Interpretation of civil liberty in Great Britain and the United States: a comparative analysis of freedom of speech and public security, order and decency.

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INTERPRETATION OF CIVIL LIBERTY IN GREAT BRITAIN
AND THE UNITED STATES: A COMPARATIVE ANALYSIS
OF FREEDOM OF SPEECH AND PUBLIC SECURITY,

ORDER AND DECENCY

A dissertation presented
by
G T MILES

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(Chairman of Committee)

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To Haven

for love and endurance
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CHAPTER I

THE COMPARATIVE STUDY OF
CIVIL LIBERTIES PROBLEMS

Statement of Purpose

Introduction

Analysis of the standards and concepts which a community invokes to solve civil liberties problems are usually found in the works of normative political theorists, who in some fashion must deal with the general problem of the relationship between the individual and the state; and in the works of legal scholars who scrutinize the practical resolution of these problems in courts of law. Concern with liberty is certainly not new, but it is a concern which is not given uniform consideration. There are, for example, literally hundreds of academic works written on various aspects of civil liberties problems in the United States. Indeed, the enormous amount of scholarly attention given to specific words and phrases, such as
"establishment of religion" or "abridging the freedom of speech" in one particular amendment to the U. S. Constitution, makes for an almost distinct category in the academic study of public law in America. Writings on the same problems in other nations, however, are not plentiful. Presumably the reason for this is not because other nations either lack the desire to protect individual liberty or that they offer perfect solutions to all civil liberties problems. Explanation is to be found rather in the fact that civil liberties questions in most societies do not emerge in the same legally-structured manner as in the United States. Another important reason for the emphasis on civil liberties in the U. S. is that because the problems are legally structured, resolution tends to take place in courts; and American courts have a more pronounced, or at least more visible, role in the political process than do most. All the various factors which make American courts, especially the Supreme Court, so intrinsically enmeshed in politics have also acted as forces which help codify problems of what is essentially democratic political theory in legal vernacular. Attention to civil liberties problems, therefore, has frequently
taken the form of an auxiliary category in American constitutional law, in which civil liberties issues are analyzed as a type of problem that besets a particular legal institution, usually, the Supreme Court.

The libertarian tradition in the United States has gained much, at least since 1937, from being so closely identified with the Supreme Court. But because the precise balance between liberty and order is the most challenging and delicate normative problem facing any democratic society, it would appear fruitful to look at the ways in which other nations and institutions settle such questions. Since other nations have civil liberties problems but not in the same codified form as in the U. S., a comparative analysis must shift the focus of attention from the context of a particular legal institution to civil liberties problems as they are dealt with in the total political process. The most convenient focus for comparative analysis of such problems falls, therefore, on certain statutes in different political systems which cause concern among libertarians.

In the hope that by broadening the context of civil liberties controversies we can perhaps gain further
insight into the problem of protecting individual liberty, an attempt will be made here to analyze the judicial and administrative uses of certain sedition and obscenity statutes in Great Britain and the United States. Our objective will not be to describe the nature, amount and source of either espionage or pornography in each society definitively but rather to ascertain what concepts, institutions, customs and public attitudes in each society enhance or detract from a libertarian solution to those problems.

There is a popular tendency to approach such problems as sedition and obscenity either with a sense of fear, wherein the major concern is to protect government and society from great evil; or with a sense of outrage at the lack of flexibility and sophistication of the established order and public opinion. The former is an attitude which only compounds the problem, and the latter is, at its best, an over-statement of the libertarian case; at its worst the pursuit of anti-libertarian goals through the use of libertarian means. In any case we shall presume that the problems warrant something more useful than simple indignation.
Utility of a Comparative Analysis

An analysis of social conflict over the issues of sedition and obscenity in two different societies has the potential of providing three different types of useful information.

Normative Standards

It could first yield some of the normative formulas that individuals and institutions in other societies use as a criteria for deciding the proper sphere of individual liberty. Inquiry into the beliefs of men in differing legal structures and political systems would appear justifiable, because this is one of the junctures in politics where ideas clearly have consequences. Even before that Athenian court decided to sentence Socrates to death for "corrupting the youth of Athens" with his impious teachings, men were putting their intelligence to the task of deciding when an individual's behavior was dangerous to the community and when individual behavior should be left unhampered in the name of liberty. The Athenian "court," which was really an admixture of a jury and a town meeting, by a vote of 281 to 220 found Socrates
guilty. If 31 citizens had chosen a different standard for defining the liberties of a citizen, things might have turned out differently for Socrates. The concepts Athenians used to dispose of this problem were of obvious importance to Socrates, but they were also important for other Greeks who might someday find themselves in the same awkward position. We shall in one sense be analyzing the same types of concepts in Britain and the U.S. which can have the same awesome repercussions, but in a more complicated setting.

There is a temptation, succumbed to by many who concern themselves with judicial concepts, to make ideas an explanation for all behavior in a society—as a cause of behavior. Ideas emerge as both a cause and effect of behavior. To explain political behavior only by emphasizing the way men think tends to imply that all problems can be traced to a philosophical mistake—which seems to contradict common sense. On the other hand, to disregard all ideas as simply rationalizations for ulterior motives has the difficulty Robert Dahl has labeled the "problem of mis-identification." When, for example, a worker in Britain votes for a Conservative Party program
because he believes that the "upper classes know best," the "mis-identification" of material self-interest and the worker's apparent incorrect perception of his social position must be explained by Materialists as "bad philosophy."

No attempt will be made here to weave a theory about the precise relationship between ideas and institutions. It should suffice to say that our concern with ideas about civil liberties is simply one way to explore certain kinds of conflict in society, not an attempt to prescribe a greater role for ideas than they deserve.

It is also important to note that civil liberties "doctrines" usually have arisen to meet the needs of specific situations, and that a comparative analysis could be useful in gaining not only new doctrine but old doctrine as it is applied to new situations. Because these questions must inevitably be resolved in the fluid history of highly differing circumstances, the addition of "new" cases and situations can also help an analyst to anticipate what may be some future civil liberties problems in the respective societies.
Institutional Influences

Secondly, comparative analysis could aid in ascertaining the effects of certain institutional arrangements and the resolution of these issues. What, for instance, of written and unwritten guarantees of liberty? How important are judicial review and the courts? What role do political parties play? Obviously no total assessment of the political system and civil liberties can be given from an examination of particular problems. But, the structure of civil liberties conflict as it occurs in these controversies can tell us what kinds of institutional devices may lead to a certain type of governmental stance toward other civil liberties questions.

Cultural Aspects

Thirdly, such a comparative approach could give information about factors in the general political culture which may influence civil liberties. Since normative decisions do not take place in a vacuum, but instead are influenced by other non-normative factors as well as normative attitudes on non-political matters, it is important to ascertain which forces are present that create a
certain response to civil liberties problems in one society that are not found in another.

A problem peculiar to those who deal with civil liberties issues, as we have already mentioned, is the tendency to treat them solely as legal problems. In this vein, it would be well to heed the warning of John P. Roche, who states,

... what is important ... to note (is) the danger in an excessively legalistic approach to civil liberties which treats the issue as though the only deprivations that occur are those which get litigated in court. Long ago, Socrates was invited by a friend to worship at the temple of the sea god and see the wonderful gifts which had been provided by those sailors saved from drowning by the god's intervention. Socrates, who knew a bad sample when he saw one, inquired, 'Where are the gifts from those who drowned?'

Most conflicts which would be construed as civil liberties questions in a juridical context in fact never enter a juridical situation, and depend on public opinion and social sanctions for the way in which they are resolved. Because of this, a study of civil liberties problems must attempt to ascertain the social norms which influence behavior on particular issues. Our primary goal will be to look at the norms used to solve these problems in a legal context, but the political culture of a society has
much to do in the formulation and solution of such issues.
To a certain extent the legal dialogue is only a barometer
of the general conflict in the society, and an attempt to
point out the relevant influences of the political culture,
where possible, will take cognizance of the fact that
courts are only one technique for the protection of
individual liberty and perhaps not always the most
efficient.

**Great Britain and the United States**

Comparison of the same problems as found in Britain
and the United States has several advantages which warrant
mention. First, an especially important factor for com-
parison of civil liberties, both societies are highly
developed and, by most definitions, "democratic." There
are cultural differences between the United States and
Britain, but these differences are not so great as to
become a juxtaposition of polar opposites. In one sense,
both nations are part of the same "general" political
tradition, i.e., Western-democratic, and have, relatively
speaking, similar political institutions. The fact that
both nations have the same language and that much comparative
work on factors other than civil liberties exists also adds to the practicality of using these two societies. Also, since World War II, both nations have played roles as major world powers, and both have had during this same period a concern for internal security which necessitated some introspection of the subject of individual rights and national security.

Another reason for comparing Britain and the United States is that there seems to exist a usually unstated, but none-the-less firm conviction on the part of American (and British) political scientists that Britain is somehow "better on civil liberties questions." Whether or not a more libertarian atmosphere prevails in England is something we shall leave until later, but such a facile conviction would appear to be at least a little overstated, if not incorrect, given the amount of evidence that is usually cited. The truly important question, however, would seem to be not which nation offers greater protection of civil liberty, but why it offers greater protection.

The operative definition of civil liberty in two such highly developed societies might seem a tangential
concern in a world where the most immediate problems are military and economic. The developing nations are a constant reminder that bookish concerns for such subtleties in Western democratic theory as freedom of speech and due process of law do not offer solutions to all major problems. In nations which have no tradition placing great value on protection of civil liberties, the procurement of liberty obviously depends upon the founding of such a tradition. In such circumstances the task is to create the necessary social and economic prerequisites for a democratic nation. In dealing with highly industrialized, complex societies which are committed to democratic values, discussion of liberty becomes more subtle and refined; and in certain ways it is a credit to the society in which it takes place because it can afford the luxury of precise inquiry into ways of becoming a more democratic community. Concern with such delicate chains of logic about liberty are important for several reasons. The first is that even though a certain stage of historical development is usually thought necessary before democratic attitudes can prevail, such a relationship is only a general correlation; the existence of "modernized" conditions does not guarantee
democratic sentiment. Thus underdeveloped nations have something to gain from the comparative study of civil liberties because it can indicate which aspects of modernization are hostile to individual freedom.

Secondly, analysis of civil liberties issues in England and America is important precisely because these are the two nations most closely associated historically with the legal protection of liberty. Libertarian ideals have been part of an accepted political heritage of both nations, but historical acceptance of certain principles can also be a great burden for those principles. Robert Gordis, writing on the development of individual rights in antiquity, has noted that, "in proportion as . . . words and ideas have become the accepted heritage of the race, later generations find them self-evident, if not . . . platitudinous." This drift from viable principle to meaningless platitude occurs on both sides of civil liberties conflict. The reaction of the general public, interested in establishing sufficient order to guarantee them personal security, at times grants a rather relaxed acceptance to dissent and opposition as part of the democratic political process. Then new groups and new issues
make government or the community feel threatened. Those who are overzealous in their desire to bring about social change get equally impatient with libertarian slogans. The reconciliation of freedom and order is difficult when government, as has frequently been the case in the past, equates order with lack of opposition. It will not be easier if, in the future, opposition to governmental policy takes on some of the characteristics of the New Left's critique of tolerance. In both England and the United States, although it is a somewhat older phenomenon in England, there exist political forces which express a view of the democratic process, as some student demonstrators did recently at Columbia, in the strident rallying cry, "Up against the wall Mother-fucker!" In both of the democratic nations we will be dealing with, this slogan expresses an attitude about political conflict held by a much larger and politically diverse element in society than just radical students in New York City. 9

Joseph A. Schumpeter has perhaps best isolated the cause of this fleeting nature of the democratic commitment when he observed,

There are ultimate ideals and interests which the most ardent democrat will put above democracy. . . .
The reason why this is so is not far to seek. Democracy is a political method, that is to say, a certain type of institutional arrangement for arriving at ... decisions ... and hence incapable of being an end in itself, irrespective of what decisions it will produce. ... 10

Definitions and Assumptions

Civil Liberty

Conflict and Process

Ronald F. Bunn, in the introduction to his Politics and Civil Liberties in Europe recommends that civil liberties problems be viewed as one manifestation of "the two cultural tugs found in any political community: consensus and cleavage." 11 Such a theoretical model has the advantage of promising a functional analysis of such problems, which "transcend, without necessarily rejecting..." such traditional categories as democratic and "authoritarian," and can thus be applied to any society. The model is also useful in identifying the problems as types of conflict situations. Bunn states that,"Consensus represents the agreement upon which order and authority must ultimately rest; cleavage refers to the disagreement that exists within the consensual framework." 12 But, civil liberties conflicts are more than simply disagreements within a consensus. A
better formulation would view civil liberties problems as sometimes disagreement about consensus. Or, to turn the formula around, certain civil liberties problems, such as the tension between sedition and freedom of political expression, force a society to arrive at a consensus about cleavage.

The phrase "civil liberty" is used in many different ways, both in law and political science. A strict legal construction sometimes distinguishes civil liberty on the basis of who is imposing the actual restraint on an individual. Edwin S. Corwin, for instance, claims, "We enjoy civil liberty because of the restraints which government imposes upon our neighbors in our behalf, and constitutional liberty because of the constitutional restraints under which government itself operates." Politically, civil liberties is frequently used as synonomous with guarantees of the democratic process. For comparative purposes, we shall use civil liberties to refer to guaranteed protection of the democratic process from infringements on the part of both government and society.

To facilitate comparative analysis, it will be useful to distinguish between general conflict and conflict
over democratic guarantees. What makes a problem of interest to us is not the conflict per se but the relationship between that conflict and normative dictates about rights and liberties. Freedom of press, religion, assembly, the right to a fair trial, etc., are all normative concerns similar to the concern for universal suffrage; that is, they are all attempts to keep the majoritarian political process "open." This conception of civil liberty, which owes much of its formulation to the American Supreme Court Chief Justice, Harlan F. Stone, we shall not interpret as a list of absolutes, but rather as the democratic "interests" of a society which must, to be sure, be balanced against society's interest in public order.

**Libertarian Solutions**

When we speak of "libertarian solutions" to a problem, we shall simply mean that the decision about the conflict has accommodated as much of this democratic interest as is reasonably possible. What is reasonable in each case is not easy to determine and must ultimately rest on the application of norms to a factual situation. The most fundamental underlying sentiment supporting the commitment to an open process is probably the notion of
"self-responsibility." It is because John Stuart Mill gave "self-responsibility," along with individual excellence, such high priority that his Essay on Liberty remains a classic defense of an open society. Contemporary political theorists such as Harold Lasswell have the same pivotal value when they define civil liberty as the desire to, "... respect practices with regard to which there is self-responsibility. The individual has certain rights and immunities; the power process relegates to him alone the making of decisions with regard to certain practices."17 Thus, a libertarian belief is almost a theory of what law should be in a democratic system. As a theory of law it stipulates that only behavior which is demonstrably harmful to others is within the proper sphere of social control. As applied to civil liberties conflicts, a decision is libertarian to the degree that the maximum amount of individual or group action is assumed to be as important a factor as society's interest in order. Such a definition hopefully avoids some of the normative ambiguity which surrounds attempts to define libertarian in terms of "natural rights" or some type of metaphysical fact.
Rights

When we speak of "rights" in connection with either the general society or courts of law we shall adopt the Holmesian notion that a "... right is only the hypothesis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." 18 Such a notion of rights is more useful for the descriptive purpose of deciding what is actually taking place when such words are invoked and is more useful for normative purposes in that it does not presuppose that a "duty" corresponds to every "right." 19 In the words of Justice Holmes,

No doubt behind ... legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by with they are maintained; but that does not seem to me to be the same thing as the supposed a priori discernment of a duty or the assertion of a pre-existing right. A dog will fight for his bone. 20

Political Culture

Sociology and anthropology use the notion of "culture" in a variety of ways, but the general meaning of culture is usually the way in with a community solves its problems. 21 Given a primary need of society, such as the
biological need for food, the means for the satisfaction of this need are partially due to geographic and climatic factors. Physical and economic factors determine the general range of food that can be eaten. Such things, however, as the choice of a particular food, how it is prepared, and whether it is eaten with a fork or chopsticks are cultural phenomena.

Political scientists, such as Samuel Beer and Gabriel Almond, use the concept culture in the narrower context of "political culture." For Beer political culture is that aspect of a general culture that is concerned with how a government ought to be conducted and what it should do. It is the values, beliefs, and emotional attitudes that are components of a society's conception of authority and purpose. This use of political culture emphasizes the normative ideas system of a given society about government and comes close to what others might call the prevailing "ideology" of a society. Political culture for Almond, on the other hand, refers to the "... patterns of individual attitudes and orientations toward politics among members of a political system." For Almond a political culture can be subdivided into several categories,
but it is essentially the "psychological orientation toward social objects." Such an emphasis makes for a difference in the way Almond and Beer use the same label. But, while disputes in anthropology and political science over the definition of culture will continue, in the interest of arriving at an operational concept, we will stipulate that the social and cultural configuration forming the background for civil liberties issues is made up of conceptions. That is, the ideas, beliefs, and attitudes (both psychological and ideological) about what is and what should be the process for resolving conflicts between the individual and society. Such a definition would include both normative and existential propositions about civil liberties as well as psychological reactions to certain types of conflict situations. Under the heading of political culture we shall include such diverse things as attitude studies of the populations in Britain and the United States, and important differences in the historical development of constitutional guarantees of liberty in each society, to help ascertain the way each nation perceives its conflicts over "rights."

It is important to realize the usefulness of
"culture" as a tool for explaining the background of civil liberties issues, but it is also equally important to realize its limitations. Almond is correct in cautioning that "... a careful analysis of political culture still provides no sure guide ... for prediction of individual behavior in a given case." An analysis of the cultural background of civil liberties will not lend itself to predicting the reaction of a particular judge, official, or crowd to a specific civil liberties issue, but it can perform a service equally as valuable in helping to explain why particular issues are issues. Much civil liberties analysis, for instance, takes the form of an input-output model, wherein the focal point is usually courts of law and the output is a chain of decisions. Political culture would rarely determine, although it may influence, the output of this system, but it can have much to do with determining the input.

_Seditious and Obscene Speech_

General prescriptions about liberty can have meaning, however, only if they are related to concrete problems. The category of "free speech" and the response of both
government and public to "free speech" issues would seem to be the best single index of a society's commitment to civil liberties, if for no other reason than that "free speech" can be made almost synonomous with "civil liberty,"

Conflicts over publishing, assembly, association, religion, etc., as opposed to civil liberties problems relating to criminal due process, for example, all necessitate some general prescriptive standards, which are much the same regardless of the specific nature of the issue. The categories about freedom of expression which have developed in American constitutional law because of enumeration in the First Amendment are useful in the American context, but for purposes of cross-national analysis it would appear wise to divide free speech problems into categories according to the rationale given for limitation of speech. This rationale could be, for example, invasion of a person's privacy (right of privacy v. free expression) or injury to a person's character (libel). Since we are interested in speech as a social problem, it is important, also, to determine who, i.e., government or private groups, articulates the demand that speech be curbed. With these considerations in mind, two categories (or rationales)
which would appear to be good indices to a society's civil liberties commitment are 1) seditious speech and 2) obscenity.

Seditious speech, or speech which is viewed as a threat to national security or public order, raises questions in areas which have great consequences for both social stability and the general climate of civil liberties. Theories of civil liberty, i.e., general statements about what constitutes permissible expression of opinion, are most clearly and directly approached when the immediate problem is security and/or order. Sedition is a crucial substantive problem in and of itself, but it is also important because many of the standards used to solve this problem carry over into the solution of other civil liberties problems; and thus it is the most convenient font of libertarian doctrine. Seditious speech and the right of assembly, although sometimes different problems requiring different criteria of judgment, can, for our purposes, be treated as the general problem of seditious speech if we presume that assembly can be, although is not always, an "organized" and "symbolic" expression of speech. Both are problems where there is a demand from government (usually) to inhibit
speech on a rationale related to public order. Conflicts between the individual and the social and political order always rank as serious, but when the conflict takes on a group dimension, as in the case of assembly, the "problem" can become a crisis.

Obscenity, on the other hand, is a demand for restraint of individual free expression with a rationale related to sexual impropriety. The demand for such restraint frequently comes from government, but also comes from private associations. Obscenity as a problem should be much more subject to the dictates of public opinion and the general social fabric than the rather technical distinctions that surround the problem of sedition. Obscenity as a civil liberties issue, in this writer's view, borders on the frivolous. It is a type of problem, however, which, because it lacks the gravity of questions such as sedition, gives us a substantially different manifestation of the problem of free speech, and in a different, and more "cultural" context.

We shall have to approach these two problems through their statutory bases, which are the most obvious source of governmental rationale, but this can sometimes be
deceptive. For the problem of seditious speech, as an example, there is a cogent list of statutes which will be our concern. Such famous statutes as the Smith Act, the Internal Security Act, and the Communist Control Act, are relevant to our purpose, but so are some aspects of the Selective Service Act, and the "burning" statutes concerned with the destruction of draft cards and flags. In Britain the problem of sedition and free speech are found in the application of the Incitement to Mutiny Act, but also in the Official Secrets Act and the Public Order Act. The problem of obscenity in the U. S. will necessitate looking at some postal regulations. It should be remembered that in employing such categories as sedition and obscenity the problem is defined not in terms of the form of speech, e.g., press, cinema, etc., but the rationale given for the curtailing of speech. Thus "D" notices (a form of press censorship used by the British Government) will be approached in this paper from the perspective of "seditious speech" since the stated criteria of the government is a concern for national security. This is not to imply that other forms of organizing these problems are not useful, simply that for our limited purposes, the above-mentioned
framework is advantageous. Such a schema, because it deals both with a critical problem and a rather frivolous one, and the response of both government and private associations, should be a generally reliable index to the ideas and problems of civil liberties in a society without necessitating a catalogue of every confrontation between the individual and society.
CHAPTER II

AMERICA AND ENGLAND: THE LEGAL AND SOCIAL BACKGROUND OF INDIVIDUAL LIBERTY IN TWO CULTURES

General Factors Influencing Civil Liberties

In this chapter we shall look at some of the major differences in the English and American political cultures which have had a bearing on perceptions of civil liberties in the two societies. Many of the similarities between the United States and Britain are, of course, obvious; English is spoken in both nations, both are highly committed to a democratic process when compared to most other nations, they share the essentials of the common law system, and historically one is the off-shoot of the other rather than a nation with a distinctly different course of historical development. These similarities are important to bear in mind, but in our treatment of the social and legal background of individual rights in the two cultures we shall emphasize differences rather than similarities in order to ascertain the way in which divergent cultural patterns can
create different environments for the civil liberties tradition.

Before describing the particular political culture as it relates to civil liberties issues in each nation, it might be valuable to indicate some of the more obvious social factors which have been found by a variety of authors to influence civil liberties in a "horizontal" manner; that is, factors which are influential regardless of particular circumstances, although the degree of influence may depend on the components of a particular political culture. These factors overlap, and no attempt will be made to find any "causal" connection between them and specific responses to civil liberties issues, but it is important to separate the factors that condition civil liberties in all societies so that they are not mistaken for unique situations in either Britain or the United States.

Educational Factors

The degree and kind of education an individual receives appears to have a significant bearing on the attitudes toward civil liberties, with the general correlation being that those with higher education exhibit more tolerant attitudes toward unconventional opinion. It has
also been found that those with a technical education usually express less interest in, and a more restrictive view toward, civil liberties problems than those with a "liberal" education. While the "Student Left" in both the United States and Britain offers some obvious examples that tolerance is not a necessary by-product of higher education for all people, it would still seem that for most a "liberal" education has "liberal" effects. It is important to note, however, that the liberal reaction to education is simply a shorthand equation for young people's response to a wide array of stimuli, of which curricula and exposure to norms of toleration are only a small part. Even with the Student Left the "tolerance for the unconventional" exists (sometimes to a point of total witlessness). But the discovery of alternatives to parental modes of thinking sometimes leads to unbounded feelings of rectitude. Thus tolerance for the unconventional becomes the same, for some, as intolerance and disdain for all things conventional. This is different, analytically at least, from an aversion to things new and different simply because they are new. This is a contempt for the familiar because it is familiar, and has probably always been a part
of the "intellegentsia's" desire for a belief system that distinctly sets it apart from the common man. There has always been a tension in intellectual communities between the norms of toleration and the norms of rectitude. We are viewing education as a horizontal factor which has increased tolerance in both nations, and still does; but it is equally important to realize that this relationship is changing in both nations, perhaps more rapidly in the United States, and, should rectitude prevail, education may not be a factor increasing tolerance in the future.

