with connotations that point more in the direction of a less elevated

\[^{73}\text{Ibid.}, \text{pp. } 170-1, 191, 198-9.\]
\[^{74}\text{Ibid.}, \text{p. } 200.\]
\[^{75}\text{Ibid.}, \text{pp. } 200-202, \text{also pp. } 109-110.\]
decency, moderation and public-spiritedness, or a kind of democratic civic virtue, but it cannot be said that he does so with sufficient clarity. For the difference between the civic virtue requisite in a liberal democracy and virtue itself deserves fuller treatment if we are to be guided, as he suggests, by the one rather than the other. If civility or civic virtue is a requirement of liberal democracy, how is it to be nurtured? Since the limited regulation of the press to restrain obscenity works through prohibitions, what positive education or institutions can actually be expected to cultivate civility?

In the ancient understanding of politics, not founded on liberal principle, virtue and both its aristocratic and democratic civic approximations could be granted immediate recognition and care. According to this understanding, as we have seen, democracy as a form of government still involves ruling and being ruled, and therefore requires both the virtues of ruling and the virtues of obeying to the extent that these can flourish in the people. A democracy composed of fools, knaves, profligates and cowards will neither rule nor be ruled well, and cannot long endure. But modern liberalism does not give direct recognition to the need for such virtues in the people. On the contrary, it seems to suppose that the combination of individual self-interest, legal penalties and political checks and balances suffice as guarantors of good rule. And liberalism's subjectivizing of the pursuit of happiness, by which happiness itself is considered a matter of individual definition and choice, adds to the predicament, for it encourages both capitalism and hedonism conjointly, and thus intensifies the problem of nurturing civility or civic virtue.

When one compares the view of liberal democracy shared by the Founding Fathers with the actual conditions (as well as views) of today, one cannot help but be struck by the relative sobriety of the former and the intemperance or license of the latter. In Jefferson, Hamilton and Madison there still remained a vivid sense of what the model citizen of a liberal democracy should be like. And there can be no doubt that they cherished, and thought necessary, a set of moral qualities that included public-spiritedness, moderation, and simplicity of manners, which they contrasted with the dissoluteness and extravagance of the titled nobility in Europe. But it is unclear

76See, for example, the reference to moral and intellectual qualities in Federalist Papers # 55, 57, 68, 73, 76, 78, 85; also, The Complete Jefferson (Duell, Sloan and Pearce, New York, 1943, ed. by Saul Padover), pp. 1057-8.
how they expected to nourish and perpetuate such civic virtues if they could not rely on natural self-interest to furnish them spontaneously. To what extent did they count on either governmental or non-governmental institutions to do so? As to the latter, we may suppose that they relied on the continuation of the family and local community, on some ameliorated influence of the churches, and on private education of the kind wealthy gentlemen could sustain. In the governmental domain, the thoughts of Jefferson (and Madison) at least were directed toward public education as a vehicle for training citizens and statesmen, and as a means of furnishing members for the occupations and learned professions.77

The essential contribution of the family and Christian religion to American Democracy is given explicit emphasis in Tocqueville’s classic study of this country in 1831-2. Tocqueville was impressed by the sobriety characteristic of American democracy:

> I do not question that the great austerity of manners that is observable in the United States arises, in the first instance, from religious faith. Religion is often unable to restrain man from the numberless temptations which chance offers; nor can it check that passion for gain which everything contributes to arouse; but its influence over the mind of woman is supreme, and women are the protectors of morals. There is no country in the world where the tie of marriage is more respected than in America or where conjugal happiness is more highly or worthily appreciated. In Europe almost all the disturbances of society arise from the irregularities of domestic life. . . .78

Shortly after this passage in Tocqueville’s text we come across one even better known:

> . . . Despotism may govern without faith, but liberty cannot. Religion is much more necessary in the republic which they (anti-religious republicans) set forth in glowing colors than in the monarchy which they attack; it is more needed in democratic republics than in any others. How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed? And what can be done with a people who are their own masters if they are not submissive to the Deity?79

78Tocqueville, op. cit., I, p. 315.
79Ibid., p. 318.
We should note that Tocqueville speaks here not as a religious sectarian but as a political thinker weighing the moral, social and political effects of religion. His remarks are important because they give us some idea of the relation between democracy and morality, place special emphasis on sexual morality and the family, and also portray vividly the “austerity of manners” that typified America in 1830 as contrasted with Europe. They throw a somewhat different light on the activities of the Citizens for Decent Literature than we receive from Charles Rembar, and in fact compel us to reflect more seriously on what Tocqueville would take to be a deep and severe crisis of present-day democracy.

