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This book review deals with Supreme Court decisions and does not address state law.

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The End of Obscenity. By Charles Rembar. New York: Random House, 1968. Pp. 528. $8.95.

The End of Obscenity was written, the author tells us, in "an attempt to offer an insight, to those who are not a part of it, into how our legal system works."[1] This slows the book considerably for the legal reader,[2] but should not dissuade him. It offers insights of other sorts to lawyers and to law students, since it is one of those all-too-rare books in which a lawyer unfolds the history of an important piece of litigation. The book begins with the author's retention by Grove Press in 1959 to defend *Lady Chatterley's Lover*[3] and ends in 1966 with his successful defense of *Fanny Hill*[4] for Putnam before the Supreme Court. In between is the story of the *Tropic of Cancer*[5] litigation.

"The end of obscenity" is the author's victory cry. If a writer can produce something not "utterly without value," he and his book are now safe from obscenity prosecution. "That is the meaning of the *Fanny Hill*[6] case. So far as writers are concerned, there is no longer a law of obscenity,"[7] the author writes. The victory came, he observes, with the opinion by Mr. Justice Brennan in *Fanny Hill* which "made law of the 'value' theory,"[8] the goal which Rembar had set out to reach some seven years before. True, only Mr. Justice Fortas and the Chief Justice joined in the Brennan opinion, but Mr. Justice Stewart seemed to accept the "value" theory under another tag and Mr. Justice Harlan accepted it in federal cases. Finally, Justices Black and Douglas concurred as a result of their "absolute" position against obscenity prosecutions. "Whether there were three or four or five Justices who sub-

[1] C. Rembar, The End of Obscenity 4 (1968) [hereinafter cited as Rembar].

[2] Perhaps the most remarkable excursus occurs when the author discusses a proceeding begun against Fanny Hill under the N. Y. Crim. Code § 22(a) (McKinney 1954), which allowed proceedings for destruction of offending books. The author notes the procedure was sustained in *Kingsley Books v. Brown*, 345 U.S. 436 (1957), with an opinion by Mr. Justice Frankfurter likening the offending books to "deodands of old." There follow several pages on the concept of deodands with citation to the views of Blackstone and Holmes, after which the author returns to Fanny Hill. Rembar at 227.

[3] D. Lawrence, Lady Chatterley's Lover (1959 ed.). The book was written in 1928 and never officially published in the United States until the Grove Press edition, according to testimony in the case.

[4] J. Cleland, Fanny Hill: Memoirs of a Woman of Pleasure (1960 ed.).

[5] H. Miller, Tropic of Cancer (1961 ed.).

[6] A book named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[7] Rembar at 490.

[8] *Id.* at 480.

http://laws.findlaw.com/us/345/436.html

scribed to the value theory, it was enough, so long as there were two others who would forbid all suppression"[9] the author concludes.

Roth v. United States[10] had established a "two-level" approach to first amendment speech. Obscenity, like libel and fighting words, was not protected speech. The reason given was that obscenity is "utterly without redeeming social importance." The lawyer's (Rembar's) job was to establish the "converse" proposition; that if a book is *not* utterly without redeeming social importance, it cannot be held obscene. A book, obscene by the *Roth* test because "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," might still be protected if it has "redeeming social importance." At the hearing on *Lady Chatterley*, testimony was introduced to establish the social importance of the book and after an adverse decision by the Postmaster General, Judge Bryan of the Federal District Court for the Southern District of New York reversed the order with a permanent injunction against the New York postmaster.[11] The Court of Appeals affirmed[12] and there the case ended, although Penguin Books was later prosecuted in England for publishing a paper back edition.[13]

In 1961, one year after the *Lady Chatterley* litigation ended, Grove Press decided to publish *Tropic of Cancer*. Almost immediately sixty court actions were filed against it. "Censorship by multiplicity of litigation,"[14] the author observes. The Massachusetts Supreme Judicial Court upheld the publication of *Tropic of Cancer* and the decision was not appealed to the Supreme Court. Other decisions, pro and con, followed in New York, California, Wisconsin and Florida, until the Supreme Court granted certiorari and reversed summarily in *Grove Press v. Gerstein.*[15]

The greater part of the book concerns the *Fanny Hill* litigation for Putnam. The author was apparently involved at the planning stage