Ecological Factors

Of much less certainty, but still a possible horizontal influence on civil liberties, would be whether a person lives in an urban or rural area. Some would claim, for instance, that the very isolation of rural groups creates greater ethnocentricism which, together with less contact with ideological, ethnic and other forms of conflict, creates a more restrictive view of legitimate social conflict. Urbanization, on the other hand, is usually thought to lead to the development of less restrictive norms about legitimate conflict because conflict is more an accepted part of life than in a rural environment.
While the impersonality which some feel characterizes urban life could conceivably cause frustration which in turn could increase conflict, this increase in "differences," whatever their source, leads to rules about interaction. According to Gerhard Lenski, for example, attitudes of tolerance and secularism "inevitably arise in urban situations," because of the close association which necessitates cooperation. "Eventually what began as a modus vivendi or temporary arrangement for specific situations," says Lenski, "becomes generalized into a basic value applicable to all kinds of situations. . . ."

Economic Factors

Closely allied with, but ultimately not the same as, an educational index is a person's economic position. Economic standing, or at least an individual's perception of his economic and social standing, have been shown to have an influence on attitudes toward individual liberty. Speaking on the phenomenon of "working-class" authoritarianism, Seymour Lipset claims:

The poorer strata everywhere are more liberal or leftist on economic issues; they favor more welfare state measures, higher wages, graduated income taxes, support of trade unions, and so forth. But when liberalism is defined in non-economic
terms—as support of civil liberties, internationalism, etc.—the correlation is reversed. The more well-to-do are more liberal, the poorer are more intolerant.\textsuperscript{4}

Contemporary student movements, both black and white, are of course strewn with examples of upper-middle class activism and intolerance. The upperclass has always been a spawning ground for "noblesse oblige" radicalism as well as liberalism, and while there may be evidence showing that such radicalism is more strident, it would be difficult to establish that it is more frequent than in the past. Even if upperclass rectitude is on the increase, this does not destroy the utility of Lipset's notion of working class authoritarianism, it simply establishes that there can be more than one source of "ego insecurity," i.e., being young and from a "successful" family. The qualifications that the "Student Left" forces on Lipset's explanation, while not destroying it, do demonstrate that the relationship between any given value and a given socioeconomic status are determinations made at a particular point in time and are therefore subject to change. What Lipset succeeds in doing is showing a difference in response based on class. Such a difference need not continue until the end of time, nor, more importantly, need
the content of that difference remain the same, especially since a sense of class distinction is in part a recognition of different attitudes. Attitudes which demonstrate that one belongs to the better portion of society may in time include a claim to understand the "Third World" better than others. Our only point is that it is not the case yet, and that for purposes of cross-national analysis one can expect libertarian attitudes to correspond to higher socio-economic status.

These intolerant attitudes are not only the product of low income and the lack of education, but also, according to Lipset, are reflections of "lower-class perceptions of reality."

... emphasis on the immediately perceivable and concern with the personal and concrete is part and parcel of the short time perspective and the inability to perceive the complex possibilities and consequences of actions which often result in a general readiness to support extremist political and religious movements, and a generally lower level of liberalism on non-economic questions.\(^5\)

Political ideology, in the sense of a rigid devotion to a rather narrow political credo as well as extreme religious fervor, is construed by Lipset as a product of this working class mentality and the "ego insecurity" that makes
members of lower economic groups "over-react" to intellectual abstractions.

A British psychologist, H. J. Eysenck, found significant relationships between those who were "tough-minded" and those who were "tender-minded" in general social outlook and their economic background. The group Eysenck classified as "tough-minded" tended to be intolerant of deviations from the standard moral or religious codes, to be anti-Negro, anti-Semitic, and xenophobic; while the "tender-minded" were tolerant of deviation, unprejudiced, and internationalistic in outlook. Eysenck, who did this study in the context of political party identification, found the correlation to be that middle class Conservatives, Labourites, and Liberals tended to be more "tender-minded" than their working class counterparts inside their own party.  

Similarly, a Gallup Poll index of anti-Semitism in Britain revealed anti-Jewish sentiment to be highest among those who identified with the Labour Party, lowest among those who identified with the Liberal Party, with the Conservatives falling in between, but with considerably less anti-Semitic sentiment than the Labour.  

Almost all
Jewish members of Parliament are, however, in the Labour Party, and are supported by constituencies which are not predominantly Jewish, which would seem to imply that the leadership of the Labour Party and the ideology of the Labour Party are egalitarian in sentiment and hence there is more mobility for Jewish politicians. The polling of the anti-Jewish sentiment of the rank and file of the Labour Party would seem to demonstrate that working class ethnocentricism is not simply a product of one country or culture, but can be found among people of similar economic and social backgrounds in all countries and cultures.

Religious Factors

Although religion as a factor which influences civil liberties is probably more conditioned by its particular cultural environment than any of the other "horizontal factors" mentioned so far, there have been suggestions from some scholars, such as Lipset, that all things such as social and economic class being equal, religious belief can be a variable which influences attitudes toward civil liberties. Given the same middle class environment, for instance, Protestants tend to take a more libertarian view toward dissent and free speech than do Catholics; and
Catholics, generally speaking, take a more libertarian attitude toward race relations than do Protestants. One of the explanations for this can be found in the "Weltanschauung" of these religions. Lipset notes that the absolutism of the Catholic church on matters of faith and morals and such doctrines as the infallibility of the Pope could make Catholics more conscious of "heresy," and thus lead them to view unorthodox speech with more disdain than Protestants. On the other hand, the implicit "universalism" of Catholicism may perhaps make Catholics less conscious of "race" than Protestants. Protestants, perhaps because of their development as religious "sects," tend to be dissenting but also "exclusive" in social outlook. This relationship between a non-exclusive view of the world and racial attitudes is so enmeshed with class, religion, and other social variables as to be almost impossible to substantiate. The relationship is probably less one of the particular religious doctrine and more of the individual's relationship to his religious group. The more highly involved an individual is in his church, for example, the more likely he is to favor integration, and the more a person is involved in his subcommunity the more
likely he is to favor segregation. Communal involvement, according to Gerhard Lenski, seems to stimulate a "provincial" response—that is, one which indicates a lack of concern with problems with groups other than one's own.\textsuperscript{9}

The relationship between certain religions and civil liberties is, however, more pronounced. In fact, in a doctrinal sense, it is only on the subject of the Bill of Rights in the United States that there seems to be a relationship between religious "liberalism" in the sense of doctrinal heterodoxy and political liberalism. After noting the distinct lack of any connection between liberal creeds and liberality in foreign policy, race relations, or welfare policy, Lenski says, "The one exception to this general pattern occurs on the issue of free speech. Here there appears to be a modest relationship between political liberalism and religious liberalism."\textsuperscript{10}

Lenski found that in the United States Catholic involvement in both the church and the subcommunity was linked with a very restrictive interpretation of the principle of freedom of speech. On each of four questions dealing with criticism of presidential actions, speeches attacking religion, and speeches espousing Fascism or
Communism, these Catholics who were "more active in their church more often expressed doubt that the Bill of Rights permits these actions than did marginal members of the group." 11 Similarly those who were more involved in the Catholic subcommunity (the less devout) were in favor of a more strict interpretation of the Bill of Rights more often than "those who had more extensive primary relations with members of other subcommunities." 12 Among Protestants there was a more liberal interpretation of the Bill of Rights which was strengthened by the involvement of the person in the subcommunity. 13

In both the United States and Britain there seems to be a relationship between "religious orthodoxy" and conservative political attitudes, especially on racial segregation. 14 The "devout," according to Lenski, think in terms of the "oneness of life" and therefore apply religious values to contemporary problems; the "orthodox" on the other hand create a "compartmentalized type of belief" where religion doesn't get confused with the non-spiritual world. 15

Lenski also found Jews to be the most consistently "liberal" in political attitudes on foreign policy, civil liberties, economics and race relations, 16 and it would
seem that this also is probably a horizontal factor operating in varying degrees regardless of the particular system and culture.

Liberty as a Constitutional Guarantee

The constitutions of the United States and Great Britain are usually cited as classic examples of two archetypes: constitutions which outline basic political principles that define the locus, distribution, and legitimate use of political power in a written document; and those which achieve the same ends by relying on customs and precedents. Such a distinction is easily exaggerated since the American Constitution, for all except the most literal, is an evolving set of judicial interpretations, customs, and precedents. But since the British Constitution consists of historic charters, judicial decisions, Acts of Parliament, common law, social convention, established custom, and just plain quirks of the 900 years of Anglo-Saxon experience, the constitutional protection of liberty becomes, theoretically, more complex; and institutionally enumerating the constitutional protections to civil liberty becomes more difficult than with the American Constitution.
The British Constitution, frequently called "flexible" when compared to the "rigid" American Constitution, is committed to the protection of individual liberty, but such a commitment goes through an endless maze of subtleties before it emerges in practice.

In the ultimate sense the notion of individual liberty emerges in both Great Britain and the United States as a corollary to the notion that governmental power should be in some sense limited. In America, with the ratification of the Bill of Rights in 1791, part of the written constitution of the land became a list of things the federal government could not do. This list, phrased as a set of immunities held by citizens against political power, contained very similar phraseology to the English Bill of Rights of 1688, but the common vernacular tends, according to John A. Krout, to obscure the fact that the two documents rest upon somewhat different assumptions.

Both to be sure are concerned with specific potential threats to human liberty and with the practical means of thwarting them. For the English, however, the source of danger was the unrestrained prerogative of the Crown; and the defense was sought in the power exercised by a majority in Parliament. For Americans, the danger seemed to lie in the will of the majority, as expressed through its representatives in Congress assembled.
Because the defense of liberty was viewed as more complicated in America, institutional protection became more complicated. The Bill of Rights, the federal system, and separation of powers can all be interpreted as devices to hinder government, be it democratic or autocratic; this is why the American Bill of Rights often appears as an exercise in "constitutional negativism."  

American constitutional framers felt it necessary to institutionalize conflict so that power could not be used arbitrarily, and in the process seemed to assume that the polar opposite of arbitrary power was a fragmented political system which made the execution of any type of power difficult.

The liberties of English citizens, on the other hand, developed not from a concentration on the locus of power, but from the organized administration of that power. The long historical process of imposing a certain routine on subjects, which the monarch called law, was also to act as an eventual check on the monarchy itself. About this subtle process of the routinization of power, Jhering was to say,  

Form is the sworn enemy of caprice, the twin sister of liberty. . . . Fixed forms are the school of discipline and order, and thereby liberty itself.
It was the imposition of such form upon the ministers of the Crown and finally upon the Crown that was to establish the supremacy of law—the most important ingredient in the English "Constitution." 21

Constitutional commands in the United States certainly incorporate the general assumption that what is not declared illegal is legal, but much of the constitutional dialogue as well as the specific language of the constitution is concerned with ascertaining whether or not a citizen has a "right" as constitutionally enumerated or understood. In Britain, on the other hand, defense of liberty stems from the principle that while no law guarantees the liberty to write or print what one likes, it is assumed that what is not specifically proscribed is permitted.

Lord Halsbury once used such a principle as the touchstone of English Constitutionalism:

The so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided that he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorized to do by some rule of common law or statute. Where public authorities are not authorized to interfere with the subject, he has liberties. 22

For Halsbury, a British subject could not possess
"guaranteed" rights such as those enumerated in the written Constitution of the U. S. because the ultimate principle of the British Constitution is that Parliament is sovereign. But, "It is well understood that certain liberties are highly prized by the people, and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them."\(^{23}\)

As inviolate as the principle that Parliament is sovereign is another fundamental principle of British constitutionalism—the rule of law. While not defined by statute, it is recognized by Crown, Parliament and the courts as a pervading principle of the Constitution. A. V. Dicey, the most distinguished commentator on the British Constitution, has claimed that the rule of law means that no arbitrary power is legitimate, that every man regardless of rank is subject to the law, and that individual rights of the common law must be protected.\(^{24}\)

English constitutional ideas always opposed the Continental and American propensity for written elaborations as mere "paper affirmations." The liberties of Englishmen were viewed as common law liberties that resulted as the natural consequences of ordinary decisions
in ordinary courts. As such, English liberties are clearly subject to abridgement by parliamentary actions, but more recent scholastic interpretations of the English Constitution place much less emphasis on common law basis of liberties.

Goodhart claims, for instance, that, "... under the unwritten constitution there are certain established principles which limit the scope of Parliament." It is true that the courts cannot enforce these principles as they can under the Federal system in the United States, but this does not mean that these principles are any the less binding and effective. For that matter some of them receive greater protection today in England than they do in the United States.

This view of the Constitution almost imposes a "natural law" over statutory law, common law and equity, but that is perhaps what most constitutional scholars do when trying to explain the "essence" of the constitutional system. When Lord Justice Denning of the English Court of Appeals described "the spirit of the British Constitution," he said it rests upon three main "instincts." First, there is the "instinct for justice," by which he means an independent judiciary. Secondly, there exists an "instinct for liberty," which consists of commitment to freedom of discussion and association. What Denning labels as the
third "instinct" of British constitutionalism is a qualification which pulls the first two instincts down from the realm of pure abstraction—the "practical instinct which leads to the balancing of 'rights' with 'duties,' powers with safeguards, so that neither rights nor powers shall be exceeded or abused." 28 "Throughout all this," says Denning, "runs the Christian instinct and with it a sense of the supreme importance of the individual and refusal to allow his personality to be submerged in an omnipotent State." 29 This seems to be another way of saying that power must be exercised in a reasonable manner, and that part of the definition of "reasonable" is that proper consideration is given to the individual interest as opposed to collective interest.

In the final analysis, English law and the Constitution fall back on an appeal to the common sense of the people and the "reasonableness" of governmental action. Rights emerge from the British Constitution as the consensus of what is reasonable in the situation. Michael Stewart says,

In a trial, the prisoner's guilt must be proved 'beyond a reasonable doubt;' it is illegal to say in public things so provocative that a 'reasonable' man may fear they will cause a disturbance. To
translate this idea into law such as courts can declare and citizens obey is not easy and the Constitution often appears a tangled maze; but the clue to it is the idea of reasonableness. 30

The written American Constitution is much more a document outlining jurisdiction, rather than assessments of "reasonableness" per se. Even though doctrines making use of the "reasonableness" rule are frequently used to determine the judicial presumption of constitutionality or unconstitutionality, American judges have tended to view the Constitution as grants and restraints on political power. The American Constitution is primarily concerned with whether government should be given particular powers. The English constitution, being much more inexact and pliable, is concerned more with the way in which power is used than the existence of that power.

Separation of Powers and the Judicial Role

Some writers, such as Labor's Michael Stewart, who has experience with the British system both as a political analyst and practicing politician, claim that the ultimate defense for British liberty lies in the separation of powers in the organization of a government itself. Legislative, executive, and judicial functions, while certainly
less distinct than in the United States are still clear enough to create checks on power. The development of disciplined parties means that the separation between legislature and executive has been, in terms of ultimate power, bridged; but, as Stewart reminds us, "the bridge rests on good relations between the Government and the majority in Parliament." As such, "Separation of these two powers... is no longer a permanent principle of the Constitution; it is a possibility, kept in the background and available for use against a Government which fails to recognize the Sovereignty of Parliament." 

Separation of the judiciary from the other branches of government is wider and more obvious, but still not complete. Since the seventeenth century judges cannot be removed by the government of the day in England and can pass down rulings which block governmental action without the threat of immediate removal. But the head of the judiciary, the Lord Chancellor, as a cabinet minister belongs to both the executive and the legislature. The United States Supreme Court, for example, can exercise the power of judicial review and declare an Act of Congress or a state or municipal statute "unconstitutional." No
British court can so boldly overrule a legislature. How then does something become unconstitutional? If, for example, the Prime Minister compelled a judge to resign, such an action would be "unconstitutional" because it is proscribed by the Act of Settlement. To this extent the British usage is no different than the American usage of the term "unconstitutional" would be if the executive branch violated the form enumerated in the U. S. Constitution by not having judicial appointments approved by the Senate. If in Britain, however, Parliament chose to dispose of the Act of Settlement, it could do so, and the Prime Minister's action would then be constitutional, whereas the constitutional procedures cannot be so easily rearranged in the United States.

An act of Parliament can be unconstitutional in two different ways. The first is by open declaration of the people that such action goes against their wishes because "... the one really important part of the unwritten Constitution (is) ... the assumption that the purpose of the Constitution is to give effect to the will of the people: democracy is the unwritten basis of the Constitution."34
The second way an act of Parliament becomes "unconstitutional" is more indirect, but more often used. Even though the courts cannot strike an act of Parliament as unconstitutional on its face (a power which while spectacular is not even used too frequently in the United States), it can discover that the application of the law contravenes "natural justice."

Since Parliament legally can do no wrong, it is only good sense for the British to assume that if a "wrong" results from an act of Parliament, the act must have been misunderstood by those who applied it. Because Parliament can do no wrong it is only logical that they would not offend natural justice. The concept of "natural justice" has been used in such a way as to achieve some of the same results that are achieved by the Bill of Rights in the United States. As A. L. Goodhart explains,

> What Parliament says is binding on all judges, and there is nothing more to be said about it. Judges, however, usually manage to get their own way. . . . By a convenient fiction it assumes that Parliament always intends that its statutes will accord with natural justice; no statute will therefore be construed to be retrospective or to deprive a person of a fair hearing or to prevent freedom of speech unless Parliament has so provided in the most specific terms.\(^{35}\)

Generally speaking, the concept of natural justice has been
applied by the courts in Britain to insure that in administrative conflicts, the subject is given a fair hearing, or in criminal cases that the defendant receive a fair trial. 36 "In many ways," says David Fellman, "the concept of natural justice is comparable to the American doctrine of due process of law." 37

The necessity of courts to interpret statutes and the application of the concept "natural justice," along with the courts' control and interpretation of common law rules, create in England a type of de facto judicial review. Edward McWhinney makes a distinction between "direct judicial review" and its "concomitant, the presence of a rigid constitution changeable only by some extraordinary process," and "indirect judicial review" or what is sometimes known as "judicial braking," which characterize countries with, "... flexible, uncontrolled constitutions like the United Kingdom..." 38 English law appears almost irrevocably "positivist" in the sense that Parliament is sovereign, and courts cannot overrule any statute on its face. Judicial discretion is further checked by the mechanics of stare decisis. However, the nature of the judicial function itself creates, if judges
are sufficiently imaginative, a role in expounding the fundamental principles of a society. The English judicial attitude on the binding force of precedents is more stringent than in the United States; until 1966, the House of Lords was bound by its own decisions. But, as McWhinney has noted, even before the Law Lords declared that too rigid adherence to precedent could lead to injustice,\textsuperscript{39} "... the House of Lords itself had developed to such a fine art the practice of "distinguishing" as distinct from overruling, prior decisions, as to make the limits of this rule rather amorphous in practice."\textsuperscript{40}

The nature and scope of judicial power is certainly augmented by the acceptance of judicial review in the United States. But in a sense, even though it arose out of judicial interpretation, it remains only a tradition specifying the locus of power; not the use of that power. The essential point for the legal protection of basic liberties has less to do with the formal power to nullify legislation than with the ability to censure, if only by implication, the existing political authority. As McWhinney states,

\ldots it may not always, in terms of end result, matter too much whether or not a power of direct
judicial review exists under a given constitution, so long, at any rate, as the courts are conscious of the possibilities of requiring legislative majorities to give second thoughts to legislation by harsh judicial construction in the process of statutory interpretation.41

Legal and Social Pluralism

The effect of such things as homogeneity and cultural pluralism on civil liberties attitudes is a subject about which there is little agreement. For instance, in a country like Britain, where political leadership generally tends to have a higher educational level than political leadership in the United States, we might perhaps expect a more favorable climate for the civil liberties tradition, since there is a correlation between education and libertarian attitudes, and in Britain "deference" would be to this educated elite. Or, to phrase it differently, if "democracy" in Britain is construed as less a matter of "mandate" than it is in the United States, we might find more protection of individual rights, since frequently such rights conflict with the "populist" demands of the community.42

While "homogeneity" is certainly a relative term which can have little meaning unless it is used with a
comparative referent, England is a more homogeneous culture than the United States. This homogeneity has perhaps been over-used as a factor to explain all of those phenomena which are indigenously English, which frequently means the degree of English homogeneity is overstated.

But England, excluding Scotland and Northern Ireland which are not part of this analysis, is a territory about the size of New York State and as such has much less cultural diversity than the United States. Even if one underscores that ancient antagonism between Welshmen and Englishmen and the contemporary intensity of Welsh nationalism, England has not had two factors which are usually used as the base definition of a pluralistic culture: significant differences in religion and color. Economic situations in the Commonwealth since World War II have of course created an increase in racial and religious differences along with increased consciousness and reaction to "color."

Immigrants from the West Indies and the Indian subcontinent brought England's non-white population to 800,000 in 1965, and with an alleged high birth rate projections indicate a non-white population of well over a million. Restriction to immigration, competition for jobs and housing have of course created white reactions, but the English reaction to
color is in many ways a reflection of its homogeneity. The non-white population is still only about two percent of the total population, and the reaction, including race riots as intense, if not as large, as any in the United States, can be viewed as a homogeneous culture reacting to "differences." Even as a culture defined by a common language, England is much more homogeneous than the United States, and this, together with the fact of a long common historical experience and centralization of political power, makes English society an insular archetype when compared with the American "melting pot."

Lipset has remarked on the phenomenon of a homogeneous culture's ability to accommodate peaceful political change within the context of its existing institutions. In noting the importance of historical continuity, Lipset observes that 10 out of 13 nations which he would label "stable democracies" developed as constitutional monarchies. Others make the argument that a homogeneous culture creates a type of "psychic security" which enables people to be less concerned with diversion from cultural norms. This could be offered as a partial explanation, for instance, of why there apparently has been more of a conception of
"un-American" than the notion of "un-British" (if we leave out color). American ethnic pluralism, some would maintain, has enabled demagogues to define "American" as a belief system, or ideology, rather than a network of historical experiences common to the entire racial and religious group, and immigrant groups have responded by "over-identifying" with this ideological construction of nationalism. From this point of view, cultural pluralism because of its divisive effect tends to create a hostile environment for ideological conflicts and hence a hostile environment for civil liberties.

Other scholars, such as Carl Friedrich, claim that a homogeneous culture helps to create an authoritarian outlook. While a society of any significant size probably could not be authoritarian simply because of its homogeneity, some argue that homogeneity is related to intolerance. The argument is that a pluralistic society has a functional need for tolerance, whereas such an attitude is not necessary in a group with a great deal of homogeneity. The diverse ethnic groups in the United States, so the argument goes, may not "like" each other, but the necessities of day-to-day living demand that they
cooperate. A plurality of groups and interests can help to instill a spirit of compromise in a political culture that may otherwise be lacking. Tolerance, in this type of situation, comes not from a belief system, but from the mere fact of physical proximity, and the functional necessity for groups to cooperate on certain levels. An example of this type of "functional tolerance," even though there may be a great deal of verbally expressed ethnocentricism, would be the lack of an established church in the United States, which some scholars maintain is not due to the lack of sentiment on the part of the founding fathers for a national religion, but rather the fact that there were numerous rival religious sects that wished to be the established church, and the functional solution to the problem was to have none. This view of homogeneity implies that a political culture with a great deal of fundamental consensus can create a hostile environment for the civil liberties tradition, and that ultimately a culture which experiences group conflict is more "tolerant" than one which has limited exposure to cultural diversity. From this perspective, pluralism enhances civil liberties because it structures and institutionalizes social conflict.
The existence of a federal system in the United States is perhaps the single greatest institutional reflection of American pluralism, and the existence of the 51 interconnecting legal and administrative networks that characterize government in America has perhaps had great effect on stability, but has not historically been advantageous to the application of libertarian principles. The statutes we shall be analyzing in reference to sedition and obscenity have a more universal application in Britain than in the United States. Sedition and obscenity statutes exist in almost all of the separate states and are usually framed and applied in a more restrictive manner than federal approaches to these problems.