The crisis in which we now find ourselves—and which is reflected in the struggle over the regulation of the press—derives not only from the changed objective characteristics of society caused by scientific industrialization (affecting both production and communications) but from the changed conception of what is necessary for a democracy. On one side are those innovators, like Rembar, whose main concern is the extension of liberty as a necessary condition of perfect scientific and artistic freedom and sexual improvement. On the other are those, like Clor, whose main concern is the moral underpinnings and moral stature of democracy and who find in the prevention of the main abuses of the mass media a necessary instrument for preserving a minimal public morality. But the pro-regulationists would have to admit that suppression, however vital, is essentially a negative instrument, and that what must occupy them to an even greater degree is restoring, or replacing by some other means, the positive moral nurture that used to be forthcoming from the family, religion, and education. No doubt their first objective must be the re-education of the so-called “educated public” through such writings as Clor’s, and thereafter the revival of higher and lower education in a sense reminiscent of their beginnings and history, which always kept centrally in mind the education of citizens and statesmen.

These recommendations fly in the face of contemporary libertarianism because its supporters have so completely lost sight of the problems attending the single-minded maximization of liberty. Perhaps enough of the older tradition remains with us, however, to permit a renewed understanding of the defects of liberty regarded as a principle sufficient unto itself. Americans have enormous confidence in formal education, and they still recognize that such edu-
cation must have moral, social and political as well as intellectual ingredients. Public education is still viewed as somehow necessitating training in democracy, or as a preparation for life in a democracy. And there still persists some sense that the influences to which the young are exposed outside the classroom and school must not be totally inconsistent with what they receive inside.

Some remnant of this sense is shown even among libertarians in their attitude toward the violence displayed in movies and on television, as well as in comic books and cheap paperbacks. Why this concern if these media have no influence? And why worry when the social sciences have as yet discovered no necessary connection between witnessing portrayals of violence and engaging in acts of violence? Indeed, the case of violence contains strict parallels with the case of sex, and it begins to provide an answer to Rembar's question as to why (or whether) those favoring the regulation of the press should concentrate on preserving sexual morality alone.

Clor's argument in favor of civility clearly implies that sexual license in the media cannot be the sole object of public regulation, though it is the only one to which he attends—quite properly—in a book devoted to the problem of obscenity. The public has an equally legitimate interest, flowing from the same source, in assuring that positive appeals to violence, to racial and religious hatred, to treason and the overthrow of democracy, etc. be prevented from having any substantial influence, through the mass media, on any substantial part of the public. If civility means anything, it means the ability to live together and to cooperate as members of a democratic society in achieving publicly essential ends. Publications noxious to this ability, whatever their form, are inherently liable to public scrutiny. They are more immediately dangerous when they directly incite to illegal action, but when they clearly prepare the way for such action, or engender attitudes that clearly threaten the public and its essential institutions, they are also, in principle, subject to public scrutiny, even though the public may prefer to practice patient and hopeful toleration rather than interference.

What I have just argued must not be attributed to Clor himself, who may reject it in whole or in part. But it is suggested by the logic of the problem he faces in connection with obscenity. Only at considerable cost has the public mind avoided grappling with these matters in recent years. For is it not evident that written and oral incitements to racial and political hatred and violence, the call for the assassination of public officials, and the open distribution
of directions for bomb-making have had their effects in terms of actual violence across the country? Has the public done what it can to protect its own officials, high and low, and its various citizen groups, from such violence directly encouraged through handbills, leaflets, newspapers, paperbacks and speeches? What if, however unlikely, such incitement takes the form of movies or even television programs?

But Rembar's question has not yet been completely answered. Is it an "outrageously immoral fact" that sexual immorality is the only immorality concentrated upon by pro-regulation forces? In his book he states that "Nothing has ever been censored on the ground that it had a tendency to promote dishonesty or cruelty or cowardice." This observation probably comes close to being true, though one could easily imagine Nazi tracts enjoining cruelty to Jews, or sadist literature (of the kind Justice Douglas did not see fit to mention as acceptable "deviant" reading matter) that might properly elicit governmental control. Sado-masochism did, in fact, play an important role in the Mishkin case of 1966. Nevertheless, the reason why "a tendency to promote dishonesty or cruelty or cowardice" has not explicitly been the subject of censorship is that writers and producers rarely attempt to cultivate these vices. Citizens sense quite strongly that such appeals do direct injury to the body politic (they do not as easily see the ramifications of appeals to lust), and so the temptation on the part of authors aiming at commercial success to create these appeals is usually minimal. It is hard to make the liar or coward (or the sadist) a broadly attractive figure, and much easier to make one of the immoral or illegal lover, so long as he seems otherwise innocent. One can imagine, however, a flood of pacifist movies that might greatly strengthen the reluctance of citizens to sacrifice their lives in war for their country, thus providing

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80We may remember the opening sentence of Justice Douglas' dissent in Dennis v. United States (1951), remarkable not only for its very traditional reference to obscenity and immorality but for the light shed on our recent national turbulence by the limitations it places on political expression: "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality...."