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[9] *Id.* at 481.
[10] 354 U.S. 476 (1957).
[11] Grove Press v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959).
[12] Grove Press v. Christenberry, 276 F.2d 433 (2d Cir. 1960).
[13] The decision turned on the book's morality, not on obscenity, and the question put to the jury by the prosecutor in his opening address was whether LADY CHATTERLEY was a book ". . . [y]ou would wish your wife or servants to read. . . . [g]irls working in factories." REMBAR at 156. The jury verdict was not guilty. *Cf.* REMBAR at 172-73, on the censorship of paperbacks. ". . . it is more than a matter of protecting the common man against a prurience that the elite may be permitted to enjoy. The censor's motivation goes deeper into a longing to preserve the common man from the ravages of intellect."
[14] *Id.* at 174.
[15] 378 U.S. 577 (1964). Five members of the court voted to reverse, citing their opinions in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Four voted to deny certiorari.

and persuaded the publisher to caption the work, on the dust jacket, as "The Classic Novel" rather than "A Literary Curiosity."[16] He was soon involved in trials in New York, Boston, and Hackensack (New Jersey). He considered *Fanny Hill* a more difficult book to defend than *Lady Chatterley* or *Tropic of Cancer*—partly because it makes sex attractive rather than disgusting and partly because of the bad reputation it had accumulated through the centuries.

The author describes the three trials in considerable detail with long verbatim excerpts, which prove most instructive and enlightening, from the examination of witnesses. The problems of qualifying witnesses and proving literary value by expert testimony are well illustrated, together with the difficulty of avoiding a "legal conclusion" which would invade the function of the court.[17] The chapter on the Massachusetts trial illustrates a devastating cross-examination of a prep school head-master, put on the stand as a literary expert by the state, who had failed to do his home-work.[18] In the chapter on the New Jersey trial, the cross-examination drew the witnesses into excess, so that they ended up "making unsupported statements that were inherently improbable."[19]

Finally, the author got to the Supreme Court with *Fanny Hill* and won a reversal of the Massachusetts decision against the book and the acceptance of the "value" test.[20] The appeal was complicated by an amicus intervention by the American Civil Liberties Union and by companion cases of *Ginzberg v. United States*[21] and *Mishkin v. New York*.[22] The American Civil Liberties Union espoused the position that obscenity could be suppressed only where there was a "clear and present danger of harmful consequences." The author found two practical objections to that argument. First, the required proof of clear and present danger is unavailable and second, the court was not ready to accept this line of reasoning.[23]

Mishkin and Ginzberg, unlike Putnam, were convicted of *circulating* obscenity and their convictions were affirmed by the Supreme Court. The author, as an attorney for reputable publishers, is con-

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[16] REMBAR at 224.

[17] *See, e.g.*, REMBAR at 254, 266, 275.

[18] *Id.* at 317-25. There was a later opportunity to strike, but the author concluded that the testimony of the hostile witness had done the defendant more good than harm.

[19] *Id.* at 344-94.

[20] A book named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[21] 383 U.S. 413 (1966).

[22] 383 U.S. 502 (1966).

[23] REMBAR at 420-21.

cerned with matters of literary value and wastes no sympathy on them. He asserts that Mishkin's books are prurient trash, and that Ginzberg was clearly pandering.[24]

In a closing chapter the author reflects briefly upon the world beyond the end of obscenity. He suggests first that a scintilla of evidence of value may not satisfy the "utterly without any value" test. The value must be discernible and demonstrable and must pervade the work—not just a few paragraphs.[25] Secondly, he suggests that other media may also pose problems of invasion of privacy or public decency, and that different results may follow from litigation involving these.

Perhaps obscenity law has been too preoccupied with erotic effect, the appeal to prurient interest and the clear and present danger of some unlawful act. Also at stake is an aesthetic interest and an interest in privacy. As the author puts it:

> [T]hat public things should be decent is not, intrinsically a bad idea. Perhaps the orthodox libertarian will find the idea more acceptable if it is put in terms of aesthetics. Consider it a form of zoning. . . . In public, a variety of rights run their course, and the traffic must be regulated. Along with the right of privacy, there can be said to be a duty of privacy.[26]

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FILM CENSORS AND THE LAW. By Neville March Hunnings. New York: Hilary House, 1968. Pp. 474. $12.50.

CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM. By Richard S. Randall. Madison: University of Wisconsin Press, 1968. Pp. xvi, 280. $7.95.

These two recently published volumes on film censorship provide a number of contrasts. The Hunnings work is descriptive, with little analysis; the Randall book contains much factual material thoroughly analyzed. The former deals with several countries, the latter only with the United States. The former is narrowly legal, while the latter deals not only with the law but also with movies as a medium of communication in a democratic society. Perhaps the largest difference is

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[24] *Id.* at 407-08, 428-34, 484-85.
[25] *Id.* at 489.
[26] *Id.* at 511.