The pluralistic character of American law is primarily due to the division of political power on the basis of geography, a system which was adopted out of the fear of centralized authority exemplified by the English monarchy, and out of the necessities of compromise among the thirteen colonies. It was also due in some measure to the original colonial status of America and the legal pluralism of Great Britain.

Mark De Wolfe Howe, speaking of the "pluralistic
character of the laws of England," says that even though Lord Mansfield was to utter from the King's Bench in 1772 that, "The state of slavery is so odious, that nothing can be suffered to support it, but positive law," imperial Britain was quite willing to encourage slave trade between Africa and her American plantations. English courts found that although the " . . . common law of England and the law of nature condemn slavery, positive law and the law of nations sustain it."45

This pluralistic inheritance has, I believe, a greater significance in American constitutional history than has commonly been recognized. . . . What the Nation needed . . . was what the Nation inherited--a tolerance sufficiently generous to allow slavery in the South and permit abolition in the North.46

For Howe the essential fact of legality in the United States is that it contains only those elements provided by the Constitution and by the statutes enacted by Congress, which before the Civil War preserved a "deep and silent neutrality with respect to slavery."47 The refusal of English judges to apply common law to British colonies, and the American federal system, combined to deny, according to Howe, federal judges the capacity of circumventing slavery by applying the common law. The effect of the
"pluralism," which is partly the result of the federal system and partly of the English assumption that common law applied only to England, was to remove the national government from crucial struggles over rights.

This Nation's commitment to silence on the largest issue that confronted the American people was at once a distinctive and a startling contribution to the art of government. Though war, constitutional amendments, and economic revolution have vastly altered the structure and the content of American law, the old commitment to national silence and national disability still serves to make American federalism a significant impediment to the fulfillment of civil rights.48

As large an impediment to the application of the Bill of Rights as federalism was and perhaps still is in the United States, it must yet be understood that it is also the existence of a federal system that has given the federal judiciary such an important role in the governmental process. Generally speaking the Supreme Court has enunciated a pro-nationalist sentiment with regard to states, and has construed the Constitution as a compact between the federal government and the people of the nation, rather than a simple agreement among the several states and the national government. In the process of enunciating a nationalist conception of the Constitution, the Supreme Court also carved out a unique role for itself in the
political process. Federalism, checks and balances and the separation of powers, and the other divisive structures so popular with the architects of the American Constitution, were attempts to keep power responsible by keeping it divided and in conflict. But such division and the conflict that such divisions are supposed to engender necessitate an arbiter, and in the United States this role of arbiter of the federal system was played by the federal judiciary. And it is the power of the Supreme Court, and the judiciary in general in the United States, which has played a crucial role not only in the search for doctrines to solve problems in a libertarian manner but also as a great vehicle for "popularizing" debate over civil liberties questions. The potential that a written bill of rights had for the political education and socialization of the people was one of the arguments Jefferson used to support the inclusion of the first ten amendments, and Jefferson's prophecy had great merit, because the Bill of Rights became a convenient decalogue that could be at least recited in American schoolrooms.
Conceptions of Authority
in Two Polities

Deferential Polity

By way of contrasting and summarizing all of the discrepancies between the two systems that we have mentioned, the most all-inclusive difference between the two systems is what could be called the conception of authority in each society. We must be aware, of course, that when we posit two different conceptions of authority in each nation, we are creating artificial analytic categories which like the categories "homogeneous" and "pluralistic" cultures, are based on interpretations of past behavior, and as such form "frozen descriptions." In societies where the rate of change at times seems to outpace the recognition of such change, such static pictures of the nation have obvious disadvantages, but since our purpose is not primarily to describe, but to discern the relationship to civil liberties problems in both nations, we shall have to be content with descriptions which seem to fit the general time period of 1945 to 1968. The conceptions of authority in particular are interpretations of broad historical patterns and the differences we shall set in
bold relief remain differences in degree and emphasis rather than kind.

L. S. Amery, for example, who has written on the dual nature of perceptions of authority, distinguishes between a British and a Continental view of representative government. The Continental view, and for our purposes the American view, conceives of political power as a delegation from the individual citizen through the legislature and an executive dependent upon the legislature. In Britain, according to Amery, "Parliament is not, and never has been, a legislature in the sense of a body specially and primarily empowered to make laws." Parliament has as its principal function the articulation of dissent and opposition, and acts as a check upon government, but does not itself govern. Harry Eckstein characterizes the same phenomenon as the Englishman's "ambivalent" approach to the democratic principle of mandate.

In most democratic countries the idea of representative government, if not its practice, involves a simple set of principles; ultimate authority lies in popular will, which is expressed in the election of candidates whose chief function is to enact the policies for which they campaigned and to represent the interests of their constituents. In Britain the matter is much more complicated. British ideas of representative government stress not only the derivative character of political authority (i.e., that authority lies in popular will) but also its
independent character (i.e., that authority is exercised over, or regardless of, popular will). These two ideas are of course inconsistent, but the British believe in both nevertheless; indeed this very want of logic explains why their conception of authority, democratic though it is, leaves such inordinately great room for leadership.51

This tendency of British public opinion to expect their political leaders to "govern more than to represent . . ." is phrased in a somewhat different vernacular by Almond and Verba, who describe the syndrome of British political attitudes as a "deferential civic culture."53 Both Britain and the United States are described as having "civil cultures," meaning that participants are positively oriented to the political structure and that there is a balance between participation and obligation, but in Britain the balance is weighted differently. According to these authors:

. . . British political culture represents an effective combination of subject and participant roles. . . the development of the participant orientation in Britain did not challenge and replace the more deferential subject orientations, as was the tendency in the United States. Despite the spread of political competence and participant orientations, the British have maintained a strong deference to the independent authority of government.54

The causes of this deferential attitude are usually
connected to the historical continuity of British political institutions and the general cultural homogeneity of British society, together with class stratification, and an educational system which enhances aristocratic deference.

**Suspicious Polity**

In contrast to the British attitude toward authority, one could submit, Americans have historically tended to be suspicious of government *per se*. American preoccupation with the fragmentation of political power in the form of federalism, separation of powers, checks and balances and "state's rights," reflect an essentially negative or "suspicious" conception of authority on the part of Americans. The historical conditions that engendered this attitude are probably not similar enough to European history to enable one to characterize this view as Amery's "continental perception of authority," but an attitude distinctly different from that of the British emerges. This negative view of governmental authority is partly a manifestation of the dominant ideology of the United States and partly a reflection of the lack of homogeneity in American culture. Laissez-faire liberalism,
the influence of Locke, Jefferson, and so forth, plus the fact that this industrial expansion could make use of an ideology emphasizing individual rights against the state, especially property rights, help to condition this negative view of authority. But a factor equally as important as ideology was the fact that the divisive factors of American society, such as regionalism, religion and ethnic differentiation, necessitated diverse political power because of the lack of consensus inherent in a pluralistic society.

Almond and Verba note that American political culture has a larger "participatory" component than almost all other political cultures.

In the specific measures of subject competence--expectations of consideration by bureaucratic and police authority--the Americans drop to third place among our five countries, below Britain and Germany. This cultural imbalance, we have suggested, is a result of American historical experience with governmental and bureaucratic authority--an experience that began with distrust and revolution against the British Crown, and that has been consolidated by the American tendency to subject all governmental institutions, including the judiciary and bureaucracy, to direct popular control.55

The essential ingredient for protection of individual liberty is that power be exercised "responsibly." Responsibility in a democratic state means two different, and
sometimes, conflicting things. Responsible can mean being accountable to the dominant sentiment of the polity, or it can mean maintaining an open political process in spite of the dominant sentiment of the polity. Governmental control emerges as both a threat to liberty and a protector of liberty. The political cultures of Britain and the United States indicate two subtle, but differing, "Gestalten" on the protection of individual liberty, one emphasizing the "popular control" aspects of the democratic formula, and at the same time attempting to limit governmental jurisdiction; the other emphasizing responsible leadership and an active role of government. Both approaches can be constructive or destructive for the libertarian tradition. The specific effect each has on civil liberties conflicts will be our next concern as we turn to the problem of seditious speech in both nations.
CHAPTER III

SEDITIOUS SPEECH IN GREAT BRITAIN

Seditious Libel

While words such as "treason" and "sedition" are related and in many ways parallel concepts, sedition is usually a more inclusive rubric designed to cover speech which could have a treasonable effect if left unregulated. "Ill opinions of the government" had always been a major concern of the Crown, and the invention of printing, while a technological advancement from some perspectives, also magnified the problem of controlling hostile opinions of the Crown. It was traditionally considered a royal prerogative to approve or deny a license for the printing of particular works. To publish works without an imprimatur was a criminal offense under Henry VIII, and under Elizabeth an elaborate system of licensing acted as effective prior restraint on publishing. Purely verbal attacks on the Crown were dealt with under the category "libel." The point of departure for the modern law of criminal libel is Sir Edward Coke's report of a Star Chamber case of 1609 in which it was established that libel
against a private person gains part of its justification from the fact that such libel "provokes revenge and therefore tends, however remotely, to a breach of the peace."¹ Since libel tends to a breach of the peace, a libel against government is an even greater offense, "for it concerns ... the scandal of government."² Subsequent common-law courts developed seditious libel, along with blasphemous, obscene, and private libel, into a far-reaching restraint on free expression. Seditious libel in the seventeenth and eighteenth centuries became a major instrument for controlling the press.³ In 1704 in the famous Tuchin's case Chief Justice Holt underscored the necessity of the concept of seditious libel by asserting that if people cannot be called to account for possessing ill opinions of the government "... no government can subsist."⁴

Until the eighteenth century, however, the difference between "treason" and "seditious libel" connoted only the degree of punishment the Crown wished for a hostile speaker. Since by Statute 25 Edward III (1352) part of the definition of treason was "compassing or imagining the King's death,"⁵ a person who printed a book
which endorsed the right of revolution, as did William Twyn in 1663, could be sentenced for treason rather than seditious libel because the scope of his attack on the Crown went beyond mere "scandal" of government. 6 After 1720, however, the idea of treason as a crime unconnected with some overt act beyond mere words died out. 7 Fredrick Seaton Siebert suggests that the government found the law of treason too limited as well as too cumbersome to control the state of public opinion during the succession crisis preceding the Hanoverian line. 8 Seditious libel, while a less spectacular charge than treason, had the benefit of being easier to justify because of less severe punishment. It was also easier to get convictions because the King's Bench limited juries to simple findings as to authorship or printing, with the decision of whether a given article or utterance constituted libel reserved for the bench as a "matter of law." As the center of political gravity shifted away from the monarch and to Parliament, the latter developed techniques to protect itself from criticism and to take appropriate action without recourse to the courts. A "breach of the privilege of Parliament," in addition to preventing unauthorized reports of its own
proceedings, was Parliament's device to prohibit personal libel on a member, bad reflections on Parliament in general, reflections on the government including aspersions on the King and his ministers, as well as certain types of obscenity and blasphemy. While breaches of privilege were frequently used by members of one House to punish members of the other House, the largest number of prosecutions by the House of Commons involved newspaper publishers, printers, etc., who were charged with creating "aspersions on the King," and there was little difference between the House's concept of a "bad reflection on government" and the common-law definition of seditious libel.

A long series of libel prosecutions, with convictions made easy by the requirement that juries establish only publication, resulted in Fox's Libel Act in 1792, which allowed the jury to decide if the sentiment expressed constituted libel. Juries sometimes broke the chain of distinctions which shackled them to facts of publication even before this Act. In a 1744 prosecution of a printer named Miller, for example, the government sought punishment for an offensive letter which appeared in a newspaper.
Parliament had been unable, for technical reasons, to proceed against the author of the letter or the publisher of the newspaper, and so turned to the printer. After being fined and imprisoned for two months by Parliament, Miller was charged with "seditious libel," and the jury was instructed to decide only if Miller had printed the letter. This fact was openly admitted by Miller, but the jury found him "not guilty" of printing the letter. 11

It is interesting to note that as authority became more democratic, the concept of "sedition" became less "personalized"—that is, less an attempt to blunt criticism of, first the Crown, then Parliament—and became more an offense against the general public. The Libel Act of 1792 defined sedition as any intent to incite disaffection against the Crown, the Government, the Church, or to "incite feelings of ill will and hostility between different classes. . . ." This newer formulation of sedition was narrower to the extent that the charge must pivot on the concept "intent to incite," but broader because it sought to prevent the causing of "ill will" among non-governmental groups in society. In 1866 a group of socialists were prosecuted for seditious libel because
their particular message was intended to excite hostility between classes. The jury, however, refused to return a guilty verdict.

Sedition and seditious libel gradually became less a companion charge to treason and more directed toward incitement to riot and what in the United States would be called "group libel." Since World War II the specific phrases "sedition" or "seditious libel" do not appear as frequent charges. In 1947 an editor named Caunt was charged with seditious libel after he wrote articles assailing British Jews for sympathy with Palestinian Jews. Justice Birkett told the jury in this case that it was their burden to decide whether the articles had the effect, or if Caunt had the intention, of promoting "... violence and hostility between Jew and non-Jew." The jury acquitted Caunt.

In 1954 the phrase "sedition" was involved in an appeal before the Judicial Committee of the Privy Council. Ebenezer Theodore Joshua was charged on two counts of sedition and one count of public mischief following a speech he gave in November of that year in the colony of Saint Vincent. (This committee has appellate jurisdiction
in cases coming from the colonies, and in this case they were reviewing a judgment of the Court of Appeal of the Windward Islands and the Leeward Islands in the Saint Vincent circuit.) Joshua, in his speech, allegedly stated that the police were scheming politically and storing up an arsenal at headquarters in order to "... shoot down people when they decide to fight for their rights." Evidence was also given at the trial that there was no truth to the allegation that the police were storing up arms.

On the specific charges of sedition the jury failed to agree on the first count and Joshua was acquitted on the second. On the charge of creating a public mischief, however, the trial judge directed the jury that they must as a matter of law find the appellant guilty of the offense if they found that he spoke the words complained of by the authorities. The authorities argued that Joshua did, by means of certain false statements in a public speech, "agitate and excite certain section (sic) of the public against the police, to the prejudice and expense of the community." Joshua's counsel argued that comments about public
officials, even if they are police, could not be said to create a public mischief. The record indicated no action taken by Joshua or anyone else against the police or any other individuals. The judges in the Court of Appeal, in reviewing the case, cited much common law precedent, however, to the effect that offenses which tend to prejudice or which cause "expense to the public" justify charges of the common law misdemeanor of causing a public mischief. These judges also reasoned that it was "... settled law that the question whether an act might tend to the public mischief was for the judge, and not an issue of fact on which evidence might be given." 15

The Court of Appeals also held that no evidence of "expense to the community" was necessary because the offense could be constituted either by prejudice or by expense. In this case the word expense in the charge was simply superfluous, and the heart of the offense was the "prejudice" Joshua created against the police.

In reviewing this appeal the Judicial Committee of the Privy Council, in an opinion by Lord Oaksey, with the concurrence of Lord Keith and Sir deSilva, side-stepped the question of whether, apart from cases of conspiracy,
there is any common law offense of effecting a public mischief. This was an issue on which there was much conflicting judicial opinion, but Lord Oaksey felt the appeal could be disposed of without reaching this general issue. Their Lordships chose instead to reverse the Court of Appeals on three less abstract grounds.

First, even assuming that the crime of public mischief exists, Oaksey stated that it is the jury's function to decide whether simple facts about words spoken constituted the offense. While it is a general principle of British law that in a trial by jury the judge's role consists of directing the jury on matters of law, and the jury's role is to judge the facts, the Court of Appeal construed "fact" incorrectly. There are, the Committee held, simple facts such as whether Joshua did say the words in question, but there are also more complex "facts" as to whether the simple facts constitute the crime alleged. It was a misdirection to tell the jury they must convict if they found the defendant had spoken the words alleged and the Committee held such directions to "... usurp the function of the jury."  

Lord Oaksey claimed that a second ground for
reversal was the use of the charge of effecting a public mischief along with charges of sedition with respect to the same speech. Oaksey suspected that the "mischief" charge was not substantively different from the sedition charges, except that conviction was guaranteed as long as the trial judge held as a matter of law that Joshua's speech was an offense. Acquittal on the sedition charges should have also brought acquittal on the "mischief" charge, according to Lord Oaksey, because the result is that "the jury found the appellant not guilty of sedition but guilty of effecting a public mischief by making a speech the mischief of which was allegedly seditious in nature." 18

A third ground for reversal was that when an indictment charges that a person "agitated" certain sections of the public, the jury must be presented with evidence that agitation existed. Since the prosecution offered no evidence that the public was agitated or excited by Joshua's speech, the indictment could fall, according to Lord Oaksey, simply on grounds of insufficient evidence.

The Judicial Committee of the Privy Council is, of
course, endowed with great latitude when construing the common law. Even though, in this case, it retreated from any statements about the offense, it did lay down a rule which could only have more libertarian consequences by insisting that the jury decide the question of public mischief on the basis of evidence that there was in fact some agitation of the public.

The words "sedition" and "seditious libel" have not appeared in other cases since 1945, but this by no means should suggest that the conduct which the government sought to punish with such concepts has gone untouched. Sedition, both in the sense of incitement to illegal action and as "group libel," is spread throughout many statutory provisions. The attempt of government to control speech which could possibly inflame certain subjects of the realm and thereby breach the peace, which is at the heart of the rationale for "seditious libel," has been given renewed sanctity.

The Public Order Acts

The Public Order Act of 1936, with its prohibition of the wearing of political uniforms and "the
militarization of politics," was aimed expressly at Sir Oswald Mosley and the Blackshirts, but contains two provisions which were controversial from the standpoint of affording a citizen maximum scope of free expression. The first, which was objected to at the time of passage by the National Council for Civil Liberties, was the provision which gave to the chief police officer in an area the discretion to disallow processions if he had a "reasonable ground" for expecting serious public disorder. The act also stipulated that a police officer could apply to local authorities for an order prohibiting all public processions of any class for a period not exceeding three months if the "situation warrants." Libertarians objected to the use of this provision in the East End of London in the late 1930's when all processions, not simply Fascist processions, were banned. 19

The second controversial part of the Act was the incorporation of what was commonly known as the "Breathing Act," or the Metropolitan Police Act of 1839, which prohibited "threatening, abusive or insulting words or behavior whereby a breach of the peace is likely to be occasioned." 20 This was the charge frequently used to check "heckling" at open air meetings.
The National Council of Civil Liberties had a tortuous love-hate relationship with these two parts of the Act of 1936—being generally suspicious of the discretionary power vested in the police, but subscribing totally to the "insulting words" proviso, especially with reference to anti-Semitic statements. In the years immediately following World War II the Council's criticism of the use of the Act was usually that it was being applied to all speeches and demonstrations, rather than specifically against Fascists.

The prevalent fear that Fascist groups would break up meetings of which they disapproved—a fear shared by the NCCL—was the rationale used to prevent groups from renting both public and private meeting halls. The logic extended not simply to Fascist groups, but to opposing groups which might attract Fascists. In 1948 the NCCL was refused the use of Central Hall, Westminster (one of London's largest halls), when it wished to co-sponsor along with the London Trades Council a discussion of the growth of Fascist and anti-Semitic propaganda in the country. The Council could only obtain the use of a smaller London hall by omitting the word "Fascist" from
the title of the meeting. The NCCL objected to the refusal to rent halls to the Communist Party, the Zionist Federation and the Trades Council Movement, and was critical of the police in London for breaking up numerous open-air meetings on the "pretext" of obstructing the highway. Physical violence by Fascists had taken place, however, at meetings of the Labour Party, Communist Party, Zionist Federation, British-Soviet Society, and the Youth Movement in 1948, and led the Council to criticize the police for failure to take action against anti-Semitic speakers. 22

In the NCCL Annual Report of 1949 the following incident was reported:

The Council has been much concerned at the widespread increase of inflammatory anti-Jewish speeches from public platforms which have gone on unchecked by police officers present at the time.

... A particularly shocking, but by no means untypical, example is that of a woman speaker at a Union Movement meeting in Marylebone who stated, 'Gas chambers are too good for the Jews.' Although eight police-constables and two sergeants were present no action was taken. This example was given to the Home Secretary by a member of the NCCL's deputation to him in June.

At another Union open-air meeting it was reported to us that the speaker made a statement to the effect that he would be glad to see gas chambers built for some of his audience, and would in fact, help in the building of them. Again although requested to do so by the individual who sent us the report, the police refused to intervene. 23
English libertarians and "provocative speech"

The Council attempted to justify police intervention in the above instances by claiming that, "Such statements are clearly an abuse of freedom of speech. . . . It has never been permissible to use remarks of so provocative a character against any religious section in this country other than the Jews." The Council's position involved more than simply a demand to give Jews as much protection from invective as other religions have, however. It involved the more general criteria of "provocative speech."

It is clear that, however much self-control is exercised by the religious section subjected to abuse, sooner or later it must lead to disturbances of public order. In the past . . . it has always been the practice when religious minorities have been concerned for the authorities to stop the abuse. Today no steps are taken to stop the provocation, and when disturbances of public order take place, the authorities tend to meet the problem by restricting the liberties of all. The NCCL has always held the view that it should be illegal for such remarks to be made and the deliberate propagation of race hatred and antisemitism should be prevented. . . .

The Council took the same attitude toward certain proposed marches, as in its 1948 appeal to the Home Secretary to stop a May Day march by Mosley in Hackney. This was to be Mosley's first outdoor meeting since 1940,
and the Council claimed that he had chosen a borough with a large Jewish minority and that the meeting and procession could "only be regarded as deliberate incitement to trouble. . . ."26 The Council's prediction of "trouble" turned out to be accurate, and even though 834 police were assigned to the procession, fighting broke out and resulted in 31 arrests. The Home Secretary argued that he did not have the authority to prevent any meeting from being held, but that he could (and did) give consent to the Commissioner of Police to use his discretion about the political climate in general and the possibility of civil disorder and to ban all processions for a period of three months. The Council objected to this general ban by invoking two different arguments. First, it claimed, the "misuse" of traditional democratic rights of speech and assembly by some led to the limitation of the rights of all persons and groups. Innocent groups which did not create disorder, they argued, were being punished because Fascist groups did create disorder. The Council's second argument was that Mosley and his ilk desired a general ban on all groups because their major objective was to silence democratic expression.27
The standard the NCCL wished to have applied in this kind of situation involved a prior assessment of the probability of disorder.

Where a meeting is so provocative of the normal sensibilities of its audience as to be calculated to provoke disorder and in fact does provoke disorder, the responsibility has been considered to be on the police to prevent it by closing the meeting. 28

This standard urged by the Council has several problems, not the least of which is that it is anticipatory in character and therefore must involve a prior assessment of social disorder. While there is certainly nothing unreasonable about wishing to foretell disturbances in order to prevent them, such an attempt at prediction necessarily involves an increase in police discretion. Since the NCCL annually assails broad grants of discretion to the police, this seems to be a formula designed to guarantee criticism of the police for either acting or not acting against a speaker. The Council, in the period between 1945-60, was in the awkward position of urging essentially a form of prior restraint against Fascist marches and the application of "insulting words" to anti-Semitic speakers, but in somewhat different contexts
criticizing police for prior restraint and "anticipating problems." In 1951, for example, the Council was extremely critical of the London police for stopping numerous public speeches in traditional meeting places on grounds of traffic obstruction. Frequently the police stopped meetings before any of the crowd actually blocked traffic and were scolded by the Council for "anticipating" traffic congestion and instructed to act only if there actually were traffic congestion. If confronted with this inconsistency, the NCCL could perhaps respond by indicating that the discretion involved in the traffic instances was merely a "pretext" used by the police. The essential point, however, remains that if only a concrete instance of something undesirable (such as traffic congestion) can insure that police are not acting by subterfuge, the same criteria ought to apply to other undesirable circumstances, such as riotous meetings.