81Rembar, p. 17.
a formidable challenge to the very preservation of any liberal society faced with powerful enemies abroad.

VI

While one can reasonably argue a pressing public interest on the part of liberal democracy in the essentials of public morality or civility, one must also show that the legal regulation of the press is possible without an arbitrariness that might endanger the massive public interest in freedom of speech and press. Laws embodying such regulation must be worked out with great care, and with a precision at least sufficient to allow of objective (rather than merely subjective) application by law-enforcement agencies, judges and juries. To accomplish this in connection with obscenity requires first a definition. Clor provides one, whereas Rembar is naturally loath to define that which, in both law and reality, he seeks to terminate. Clor proceeds by threading his way between the Catholic view, which covers too much, and the view of the Kronhausens (identifying obscenity with pornography) which covers too little:

Obscenity is a way of looking at man which dehumanizes human purposes and human beings. It is, after all, what the dictionary says it is and what the etymology of the word implies: it is the 'filthy,' and it is that which ought to be 'off the scene,' of the public stage of life. 82

Obscenity treats human beings as mere bodies or animals, whether in connection with sex, violence or death. Sexually, it is material that tends predominantly to "arouse lust or appeal to prurient interests"—the definition given in Roth—where "lust" means primarily "depersonalized" sexual desire:

What the law is concerned about is the systematic arousal of passions which are severed from the social, affectional, aesthetic, and moral considerations which make human relations human. . . . Obscenity arouses the desire for sex as such—not for sexual relations with a person for whom one cares. In the eyes of impersonal lust, human qualities are stripped away and a person becomes an instrument existing solely for the pleasure or manipulation of others. 83

82 Clor, p. 242.
88 Ibid., p. 244.
Judged by this standard, Clor tells us, *Fanny Hill* is obscene, but not *Lady Chatterley's Lover*. The former concentrates on sexual encounters in a variety of forms and pays little attention to character or plot; the latter contains only eight sensual passages occupying less than a tenth of the novel and envelops characters and actions in a larger theme: "When physical acts are presented, they are always presented in their human context; their supra-biological meanings are never lost or depreciated." 84 But does this statement apply precisely to Lawrence's book? In fact, when Connie and Mellors first meet (in the scene quoted by Clor) they are attracted by little more than lust. In addition, the attention Lawrence pays to physical detail—to the description of bodies and of the feelings accompanying animal sensuality—is not sufficiently appreciated by counting passages and pages: most readers recognize that these descriptions somehow constitute the high points or the essential meaning of the book. Moreover, one cannot forget what Lawrence takes pains to indicate: that both lovers are in fact otherwise married and hence involved in glorified and unpunished adultery.

Lawrence's message, if we had to put it in capsule form, was that the key to human happiness lay in natural sexuality, from which develop love and tenderness. While it is already an exaggeration to say that "supra-biological meanings are never lost or depreciated" in the work, it is certainly true that the biological (sex) is made the essential source of the supra-biological (love and tenderness), and that the supra-biological quite emphatically does not extend to those normal or conventional obligations surrounding marriage society considers essential to its healthful preservation. In particular, Connie and Mellors are never viewed as citizens—as elements of political society. They live within political society, and are protected by it. Indeed, their very tenderness and charm are probably traceable not to primordial human nature but to a cultivation possible only within the framework of society. In Lawrence's view, however, their happiness require that they be freed of society's rules, conventions, or artificial restraints. And Lawrence's art is meant to act upon his readers in such a way as to make them more open to the allurements of untrammeled nature as experienced by his protagonists. Above all, the artificial modesty of the female, which prevents her from accepting her own sexuality, must be destroyed: hence the noticeably

greater attention given by Lawrence to what Connie perceives and feels. And this massive assault on the power of convention (and simultaneously on the ruined aristocracy of Europe and Christian asceticism) is given emphasis by the adoption of popular vulgarity, so that the candor of nature, with its sheer biological references, replaces the deceit of conventional language. Certainly the sexual vocabulary employed has little of the "supra-biological" about it.

Seen in this light, the predicament of judging the book's obscenity becomes much greater than Clor admits. And even Rembar attests to the correctness of this view, since he dismisses the possibility of defending the book on the ground that it did not appeal to lust or prurient interest, normally understood. Judge Woolsey's characterization of the sexual content of Joyce's *Ulysses* as "emetic, not aphrodisiac," would not work for *Lady Chatterley*:

> To be sure, Lawrence put a lot in his novel besides the sex. But sex was its theme, and the presentation of the theme involved the specific description of sexual experience. The 'erotic passages' took up much more of the book than those in *Ulysses*. Indeed, if impact as well as extent was considered, it was the nonsexual passages that might be deemed isolated. Nor could Lawrence's descriptions be said to make sex unattractive. What Mellors and Connie were up to sounded pretty good. Certainly not emetic and to most people, probably aphrodisiac.\(^{85}\)