More important than any apparent contradictions about the proper scope of police discretion in the NCCL's standard, however, is the factor deemed most appropriate for controlling the range of permissible speech. If police, or anyone else, are guided by the standard that
speech "so provocative of the normal sensibilities" is not to be permitted, it would put the audience, and perhaps not even the intended audience, in control of what is said. "Normal sensibilities" would presumably vary greatly from audience to audience, and while such a situational criterion could be an asset in terms of solving real problems, it places the burden of prediction on the speaker. Even if we assume that a speaker bears some responsibility for the disorders caused by those who disagree with him, the "normal sensibilities" standard is an attempt to isolate and evaluate not overt behavior, but rather the probable psychology of the listener.

In 1962, however, the Council was to criticize the "insulting words and behavior" provision of the Act of 1936 on the ground that it gave police the power to prohibit processions not only on a particular occasion but also "of a particular character." In the 1960's the groups using strident language had changed, and the Council complained that the Public Order Act was being used in circumstances far removed from those of the Fascist marches in the immediate pre-war years. Even in the 1950's the NCCL objected to what it felt to be the improper
application of the statute, such as the conviction and 
L50 fine of a person displaying a poster near the U. S. 
Embassy claiming that the Rosenbergs were being "framed 
as part of the drive to silence fellow trade unionists 
and peace workers." Or the charge of "insulting behavior" 
levelled in 1953 at a man who had witnessed what he 
believed to be a wrongful arrest of another man and 
demanded that police take his name as a witness for the 
defense. In the course of explaining his position the 
individual shook his fist and resorted to "improper 
language" which the police found insulting, but the 
Magistrate dismissed the case because he felt the charge 
was inappropriate. 30 The Council never complained of the 
validity of attempting to regulate "provocative" speech 
divorced from any instance of disorder. Their objections 
usually consisted of the request that the Act was designed 
for, and by implication at least should be restricted to, 
Fascist groups.

There can be several explanations offered for the 
Council's concern to regulate Fascist demonstrations. 
First, as is the case with libertarian groups in the 
United States, the Council draws members from a constituency
which overlaps the Jewish community. Secondly, and this is only a casual observation based on the tone rather than the content of some of the Council's reports, the NCCL perceives itself as somewhat more a member of the "Anti-Fascist Front" than groups such as the American Civil Liberties Union. But a more credible explanation than either of the above, though they may be partial influences, is the sensitivity in the NCCL, which is also reflected in the press, public opinion, and the law, to defamation and its consequences. Legally this is reflected in the much more drastic restraint the English law of libel places on the press than American law. The guide editors must use is to question whether any item in their columns will "tend to lower the individual to whom it refers in the estimation of right-thinking persons generally, or to bring him into hatred, ridicule, or contempt, or to exclude him from the society of his fellow men." 31 Politically and socially it is reflected in the enthusiasm of the press and the NCCL over the Race Relations Act of 1965 which attempts to punish racial insults.
English courts and "insulting" speech

English courts, cannot, of course, strike legislation, but they can alter the utility of an act both by interpretation of the act itself and by deciding whether the use of the statute is appropriate to specific conditions. In 1967, for example, the Oxford Magistrate's Court dismissed charges against five picketers who were demonstrating their opposition to the racial exclusion policy of a local hairdresser. Police invoked the Public Order Act by claiming that the picketers "displayed insulting signs whereby a breach of the peace was likely to be occasioned." The Magistrate, in addition to pointing out the lack of evidence for actual "insults" scolded police for inappropiate use of the Act on the ground that what the police actually were attempting was the charge of unlawful picketing through the use of the 1936 Act. The question of the right to picket in Britain holds a rather obscure position, with clarification actually being a highly discretionary police function based on an assessment of circumstances. In the Trades Dispute Act of 1960, for example, a picket is only lawful: 1) "merely for the purpose of peacefully obtaining or communicating
information," or 2) "merely for the purpose of peacefully persuading any person to work or abstain from working."
The picketers could presumably be protected by the Act's permission to "communicate information," but the NCCL claims that the Act enables police to set severe limits on the number of picketers and makes effective picketing "... virtually impossible if the police decide to clamp down."32

In two other cases, however, the application of the Act and the meaning of "insulting words" was greatly extended. In Jordan v. Burgoyne the Queens' Bench reversed the London Quarter Sessions Court and upheld a conviction for "insulting words" in a case reminiscent of America's Terminiello v. Chicago, except for the radically different criteria employed by the Queen's Bench. The facts in this case stem from an address given by John Jordan before a group of about 5,000 people at a public meeting in Trafalgar Square in 1962. In the front ranks of this crowd there were reportedly between two and three hundred young people. This group, the court record states, contained Jews, supporters of the campaign for nuclear disarmament, and Communists. Jordan, in the course of his speech used the following words:
more and more people every day . . . are opening their eyes and coming to say with us: 'Hitler was right.' They are coming to say that our real enemies, the people we should have fought, were not Hitler and the National Socialists of Germany but world Jewery (sic) and its associates in this country.\footnote{33}

This statement by Jordan, while obviously impolitic, also turned out to be illegal because of the activity which followed, and the judicial assertion that such activity was Jordan's fault.

George Burgoyne, Superintendent of the Metropolitan Police, was in the vicinity of the speaker's platform and was responsible for maintaining peace. There was reportedly heckling throughout the entire meeting in all parts of the crowd, but the people immediately in front of the speaker's platform made repeated attempts to attack the platform. After Jordan made his statement about the wisdom of National Socialist policy in Germany, there was complete disorder and a "general surge forward by the crowd toward the speaker's platform."\footnote{34} The police had great difficulty in restoring order, and twenty members of the crowd were arrested for breach of the peace. Jordan was charged under Section 5 of the Public Order Act of 1936 for using "insulting words." In the Bow Street Magistrate's Court
he was convicted and sentenced to two months' imprisonment.

On appeal to the London Quarter Sessions the conviction was reversed on the ground that Jordan's words would not have led an "ordinary and reasonable" citizen to a breach of the peace. The Quarter Sessions explained that they allowed appeal against conviction because, while highly insulting, Jordan's words could only result in conviction if they led to a breach of the peace. Quarter Sessions claimed that Jordan's words preceded a breach of the peace, but that the Public Order Act was aimed at incitement of an ordinary reasonable citizen, and, in their view, Jordan's listeners didn't fall into either category. Quarter Sessions was essentially saying that the words in Section 5 that read "... whereby a breach of the peace was likely to be occasioned," should be construed to mean "... likely to lead to a breach of the peace by the ordinary and reasonable citizen."

Burgoyne appealed to the Queen's Bench Division. Lord Parker, with the concurrence of Judges Ashworth and Winn, claimed he had great difficulty in "understanding what Quarter Sessions was intending to convey." For Lord
Parker the lower court's reference to "ordinary and reasonable" citizens incorporates into the statute a "hypothetical audience." The danger of interpreting the statute to include this hypothetical audience, according to Lord Parker, is that it overlooks the special nature of this crowd and assumes that there was no one in the audience intent upon breaking up the meeting. This criticism of Lord Parker's incorrectly implies that Quarter Sessions did not realize the volatile nature of the crowd, when in effect the lower court was simply stating that because the nature of the crowd was not "ordinary and reasonable," the disorder was not Jordan's fault. The function of the hypothetical audience for Quarter Sessions was to shift culpability for the disorder, whereas for Lord Parker the predisposition of the crowd toward violence places greater restraint on the speaker. Even if one assumes, Lord Parker stated, that the "persons present are a body of hooligans," if the words used "threaten, abuse or insult," then the speaker is guilty of the offense. According to Lord Parker "... the speaker must take his audience as he finds them." 36
Interpretation of the Act with reference to the synthetic, rational audience is incorrect according to the Queen's Bench, but even using that criterion, Lord Parker claims that he cannot "... imagine any reasonable citizen, certainly one who was a Jew, not being provoked beyond endurance." Evidence that some members of the crowd wanted to stop Jordan from speaking, which was the factor which inclined the Quarter Sessions to excuse Jordan, was a factor which, for Parker, added to the wrongfulness of his action. The police had successfully prevented the people in the crowd from obstructing the speakers, but Jordan, in his opening statement, according to Parker, deliberately insulted the people that the police had successfully prevented from interfering with him. This alone, he stated, constituted a clear contravention of the Act.

Jordan, who acted as his own counsel in this case, and did so according to Lord Parker "with great skill and industry," had argued that police invocation of the Public Order Act was an inroad into a citizen's freedom of speech. For the Queen's Bench the action did not curtail any rights of free expression, because Jordan's words
amounted to verbal assault. Lord Parker explained:

A man is entitled to express his own views as strongly as he likes, to criticize his opponents, to say disagreeable things about his opponents and about their policies, to do anything of that sort, but what he must not do—and these are the words of the Act—he must not threaten, he must not be abusive and he must not insult them, 'insult' in the sense of hit by words. 39

The Queen's Bench could have held with Quarter Sessions on the same ground, or they could have upheld even without the reasonable audience test, by claiming that Jordan's speech did not constitute a verbal "hit." The Quarter Sessions had essentially said that Jordan was not guilty of "incitement." Lord Parker was to rule that "incitement" does not, alone, constitute the crime described in the Act. Speech which is a "hit by words" is what the statute seeks to regulate, and Jordan was guilty of several hits.

Once again, as in the case with seditious libel when it covers group defamation, there is an obvious sense in which people can be "hit by words"—sometimes with a pain as real and damaging as a physical blow. But as a guide in delineating the permissible area of speech it places ultimate authority for what is said on the listener. This is perhaps of some value when the listener is not in
a volitional situation, such as in sound truck speech or public speeches in areas not typically used for such purposes and where the listener cannot easily get rid of the speaker by leaving the meeting or in some fashion "clicking off" the message. In the present situation the audience was in no sense captive, and Jordan received a two-month sentence for insulting people who were already insulted. Since Lord Parker ruled out any abstract criteria which would define "insult" with reference to the average man, the "hit by words" must be related to the pain threshold of Jordan's audience, which, one could submit, was close to zero.

The NCCL, not noticeably irate about the ruling in the Jordan case, did express concern over a 1966 case in which the insulting words provision was greatly extended. This case concerned the prosecution in the Divisional Court of Gwyneth Williams after she handed out leaflets addressed to "American Soldiers in Europe" to American servicemen outside a residential club in Lancaster Gate. This leaflet criticized U. S. involvement in Vietnam, using what the NCCL classified as "restrained and temperate language." The NCCL also claimed that the pamphlet was
not designed to provoke passion. The judges, however, held the pamphlet to be insulting because it invited its readers, if they accepted its arguments, to "consider deserting." The Council felt that the judges were in effect saying that it was "insulting" to ask a soldier to consider a certain point of view. The argument used by the defense in this case was that soldiers, as morally responsible and rational persons, would not be insulted by being asked to consider whether they had a higher duty than their military obligation. The judges were not impressed, however, and the Council bitterly noted, "The Nuremburg decrees established that every individual has a duty to determine for himself the legality of his country's actions. But English law now forbids us even to ask servicemen to consider this duty!"

In the 1950's the NCCL had been successful in getting several charges under the Act dismissed, as in 1951 when a Magistrate dismissed a prosecution for insulting words and behavior against a person collecting signatures for a peace petition. But in 1963 the Criminal Court of Appeal extended the Act to include almost all forms of actual and potential breaches of the peace.
Police in Ramsgate charged John Ward with violating Section 5 of the Act when he was involved in a family brawl. Ward appealed his conviction to the Kent Quarter Sessions, and at the end of the prosecution's case that court stopped proceedings and allowed appeal to the Court of Criminal Appeal because it understood the Public Order Act was "limited to conduct at political meetings and the like and in the course of political and similar processions and could not be extended to disputes between neighbors. . . ." 42

Lord Parker ruled that the Act did apply to domestic disputes by arguing that even though it was quite easy to demonstrate that it was not Parliament's intent to cover neighborly disagreements under the statute, the intent of Parliament is only judicially relevant when the controlling and operative words of an act are ambiguous. Section 5 was not ambiguous for Lord Parker. Since it was designed to preserve peace and order, both in the sense of keeping the public orderly and keeping public places orderly, he therefore saw no reason for "limiting the operation. . . ." of the Act. 43

It is important to note here that the lower courts
and Quarter Sessions made attempts to restrict the Act to a narrower class of behavior, with the Queen's Bench being reluctant to restrain the use of the Act. In the Ward case the Quarter Sessions asked, "Why invoke the Public Order Act?," and Lord Parker replied, without much judicial elaboration, "Why not?"

CND Demonstrations

The NCCL and the CND

The increasing frequency of conflict between the police and the Campaign for Nuclear Disarmament and the "Student Left" became the focal point for English libertarians in the 1960's. Problems were compounded by the fact that after 1961 the CND became enthused with "direct action" rather than more routine methods of expression. The NCCL took the position that resort to civil disobedience in order to gain support for a policy was not justifiable because "... the people of a democratic country should argue their policies rather than attempt to impose them by force, even if the force is non-violent." It did, however, support many of the CND complaints about police attendance at indoor meetings of the CND; police
photographing demonstrations (justified by some local police as private curiosity rather than professional interest); the deportation of an American student who was a leader in the CND; as well as general support of the CND's claim that they were denied access over both the BBC and independent television. It also supported complaints about the refusal of public agencies, such as the British Railways, to accept "political" advertising.

The CND has had problems obtaining meeting halls and has claimed that bail is frequently excessive for its members. It also claims that "binding over"—a process whereby a person can be "enjoined" to keep the peace for a specified period, even though no offense has been proven, and which, if broken, can result in imprisonment without trial, proof of offense, or appeal—is discriminatorily practiced against them. Most of the NCCL's concern, however, has been with the prevention of over-reactions on the part of the police to demonstrations which have both legal and illegal aspects. After publishing a special report entitled "Public Order and the Police" which complained of unnecessarily violent handling of sit-down demonstrators belonging to the Committee of 100 in 1961, the NCCL began
to issue credentials to "observers" at demonstrations in
the hope that their presence might discourage the out-
break of violence. These observers usually attempted to
prepare balanced reports after demonstrations which evalua-
ted both the demonstrators and police. Following a
Grosvenor Square demonstration in 1968, for example, the
Council criticized "minority troublemakers" and some
instances of the "provocative use of police forces," but
nonetheless complimented most police who, it felt, were
"admirably restrained considering the hostility of the
crowd." According to the NCCL the relationship of the
police with the public deteriorated in the 1960's,
especially with "particular groups such as young people,
colored people, demonstrators and motorists, ..." The
deterioration, they are fond of noting, is much less
severe than in the United States (the most prevalent
complaint was the use of mounted police to break up
crowds, rather than "brutality"). The Council has also
expressed sympathy for police who fall victims of a situa-
tion provoked originally perhaps by one or two irritable
exchanges between officers and demonstrators. Police,
the Council claims, by their mere physical presence at
demonstrations, become a "target for the pent-up frustrations and a substitute for the policies which are the original object of the protest." 48

CND Activities and the Police and Courts

The Public Order Act, even though subject to broad judicial interpretation, was not usually invoked against the newer forms of propaganda and protest. Attempts to stop CND activities when no disorder was involved included the resurrection of the ancient Metropolitan Streets Act of 1867 which requires permission of the Commissioner of Police to advertise with handbills. The Act was used extensively in 1963 against the Committee of 100 for distributing leaflets without the necessary permission. The NCCL, noting that the only other time the statute had been used politically was against suffragette organizations, claimed the London police were engaging in deliberate harrassment of the CND. The charge "willfully disregarding the Commissioner's regulations" was also widely used and is essentially failure to disperse when so ordered by the police. This involves instructions at a demonstration which has been given approval, but which because of subsequent developments the Commissioner has decided to
disperse. Such a power is obviously necessary if the police are to disband disorderly demonstrations. Having the discretion extend to meetings which might be but are not disorderly, along with the fact that prior approval has already been given, can lead to great confusion and even disorder. Such a situation existed in 1966 when the British Council for Peace in Vietnam obtained police permission for a demonstration in Grosvenor Square (American Embassy) which was promptly dispersed by the police when the Committee of 100 arrived with the march. Demonstrators were informed of the Commissioner's decision verbally by loudspeakers, and many claimed they did not hear the instructions. Those who did, seeing no disorder and having followed all proper channels in the planning of the demonstration, viewed the police action as arbitrary. 50

Appellate courts in two instances passed down rules which narrowed police authority with reference to demonstrations. The first involved the Divisional Court's ruling in 1967 which eroded the famous "sessional order." The sessional order is a House of Commons directive to the police made at the start of each session to insure that there is no disorder in the neighborhood. Since 1839
the Commissioner of Police, operating under the mandate of the sessional order, has formulated regulations which included the right to ban all processions and assemblies and "causes of obstruction" in the area while Parliament is sitting. The operating formula used by police, and generally believed by the public to be a ruling by Parliament itself, was that Parliament was insulated by a one-mile demonstration-free zone. After a Bow Street magistrate had convicted participants in a stationary (and peaceful) "vigil" at the junction of Whitehall and Downing Streets, Divisional Court sent the case back to the magistrate with the direction that the magistrate must be satisfied, without hearing fresh evidence, that the defendants were obstructing or could potentially obstruct MP's or create a breach of the peace. On re-hearing, the defendants were acquitted. The effect of the Divisional Court ruling was to limit police power severely in reference to peaceful demonstrations in central London and to make justification for police intervention swing on the behavior of the demonstrators, rather than simply on some arbitrary zone around Parliament.

In 1963 the Court of Criminal Appeal reversed the
conviction of George Clark in the London Criminal Sessions Court for inciting people to commit a public nuisance by unlawfully obstructing the highway during a demonstration against Queen Frederika in July of that year. The Court of Appeal, while undoubtedly influenced by the severity of the sentence (eighteen months' imprisonment), stated that for an obstruction to be unlawful it must constitute an unreasonable use of the highway, and that a "peaceful demonstration is not *prima facie* unreasonable."\(^{52}\)

On charges arising from the same demonstration, Peter Moule and Terrance Chandler were indicted for the common law offenses of conspiracy and incitement to public disorder. These charges were dismissed, but the two were imprisoned for four and nine months respectively on charges of inciting people to commit a public nuisance. It is with reference to Chandler that a vindictive motivation on the part of the government seems to emerge. This is not based on the frequency of conflict between Chandler and the police, which was extensive (he was also convicted under the Official Secrets Act, which we shall discuss later) but rather his conviction under the Forgery Act of 1913. This action would seem to reflect police impatience
with his political activism because he was convicted for "counterfeiting" under the Act when he was found in possession of two litho plates used to make mock U. S. "dollars." The "dollars" contained political slogans and were of a color which clearly distinguished them from the real thing. Chandler and six others were convicted and conditionally discharged for three years. The NCCL objected strenuously to the use of Old Bailey and "thousands of pounds of public money . . . in a futile campaign to harass a few politically active young people."

Political speech, of course, can take many more forms than simply demonstrations and speaking before large audiences. Since the form as well as the content of political speech can be as varied as self-expression and social interaction itself, the charges employed to regulate political speech can be highly varied. If the form of protest about the Vietnam War is through paintings, it can be subject to removal from an exhibit on aesthetic grounds, as in Croyden in 1967. It is, then, virtually impossible to distinguish between suppression of a political point of view and suppression of bad art, though the NCCL assumed the former. Or if it is a play, such as
"Macbird," a satire on President Lyndon B. Johnson, the Lord Chamberlain was formerly able, as he did in 1967, to refuse a license on the ground that "it presents a head of state of a friendly power in an unfavorable light." The place as well as the medium can become important in determining the legality of the political speech, as when two persons were convicted of "indecency in church" after they called the Foreign Secretary a hypocrite during his reading of a sermon in a Methodist church service which preceded the Labour Party Conference in 1967. The two received two-month sentences under the 1860 Ecclesiastical Court Jurisdiction Act, and their appeal was rejected by the Lord Chief Justice on the assumption that controversial matters should not be raised in sacred places, and this disturbance could be regarded as indecent within the meaning of the Act. The libertarian issue becomes, in this kind of case, whether the "other social interest" is sufficiently real to avoid any indication of a simple pretext to silence unpopular opinion. The NCCL views denial of soundtruck permits as such a pretext, but the simple fact that permits are easier to obtain for official electioneering, which they use to butress their case for
discriminatory police discretion, could also be viewed as a temporary relaxation of neighborhood tranquility in the name of the fairly infrequent demands of electoral politics in a democracy. The church incident is compounded by the fact that party politics and religious services were not only mixed but involved the same personnel. Given an element which views anything public and verbal as a legitimate forum for public debate, it is perhaps wise to remind people, in principle at least, that there are some aspects of life which, if not "sacred," should be at least non-political. A two-month sentence, on the other hand, seems a harsh way to drive home a lesson about social propriety, and there is some utility in distinguishing (for purposes of punishment) between behavior which is in bad taste and perhaps necessitates removal and that which is truly criminal.

Freedom of Expression and National Security

Political Activities and Employment

Just as a libertarian interest in free expression must be weighed against probable public disorder and community tranquility, freedom of expression and political
association are also, most would hold, subject to some restrictions when the people in question are involved with national security. Their political beliefs and association offer one kind of evidence as to their ability to maintain the degree of trust or "loyalty" that such positions require. Even though Britain has never used "loyalty oaths" for governmental employment, Britain has governmental security programs designed to protect against infiltration and reinforce the necessary secrecy in matters of national security. This concern extends also to labor unions, personnel in private corporations with defense contracts, and aliens wishing to enter the United Kingdom. Political parties are sufficiently disciplined to make their rulings about associations quasi-official, but Britain cannot be viewed as having a counter-part to the American Attorney General's list. Major parties have lists of "proscribed organizations," meaning that membership in any of the listed organizations is "incompatible with membership in the party." But this list is shorter, and more cautiously drawn than the American list, and of course relates only to party membership. Since 1946 the Labour Party's constitution has restricted membership to
those not owing allegiance to "political organizations abroad." The Co-operative Party, an organization of independent co-operative societies affiliated with the Labour Party for political purposes, was faced with the problem of many Communists holding posts of secondary importance and instituted what amounted to a disclaimer affidavit for members of the national committee and the central governing body.  

Civil servants who are dismissed for security reasons have recourse to an administrative tribunal which makes the initial recommendation about an employee's reliability. There is no counsel allowed in this procedure nor any higher appeal since the tribunal only acts as an advisory board for the minister, who takes ultimate responsibility for dismissal. This was instituted in 1948 in an attempt to "tighten" security measures, and was "tightened" again in 1952 when people engaged in secret work or handling of secret material were required to answer a questionnaire and disclaim association in Communist or Fascist groups. The most important characteristics of the governmental security programs are that they are designed to effect only the possibly "disloyal"
in certain sensitive positions; efforts are made to transfer "risks" to areas where their associations or beliefs would not be inimical to security. The security program is therefore directed at the specific objective of insuring secrecy rather than a general denial of governmental employment to alleged subversives. Designation of a "sensitive" position is, of course, not easy, and the practical effect of security regulations was most felt at the Ministry of Supply since virtually all war production contracts, atomic research, etc., pass through its jurisdiction. The most controversial designations of "sensitive areas" are probably the Ministry's concern over telephone technicians. However, one of the most celebrated cases concerned the absence of a sensitive designation before the Ministry of War's inclusion of couriers. This was done after a one-armed messenger who delivered dispatch cases and sold the Daily Worker while on the job received great newspaper publicity. The individual was transferred to another ministry but was never told to stop selling the Daily Worker.

The problem of Communists in civil service unions has also caused some controversy and led to a judicial
inquiry under the leadership of Lord Justice Radcliffe in 1963. The Radcliffe report, while not suggesting that any union official ever had obtained secret information, did suggest that the situation was a possible danger. After 1963 the government was empowered to notify a union that it considered an official unreliable for security reasons. The union official has recourse to the three-man tribunal, and if not sustained, probably (although this remains somewhat obscure), is removed from being an official or the union is denied affiliation with a governmental department. In 1963 two conflicts arose in this connection; one concerning a technician's union (telephone) official who reportedly met in social gatherings with diplomats from Communist countries, and the second concerning an official of a manual worker's union who was refused permission by the office of the Minister of Science to enter the atomic research establishment at Aldermaston. In the latter case the official was a member of the British Communist Party but desired to enter only the canteen and administrative block.

The rationale for the government's decisions about security risks is usually not disclosed, and, as in the two
instances above, the NCCL can only speculate as to the real reasons. The rationale cannot even be gleaned through Parliamentary question periods. In 1956, for example, the Ministry of Supply had asked that a chemical company dismiss one of its solicitors on the ground that he was a security risk. Since the firm could not be awarded government contracts unless it could comply with security standards, the individual was dismissed, and because he was not a governmental employee he had no legal recourse or administrative appeal. When asked by the opposition in Parliament for the charges against the solicitor, the Minister of Supply resorted to claims of ministerial responsibility and "security" to avoid giving any answer. Two years later the justification given by the government (which the NCCL assumed to be the total justification) was that the solicitor's wife, before marriage, had been a member of the Communist Party. The notion of ministerial responsibility along with the cloak of security, acts in the view of many, to reinforce governmental secrecy in security dismissals. Some, such as Harry Street, argue that ministerial responsibility causes innumerable cases of Englishmen being denied access to the Courts in
situations where "judicial scrutiny is standard practice in the rest of the Western World." The government's refusal to disclose their rationale may, but need not necessarily, imply that the action is arbitrary. In fact the secrecy surrounding the security program can have, as Wilson and Glickman have noted, quite beneficial libertarian effects. Although the accused people have difficulty getting reasons, there is also no "trial by accusation" in the press, and the secrecy of the government and their standards can also make it difficult for outside groups to attack employees on loyalty grounds. The government was noticeably unresponsive to a plea from the Evening Standard to dismiss a Communist who was also general secretary of the Civil Service Clerical Association and failed to heed the warnings of Common Cause, an anti-Communist organization's pamphlet which listed Communist and "near-Communist" civil servants and called for their dismissal. Secrecy in this type of case can make the issue appear to the public as a technical decision on the part of the government, rather than stern warnings that certain groups and certain associations will not be tolerated in government. The "style" in which the security
program was both implemented and justified created an attitude much different than the one which existed in the United States during the same period. The attitude is characterized by Lord Chief Justice Denning's assertion that the government's concern with Communism should not be to deprive them of liberty, but simply of access to military secrets. This attitude is also indicated in the Co-operative Party's explanation of its ban on Communist officials in its organization as only a difference in political faith, as not meant to question the right of Communists to hold, advocate, and secure support for their views, or to "dispute their sincerity." This attitude reflects more than simply a penchant for polite expression of disagreement; it reflects an assumption that Communism is an incorrect political view but that it is not a "totally evil . . . satanic world-wide conspiracy . . . or the anti-Christ." In an organization formed around political principles, members may be dismissed if they deviate from those principles. However, this implies only a difference in opinion, not that the dissidents are totally unfit for any employment or that they are rejected as fellow citizens.
This attitude is also reflected by the fact that, while there have been controversies about Communism in education and the Middlesex County Council did ban Communists and Fascists from being appointed headmaster, generally speaking little impetus was marshalled behind the proposition that Communist teachers were subversive by definition. Britain has not been lacking in attempts to ignite public opinion on this subject, but such attempts have been noticeably unsuccessful. The same has been true about the general response of the public and the government to charges that something should be done about disloyal Englishmen in communications, entertainment, the professions, and religion. Such incidents as the disclosure of the Canadian spy ring and the cases of Alan Nunn May, Klaus Fuchs and Bruno Pontecorvo, aroused concern for British security and support for a tighter security program. The fact that Fuchs was uncontroversial and escaped detection for five years caused some to speculate about the utility of attempting to ascertain a person's reliability on the basis of expressed attitudes and associations. Even with this increased sensitivity about security, the distinction between speech and opinion on
one hand and espionage and military secrecy on the other was preserved. This perception of Communism as a political doctrine not necessarily related to espionage and therefore not a "loathsome contagious disease" was also widespread in the society, not just in government. A post-war national poll by the British Institute of Public Opinion which sampled attitudes about making Communist Party membership, incompatible with membership in the Labour Party revealed that 54 percent felt that the Labour Party should not admit members of the CP, with 16 percent feeling that membership should be open, and 30 percent responding with "Don't Know." Another dramatic example is the rejection by the British Legion, the counterpart of the American Legion, of a proposal to prohibit Communists from joining because most members of the British Legion did not want membership to depend on a political criteria. This reflects the feeling that one can have hopelessly erroneous political beliefs and still be a worthwhile member of groups formed for social purposes—that one can be a Communist and still be English.
The Official Secrets Act

The renowned Official Secrets Act which is cited in almost every English spy thriller has also caused occasional concern among libertarians. The Act, passed to prevent the reoccurrence of Foreign Office scribes giving the contents of secret treaties to hostile powers and the press, as one did in 1878 as a gesture of disenchantment with the lower rungs of civil service employment, has occasionally been used in obvious non-security matters. In 1938, for example, it was invoked when a Daily Dispatch reporter refused to reveal the sources of one of his news stories when police were seeking to stop a "leak" in their own department. It has also been used to prevent publication of articles about prison conditions, as well as genuine instances of espionage. In February of 1962 the Act was to receive its most controversial application when six members of the Committee of 100, including Terrance Chandler, were charged and convicted on two counts of conspiracy to commit breaches of the Act. The five male defendants were sentenced to eighteen months in prison and the lone female defendant to twelve for their part in a large-scale demonstration at Wethersfield Airfield.
in 1961. Wethersfield was at the time occupied by squadrons of the United States Air Force assigned to the Supreme Commander Allied Forces, Europe, and was chosen by the demonstrators because of the alleged presence of nuclear weapons. The intent of the demonstrators was that a number of people should take positions outside the two entrances to the field while another contingent would, if possible, enter the airfield and sit in front of aircraft to prevent them from taking off. The admitted objective of such an action, at least on the part of the six defendants, was to ground all aircraft and immobilize the airfield or, as they expressed it, to "reclaim the base for civilian purposes." The government had designated Wethersfield as a prohibited place within the meaning of the Act, and the defendants were convicted for conspiring to enter such a place and entering such a place. At the trial the jury was instructed that in order to find the defendants guilty it was necessary for the prosecution to demonstrate that they conspired together and that the conspiracy was clearly either to enter a prohibited place, and that the intent of such a conspiracy was for a purpose "prejudicial to the safety and interests
of the state." The defendants freely admitted the conspiracy, but chose to argue vigorously over their intent. On appeal to the Court of Criminal Appeal, counsel for Chandler put forth secondary arguments to the effect that the Act could only be used to prevent mischiefs stemming from espionage and the collection and disclosure of secret information. Lord Parker quickly dismissed these arguments by ruling that the Act empowers the Secretary of State to declare a place prohibited on the ground that the "destruction or obstruction . . . would be useful to the enemy," and that the Act was not therefore limited to espionage. 73

More strenuously argued, however, was the plea that the defendants had no intent to prejudice the safety or interests of the state and that their action did not in fact prejudice those interests. This argument focused on the refusal of Judge Havers to allow questions during cross examination that were related to, or tried to establish, 1) the advisability of a nuclear deterrent weapon in the United Kingdom; 2) the possibility of accidental detonation; and 3) the "attraction" of such defense installations for hostile attack by other nations. The
defense argued that unless they could get at the "substance" of the demonstration, i.e., the desirability of nuclear disarmament, the prosecution could not prove an intent to prejudice the interests of the state, nor could a jury evaluate whether the defendants' actions actually did prejudice the interests of the state. The prosecution argued that intent could only be established by first establishing that the defendants' actions were prejudicial, after which their purpose could be inferred from such actions. The defense argued that an individual's "state of mind" was relevant to prejudicial intent, even if the actions were prejudicial. Lord Parker sustained the prosecution's point of view by contending that the individual's state of mind was a different and irrelevant issue with reference to establishing intent. If the action taken is prejudicial, then an intent to prejudice simply means, for Lord Parker, a deliberate intention to take such action.

The defendants' desire to explore their "state of mind" at the trial reflected their wish to debate nuclear disarmament on its "merits." This "intent" became painfully obvious when Patrick Pottle, one the accused who
conducted his own defense, asked an Air Commodore during the process of cross examination whether he were "familiar with all the facts on the nuclear bombings of Hiroshima and Nagasaki; whether or not there was any official order from government that he would not accept; and whether n or not he would "press the button." In a style of argument that is now familiar to student activists, Pottle asked the witness if he would "slit the throats of all two year old children in this country;" quoted from a document (which the judge reminded him was not really cross examination) from Sir Winston Churchill to the effect that atomic bases in East Anglia made Britain the target of Soviet attack; and asked whether the witness was familiar with Adolph Eichmann's defense. Judge Havers invariably instructed the witness not to answer, and Lord Parker was quick to note the larger "political motivation" of the defendants, and rule:

Insofar, therefore, as it was sought to challenge the policy of the Crown, it seems to us that cross examination and evidence to that end were rightly excluded. Granted that the policy and granted the use of the airfield within that policy, it was of course open to the defense to show, if they could, that the acts proposed would not prejudice its operational effectiveness . . . the emphasis of the appellants' arguments, both at the trial and before us, was concentrated on a
challenge of policy rather than on the issue whether, within the policy, the acts proposed were prejudicial. Accordingly, we are satisfied that the learned judge did not exclude any cross examination or evidence which was admissible and relevant, and there being no possible criticism of their summing up these appeals fall. . . . "74

The Court of Appeals granted leave to appeal to the House of Lords, however, because it felt that the case raised a point of law of general public importance, specifically the proper definition of the state's interest. The Law Lords (in the House of Lords, before Viscount Radcliffe, and Lords Reid, Hodson, Devlin and Pearce) each wrote an opinion, but all were in favor of dismissing the appeal.75 Lord Reid took essentially the line of reasoning expounded by the Court of Appeal, arguing that the disposition and use of armed forces was a governmental matter and could not be questioned in the courts. According to Reid it would be hardly "credible" that Parliament wished to entitle a person who had deliberately interfered with the armed forces to submit to a jury that the " . . . government policy was wrong and that what he did was really in the best interest of the country."76 Lords Hodson and Pearce and Viscount Radcliffe laid great stress on the same point underlining the viewpoint that
the wisdom of nuclear weapons was not a justifiable issue.

Lord Devlin reached the same holding, but by following a slightly different path. For him, the issue of what was prejudicial to the state was not a question of law but of fact, and should, therefore, have been determined by a jury. Since he found it difficult to see how a jury could have found actions designed to obstruct a policy supported by a majority of the population as anything other than prejudicial to the state, he concurred in the holding, but resented the use of "government" and "state" as synonyms. The government's argument throughout all of the proceedings was that whatever was in the interests of the government was necessarily in the interests of the state, and by implication, all the people in that state. Lord Devlin found no evidence to suggest that the testimony given by the government in the Chandler case was in any way exaggerated or offered in bad faith; he argued simply that a purpose which "appears to the Crown" as prejudicial is not the same as the fact of a prejudicial action. Devlin deviated from the other Lords only on the question of who is to decide what is prejudicial. Devlin appeared to agree with Lord Pearce when he insisted
that "interests of the state" could not mean "... the interest of the amorphous populace without regard to the guiding principles of those in authority." The phrase must mean, according to Pearce, "... the policies of the state as they are, not as they ought in the opinion if a jury to be."77 Devlin's distinction between "the state" as all legitimate authority and "government" as simply the lessor implementor of sovereignty was designed to avoid saying the interests of the Crown and the interests of the state are the same. Some writers, such as Geoffrey Marshall, have claimed that in this case the distinction was obliterated by giving the Crown the privilege of defining the "interests of the state." While the distinction was obliterated (because it was not accepted by the majority of the Law Lords), for Devlin the fundamental point is that the servants of the Crown are capable of formulating policies which prevent the citizen from doing something that they (the Crown) do not want him to do, and it is a legitimate judicial function to prevent the abuse of this prerogative. There was nothing in the Chandler case that suggested to Lord Devlin that such an abuse existed, but the jury should have decided this. For Devlin the Crown alone is able to give authoritative
evidence as to the interests of the state, but the "Crown's opinion as to what is or is not prejudicial is just as inadmissible as the appellants". Marshall's basic argument was that if the Crown can define its interests, it can thereby determine what is to count as prejudicial to them, but this need not be the case. The jury for Lord Devlin should decide if interests have been prejudiced, not what those interests are. In this case, the defendants spent much time arguing that the normal operation of Wethersfield Airfield was not an interest of the state. For Lord Devlin neither the defendants nor the jury can define "interest;" they must restrict themselves to the question of what is prejudicial. Such a formulation of the problem avoids two dangerous alternatives: having the Crown define both what is in the interests of the state and what is prejudicial to those interests, thereby restricting the jury to a determination of the actions alleged; or having the jury decide whether Wethersfield is necessary to the "good life" in England, and thereby solidifying sovereignty in twelve impaneled subjects. The first method is reminiscent of old seditious libel charges, in which the jury cannot find
a defendant innocent unless it is willing to wink at established fact. The problem here is that the offense, which is not the same as the action (of publishing or entering an air base) is predetermined by the government because conviction necessarily follows the action. The action is ascertained, but the action is not evaluated with reference to the offense charged. The second alternative invests the jury with a novel sort of ad hoc judicial review power, which would encompass not only the power to dismantle specific laws, but even to change foreign policy. Marshall, who views the Chandler case as unjustified governmental harrassment of the CND, seems oblivious to the consequences of allowing the propriety of unilateral disarmament to be a juridical consideration. Even if, as Marshall argues, the pivotal factor in this case was the definition of interests, not the definition of prejudicial, it is not sufficient to object to the holding merely because it stipulates that the definition of the national interest is a Crown prerogative. The elemental fact remains that the definition of national interest is someone's prerogative, and when the apparent choice is between the Crown and a jury, it seems folly
to assume that the jury would be any better a reflection of the will of the nation than its government. The use of the Official Secrets Act to punish the behavior in the Chandler case creates some awkward problems, but the restriction of evidence about intent to a desire to stop the normal functioning of the air base, rather than a persons' intent vis-a-vis metaphysical standards, would appear essential. Nor is it really accurate, given the past uses of the Act, to claim that it was being used for a purpose other than Parliament intended. The NCCL felt the sentencing in this case was "savage," using as the point of comparison the penalty for "criminal" offenses, which implies that Chandler's conduct was less criminal than grand theft because his rationale takes longer to explain. What the use of the OSA did achieve was a very dramatic charge against the defendants which pointed out unsavory political purposes rather than simply trespassing, and it is perhaps a mistake for the Crown to have tried to compete with the CND in dramatizing an issue. It is this drama which surrounds the Act that is an indication that the government was interested in a "political trial." The Act connotes espionage to the general public, and the
CND activities do not fit in that category as traditionally defined. However, the antics of the CND were close enough to espionage to shield the government from a charge of engaging in ruthless suppression of freedom of speech. There is presumably a difference between long-term suppression and occasional outbreaks of vindictiveness.

**Race Relations Act of 1965**

**The Britton Case**

The desire to protect subjects from speech which is insulting received renewed emphasis in Section 6 of the Race Relations Act of 1965 which states:

1. A person shall be guilty of an offense under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by color, race, or ethnic or national origin—
   a. he publishes or distributes written matter which is threatening, abusive or insulting; . . .
   b. matter or words likely to stir up hatred against that section on grounds of color, race, or ethnic or national origin.

2. 'Publish' and 'distribute' mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the person publishing or distributing is a member . . .

During the second reading of the Race Relations Bill before the House of Commons in May, 1965, the NCCL
objected to Section 6 because it omitted any mention of religious groups and therefore was not, in their view, sufficiently extensive. The reasoning here was that much ostensible religious discrimination against Hindus and Muslims was really based on color, which is certainly true, but Section 6 is levelled at "hateful speech," not employment or accommodations.

The first use of the Act was in July of 1966 when 17-year old Christopher Britton was caught by a member of Parliament (Bidwell) after he (Britton) had broken a glass panel of the M.P.'s front door and inserted a pamphlet entitled, "Blacks Not Wanted Here."²² Britton (who was, if not drunk, at least drinking beer during this escapade) had littered several other pamphlets expressing the same point of view on the front porch and was carrying a copy of a pamphlet entitled, "Do You Want a Black Grandchild?" The pamphlets originated from a London group called the "Greater Britain Movement" which was opposed to black immigration. Britton explained that he believed that Bidwell was responsible for bringing blacks to Britain. In Middlesex Quarter Sessions Britton was charged and convicted for violating Section 6 of the Act and was sentenced to a "period of reform school training."
This conviction was reversed by the Court of Appeal, because, in the opinion of Lord Parker, the antics of Britton did not constitute "distribution" within the meaning of the Act. According to Parker distribution to an M.P. is not distribution to the public at large, and while the police may have had a case against the publishers, they didn't have one against Britton. Lord Parker was also perturbed that the issue of distribution was withdrawn from the jury (the trial judge held there was no contest about distribution) and based his reversal on a narrow construction of "distribute." But in some dicta at the end of his opinion he scolded law enforcement officials for the use of the 1965 act in this kind of a case. The police, he claimed, were invoking the Race Relations Act because of the words used, and the crucial consideration should not be the words or even the distribution, but the circumstances of distribution. If the circumstances of distribution reveal an intent to stir up hatred, the Act is appropriate, but in this case the circumstances are far removed from intention to stir up hatred. Lord Parker's approach is interesting because, in addition to establishing a formula which places the
emphasis on circumstances rather than on the words used, it is a rare instance of the Court of Appeal narrowing the application of an Act. The rather specific instructions as to when the Act is applicable and the open chiding of the police is equally rare. The Court of Appeal's ruling in this case received an immediate political reaction when the House of Lords rejected a private member bill introduced by Lord Brockway that would have closed some "loopholes" of the Race Relations Act discovered by Lord Parker. The government agreed that there was need for "further action at the appropriate time," but felt the Act was too new for amendment at that time.  

Michael X

The first conviction to be sustained under the Race Relations Act ironically involved the leader of the British Black Muslims, Michael de Freitas, who adopted the name Michael Addul Malik and Michael X when converted to the Muslim faith after contact with American Black Muslim leader Malcolm X in 1964. Malik received a twelve-month sentence for inciting racial hatred during a speech he gave in Reading in 1967. He was a substitute speaker before an audience which had come to hear American
Black Power Leader Stokeley Carmichael and, according to prosecutor Kenneth Jones, elaborated on two themes. The first consisted of an attack on white people generally, contending that they were vicious, nasty, soulless, savage, and guilty of degrading and oppressing black people. The second, according to Jones, was an exhortation to black people to ignore the laws of Britain; to inspire terror among whites; to use violence against enemies and even shoot, kick and if necessary kill them.

The initial hearing, in which Malik was refused bail, was a noisy encounter between Malik and the judge, complete with the removal of some of Malik's supporters from the gallery. Malik was found guilty in Reading Quarter Sessions, and ten days before the Court of Appeal reviewed the case, an article appeared in the Sunday Times which Malik claimed made a fair appeal impossible. The Court of Appeal held that there was no possible effect on the appeal since the article had no effect on the original trial. The Divisional Court, however, did find the article sufficiently prejudicial to fine the newspaper £5,000 for what it described as "a very serious contempt."

Malik, who conducted his own defense throughout the proceedings, on appeal argued essentially that the
meaning of the words he used meant something different to him as a West Indian and meant something different to his audience than they did to white Englishmen. Lord Parker noted, however, that the issue of possibly differing "cultural contexts" had been presented to the jury, and since they did not recognize a substantial difference between West Indian English and Reading English a new trial was not in order. Lord Parker also refused to reduce the sentence handed out by the Reading Court, claiming that the propriety of any given punishment should be related to the violence of the words used.

Since the maximum sentence for this type of offense was two years' imprisonment and a fine of £1000, he saw no reason to interfere in this sentence since Malik was guilty of a "serious infraction" of the Act. 86

**Neo-Fascists**

Colin Jordan, leader of the English Fascist movement, was given an eighteen-month sentence in 1967 for violating Section 6 of the Act for racist statements made at a public meeting. Melvin L. Wulf, legal director of the American Civil Liberties Union, has noted that this incident (which he describes as "intolerable by ACLU
standards") received little attention, and that the Race Relations act itself had provoked "... hardly any but favorable comment" in Britain. The NCCL objected to the use of the act against Malik but were silent about its use against Jordan. The Council explained in 1968 that while it welcomed the passing of the Act in 1965, it "had not bargained for the way in which it would be enforced." The Act was, in their view, designed to protect minorities and blacks in particular, and they expressed concern "... that colored people should have been the first to feel the whip, when Fascist and racialist publications continue to circulate with relative impunity." 87

The Thorn Case

There was one other attempt to apply the Act of 1965 when Dr. Carl-Theo Thorn brought a private suit against the BBC for inciting racial hatred because of its "anti-German propaganda." The propaganda Thorn had in mind was the television series "The Rat Patrol" which he sought to enjoin because of the use of "foul, abusive and spiteful language, gestures, mimics and imitations, when Germans or Germany were mentioned." The Act specifically states that no prosecution can be instituted under
its provisions except by or with the consent of the Attorney General. Thorn had no such permission, but relied on an 1880 case which held that when a statute creates a new offense there is a remedy in equity by injunction to protect against such an offense. The action was dropped, however, when the Chancery Division ruled that the Act created no civil remedy for an individual.

Conclusion

Free Expression and National Security

What is perhaps most significant and most laudatory in our account of controversies about seditious speech are some things which did not happen, especially with reference to the post-war response to domestic Communism and the Cold War. There was no equivalent of the Smith Act or a loyalty review board, no sensational legislative investigations, and in general, no public hysteria about an "enemy within." The reasons for this response are complex, involving factors in the political and social system as well as aspects of political culture. The Communist Party in Britain, while never strong, did have a larger per capita membership than the party in the
U. S. The simple existence of more Communists, together with the existence of a political tradition which included a theoretical alternative to capitalism, meant that the CP had more respectability and was perceived as less of an "alien" influence. Even this more relaxed public opinion, however, cannot totally explain the responsibility exercised by political leaders in dealing with the security problem. Wilson and Glickman have pointed out that much credit is due the professional civil service and the administrative good judgment exercised in implementing the security program. The general status which accrues to the civil service, as well as the popular belief that politics in general is a "respectable" endeavor (part of the deferential political culture), creates an "institutional self-respect which mitigates against irresponsible conduct." The existence of an "establishment" in a genuine sense, not simply an epithet to describe any suburbanite regardless of influence, can act to limit participation on many levels of decision making and can have, when the threat stems from inflamed public opinion, libertarian consequences. The same "insular" quality of decision making can explain the lack of success in Britain
of the issue about Communism in education, since the ordinary Englishman has never been encouraged to brood about the content of courses at Oxford and Cambridge. Since being a Communist was not viewed as an action which condemned one to eternal damnation, being an ex-Communist was also not viewed as instant salvation, and in Britain few people made careers out of past political indiscretions. English trade unions, where the threat of Communist infiltration was much more real than it was in the U. S., usually managed to hold control; and the press, with a few ostentatious exceptions, did not hammer away at the evils of domestic subversion.