If this is true—if sex is the theme of the book, and if the book's impact is concentrated to a considerable degree (even dominant degree) in its erotic passage—then the book must substantially arouse the very "impersonal lust" that Clor finds central to obscenity. We may grant that Lawrence conveys, in addition, a broader understanding of those "social, affectional, aesthetic and moral considerations which make human relations human," but the impact of the sensual per se is, nevertheless, pronounced throughout. Moreover, Clor may be mistaken in requiring only that the biological or animal element of lust be suffused with "human" meaning, or, in short, that love be added to lust. As he himself tells us, society, civilization, and liberal democracy require not only such emotional or social emendations of lust but political, legal and moral ones as well. Love added to lust may be better than lust by itself, but both are ill-directed toward someone else's legal mate. There are citizen obligations that

\(^{85}\text{Rembar, p. 22. See also pp. 49, 94, 219.}\)
must control humanized lust if civility and decency are to be re-
tained. We ought not to make advances to a married woman, or
forsake one’s own partner and children; we ought not to make im-
mediate sexual advances to anyone, married or unmarried; we
ought not to think that bodily attachment is a sufficient warranty
of an enduring love relationship; we ought to restrain our sexuality
until we are old enough to make a proper choice of partners.

By stimulating natural sexual desire or lust, Lawrence wrenches
it free of the network of moral and legal obligations that make it
consistent with society and civilization. And it is frivolous, or adoles-
cent, to think that the deep and not entirely unviolent or innocent
forces of sexuality can be liberated without deeply affecting society
as a whole. Will lust-with-love necessarily prevail over lust itself
when the wholesomeness—indeed, the sanctity—of sexual satisfac-
tion as such is preached up and down the land? Should any restraints
be taught the young? How will it be possible to keep anyone past
puberty from sexual experience, and on what grounds could it be
done? What will be the effect of continuous sexual experience on the
stability of love (and, even more important, of marital) relation-
ships? If fidelity is not an obligation, why should it last one minute
longer than the feeling of love itself? Is there a fixed parental ob-
ligation to care for one’s children?

Only considerations such as these make intelligible Chief Judge
Conway’s attempt to apply the 1954 law of the State of New York
to movies (e.g., Lady Chatterley’s Lover) which “alluringly portray
sexually immoral acts as proper behavior.” But there is not the
slightest reference to them in Justice Douglas’ Mishkin dissent or
his Fanny Hill concurrence, where the emancipation from sexual
restraints of almost every kind is presumed to be self-evidently good
not only for individuals but for society at large. Even in Justice
Brennan’s Roth opinion, with its paean to sex as “a great and
mysterious motive force in human life,” there is no explanation
why materials appealing to prurience or “having a tendency to excite
lustful thoughts” (appealing, that is, to this very “motive force”)
should be regarded as publicly noxious. And the problem completely
disappears when Brennan declares in Fanny Hill that only material
utterly lacking in social value can be considered legally obscene. For
what is that negative element ordinarily called obscenity that can
be overweighed by attestations of social value? Why is it negative—
i.e., publicly harmful? What social, political or moral values are
threatened by lustful appeals? And does the public interest in the
free exchange of ideas necessarily protect artistic appeals to lust?

In *Roth*, Brennan tells us, in effect, that even ideas with a cer-
tain amount of social importance may be "excludable because they
encroach upon the limited area of more important interests," adding
that "implicit in the history of the First Amendment is the rejection
of obscenity as utterly without redeeming social importance." Later
in the opinion he recurs, implicitly, to the notion that obscenity does
unacceptable public harm when he states that the door barring fed-
eral and state restrictions on the freedom of speech and press "must
be kept tightly closed and opened only the slightest crack necessary
to prevent encroachment upon more important interests." 86 Ob-
scenity, then, violates public interests paramount to those protecting
freedom of speech and press. Why is this so? And why, then, should
the presence of even very slight social value in obscene materials
protect them? How great, in short, is the harm to the public interest
done by obscenity (the appeal to prurient interest) taken by itself?
If this harm is so great as to justify governmental encroachments
upon the freedom of speech and press in the first place, does not the
public interest require that redeeming the material involved through
other qualities should be made exceedingly difficult?

Rembar can look with equanimity upon the emanicipation of
at least all books (he admits that movies may require different
treatment) only because he thinks the long range effect of this
emanicipation will be the end of obscenity. For a short while the
thrills of salacity and lust will continue, and even magnify, but these
"anti-sex" manifestations will disappear once the unnatural restraints
on natural sexuality pass away. Rembar, as distinguished from
Justice Douglas, does not affirm the desirability of catering to every
kind of sexual interest, normal or abnormal. But he emphatically
agrees with D. H. Lawrence that sex must come into its natural own,
and that human happiness depends on its doing so. His case falls
to the ground, however, if he and Lawrence have underestimated
the moral, social and political importance of sexual restraints and
obligations to the preservation of both civilized society and liberal
democracy.