The insularity of decision making can also reveal negative effects as when one attempts to ascertain the motivation behind a prosecution, such as the application of the Official Secrets Act and the Forgery Act against the CND. Marshall, for example, had noted that long-accepted political conventions such as cabinet responsibility can immunize law enforcement officials from undesirable political pressure, but can also inhibit on occasion what may be justifiable political criticism. This, together with typical judicial reluctance to embark
on criticism of executive policy and solid control of the legislature by one of two major parties makes it difficult to exercise effective control over ministers even when the opposition wishes. When there is no such division along party lines, the responsibility of law enforcement officials to Parliamentary-based policy makers is amorphous at best. Advice given to police by the cabinet is treated as confidential by the rules of the House, and direct questions about such advice are out of order, as are any questions which might prejudice a case pending. This makes it difficult to ascertain whether the prosecutions under the statutes we have mentioned were ministerial decisions or promulgated at a lower level. The immunity which surrounds the entire process of criminal prosecution in England means that in some cases "accountability" can be traced to the Attorney General (or the D.P.P. who acts on his authority), but it is not clear even then what is a governmental decision since the Attorney General acts as a legal officer of the Crown, which is theoretically separate from the role of minister. In most cases, as Geoffrey Marshall is fond of pointing out, the charges used against the politically unorthodox do not involve the
spectacular uses of the Official Secrets, Race Relations, or even the Public Order Acts. Much more probable are charges for petty offenses—obstruction of the highway or police, disobeying local by-laws, refusing to be bound over, and trespassing—which not only can be used by the government to cloak an evil intent, but can even be used by law enforcement officials to avoid governmental scrutiny. Because most prosecutions in Britain are private prosecutions brought by policemen as individuals, the government theoretically at least, "does not start and cannot stop summary proceedings." Marshall even suggests that the more spectacular charges against Chandler were probably not the product of direct initiative of ministers collectively or the Home Office, but simply police decisions. Even if this were the case, the use of the OSA at Wethersfield is not an extravagant use of the Act. In instances such as the Chandler case, the Labour Party was quick to charge "political trial" and criticize the government for its handling of the CND in other demonstrations. Pressure at this juncture is perhaps instrumental in preventing any regime from using prosecutions against political groups to glorify its own
importance. Although the same pressure would be applied in the opposite direction, especially if the opposition is looking for things with which to embarass the government and harpoons the ruling party for inaction against subversion. This tactic was not used by the "out" party in Britain, which, in addition to indicating differences in political culture, also indicates something about English conservatism.

**Free Expression and "insulting" Speech**

On the negative side of the ledger is the favorable reception, in Britain, of the concept of "insulting" speech, which was bolstered in the Race Relations Act of 1965. While the Britton and Malik cases, along with Thorn's abortive attempt, certainly do not constitute cavalier application of the Act by the government, it is important to note that none of the cases involved the actual outbreak of violence or disruption, and the pivotal consideration is the content of remarks rather than the situation in which they are made. True, the Act itself makes a small "situational" rule by requiring that the words be spoken in a context where they may be heard by people who disagree. Thus racist statements at
a closed meeting of racists would not be "insulting"  
because there is no one present to be insulted. Lord  
Parker's suggestion that police look at circumstances  
rather than words themselves in the Britton case cannot  
be interpreted as a plea that the Act be used in cases  
of actual incitement, or a logic similar to the Homesian  
emphas i s on circumstances rather than words spoken as  
the pivotal issue to be evaluated. Lord Parker's point  
was that Britton's "speech" was not sufficiently public  
for it to be insulting. The judicial circumstantial require-  
ment is therefore an assessment of the scope of the audience  
rather than the probability that the audience will react  
undesirably. In fact, the entire logic of the Act of  
1965 and of the "insulting words" provision of the Public  
Order Act is that it can be presumed that a heterogeneous  
audience will behave badly if a speaker is not sufficiently  
diplomatic. Even Parker's attempt to restrict the con-  
cept "insult" to circumstances where there is likely to  
be an "insulted" drew quick reaction in Parliament,  
indicating a feeling that the Act should be more inclusive.  
There is no statutory or judicial rule that requires the  
words to present any concrete danger to the community,  
simply that the words, in the view of the government and
a jury, be insulting. The best defense of this concept was Lord Parker's decision in *Jordan v. Burgoyne* that there was such a thing as verbal assault, and that "verbal hits" threaten public order. Just as the logic of the concept "libel" was sustained in 1609 because it "provokes revenge" and is therefore a potential breach of the peace, the verbal punches of Malik and Jordan were held to be potential breaches of the peace in 1967. This is why we have designated the charges stemming from the common law of seditious libel, the Public Order Act and the Race Relations Act as conceptually identical to group libel. Specific objections to this concept on libertarian grounds have been suggested; it is sufficient to note here that English Law, and by and large English libertarians, place great emphasis on the protection of individuals from insults and abuse by other individuals. This desire to protect an individual from certain speech can be viewed as a different weighing of competing concerns for the rights of an individual. Just as English libertarians have traditionally been less mechanical in their approach to freedom of the press, making the "right to know" a subordinate concern when in conflict with a "right to a
fair trial," the concern for defamation outweighs the concern for unfettered expression when the two values collide.

It is also worth noting that the lack of oppressive legal sanctions against those engaged in self-expression is certainly not the result of a want of authorizing legislation. Henry Hamilton has noted that an illiberal regime in England has "an intricate web of unrepealed legislative restriction" which could be used to limit "the right of freely expressing beliefs severally designated sedition, blasphemy, and obscenity." Nor did the courts significantly truncate any of the legislation we have analyzed. The attempt of Quarter Sessions to formulate a "reasonable audience" test in the Jordan case was quickly undone by the Queen's Bench, and the Public Order Act was extended even further by Parker in the Ward case. Parker's only attempt to restrict the application of a statute was in the Britton case, which irritated Parliament. In cases involving street oratory and demonstrations thought to endanger security, the courts implement no substantial alterations which would narrow statutes. In the Jordan and Ward cases, however, there was an extension at
least in the sense that Lord Parker had defensible arguments as to why the Public Order Act should not have been used.

The lack of hysteria over "subversion" and the desire to punish those who engage in verbal hitting are not unrelated. Both can be traced to the "deferential" culture and the expectation of responsible leadership. The phlegmatic approach of the English to certain kinds of diversity can make them tolerant of radical political creeds and reluctant to define "Englishman" as an ideological category, but can also make them concerned about speech when it takes a form that could erode the understood sense of social propriety. The assumption that leaders should govern, not simply represent, leads to certain expectations, one of which is that they act responsibly, even if their leadership position entails only "leadership" in the sense of speaking before a group. In short, both a subversive "witch hunt" and an anti-semitic tirade connote hysteria, and as such, conflict with the perception of what constitutes a qualitative political style that is supposed to reflect "rule by betters." Deference implies a certain amount of respect for the leader--but the leader must, by his conduct, earn such respect.
In one sense there is great emotive consistency in wishing a person not to be hampered in expressing his beliefs and desiring that he express such beliefs tactfully. To tolerate all but intolerance has long been a libertarian motto and reflects a desire to create an environment in which minds can meet for purposes of exchange rather than confrontation. An English libertarian could easily argue, for example, that Malik or Jordan did not really wish to change the hearts and minds of those who disagreed, and thus failed to establish the initial respect which would enable others to give them the deference of listening. While it is difficult to establish that a society "thinks" any particular way about anything, it would appear that one could, for comparative purposes, view the English as perceiving free speech as a value of interaction rather than collision. A commitment to speech is secondary to the commitment to communication through speech and respect on both sides. As such, speech can be legitimately restricted not only when it threatens order, but also when it threatens decorum. The decorum requirement is held to be essential if the speech is to be meaningful. A deferential polity views democratic
politics as less a matter of mandate and conflict and more a matter of rule and control. In reference to freedom of expression it would appear that the English view liberty not as a guarantee of a pure adversary-conflict process, but more a matter of basic civility in social interaction. Civil liberties do not become an extension of the adversary legal process, but an extension of "good form"—perceived as rules of cooperation, rather than rules of conflict.
CHAPTER IV

OBSCENITY IN THE UNITED KINGDOM

Obscene Publications Act of 1857

The Hicklin Rule

Until the passage of the Obscene Publications Act of 1959, English law on obscenity depended on an 1857 Act which sought both to stop the sale of tawdry pamphlets on Hollywell Street and to clear up the ambiguous nature of common law doctrine on obscenity.¹ The Act was designed to "suppress works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in any well-regulated mind."² In 1868 Lord Chief Justice Cockburn, in R. v. Hicklin, interpreted the Act with phraseology which became the keystone of Anglo-American notions on obscenity. A work is obscene, and its author therefore punishable under the Act, if it has a "tendency," according to Lord Cockburn, "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."³
The diligence with which the 1857 Act was applied varied of course according to the general climate of public and official opinion. After sporadic use in the late nineteenth century the number of prosecutions under the Act rose in 1923 when the United Kingdom became a signatory to a document from an International Convention dedicated to the suppression of traffic in obscene publications. The most notable case in this revival of prosecutions consisted of the destruction order of Radcliff Hall's *The Well of Loneliness*. For the next quarter-century there was what Harry Street called a "gradual cessation of prosecutions in respect to literature," but the 1950's marked another increase in government concern about obscenity. It was during this period that the King's Bench Division cleared up legal details of the Act by holding that photographic negatives as well as positives come within the meaning of the Act; and that the summons issued to a publisher to "show cause" why the material should not be destroyed must be made within a reasonable time of confiscation, but that eleven months is reasonable. It was also held that if only the covers of a publication were obscene, the destruction order could still include the
entire publication; and that the prosecution should simply present material thought to be obscene before justices without comment or "innuendo," although when such "innuendo" exists it will not overturn a conviction. In 1954 the Court of Criminal Appeal held that a magistrate may leave the matter of obscenity to the judgment of a jury, but also went to great lengths to indicate that such a practice was not only unnecessary, but probably bad procedure.

In the same year the Court of Criminal Appeal refused to reverse a case on the ground that the Recorder of London in his summation avoided any reference to contemporary standards. The court took note of the changing standards for what may tend to deprave and corrupt but held that the material in question possessed such a tendency. The problem of a contemporary standard for obscenity received more judicial attention, however, in another 1954 case involving the publishers of Stanley Kauffman's The Philanderers. The "opinion" in this case consisted of Justice Stable's instructions to the jury (five-and-a-half pages in the law reports) before each member was given a copy of the novel to read and evaluate. While informing the jury that they were entitled to ignore
any opinions he had about the matter, Judge Stable expressed his personal feeling that the prosecution's case contained a "certain confusion of thought." The prosecution had suggested that the jury was going to determine whether books like *The Philanderers* were going to be published in the future, and Stable warned the jury that their role was not to establish what was good taste in the United Kingdom, but simply to decide whether the prosecution had established sufficient evidence to affix criminal punishment for violation of a statute. After a lengthy discourse on some of the more extreme Victorian attitudes about parts of the body—such as referring to gentlemen's legs as "understandings"—Justice Stable cautioned the jury that, while their function was to discover whether the book tended to deprave and corrupt, they must be careful not to confuse this criminal offense with any tendency the work may have to shock or disgust.

The Hicklin rule, Stable further explained, answers the question "corrupt and deprave whom?" by stipulating anyone whose mind is open to such influences and into whose hands the publication may fall. These words, however, are not self-explanatory, according to Stable, and he therefore
urged the jury to remember that much "great literature . . . is wholly unsuitable for reading by the adolescent . . . ,"

and that the function of the contemporary novelist is not merely to entertain, but to be "chroniclers of an age."

The Philanderers, the Justice admitted, may strike very many people as very crude, but it purports to depict the life of certain, perhaps not typical, people in New York City. Since this is the objective of the novel, Judge Stable asked:

If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if, contrary to the facts, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or sometimes found in cabbage patches or under gooseberry bushes?

In concluding, Justice Stable underlined his belief in the necessity of obscenity statutes to protect a healthy society, but warned of the ultimate ineffectiveness of such laws if they are employed indiscriminately. The jury, evidently choosing not to ignore Stable's personal opinion, returned a verdict of "not guilty." This case is an interesting example of how a trial judge, using instructions to the jury, can in effect truncate a statute at
least on a case-by-case basis, since a literal rendering of the Hicklin rule could have had *The Philenderers* evaluated in terms of its effects on a sexually precocious twelve-year-old.

**Reform**

In response to the increasing number of prosecutions for obscenity in the 1950's the Society of Authors set up a special committee, presided over by Sir Allen P. Herbert, himself a prominent author and lawyer, which sought to reform the Obscene Publications Act of 1857. Its reform bill was introduced in the House of Commons by Roy Jenkins in March of 1955, but no action was then taken.  

In the same year Parliament enacted the Children and Young Persons (Harmful Publications) Act, 1955, in order to deal with "horror comics." The Act punishes those who produce stories told in pictures which portray violent, cruel, repulsive, or horrible acts in a way which would tend to corrupt a young person. In March of 1957 the bill of the Society of Authors was referred to a Select Committee, and a report to the House of Commons ensued two years later. Impressed with what the committee viewed as
the existence of a sizeable and lucrative trade in pornography, the report made proposals both for facilitating the suppression of pornography and for clarifying the law of obscene publications. The committee sought to vindicate some of Judge Stable's concerns over the scope of the 1857 Act, and recommended that the effect of the work as a whole be considered; that the defense of literary or artistic merit be allowed; and that the author have a right to produce evidence indicating that the material does have literary merit.

The resulting Obscene Publications Act of 1959 was a compromise of the committee's report, which even in its final form faced considerable opposition because of the allowability of a defense based on artistic merit, and on the admission of expert evidence as to artistic merit. The 1959 Act tightens the definition of obscenity, but expands the police power to suppress such obscenity. Under the old Act, for example, the police could not obtain a search warrant without evidence of previous sales; under the new act a warrant can be had on evidence that the material is being kept "for publication for gain." The new Act also empowers the police to search bookstalls and
vehicles and to seize business documents which might help to uncover the wholesale outlets of obscene publications. However, the new act does not allow a defendant to plead "no intent" to deprave or corrupt, but does allow him to argue that he has not read the material. Since the accused is quite often not the author, but a bookseller or the publisher, this defense was hailed as a significant improvement by English libertarians. Under the new Act the author is also given the opportunity to argue against destruction of the work and is entitled to appeal against forfeiture even though he did not appear before the court in the initial hearing.

Obscene Publications Act of 1959

Lady Chatterley's Lover

The major clarification of the new Obscene Publications Act involved the prosecution of Penguin Books, Inc., when they decided to mark the thirteenth anniversary of D. H. Lawrence's death by publishing an unexpurgated edition of Lady Chatterley's Lover. The new Act, and the success of the work in legal battles in the United States, prompted the publishing house to attempt such a venture;
but the Director of Public Prosecutions felt that the work was prima facie obscene under the new statute.\textsuperscript{14}

The well-publicized trial which ensued featured thirty-five prominent authors, clergymen and scholars who testified on behalf of the book, pitted against the D.P.P. who at one point asked the jury if Lawrence' s work was a book that " ... you would wish your wife or your servants to read?" Three of the jurors were women, and the defense counsel, noting that there were all sorts of people, even jurors, who didn't have servants, exploited the class prejudice implicit in the prosecution's argument. He recalled the observation of a judge in an earlier case whose indictment against a work consisted of the assertion that, "It would never do to let members of the working class read this."\textsuperscript{15}

The prosecution was unsuccessful, and the major importance of the encounter in \textit{R. v. Penguin Books, Ltd.},\textsuperscript{16} in addition to making the paperback edition of \textit{Lady Chatterley's Lover} an instant bestseller, was a ruling on the status of the author's or publisher's "intent" vis-a-vis depraving others and the proper application of the "public good" defense. Justice Sir Laurence Byrne ruled against
Penguin Books' desire to introduce evidence as to their (and D. H. Lawrence's) intent in publishing the work. Counsel for the publishing house argued that since the new act was not a general censorship law but aimed only at the obscene, the question of intent was of crucial importance in determining the offense. Even though there was much evidence to indicate that Parliament had intended the accused to have the opportunity to rebut the presumption of intent to corrupt under the new act, Byrne reasoned that this was not allowed under the old act and the new act did not specifically require it; so precedent ruled. According to Harry Street, established tradition in English legal procedure does not allow courts, in trying to interpret law, to consult the reports of Parliament and legislative committees. Courts must rely on the language of the act alone. The matter of intent was allowed to sneak in on the defense of the public good, however, when Byrne ruled that in deciding this issue the jury must evaluate the general purpose of the author or publisher in producing the work.

Apart from telling the jury that it was insufficient that the book merely shock or disgust them to sustain it
as obscene, the only help Byrne gave the jury as to the meaning of the words "deprave and corrupt" was to offer dictionary synonyms such as "make morally bad," "pervert," "debase," and "render morally unsound or rotten." The defense of the public good, however, proved to be pivotal in determining the outcome of the case. When the jury deliberated for three hours, after having heard testimony and read the book, and returned a verdict of not guilty, C. H. Rolph claimed that the defense of the public good probably prevented a hung jury.\textsuperscript{17} Reportedly nine of the jurors were in favor of acquittal on the grounds that the work did not tend to deprave and corrupt. Three other jurors believed that the work was obscene, but on the further question of publication for the public good, they were convinced that the literary merits of the novel outweighed its obscenity; on the basis of this balancing process they supported acquittal.\textsuperscript{18}

Even though this case was only a specific trial with no necessary force as interpretation in English law it in a \textit{de facto} sense began a construction of the Act which emphasized expert evidence. The defense of public good, Byrne insisted, did not mean that publishers who can
give any kind of justification to literary merit are immune from punishment. In fact the onus is on the defendant to establish "public good," and the public good must outweigh the harm caused by the work's obscenity. The ruling that literary merit is part of the test for the public good, even though this was clearly not the only criterion, established a practice whereby both the defense and the prosecution (which used no experts in this case) can put forth diverse kinds of professional testimony to help jurors determine the nature of the public good.\(^\text{19}\)

To a certain extent the D.P.P. was "cooperative" in this case because of his decision to proceed against the publisher rather than individual booksellers. The latter course of action would certainly have resulted in either less will or less finances to conduct an all-out legal defense. No doubt Penguin Books emerged from the whole incident with a profit, since the trial itself helped to publicize the book, but the libertarian "victory" was marred somewhat by Judge Byrne's refusal to award costs to the publishing house. In this particular case the costs were £13,000 and Milton Konvitz, totalling up the court costs in both England and America (where the book had
been cleared for the U. S. mails a week before), concluded that the clearing of "Lady Chatterley" of her ill repute, along with vindicating the public's right to read, cost at least $111,400.00.

R. v. Shaw

In 1961 the "Ladies Directory Case," in which Frederick Shaw was indicted for publishing a prostitute's directory, led to further judicial analysis of the new Obscene Publication Act. On appeal before the Criminal Court of Appeals, Shaw sought a reversal of his conviction at the Central Criminal Court in 1960, in which a jury had found his activities to contravene 1) the Sexual Offenses Act of 1956, because he was living wholly or in part on the earnings of prostitution; 2) conspiring to corrupt public morals by means of his magazine entitled, "Ladies Directory;" and, 3) publishing an obscene article, namely, an edition of the Directory, contrary to the Obscene Publications Act of 1959. Shaw had been sentenced to nine months' imprisonment. He had apparently decided to publish the Directory, which consisted of names, photographs, and other descriptions of prostitutes, to
create a medium through which prostitutes could advertise for clients. (Changes in the Street Offenses Act in 1959 had put penalties on soliciting in the streets.) Shaw, who also claimed he had "cleared" the publication with Scotland Yard before distribution, argued that his endeavor had an "honesty of purpose" which should indicate he had no illegal intent. Judge Ashworth, speaking for the Criminal Court of Appeal, noted that the 1959 Act, unlike a common law prosecution for obscene libel, did not require an intention to corrupt—"... obscenity depends on the article and not on the author." 21

The main argument offered by counsel for Shaw against the application of the OPA was that the trial judge, during his instructions to the jury, incorrectly directed them to regard what people did after reading the Directory as a test for obscenity. The trial judge had defined the problem as one in which the jury was to decide whether Shaw's magazine did encourage readers to contact prostitutes. If the jury decided that such contact was encouraged, the next step was to decide whether such conduct corrupts or depraves people. Judge Ashworth did not find this objectionable. 22
Shaw's final argument against the application of the OPA was that inasmuch as the people likely to read the "Ladies Directory" were people who had come to such areas as Soho and Paddington in search of the practices advertised in the booklet, they were corrupt and depraved already. Therefore, argued Shaw, he cannot be found guilty of corrupting those who are corrupt in the first place. Judge Ashworth simply noted, "The fallacy in this argument is that it assumes that a man cannot be corrupted more than once. . . ." 23

The Court of Appeal held the first count of living off the earning of a prostitute to be applicable, because through the advertisements in his periodical Shaw was "in essence . . . paid by the prostitutes." Shaw had argued that he did not receive the prostitutes' earnings but merely profited from the sale of the booklet after all expenses had been met through advertising. To Judge Ashworth this was a "much too narrow view of the facts." 24

The common law charge of conspiracy to corrupt public morals was, however, a more complicated matter for the Court of Appeal. Counsel for Shaw had insisted, with considerable justification, 25 that the use of the
common law concept of "corrupting public morals" in this case was the creation of a new offense by judicial fiat. This argument was rejected by Judge Ashworth because, in his view, the court was not making new laws, simply applying "existing law to new facts." The fact that the precise definition of public decency and morality will vary over a period of time because of different juries does not affect the principle that conduct calculated or intended to corrupt public morals is an indictable misdemeanor.

The upholding of the common law charge was especially awkward for the Criminal Court of Appeals since Section II (4) of the Act of 1959 stipulates that the Obscene Publications Act, not common law, is to be used if the essence of the offense is that the matter is obscene. Counsel for Shaw argued that Parliament's intent in his subsection was to prevent obscenity proceedings at common law against a publication that was also being prosecuted under the Act itself. It was also argued that the thrust of the indictment was obscenity, since that was the concept necessary to establish any "conspiracy to corrupt public morals." To this Judge Ashworth replied:
In our view, the short answer to this argument is that the offense at Common Law, mainly, conspiracy to corrupt public morals, did not 'consist of the publication' of the booklets. The Common Law offense alleged by the prosecution consisted of the agreement of the appellant and others to corrupt public morals by means of the booklets and although it is unlikely that if the appellant had been acquitted on a third count he would have been convicted on the first, the two counts involve different issues and the verdict on each need not necessarily have been the same. In our view the primary object of S. 2 (4) was to exclude proceedings at Common Law for the Common Law offense of publishing an obscene libel. The offense has not been abolished by the Act of 1959, although as a result of the subsection, proceedings in respect of it can no longer be brought.

The Court of Appeal found all three counts to be valid. It dismissed Shaw's pleas against the nine-month sentence, which it felt would have been appropriate on any one of the counts, but did grant leave to appeal to the House of Lords with reference to counts one and two. The Law Lords sustained Judge Ashworth's reading of Section II (4) of the OPA.

**Definition of "Publication"**

An appeal in 1962 by one Will Barker against his conviction and sentence of eighteen months' imprisonment before a recorder and jury at Manchester Crown Court on
five counts of publishing obscene articles in the form of photographs and catalogs forced the Criminal Court of Appeal to define what "publication" meant under the OPA.

Barker did not deny production of the photographs, but he did claim that 1) the photographs in question were not obscene within the meaning of the Act of 1959 and, 2) that since he sent the photographs to only four individuals (one of whom claimed that he used them only for sketching and never revealed them to anyone else), he was not really "publishing" within the meaning of the Act. Judge Ashworth ultimately ordered the conviction quashed, but not on any ground that was part of the appeal argument. Ashworth held that the Trial Recorder's direction that the jury disregard the testimony of one of the recipients that he showed the photos to no one was a misdirection. The Recorder had also emphasized the fact that Barker had no knowledge of the age of those who applied for his photographs, which Judge Ashworth thought was an irrelevant factor which, together with the misdirection, led him to conclude that the issues were not properly placed before the jury.

In disposing of the arguments presented by Barker,
however, the Court of Criminal Appeal ruled that the forms of publication punishable under the OPA fall into three distinct groups: first, publication to an individual; second, publication on a wider scale involving more than one person; and third, a mere offer for sale or letting on hire which would constitute publication. So even though Barker's conviction did not stand, the Court of Criminal Appeal made it clear that "publication" means making anything available to another, and even held that an exchange of money is not essential to the notion "publish."