In his two final chapters, Clor wrestles with the problem of formulating workable principles for regulating obscenity in a liberal democracy. He begins by considering the older judicial view (instancing opinions as recent as 1929 and 1934) that no literary value can outweigh substantial harm done by a book to the public morals and public decency. The newer view, of course, is that any small amount of literary value can outweigh any large amount of obscenity. Clor demonstrates convincingly not only that society has an important interest in good literature but that liberal democracy—with its emphasis on “comfortable self-preservation”—requires artistic visions that raise the soul of the citizen to higher spheres. He is perfectly aware, however, that much of modern art (with art criticism in tow) seeks to destroy all conventional standards and restraints, and therefore supplies materials most in need of public regulation at the same time that it vehemently opposes such regulation.

Clor uses Henry Miller's *Tropic of Cancer* as a case in point. This work uses obscenity and vulgarity in a conscious attack on the restraints placed by society on the elemental passions:

But it cannot be denied that Miller's work is *serious* literature. He uses obscenity for a serious literary, intellectual, and 'moral' purpose. The anomaly lies in the fact that the purpose itself tends to be obscene.  

Clor had previously suggested that liberal society must strive to protect not only works of acknowledged excellence, but also works of acknowledged seriousness. In doubtful cases such seriousness should suffice to protect the work in question. In connection with Miller's work, which he calls a clearly "borderline case," he counsels letting the work alone, but only on the grounds of "practical necessity" rather than of any substantial social value it actually possesses.

Clor does not attempt to justify this "practical necessity," except implicitly by his reference to Miller's work as "typical of a prominent movement in modern literature." But by this point the picture has

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87 Clor, p. 248.
88 Ibid., p. 254.
89 Ibid., pp. 252-4, 273.
become confused indeed. For Miller’s attack on society, abetted by
his prominent use of obscenity, hardly constitutes the kind of doubt-
ful case in which, according to Clor’s own principle, the “serious-
ness” of the work might serve to protect it. And what becomes of
Clor’s later rule that a judge applying “contemporary community
standards” in detecting obscenity should do his utmost to look for
such standards to the highest levels of the public mind as much as
possible? If *Tropic of Cancer* is tolerated, should its host of lesser
imitations be banned? Is it simply because Miller’s work is “typical
of a prominent movement in modern literature” that it should not be
banned? And is this the case because “contemporary community
standards” have in fact expanded to tolerate Miller’s work? Or
is it because a vocal and perhaps sizeable segment of the literati
and of the so-called intellectuals would raise an audible protest if
Miller’s work were touched? It can hardly be argued that either
the general public mind or the public mind at its highest and most
responsible levels would fail to find Miller’s work obscene. Tolerating
it would therefore be tantamount to granting a veto to the pro-
ponents of this anti-social movement in literature—i.e., to those who
by faith and occupation are dedicated to the very ends any public
regulation of the press must oppose.

It seems that Clor prefers to avoid doing battle with the literati
on their own ground: he concedes them their “serious” classics
in the hope that they will sacrifice the less “serious” imitations. This
strategy has two apparent defects. First, it is not likely to work:
many of the literati will defend *Fanny Hill* with almost the same
vehemence as *Tropic of Cancer*. Secondly, if it did work, it would
permit the corruption of those elements of the population (mainly
associated with universities and literary affairs) likely to read Miller
while preserving the public morals and decency of those less educated
parts of the public who would be less likely to read him and who
would also be kept from reading his cheaper imitators. Is it, then,
practical and wise to allow such a distinction between the few and
the many to arise? Are they not parts of one public, subject to
common restraints and obligations? Can the many remain un-
corrupt when the few, who are leaders, are open to corruption?
And if one had to choose, is it more important that efforts be made
to inculcate and preserve a sense of public responsibility in the many or in the few?

One must bear in mind that our national judicial premissiveness in connection with obscenity is less than a decade old. Even up to *Roth*, elements of the older tradition were still retained, and only with the trinity of cases in 1966 (*Fanny Hill*, *Mishkin* and *Ginzburg*) did a radical change clearly occur, even though it was prepared by the language of *Roth* itself. This is a fact of some importance. The sanctity deriving from longstanding precedent has not yet been won by the new rule. It can still be overturned, or modified in a direction more consistent with the public interest. This connection with an older tradition will be substantially assisted by books like Clor's, which attempt to reason not only with Supreme Court justices but with all parts of the educated public, including the literati and their friends. It is then a matter of some moment that the problem remains unobscured. The question would be simpler if *Fanny Hill* were the typical case: its obscenity is certainly not redeemed by other qualities. But the two recent works of greater repute that Clor would save, one in principle (*Lawrence's*), the other by practical necessity (*Miller's*), may require condemnation—do, in fact, require it if the reasonings presented above are correct. It is better to face this likelihood now: some highly reputed recent works are obscene by intent and effect, and the fact that they are highly reputed only demonstrates the magnitude of the decadence of our recent literature, not the wrongness of the principle to be applied in the public interest.

Given this decadence, it may even be argued that a clear and strong assertion of the public interest through adequate legislation and judicial review is now more urgently needed than ever before. Either the regulation of the press in the public interest has a clear and strong principle capable of winning broad rational agreement, or it is better left unattempted. The situation is such that to over-complicate or dilute the principle, far from providing a realistic or practical accommodation to existing prejudice, is to obfuscate the end being sought. When Charles Rembar defended *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Fanny Hill*, his general aim was constant and clear: to bring an end to obscenity, both in law and in fact. Those opposed to Rembar's libertarianism must take seriously his appreciation of the grave threats posed by the old law of obscenity to all three works. They must face the possibility
that the old law, even when modified to allow for a public interest in sustaining good literature, will condemn the very works Rembar has successfully defended in the recent past.

While it is always easier to grant a freedom than to retract it, this should not be regarded as an insuperable obstacle. Particularly with the flood of wholesale obscenity and pornography that has engulfed the world of print, movie and stage since 1966, the desire on the part of states to re-assert some form of regulation has been strengthened, not weakened. These excesses, now so obvious, make it possible to rejoin the longstanding tradition of the old law of obscenity and to make whatever emendations are consistent with its essential force as an instrument for preventing public harm. But its essential force requires the clear assertion of a public interest in morality and decency (or civility) superior to the right of the artist or producer to create whatever he pleases.

VIII

What kind of judicial rule can be fashioned to embody this principle? In Roth the Court made legal obscenity depend on prurient appeal to the average person, applying contemorary community standards, of the dominant theme of the material taken as a whole. This rule contains several difficulties. If the effect of the work on the average person is in question, why add "applying contemporay community standards"? The important element requiring public attention is the possible harm done to the average person himself, and the presumption must therefore be that his own standards are those that are appropriate in judging prurient appeal. Otherwise stated, either "contemporary community standards" are, by definition, those of the average person, or they are not. If they are not, whose standards are they? Are they the standards of the most "advanced" or "liberated" parts of the community? Are they the standards (as Clor suggests) of the better and more responsible parts of the community? And what community is involved? If state or local laws are being applied, should it not be the state or the locality? And who can best judge the effect of the work on the average person? Is it the average person himself—in short, a jury—or can it be a judge as well who must therefore ask himself what the likely effect of the work will be on the average person?

These questions arise directly from an effort to clarify the meaning of the Roth rule. But one can also question its adequacy, how-
ever clarified. Why must the dominant theme of the work have prurient appeal? Is this not already letting too much go by? Is there not a public interest in regulating writings or spectacles that have a substantial prurient effect, even if the dominant theme of the work is lacking in such an effect? The theme can be a war, or a murder, or a relation between two or more people, but it can be attended by obscene descriptions so marked as to leave an indelible imprint on the mind of the consumer. And if the effect of the work on the average person is the sole test of obscenity, how is it possible to make laws that look particularly to the effect on children, or on other parts of the population (e.g., homosexuals)? Finally, is reference to “prurient appeal” enough? Clor lists four obscene elements, two of which involve prurience, two the morbid treatment of harm to the human body. And the writings of Henry Miller furnish a fifth category, involving shocking sexual descriptions that do not necessarily appeal to lust but revolt. It may be that some of these phenomena do not properly fall within the meaning of obscenity, but the law should take pains to specify the ones that do, and on grounds that clearly indicate the public harm in question.

Concentrating, now, on that which is sexually obscene, the law should also give thought to the problem as to whether lustful appeal and the encouragement of sexual immorality are identical or separable categories. The movie Lady Chatterley's Lover was an extremely expurgated version of the book, with almost all sexual details of deed and discourse removed. But it still had the effect of making adultery, under certain circumstances, look acceptable and even desirable. Chief Judge Conway was right in claiming that it did indeed “alluringly portray sexually immoral acts as proper behavior,” and the part of the New York statute being applied did not deal with obscenity but with acts of sexual immorality presented as “desirable, acceptable or proper patterns of behavior.” It appears, then, that the categories of obscenity and encouragement to sexual immorality are separable, and the public interest in each, while essentially related, is not precisely the same.