The Copper Case

The issue of who can appeal a decision under the OPA also arose in 1962 when a metropolitan police officer (Burke) equipped with the proper warrant, confiscated 650 photographs, negatives, prints, etc., from the shop of John B. Copper. Copper appeared to offer arguments as to why the articles should not be forfeited and apparently convinced the Middlesex Justices of the Peace that only 123 photographs and prints and 46 negatives were obscene, because the rest of the articles were returned. Burke appealed to the Queen's Bench Division urging that all the
material was obscene and that there was no reason for distinguishing between the articles forfeited and those returned.31

Copper's defense at the appellate level consisted of two basic points. First, he claimed that the Act of 1959 "in effect contained its own code," and that in this self-contained code there is a provision for appeal: it stipulated that the party who has appeared to show cause why material should not be forfeited has an appeal, but the statute said nothing about the prosecution. To this argument Lord Parker stated that while for certain purposes the Act could be said to contain its own code, it certainly did not create a special code in regard to appeals.32

The second point pressed by counsel for Copper was that Burke could have appealed only under the Magistrate's Courts Act of 1952. That Act provides appellate procedures for any person who is a party to a proceeding before a magistrate's court. Counsel for Copper argued that Burke was not a party to the proceedings and was not aggrieved by the order. Lord Parker agreed that since no costs were ordered against him, Burke was not a person aggrieved, "But I am quite satisfied that he was a party to the
proceedings." Another factor to keep in mind, according
to Lord Parker, is that Burke was "not complaining in
respect of his success. He was complaining in respect
of the many, many articles in respect of which no order
was made." 33

This argument by Lord Parker is far from self-
explanatory, and he did not offer much elaboration. He
seemed to be saying that Copper's argument to the effect
that the magistrate's order was final and therefore could
not be appealed by the prosecution under the Act of 1959
or the Magistrate's Courts Act was fallacious because
Burke was not challenging the order itself but rather what
was not ordered. Lord Parker may have felt that his kind
of distinction was necessary, since counsel for Copper did
argue that there is no right of appeal in favor of a
prosecutor who has succeeded. Lord Parker was arguing
that the prosecution was not appealing what it succeeded
in doing, but rather what it was not successful in doing.

Lord Parker took great pains to explain that the
question of obscenity was largely "factual" and therefore
a judgment which is properly the jurisdiction of the
Justices, and that the Queen's Bench Division should limit
itself to questions of law and not "superimpose their judgment of obscenity over that of the justices." 34 But in this case the Justices "went wrong in law," Lord Parker concluded, because, "There is no conceivable basis on which it could be said that some photographs in the bundle forfeited are more obscene than photographs in the bundles which have not been ordered forfeited." 35 To dramatize the superficiality of the distinction made by the Justices, Lord Parker, not exactly one who has a great aversion to subtle distinctions, pointed out that, "We had our attention drawn to one particular photograph which appears in two bundles, the one to be forfeited and the other a bundle not to be forfeited. 36

In those circumstances, it is perfectly clear that something has gone very wrong. Counsel for the respondent, I do not think from any inspired knowledge but merely as a suggestion, ventured to suggest that maybe the justices divided up the photographs and were each responsible for a certain number, and on that basis it would be possible for one justice to take a certain view of obscenity and the other to take a different view. I am loathe to think that that happened because it would have been a most improper thing. The decision is not a decision of individual justices but a decision of the whole bench. Something, as I have said, went clearly wrong. 37

Finding the same photograph in both the allowable
and the "obscene" bundle is perhaps an index of a certain amount of inattentiveness on the part of the Justices. But Lord Parker's criticism (even though he called it a "criticism in law," when one could presumably argue without great difficulty that he was substituting his "factual observations" for those of the Justices) even goes to the extent of arguing that the justices perhaps did not realize how socially harmful these photographs were.

... these articles were liable to be sent to anybody, young boys, school children, young girls and anybody on payment of the price. One has only to look at these photographs to realize that in the vast majority of cases there is no conceivable artistic merit. They provide no inspiration, as has been said in other cases, and are purely filth.38

What was extremely interesting, and one could submit extremely devious in this case, was Lord Parker's assertion, which he had to make in order to obtain jurisdiction, that the Justices made some sort of essential mistake "in law." This is a point which he continually asserted but in no sense proved. There emerges here a curious kind of "judicial activism," in the sense that the appellate judges are construing their own role broadly in order to reinforce police autonomy and free them from the "errors in law" at Middlesex.
Deprave and Corrupt Whom?

R. v. Clayton

Later in 1962 two proprietors of a book shop were convicted of conspiracy and the selling of obscene articles under the act, and received sentences of fifteen months' imprisonment on each count. The complication in this case, and the basis for the appeal before the Court of Criminal Appeal, was that the recipients of the obscene articles were two plainclothes officers on the staff of the Obscene Publications Department of New Scotland Yard. Since the criterion set forth in the statute to determine obscenity is the effect of the material (i.e., tendency to deprave or corrupt) on those who are likely to receive it, the bookshop proprietors argued that no obscenity had been proved because the police officers, under cross-examination, testified that the photography in the magazines sold to them did not arouse any feelings in them whatsoever.

Lord Parker, for the Court of Criminal Appeal, noted that precedents had established that the test of obscenity was the effect of material on the recipient, and while partially agreeing with the prosecution that
there was such a thing as "inherent obscenity" which
could characterize the material itself, held that the
charge must be related to the susceptibility of the
viewer. The prosecution had argued that the photographs
were inherently obscene and would tend to deprave and
corrupt a likely buyer. The fact, they urged, that the
material did not corrupt a "scientific viewer" (New
Scotland Yard) should not undermine the charge of "selling"
obscene material. Lord Parker, however, ordered the con-
victions for selling quashed because the offense depended
on what happened to the buyer. But the convictions for
conspiracy stood because, according to Parker, the only
possible defense against the charge would be to prove that
the proprietors sought only to sell their material to
New Scotland Yard and other such "scientific observers."
No such evidence was presented, and Parker reiterated the
fact that even if it were, conspiracy requires no actual
publication or measurement of the effect on others.

Relying on R. v. Shaw, Parker also rejected the
argument that the common law offense of conspiracy to
corrupt public morals is inapplicable to a case being
tried under the OPA, by claiming that the two offenses
are different and that the OPA conviction had been quashed anyway.

This in effect means that there are two different kinds of obscenity. One, under the OPA, is defined in terms of the effect on an actual recipient; the other, under common law, depends on intent to corrupt. The publication is irrelevant to this offense, the courts insist, but it raises the interesting question of how one would prove intent without finding some material which was obscene. Obscene in this context, since the recipient-effect standard is irrelevant, would have to be based on the "inherent obscenity" of a piece of evidence which the prosecution uses to demonstrate an intent to deprave and corrupt others. Presumably "no intent" would be allowed as a defense for this charge since we are not talking about "obscene libel," which the OPA supersedes, but conspiracy to corrupt public morals which is still an indictable offense under common law. "Still" in this context may only mean "since R. v. Shaw," but it is an easier charge to prosecute since it avoids recipients of material. Parker even ended his opinion with a small apology to police officials for handicapping them under the OPA but
told them that test purchases were still valuable because the police could then obtain a warrant to seize obscene material in order to bring conspiracy charges. (They are presumably relevant only to help establish intent.) This seems to be a judicial tip to the police to concentrate on conspiracy rather than on the selling of obscene material. What constitutes corruption of public morals is a decision the jury makes with reference to their understanding of both "public" and "morals;" what constitutes obscenity depends on the jury's evaluation of the effect material has on actual, non-scientific, individuals. This would imply that corruption of public morals is a more general notion than obscenity, and one in which the jury has more discretion.

R. v. Mayling

The contention, used successfully in R. v. Clayton, that, where the offense required a tendency to deprave and corrupt, the police could not be used as a substitute for the public, was unsuccessful as a defense against a common law indictment for outraging public decency. A case in 1963 concerned a homosexual incident in a public lavatory "to the great disgust and annoyance of divers of Her
Majesty's subjects within whose purview such behavior was committed." The "subjects" in this instance were the apprehending police officers, and their "disgust and annoyance," according to Justice Ashworth of the Court of Criminal Appeal, could be used as evidence of the type of annoyance required. It was more important, according to the Court of Appeal, however, to realize that the pith of the indictment was that the act was indecent and committed in public, rather than that it was the reaction of probable onlookers. 42

Queen's Bench Division

Morgan v. Bowker

In 1963 the Queen's Bench Division reviewed two prosecutions under the OPA, the first of which concerned the conviction of Robert Charles Morgan for publishing obscene film, photographs and magazines which were advertised in a booklet entitled, "Glamor Catalog 1962." This catalog was advertised in a magazine called "Sparkle," which contained order forms inviting readers to order copies of the catalog and/or some films and other material described in Morgan's ad. No restriction appeared on the
order form as to age or sex of the potential customer. After presentation of the catalog and some examples of its products, Justices of the County of Buckingham, sitting at Slough, ordered Morgan to appear and "show cause."

After the Justices had ordered forfeiture, Morgan appealed to the Queen's Bench on two grounds. The first was a procedural point involving the question of whether the full court or only one Justice could issue the summons. In Slough all the Justices had viewed Morgan's material (for about five hours) and then all had ordered the summons. Solicitors for Morgan argued that the use of the full court to issue a summons to "show cause" meant that the court had already decided the material to be obscene, and therefore they could not have open minds to Morgan's defense that the material was not obscene. Lord Parker, speaking for the Queen's Bench, dismissed this argument by explaining that the Act did not require a *prima facie* case of obscenity and then a full hearing to decide obscenity in fact. The function of the hearing was not to determine the obscenity of the material but rather to evaluate any reasons the appellant may give as
to why matter already determined to be obscene should not be forfeited.43

The second ground concerned the relevance of actual recipients of the articles. The Justices at Slough refused to hear any testimony about persons who received copies of the material in question. Morgan claimed that when he received orders for films and other material he always wrote back to the respondent asking them to declare they were over twenty-one years of age. This practice, Morgan argued, should be allowed as evidence that his material was not published for the young and therefore could not be obscene within the meaning of the Act. The Justices declined to hear such evidence by reasoning that the Act required that they look only at the actual circumstance in which the articles were found in order to determine likely recipients rather than testimony about recipients themselves. The Justices' interpretation of their duty stemmed from Section 3 of the OPA which states:

For the purposes of this section the question whether an article is obscene shall be determined on the assumption that copies of it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner.44

A confusion which, according to Parker, had been "constantly
arising" was in the words, "but in no other manner."

In the present case the Justices took the view that it meant they must be concerned with the actual circumstances surrounding the finding which meant only the situation in which the material was discovered. This interpretation, for the Queen's Bench, was incorrect because the nature of the offense required an assessment of the publication with reference to the circumstances in which it was found, and the "full circumstance" include the "nature of his business and the method under which it has been conducted . . . just as much as the nature of the premises." Morgan’s intent is still quite irrelevant to the offense, but testimony about who the actual recipients were is not only not the same as establishing intent, it is essential to determine whether the material will deprave and corrupt. The case was returned to the Justices, with Lord Parker's instructions to consider whether the material would corrupt adults; whether it was likely to be received by minors; and if likely to be received by minors, would tend to deprave and corrupt them.
Straker v. D.P.P.

On the same day as the Morgan decision the Queen's Bench Clarified the status of negatives by holding that unretouched prints made from seized negatives could not be used as evidence, that the negatives should be forfeited. This appeal concerned the decision of the Marlborough Street Magistrate's Court to seize about 1500 negatives and display cards from the studio of Jean Straker. This was an unusual case in two respects: first, Straker's method of taking orders; and secondly, Lord Parker's obvious sympathy for the defendant. Straker's studio, while at the end of a typical honky-tonk Soho street, is also a corner building on Soho Square, an affluent block of town houses in central Soho. Straker considered himself a serious photographer and artist who specialized in nude photography for both artistic and medical uses. His method of advertising was to post photographs of nudes (usually tastefully done), in the windows of the first floor of his studio, and then charge a 5s. admission fee to his exhibition upstairs. Reportedly once inside Straker's studio each client could review photographic prints on display cards. Each card had a
number and for an additional fee prints could be ordered from the corresponding negatives. The police seized negatives, made their own copies, and presented these positives along with the display cards as evidence that Straker's work should be seized. Straker, conducting his own defense in both the original hearing and on appeal (where Lord Parker commended him for the "moderation" with which he presented his case) argued that the unretouched prints were made by the police, not him, and could not be used as evidence of material which he published. Lord Parker agreed and ordered the negatives returned to Straker, but was careful to avoid any general ruling that negatives are not "articles" within the meaning of the Act, simply that in this case the only negatives which could be seized were those from which Straker had made an obscene positive.

Straker also argued that the Magistrate was incorrect in insisting that any member of the public could receive a print, because he was vary cautious about accepting the admission fee and taking orders for prints so that no one was likely to be corrupted or depraved. Lord Parker strongly implied that he would personally
believe Straker's claim, but in his view the Queen's Bench could only be concerned with whether the Magistrate had erred in law. And since the Magistrate had found 204 of the display cards to be obscene and since Straker could not tell whether something would tend to deprave or corrupt an individual merely by looking at him, the forfeiture of the material stood.

"Obscenity" Not Restricted to Sex

**Obscenity as Encouraging the Use of Narcotics**

An important clarification and extension of the concept "obscene" occurred in 1964 in the Queen's Bench Division's ruling in *John Calder, Ltd. v. Powell*. This case concerned the confiscation of *Cain's Book* by Alexander Trocchi, along with numerous other articles considered obscene by Justices of the Peace in Sheffield. Calder Ltd. (the publishers) appeared at the "show cause" hearing although the shop owner and publishers of other material confiscated did not present evidence. Calder Ltd. called upon five expert witnesses, including the author, who testified that, in their opinion, the book did not tend to corrupt or deprave anybody. They also urged that even
if the book did corrupt some individuals, it was still a book of literary and sociological merit. One of the most interesting aspects of the case was that the book concerned the life of a narcotic addict in New York City, and the prosecution invoked the Obscene Publications Act of 1959 because they felt the book highlighted the favorable effects of drug-taking. The danger of the book from the standpoint of the prosecution was related to drugs, not sex. The Justices agreed and found that the work, taken as a whole, was likely to deprave the people who were likely to buy it.

Calder Ltd. on appeal argued that the book was unlikely to corrupt individuals, and that the positive testimony of the expert witnesses had not been rebutted by the prosecution since the Crown called no witnesses. The publishing company also argued that the Crown gave no evidence that the book was not for the "public good" simply that it was obscene. Section 4 of the Act provides that if any publication is justified as being "for the public good, that is, in the interests of science, literature, or other objects of general concern," it shall not be destroyed, and also guarantees the right of the opinion of experts to be used in deciding this question. The Justices, in dealing with the matter of the expert
testimony presented, simply stated that they did not accept the evidence as sufficient, and therefore Calder Ltd. had not proved that the publication was for the public good.

Lord Parker, in giving the decision of the Queen's Bench Division, stated that he also felt that there was "abundant evidence" on which the Justices could come to a decision that the book was obscene even with the existent of expert opinion. Part of the argument used by Calder Ltd. was the assertion that the justices should not have read the book but simply evaluated evidence laid before them by the prosecution and defense. To this Lord Parker replied that the justices are certainly free to look at the books themselves just as they are perfectly entitled, however honest the witness, to say that they cannot accept his evidence. If the Justices are free to listen to expert evidence, Parker asserts, they are equally entitled

"... if they choose, to disregard that evidence."52

Calder Ltd. had misconstrued Section 4 of the Act. In Parker's view the relevant section of the Act can be rephrased this way:

... granted that a book has been properly found to be obscene, nevertheless it may be for
the public good that it should be published, and, in deciding whether it is for the public good, it should be published, the justices must consider whether this publication would be justified on the grounds of science, literature, art or learning, or other objects of general concern. In other words, the justices must weigh up the obscenity against the merits of the article in order to decide whether its publication is for the public good. 53

In this kind of a case, Lord Parker seemed to be saying, the justices make up their minds as to whether the obscene material has sufficient social merit not to destroy it. Since the issue of obscenity is already decided, the problem becomes one of weighing the social utility of the article against its obscenity. The defense had argued that the burden of proof had been reversed, and it was essentially up to Calder Ltd. to establish "public good." Lord Parker agreed, stating, "... the onus of proof on the basis of probabilities is on the defense," 54 but didn't find this state of affairs objectionable.

Another obvious issue raised by the defense in this case, but not the pivotal argument in their appeal, was that the concept obscenity must have something to do with sex. Lord Parker realized that this was a rather crucial point, since none of the other points would matter if obscenity had to be related to sex. Counsel for
Calder Ltd. had argued that obscenity in the past had always been treated as having regard to sexual desires and sexual behavior, and that the word must be confined to that sort of behavior. Lord Parker replied:

Of course it is true that the cases that have so far come before the court are all concerned with articles which do concern sex; but the fact that there has been no decision on the point certainly does not conclude the matter in his favor.55

Counsel for Calder had even referred to the U. S. Supreme Court decision in Roth v. United States to help demonstrate that obscenity must be used in conjunction with sex. Lord Parker, not going into the jurisdictional aspects of this kind of argument, and also "confessing" that he had not had time to read a report of the case in detail, stated, "... but, in my judgment it is perfectly plain that depravity, and indeed, obscenity (because obscenity is treated as a tendency to deprave) is quite apt to cover what was suggested by the prosecution in this case."56

This book—the less said about it the better—concerned the life, or imaginary life, of a junkie in New York, and the suggestion of the prosecution was that the book highlighted, as it were, the favorable effects of drug-taking, and, so far from condemning it, advocated it, and that there was a real danger that those into whose hands the book
came might be tempted at any rate to experiment with drugs and get the favorable sensations highlighted by the book.\(^7\)

English law has held that there is more than one road to depravity, with sex being the most frequently used but by no means the only path.

**Glorification of Violence as Obscenity**

In 1967 the scope of the concept obscenity was found to be even broader when the OPA was invoked against "bubble gum" cards which depicted military battles. This case was brought to the Queen's Bench by the prosecution because Justices of the Northeast London Commission refused to allow the prosecution to use testimony of psychiatrists. The psychiatric testimony was to the effect that the cards sold by A. and B. C. Chewing Gum, Ltd., would tend to corrupt and deprave the average child. Lord Parker ruled that if the defense can use expert testimony the prosecution may also.\(^8\)

The London Justices had read the OPA as allowing for expert testimony to establish the social value of material but reserving the question of the tendency of material to deprave and corrupt for the court and jury, not a psychiatrist. According to Parker the ultimate question
of which cards tended to deprave and corrupt was up to the Justices, but evidence as to the general effect of the material in question would have on the minds of children should be allowed. By excluding such evidence, the court hampered not only the prosecution, but prevented the defense from cross-examining experts put forth by the state on a question which is pivotal to the entire indictment. The question of whether material tends to deprave and corrupt is properly the prerogative of the judge and jury, but in answering this question they "need all the help they can get," Lord Parker stated.

A point which the Queen's Bench felt needed some additional clarification, however, was the interpretation of the OPA put forth by the chewing gum company to the effect that expert testimony could only be allowed to establish the "public good" of material which had already been decided to be obscene. Parker wished to make it clear that expert testimony is allowable on both the question of the social utility of obscene work and the tendency of the material to deprave and corrupt (obscenity).
Defense of the "Public Good"

Private Prosecutions

"Last Exit to Brooklyn," by Hubert Selby, Jr., is a series of stories about New York homosexuals and drug addicts and the violence characterizing their environment. In January, 1966, the publishing house of Calder and Boyers, Ltd., realizing that the book was controversial and might be regarded as offending the OPA, had its solicitors write the Director of Public Prosecutions and enclose a copy of the book along with their announcement that they proposed to publish the work. The publishing company, in this letter, argued that the work was serious literature and not likely to appeal to those with merely a "prurient interest," but also stated that if the Director did decide to prosecute they would engage in a strenuous legal defense against such a move.

If, contrary to their expectations, the Director did decide to prosecute, the company requested that proceedings be instituted under Section 2 of the Act, wherein a defendant is entitled to be tried by a judge and a jury, as opposed to Section 3 under which the book itself would be forfeited if it was considered obscene. A return letter
strongly implied that the D.P.P. didn't feel any action against the book was necessary, using the same ground originally put forth by the Attorney General, Sir Elywn Jones, who declined to prosecute because he saw no chance to prevail against a serious, if somewhat repulsive, work.

However, Sir Cyril Black, described by Anthony Lewis of the New York Times as the Conservative Party's member of Parliament who "regards himself as a moral watchdog of the community," brought private criminal prosecution under Section 3 of the Act. This action was successful, and the magistrate who heard the case ordered the forfeiture of the three copies of the book which had been seized. Calder and Boyers again wrote the Director of Public Prosecutions informing him that in spite of the magistrate's decision, they intended to continue publishing the book and expressed their willingness to fight legally and proceeding he might feel impelled to take under Section 2. The D.P.P. responded to the challenge and was successful in getting a conviction against the publishers in Central Criminal Court which resulted in a £100 fine plus £500 towards the cost of prosecution.
The basis for the publishing company's appeal primarily concerned the trial judge's instruction to the jury on 1) the meaning of "obscene;" 2) paraphrasing the defense's allegation that the book was not obscene; and 3) guidance on the matter of "public good" as a defense against punishment stemming from the OPA.

Judge Salmon, delivering the opinion of the Court of Appeals, felt that the appellants' argument that the trial judge should have explained that the essence of moral corruption is to make a person behave badly or worse than he otherwise would behave or blur his perception of the difference between good and evil, would have resulted in only greater ambiguity. The trial judge simply reiterated dictionary definitions of "deprave" and "corrupt," and instructed the jury that they must concentrate not on isolated passages by the work taken as a whole. When a statute lays down the definition of a word or phrase "in plain English, it is rarely necessary and often unwise for the judge to attempt to improve on the . . . definition," according to Judge Salmon.

A flaw in the instructions to the jury which the
appellants didn't point out, but which Judge Salmon thought raised a "difficult question," was guidance on the matter of "persons likely to read the book." To Judge Salmon this cannot mean "all" persons, nor can it mean "individuals who may be corrupted by almost anything." Ultimately, according to Salmon, the question becomes one of numbers: how many are corrupted. The statute cannot be construed as meaning that a majority of the average readers would be corrupted, because, according to Salmon, such a work could never be justified as being for the "public good." The interesting implication here is that if a work should corrupt a simply majority, then it cannot be defended as being for the public good—which would make the defense of literary merit applicable only if less than fifty-one per cent tended to be depraved. By a process of elimination, Judge Salmon held that the requisite number of corrupted to constitute the offense cannot be all, it cannot be a majority, it cannot be one, or even an aggregate of the easily corruptible.

This court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it. What is a significant proportion is a matter entirely for the jury to decide.
The lack of such an instruction is serious, according to Salmon, but since it is impossible to determine whether the absence of such instruction made the jury conclude that one must be corrupted or more than half of the readers must be corrupted, the lack of direction on this matter alone does not vitiate the conviction.