The legal definition of obscenity, in its prurient aspects, should depend on the public interest in preventing moral, social and political harm. It must therefore be concerned with the likely effect on

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91See Rembar, pp. 175, 184, 219. For Clor's list, see p. 245.
92Clor, p. 44.
any substantial part of the public of the material involved. And "likely effect" must mean, in the context of this concern, any substantial or significant (rather than minor or incidental) effect, and not merely the effect of the "dominant theme," which is already the extreme case of bad effect. Thus re-defined, legal obscenity consists of material likely to have a substantial prurient (lust-arousing) effect on any substantial part of the public. The judge or jury trying such material must attempt to ascertain whether it is likely to have such an effect. Each must ask this objective question, and must not simply apply his own subjective reactions to the material. Testimony can be received from witnesses who might be in a position to throw light on the issue of "likely effect," and on the issue of how substantial the obscene effect is and on what part of the public, but the ultimate judgment of these matters remains with the judge or jury. As to effects on the general public, conceived in terms of the average adult population within a state or locality, there is no doubt that a jury, by its very nature, will be able to assess likely prurience better than a judge.

If the Supreme Court decides to retain the "dominant theme" element of its definition of obscenity, it would be unwise, from the public's point of view, to permit any redeeming value to be attached to any other aspect of the work. Such a work is already so thoroughly harmful that no other value should be permitted to speak in its behalf. The idea of redeeming social value properly comes into play only when the judicial rule prohibits any substantial prurient effect. Here, since the problem is one of circulating a whole work, and not merely the acceptable parts of a work, it seems appropriate to introduce the idea of other qualities great enough to redeem the work and permit its public circulation. But no minimal value should be an acceptable counterweight to substantial obscenity. The public interest can only be served if very great intellectual, literary, historical or other value exists in the work. And here again, while testimony may be solicited from experts, the ultimate judgment must be made by judges or juries.

Clor would clearly exempt works of "acknowledged excellence" from his rule, and would also strive to protect works of "acknowledged seriousness." Neither of these considerations should be incorporated in the rule itself. Since exceedingly few, if any, literary classics (works of acknowledged excellence) are obscene in their dominant theme, real problems will arise only in connection with
substantial prurience. But the weight to be accorded acknowledged excellence as well as acknowledged seriousness would have to be assessed by judge or jury, and should be very great in the former case and of only lesser importance in the latter. It should be made difficult, not easy, to overcome the defect of substantial obscenity—otherwise the public interest in sexual morality, which is central to social and political life, will be subordinated to the public interest in literature, which is more peripheral. In the realm of the movies, for example, only extraordinary artistic or other merit should suffice to save a film that is substantially obscene: in fact, in this particular medium, substantial obscenity should perhaps serve in the way obscenity of dominant theme serves in the case of books, permitting no merit whatsoever to redeem what is already grossly harmful.

The rule suggested above is such as to involve two principal places where differences of judgment will appear: 1) in assessing whether prurient effect is substantial; 2) in weighing the value of other redeeming qualities. Regarding the former, judges and juries may be supposed acceptable and even good arbiters, but are they so regarding the latter? Perhaps the average judge will prove superior to the average jury in this respect, and judicial innovations (e.g., administrative boards) to cope with the peculiarieties of this kind of problem in the first instance are not unthinkable either. Nevertheless, a serious case can be made for the adequacy and appropriateness of juries too. As average people they are the best representatives of the public at large, and if it is the public at large that is most threatened by obscenity, its representatives have the greatest right to grant variances, so to speak. Moreover, if literature is in fact in the public interest, it should be possible for those who are its greatest devotees to make their case to the public itself, and in terms the public can understand. The only other alternative (apart from judicial innovations) is to grant a kind of supremacy to the exponents of literature which would surely undermine the moral and other interests of the public.

It is important to note, at this point, that the need for proving very great merit in a substantially obscene work in order to save it can only have a salutary effect on literature and literary critics and scholars as well as on the public. It was embarrassing to those who love good literature to witness the spectacle of critics and scholars defending at trial the literary merits of Tropic of Cancer, let alone Fanny Hill. Whether these experts know it or not, the result of their
testimony was not only to demonstrate openly their insensitivity to public moral requirements but also to degrade literature. For if the ability to write well and tell an interesting story are taken by themselves to distinguish art from trash, regardless of substance or content, literature has in fact been degraded. Gone is the sense of what separates Aristophones' *Lysistrata* from *Oh! Calcutta!*, or Swift's description of the Yahoos from Miller's *Tropic of Cancer*. This degradation may receive a salubrious setback if the burden of proving literary or other merit is made much more difficult than it has been recently.\(^{93}\)

**IX**

Clor's study, like Rembar's concentrates primarily on literary materials rather than on the movies, and on adult consumers rather than children. Both men clearly allow for the possibility that movies and children require special treatment,\(^{94}\) but the clear presumption of such regulations can only be that movies are capable of working a special kind of harm, and that children are especially susceptible to harm. In fact, given the massive and increasingly corrosive influence of movies today, and the degree to which they have begun to invade the television screen as well, the subject of obscenity deserves to be studied with this medium as the primary focus of interest. For many a libertarian holds different opinions about movies and books, and will concede that the visual encouragement of violence, if not the visual excitation of prurience, requires public regulation. Certainly few parents have protested against their inability to bring young children to x-rated movies, though it is clear that self-regulation by the producers has proven in other ways deceptive and against (and not merely insufficient for) the public interest.

Clor gives little direct attention to the distinction that has occupied the Supreme Court between advocating ideas and inciting to action, though he certainly emphasizes the related distinction between argument and art.\(^{95}\) Similarly, he says little about the distinction between prior and posterior restraint as techniques of regulation—an omission largely justified by his attacking the more fun-

\(^{93}\) On the effect of complete freedom on the arts, see Walter Berns, "Beyond the (Garbage) Pale, or Democracy, Censorship and the Arts," in Clor's Rand McNally collection.

\(^{94}\) Clor, pp. 53-4, 275-6; Rembar, pp. 486, 501-2.

\(^{95}\) See notes 62-4 above and the passages to which they belong.
damental issue as to whether there should be any governmental restraint on obscenity at all. Nevertheless, some systematic reflection on the different uses, and implications, of the two techniques would have been helpful, and would even have been necessary (as he seems fully aware) had he done more with the problems posed by movies. Such analysis may have served another purpose as well, since the background of the word “censorship” used in Clor’s sub-title (Censorship in a Liberal Society) associates it with prior rather than posterior restraint, and since it is still so associated in the popular mind (and in the Oxford Universal Dictionary). From this point of view, it may have been more accurate as well as more prudent to use the general category, in the sub-title and elsewhere, of “regulation of the press” rather than “censorship.”

We may vouchsafe a word, finally, on why our society finds itself beset with such problems. Insofar as obscenity has hitherto played a role in great literature, it has done so peripherally, or as a part of comedy, but not with blatant overriding prurient intent. Great writers, almost without exception, knew well how to transcend sexual mores which are at least to some extent conventional without openly shocking them or seeking to destroy their essentials. And they restrained themselves not only in their own interest but in the interest of society itself. The situation we have recently witnessed in this country and in other countries of the West derives, in part, from an inherent tendency to drive liberty to an extreme. But it derives even more from a combination of historical developments in politics, philosophy, science and art, among which may be cited: 1) the tendency of individuals in liberal society to lose sight of the degree to which they are formed by society and in need of moral education; 2) a continuing modern assault on the otherworldliness and ascetic ideals of Christianity in the name of natural or worldly satisfactions; 3) reactions against the seemingly bleak materialism and artificial hedonism of liberal capitalistic society that lose sight of this society’s real accomplishments; 4) the presumably novel discovery by psychology of the instinctual life, and the superficial popularization and hence vulgarization of this theme; 5) the typically modern need to unearth continually new objects of rebellion, and the finding of an apt and almost limitless supply in supposedly conventional restraints from which men must be liberated; 6) the comparatively recent view of the artist as revolutionary emancipator, whose purpose it is to destroy all obstacles to popular happiness.
More generally, the background of modern life has been provided by philosophies which deny an intrinsic order to human nature, and hence to human happiness, and also, more recently, by a social science that is inherently hostile to common opinion and its moral judgments. The net result of all these forces, especially in recent years, has been to break the liberal ship of state loose from its traditional moorings. But society cannot receive its primary guidance from scientific or artistic claims to truth. Its needs must be understood from within its own perspective—i.e., the perspective of active citizens and statesmen, and of those whose reflections are guided by the common concerns of active men. D. H. Lawrence and Charles Rembar wish to liberate natural sexuality: they have no concern for sexual obligations or the family. Justice Douglas wants to liberate the various "normal" and deviant groups: he pays little heed to the common elements of human nature or to the need for social and political cohesion. Henry Miller seeks to liberate the elemental passions from society's artificial constraints: but he seems oblivious of the fact that elemental passions are hardly innocuous, and of the likelihood that a world based on them would move either toward totalitarianism or savagery. American political (and judicial) thought in recent years has suffered badly from the intrusion of such puerilities into public life. For their effect is constantly to pull society toward false and extreme solutions, to polarize the community into liberators and traditionalists, and to make moderate politics impossible.

Particularly in these times, when the "advanced" forces of intellect and imagination are pitted against sound practical judgment, liberal democracy needs a ballast—a heavy, central weight—to keep it from pitching with every wind or overturning. The federal judiciary, headed by the Supreme Court, can help provide such a ballast. But this will require judges whose understanding of the basic law is tempered by political sagacity, and whose steadfast independence and clarity of mind can resist the attractions of merely popular doctrines. Wherever such men exist, Harry Clor's book, more than any other, will help them think through the problem of obscenity.

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