Two other flaws in the direction to the jury were serious enough, however, for the Court of Appeals to overturn the conviction. The first was the trial judge's failure to paraphrase the defense's argument against the charge that the work was in fact obscene. The defense argued that instead of tending to encourage any one to homosexuality, drug-taking or senseless violence, the book would have precisely the reverse effect. The trial judge construed that argument to be that the book could have socially constructive effects, and paraphrased it as part of the defense's argument on "public good," not on obscenity itself. Judge Salmon viewed this as a fatal defect since it was a contention that the book would not have the effect the prosecution alleged, and that the jury's assessment of the effect of the work is crucial to the finding of obscenity. The jury might well have
rejected the defense' argument, but the Court of Appeal could not be absolutely certain, and the fact that the jury deliberated for nearly five and one-half hours in this case created the possibility of a "miscarriage of justice." 63

The second flaw, according to the Court of Appeal, was the lack of guidance on the "public good" provision of the Act. The trial judge faced a difficult task because he had no previous authority to help him with the proper interpretation of the "public good," a section of the OPA which Judge Salmon noted left even the Director of Public Prosecution in a "state of perplexity." Any guidance given by the trial judge might have been inadequate, but the problem in this case was no guidance at all for the jury. "In effect he threw them in at the deep end of S. 4 and left them to sink or swim in its dark waters." 64 Judge Salmon, at least aptly named for such aquatic metaphors, plunged into the dark waters of Section 4 and stated that in such a case:

... the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary,
sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good. A book may be worthless; a book may have slight but real merit; it may be a work of genius. Between those extremes the gradations are almost infinite. A book may tend to deprave or corrupt a significant but comparatively small number of readers or a large number or indeed the majority of its readers. The tendency to deprave and corrupt may be strong or slight. The depravity and corruption may also take various forms. It may be to induce erotic desires of a heterosexual kind or to promote homosexuality or other sexual perversions or drug taking or brutal violence. All these are matters for the jury to consider and weigh up; it is for them to decide in the light of the importance they attach to those factors whether or not the publication is for the public good. A jury must set the standard of what is acceptable, of what is for the public good in the age in which we live.65

The significance of the Calder case, in addition to the "significant proportion" rule for establishing how many must be corrupted, is that it makes clear that the judgment of the "public good" served by any work is to be based on the jury's weighing the positive effect the book may have in literary or sociological terms against the work's tendency to deprave and corrupt. Confusion had arisen in previous cases because expert witnesses were asked whether they regarded a particular book or section of the book to be obscene. This ruling stipulates that
what the experts should have been asked was whether they regarded the book to have literary or other merit, with the jury deciding whether these merits counterbalanced the harm which they have already decided exists since they have labeled the material obscene. A review of the Calder case in the Law Quarterly Review found the holding to "make sense of the law" because a jury may find without questioning an expert's view, "that a book has great literary merits and that on balance the book does more harm than good." However, as in the Chewing Gum case, it appears clear that the defense can use expert witnesses to present evidence to the jury that the work in question does not tend to deprave and corrupt. Once the jury decides that the work would tend to deprave and corrupt a significant proportion of those likely to read it, then experts are restricted to questions of literary merit. But since the jury does not retire to decide obscenity and then to sit again to hear evidence about social merit, it is virtually impossible for experts to know when they are doing what. The implementation of this decision would seem to depend on the trial judge's ability to sort out arguments about the effect of the book on individuals and the importance of the book to society.
Post Office Act of 1953

R. v. Stanley

In 1965 the Court of Criminal Appeals was called upon to interpret the Post Office Act of 1953 and distinguish something which is "indecent" from something which is "obscene." This case concerned the conviction of Allen B. Stanley at the London Sessions Court on two counts of sending a postal packet containing indecent and obscene articles through the mail and conspiracy with his co-accused and others to contravene the same section of the Post Office Act. Stanley was also indicted on two counts under the OPA of 1959 for publishing two obscene films; the indictment failed, even though a fourteen-year-old boy was found to possess a catalog describing Stanley's films, because the jury found his films to be "indecent" but not "obscene." Stanley was fined £100 for violations of the Post Office Act and on appeal invoked essentially four different arguments.

He claimed, first, that the instructions to the jury were insufficient because the words "indecent" and the words "obscene" were employed tautologically to convey the same idea and mean the same thing. Second, he alleged,
the jury had clearly indicated that they had found the brochures referred to in the indictment as "indecent" but not "obscene" because they acquitted him on the counts stemming from the OPA. Therefore, their verdicts of guilty on the counts stemming from the Post Office Act were "unreasonable." Third, he argued that, if the words "indecent" and "obscene" were not synonymous, the counts against him under the Post Office Act duplicated one another because they alleged two separate or alternative offenses in each count, and they were also vague. Fourth, he claimed, the judge was wrong in law because he failed to exclude evidence by the fourteen-year-old boy as to the effect that certain exhibits had on him (the boy). 67

Lord Parker dismissed the argument about the testimony of the boy by simply stating that it was "inconceivable" that such testimony could have made the "slightest difference." 68 On the semantic issue Lord Parker explained that the London Sessions Chairman defined "indecent" to mean simply something that offends the "ordinary modesty of the average man," whereas "obscene" has a statutory definition involving the tendency of material to deprave and corrupt. The jury had concluded that neither the films
nor the brochure were obscene but that they were indecent. Counsel for the appellant had relied heavily on some dicta from a 1953 case in which Lord Cooper had stated that "indecent or obscene" were employed tautologically to convey the same idea. All that Lord Cooper was trying to convey, according to Parker, was that the two words expressed the same idea but in varying degrees. In order to make this assertion Parker had to stretch the meaning of Cooper's opinion (where the point was exactly the opposite of his) but the essential fact for Lord Parker was that they jury recognized the works in question not to offend against standards at the "top end of the scale so as to be obscene, but only at the lower end in that they were indecent." To the Court of Criminal Appeal an indecent article is not necessarily obscene, but an obscene article is necessarily indecent.

"Backup Statute" for When the OPA Fails

Mr. David Cunliffe, publisher of an anthology entitled The Golden Convolvulus, was charged with publishing an obscene article but was found not guilty because he did not have enough customers for the jury to decide the
material's tendency. However, the jury thought that the publication was "indecent," and Cunliffe was fined £50 for sending "indecent material through the post," contrary to the Post Office Act. The Post Office Act, therefore, is apparently used when the offending material is sent through the mail, but is not objectionable enough for prosecution under the OPA. In the above cases at least the Post Office Act served as a convenient "back-up statute" to be used when the OPA fails.

**Official Censorship**

**Lord Chamberlain**

Acts of Parliament are not, however, the only instruments of government concerned with obscenity, or perhaps even the most important. Reading is essentially a private matter, and obscenity in a public place, such as a theater, involved not acts of Parliament (or the courts), but the Lord Chamberlain. Probably because not all, or even most, of the Crown's subjects could read in the early history of England, royal concern for what was communicated was less with books and published material than with plays and public performances where it was possible for a citizen to ascertain a point of view or be
corrupted without being literate. The institution of the Lord Chamberlain, presently Cameron Fromanteel, first Baron Cobbold, educated at Eton and Cambridge and former head of the Bank of England, was designed for this purpose. Until 1968, when his censorship powers were removed, he approved or disapproved (for a fee paid by the author) of all manuscripts scheduled for public performance in the United Kingdom. This curious British institution was the object of endless complaints from British playwrights, and the Lord Chamberlain's role as official censor (he has other roles, such as keeper of the Royal Swans, etc.) once led him to declare his own official letters to theater managers as "not permitted" when one imaginative producer enquired if he could read the Lord Chamberlain's letter containing the required deletions during the interlude such deletions would cause in the production.

What was censored by the Lord Chamberlain was not solely or even primarily sexual references, but any references to the Government, Queen, or Church which he considered to be in bad taste. The usual procedure was for the Lord Chamberlain first to read the manuscript and
make deletions, if any, and specify what must be substituted. This was frequently followed by a period of lobbying between the author and the Lord Chamberlain over substitute phrases, etc.

There were techniques of avoiding the scrutiny of the Lord Chamberlain, such as declaring the theater a "private club," but this was an effective technique only because the Lord Chamberlain chose to make it so, since his jurisdiction extended to "any public place," not simply to theaters. Periodic prosecutions were taken against private clubs, usually on the grounds that non-members had been granted admission, which served as occasional reminders of official authority in this area. In 1951, for example, action was taken against the Unity Theater in which the management and everyone concerned with the production of the play—including the ticket-seller, was fined a total of L 218 plus costs. The issue was not the play itself, but simply the "easy membership" in the club. This led seven other theater clubs, represented by the NCCL, to file a "watching brief" which urged that licensing authorities desist from intervention with theater clubs. This may not have been a typical
"reminder" of official power over play production, because police, in interviewing the staff of the theater, allegedly asked detailed questions about the private beliefs and friendships of the staff, and the entire case took on aspects of police harassment of London's "minstrel class." 76

The End of Stage Censorship

"Saved"

It was a judicial action which, ironically, set in motion a chain of events which eventually, with the wholehearted approval of Lord Cobbold, led to the removal of stage censorship powers from the Lord Chamberlain. Plans to abolish the curious anachronism had probably existed since its inception but had always ended in defeat. In 1865 and 1907 English playwrights petitioned Parliament to do away with the Lord Chamberlain's power, but with no results. In 1949 a bill got through one reading of the House of Commons but proceeded no further. 77 In 1966, however, several events coalesced into a road to reform.

Not to be overlooked, of course, was the importance of Home Secretary Roy Jenkins, who was openly opposed to the Lord Chamberlain as censor and instrumental
in liberalizing the Obscene Publications Act of 1959. But an even greater source of pressure was generated when the Lord Chamberlain himself extended his censorship powers to cover plays put on by "private" theater clubs. The action against "Saved," which some speculate was a deliberate extension of power by the Lord Chamberlain to bring about his own undoing, received judicial sanction in the Marylebone Magistrates Court in April of 1967.

In this case Magistrate Leo Grodwell held that the English Stage Society (the producers of "Saved") had violated the "for hire" provisions of the Theaters Act of 1843. The Lord Chamberlain wanted the deletion of a scene in the play in which a baby is stoned to death; the author and producers refused, which meant the play was not approved by the L. C. The Lord Chamberlain argued that he had jurisdiction over "Saved" because 1) English Stage Society was not a genuine "private club" and 2) the Theaters Act stipulated that a play must be approved by the L. C. if it is "for hire." This was a break from the long tradition of accepting a tongue-in-cheek definition of private club. The English Stage Society charged 5 s. by which a person became an "associate member" of the
Society and was entitled to see a performance. The Marylebone Magistrate was to help end this sixty-year-old custom by holding that because the Royal Court Theater, where "Saved" was performed, like most English theaters, sold alcoholic drinks and did not have free admittance, the entire production is "for hire."

During the trial such notables as Sir Laurence Olivier testified as "character" witnesses for the Society, and the magistrate showed signs of irritation at the "advice" prominent citizens were offering. The action against the English Stage Society did, however, provoke a debate in Parliament which gave rise to a promise by the Labor Party to form a committee to review the entire issue of censorship.

Action from Parliament

A joint committee of the House of Lords and the House of Commons was then set up and, after studying the problem for a year, announced in June of 1967 that it unanimously felt that an end to the licensing system was desirable. Almost a year earlier the Lord Chamberlain had publicly announced that he felt his censorship duties were "no longer appropriate." The committee said:
No one man should possess unqualified dictatorship over what may or may not be presented in our theaters. Attendance at a theater is a voluntary act. It is better that an individual should have the right to decide, with full knowledge, what sort of play he wishes to see than that some central authority should attempt to lay down what is suitable for the average person.  

During the various hearings before the committee the only significant group wanting to continue the censorial powers of the Lord Chamberlain was the Society of West End Theater Managers. These managers, who run the more lucrative of London's commercial theaters, feared that if plays were not licensed they would be open to prosecution for libel and obscenity. The committee proposed an end to all forms of licensing and recommended that the theater be covered by the Obscene Publications Act of 1959. This, together with the laws of libel, defamation, public order, blasphemy and sedition, it felt, were sufficient to make the English theater subject to the rule of law.  

At the hearings criticisms of the Lord Chamberlain as guardian of sexual propriety were frequent, but not as frequent as the criticism of censorship based on the political aspects of censored plays. The banning of "MacBird;" Hochhuth's "The Soldiers," which Lord Cobbald
held maligned the characters of Sir Winston Churchill and Lord Cherwell; and the Hampstead Theater Club's production of "In the Matter of J. Robert Oppenheimer" were cases in point. In the Hampstead case the simple technique of open defiance resulted in the Lord Chamberlain subsequently licensing the play for public performance. 

On February 23, 1968, Labor backbencher George Strauss (because he had good luck in the annual draw for limited private-bill time) introduced the measure to end stage censorship. The Labor Government approved of the idea, but left it as a private member's bill, which is the usual course in matters of morals. Strauss' bill permitted legal action to be taken against a play if any citizen complained the play libelled him. The Attorney General was also authorized to bring criminal obscenity proceedings under the OPA. Conservative MP Norman St. John-Stevas, a noted libertarian legal scholar, expressed concern about satirization of the Crown and unsuccessfully called for an amendment to forbid the depiction of existing heads of state in any country. Strauss rejected the notion on the ground that political figures can be and are satirized in newspaper cartoons and books, and that there was no reason to attempt their
protection on the stage. He also noted the popularity of the stage hit "Mrs. Wilson's Diary" which portrayed Prime Minister Wilson as a bumbler in a Batman costume.  

Surprisingly, the long-argued proposal passed the House of Commons by voice vote without recorded dissent, and 400 years of stage censorship came to an end. The last play to be submitted to the Lord Chamberlain was the proposed production of "Hair," which came back marked "unacceptable." The official date for abolition of the Lord Chamberlain's censor power was July 25, 1968. On July 26, 1968 "Hair" opened in Shaftesbury Theater, London.

British Board of Film Censors

Film censorship in the United Kingdom stems from the original desire of the Crown to protect the public from flammable films. Checking the chemical content of the celluloid was extended to the content of the film, but since sixteen-millimeter films were usually non-flammable they are curiously exempt from censorship and control. Repeated attempts, in 1934, 1939, and again in 1951, were made to introduce control over sixteen-millimeter films, but pressure group activity on the part of
the NCCL, the Missionary Societies, and the Association of Cinematographic and Allied Technicians was able to keep censorship from being extended.

The chief instrument for censorship of films is the British Board of Film Censors, which, while not a statutory authority, operates under the general model of licensing conditions stipulated by the Home Office. In films, as in plays, sexual impropriety is not the only ground for censorship. Clause 10 of the general conditions for licensing set down by the Home Office states that a particular film may be banned if, "... it contains matter which, if exhibited, would offend against good taste or decency or would be likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling." This mandate is interpreted by the general secretary of the BBFC. One of the central objections to censorship, of course, is that it makes art so dependent on the censor, and nowhere is this dependency more evident than with the BBFC, and the man who happens to fill the role of secretary. Clause 10 was used by Lord Morrison, secretary during the period immediately following World War II, to prohibit producers from showing such...
things as "antagonistic relations between management and labor," "clutching hands," "salacious wit," "sensuous exposure of girls' legs," and "British officers and civilians in an odious light as regards their conduct in India." 90

Under the reign of John Trevelyan, the Board of Film Censors became in the view of many, an important positive influence on the British film industry. Lord Morrison once stated that "South Pacific" was among his favorite films, and critics charged that he used this film as a critical yardstick for what was morally acceptable. Trevelyan, on the other hand, is not only a connoisseur of the arts (a jazz pianist, member of the Board of the Western Theater Ballet, and for twelve years Chairman of the London Philomusica) but also a genuine film aficionado. The New York Times reported that while Trevelyan had his detractors, many London critics and movie producers credited him with having created the atmosphere "essential for the revolution in British film making that began a decade ago." 91 Trevelyan himself has stated that he liked to think his job was not "wholly negative." One of his most ardent supporters is Harold Pinter, whose play,
"The Caretaker," received severe deletions by the Lord Chamberlain but emerged almost intact when it was made into a movie. When the play was revised, the Lord Chamberlain even reversed his decision as a result of what Trevelyan had allowed in the film, and made no deletions.

"I detest and fear censorship and equally the office of the censor," Pinter has stated. But about Trevelyan, Pinter feels that, "Without him, most, if not all, of the serious international products of the British industry in recent years could not have been made." Trevelyan construed his function to be one in which the public received films which were "in good taste." His only criteria for establishing this was "on the feel of the thing." His standards for obscenity centered very closely on whether, for example, nudity was relevant to the film or had any intrinsic value. Excessive violence and violent sexuality, he would contend, can have disastrous effects on children, and for this reason he believes that some sort of censorship is necessary to the public interest.

Most of the cuts made by the BBFC in most films seem to receive at least tacit approval from critics.
Richard Round, film critic of the Manchester Guardian, felt that the scenes cut from Mai Zetterling's "Night Games" still left "enough that is scandalous . . . remaining for those who are interested in that kind of thing." Much more controversial, however, was the film version of James Joyce's "Ulysses," shown widely in the United States with all of its footage and dialogue intact (although simultaneous two-day showings throughout the nation helped to make action against the film difficult), but subject to what the director felt was a "hatchet job" in Britain. Joseph Strick, director of the film, was so upset by the twenty-nine cuts, twenty-seven involving Joycian language and two involving Joycian images, that he "retaliated" by marking each cut in the film with a "beep" on the sound track and provided theater patrons with a leaflet containing the beeped dialogue and a description of the beeped scenes. Strick also facetiously threatened to add a title card to the picture reading: "Cuts by John Trevelyan."

But Trevelyan also met his critics head on. In a meeting in Festival Hall on September 16, 1968, before a crowd of about 2,000 film buffs and movie critics, most of
them members of the New Cinema Club formed in 1967 at least partly to campaign against governmental control over films, Trevelyan showed more than two hours of film that he had censored, and explained why. In the daring confrontation, in which the audience saw sequences never shown to the public before, many left still convinced that censorship was inherently evil and unnecessary, but very few left unmoved by what they saw. Trevelyan described this rather unprecedented exhibition as "an illustrated lecture" in which he tried to justify his job in terms of what he felt to be "regrettable necessity." What began as a hostile audience ended up giving Trevelyan an ovation. "Frankly," Trevelyan told the audience, "I find sex in truly artistic films much less a problem than the mounting wave of violence,"
and he expressed a particular concern about the possible flood into England of American "blue movies" which he said were "scarcely concealed pornography with a strong streak of sadism thrown in."\(^{100}\)

The audience did object to the deletion of a nude scene in the Swedish film "Hugs and Kisses," but Trevelyan argued that he had to "anticipate" probable action under obscenity statutes and stated, "We have to protect not only the public but the film industry itself."\(^{101}\)

**Other Sources of Punishment for Obscenity**

**Customs**

H. M. Customs gained the authority to censor books through the Customs Consolidation Act of 1876, which prohibits the importation of indecent or obscene works. Customs officials work from a black list compiled by the Commissioners of Customs and Excise which may include books which have not been the subject of prosecutions. Customs officers are empowered to seize any books a citizen or alien may wish to bring into England, but the list itself is not divulged to the public.\(^{102}\) This is especially inconvenient since a person does not know what
books he may buy abroad and import and has no way of finding out. A person whose books are seized has a month in which to notify the Commissioners that he objects. As a matter of practice the customs officials do not tell the individual of this procedure, and after this time the books are automatically forfeited. If the person does object within the specified period, the matter then goes to court. In one of the more well-publicized examples of customs censorship, Jean Genet's works in French were seized even though they had been bought for the reference library in Birmingham.103

British customs successfully resisted the Select Committee's proposal that no destructions be made by customs officials without a court order, arguing on grounds of administrative inconvenience and expense. It is important to realize that in the seizing of books by the customs officers the OPA does not apply. Material seized by customs operated essentially under the guidelines of the Obscene Publications Act of 1857; literary merit cannot be raised as a defense, expert evidence about such merit is inadmissible, and the criteria for determining obscenity can be based on isolated parts of the
book, not the work taken as a whole. Nor, as we have seen, do the standards of the OPA of 1959 apply to obscene material sent through the mails. Post office officials censor under the authority of the Post Office Act of 1953, which made it punishable to send obscene matter through the post and authorized officials to detain and destroy such material. Having essentially three different agencies operating under three different statutes to search for obscenity in books alone can create endless confusion. In 1960, for example, customs officials were allowing *Lady Chatterley’s Lover* to be brought into the country, while the Post Office was seizing copies which were mailed.\(^\text{105}\)

The NCCL, in 1968, effectively intervened on behalf of a young American poet, Clive Matson, who traveled to Britain in order to give a series of readings. Customs officials seized sixty copies of his own book and seven copies of a magazine in his possession because they were "on the borderline" and could possibly be obscene. The Council in this case provided Matson with legal counsel, and after it approached some members of Parliament, the material was returned to Matson with no further action taken by the authorities.\(^\text{106}\)
There are also, of course, numerous local acts relating to obscene publications, as well as local by-laws. The Home Secretary, however, has in recent years refused to authorize those portions of local by-laws which are submitted for his approval (as all by-laws must) if they deal with obscenity. 107

Local authorities also obviously have numerous informal mechanisms to control the type of reading matter circulating in the community. There are unofficial approved lists of comic books and picture post cards, and numerous communities have unofficial censorship committees composed simply of concerned citizens. There have been certain types of industry pressure on the Home Office to set up national censorship boards. The Post Card Association, which represents most of the manufacturers and wholesalers of post cards in the United Kingdom, on one occasion asked the Home Office to set up an independent national censorship board because the Association complained that the criteria of various local authorities was so erratic that the industry did not know what sorts of things it could print and have legally distributed in all
areas. Pressure groups urging more stringent application of obscenity statutes presumably would be in favor of decentralized control of the criteria for obscenity, since this would force whatever "industry" concerned to be extremely cautious in what it presented the public if it wished their products to be widespread and therefore make money.

The increase in literary and cinema prosecutions for obscenity was usually not the result of high governmental involvement but of local police officers and private pressure. It was individual police officers who, for example, made the decision to prosecute sellers of Beardsley pictures under an early nineteenth-century Vagrancy Act. This Act, aimed originally against veterans showing their wounds as they begged, prohibits "willfully exposing to public view an indecent exhibition" and is prosecuted without a jury or the right to offer evidence of serious artistic purpose. Concentrating on the literal wording of the Act and avoiding its historical context enabled Magistrates to convict the sellers.
The NCCL

The Council almost annually attacks British censorship laws, usually by pointing out that the measures do very little to restrict the sale of what it calls "true obscenity and pornography." It usually chooses to focus on the archaic nature of the entire endeavor rather than on the problem of obscenity itself. A typical statement occurred in the 1967 annual report:

Meanwhile those in search of true obscenity and pornography can still find it readily obtainable commercially in unlimited quantities (if not in the most attractive surroundings) in Soho and elsewhere in our large towns. So much for our laws of public morality. 110

In its annual report for 1966 the NCCL stated its general philosophy toward censorship. In principle it accepts that there "may sometimes be a need for limited censorship when real harm to individuals may otherwise result: liberty is a principle only insofar as it does not infringe the rights of other individuals." 111 It went on to state that:
In practice, however, it is at present difficult to justify censorship, in that no recorded case of the banning of a film, a book, play or a television program has in our view been in the public interest.\textsuperscript{112}

This general acceptance of the power to censor is thus not only typical of British society in general, but also of libertarian organizations. For a whole host of reasons the British are perhaps much more sensitive and sympathetic to arguments about the public interest and governmental action in the public interests, than Americans are, and there does not seem to exist the rather congenital hostility to power per se that exists among American libertarians.

The great harm of pressure groups lobbying to tighten up English censorship laws, at least to the NCCL, is not their effectiveness but the fact that they detract attention from the need to revise British censorship laws "in the light of common sense and tolerance."\textsuperscript{113} The OPA is viewed by the Council as a flagrant infringement on civil liberty because it leaves far too much discretion on the vague standards of obscenity to the judge or jury.\textsuperscript{114}
Other Groups and Public Opinion

There is also, of course, a demand for an increase in censorship. Groups such as the League of Women and the "Clean Up TV Campaign" pressured the House of Commons to place greater restrictions on the portrayal of violence and sexual relationships in TV plays, and certain MPs did call for a control body for the BBC but were resisted by the rest of the Commons on the ground that the BBC had criteria for "good taste and decency," and had not demonstrated any violation of public trust. The BBC is not especially timid about presenting things such as nudity to its audience. In October of 1968, for example, it ran a television documentary on a group of naturists (nudists) exhibiting male and female anatomy in full color. The program began with an opening shot of two naked men swimming in a pool, with the producer of the documentary warning the audience that they might find what was to come a bit embarrassing. A BBC official said later that he had received some telephone calls from viewers complaining about the program, but the overwhelming critical reaction, on the part of the British press at least, was that the program was a poor advertisement for sex.
While bold things were happening on the BBC, in 1966 the Hampstead Arts Council took what the NCCL viewed as timid action when it withdrew from its exhibition works by six Swedish painters, including a nude portrait of the Roman emperor Heliogobulus because of "recent police actions." The police actions referred to by the Arts Council were, the NCCL surmised, the prosecution of the Robert Frazer gallery for its display of works by the American pop artist Jim Dine which were visible from the street and were held by the police to have "caused offense to the public (violation of the Vagrancy Act). The Listener, describing the American's work as "... phallic exaggerations to be found on the walls of public lavatories," stated that Dine, "... used these graffiti delicately and wittily, although not without sympathy."

The 1966 trial in which Ian Brady and Myra Hindley were found guilty of murdering three children--dubbed by the press as the "Moors Trial" because the bodies were found in the nearby Moors--created an increase in public sentiment for censorship of salacious works with overtones of sadism. This crime was motivated by a need for sexual gratification, and Brady in particular had a
library almost exclusively concerned with the works of the Marquis de Sade and other works of this genre. While there was much discussion about the relationship between pornography and crime and the general social utility of censorship, the dialogue quickly moved to a re-evaluation of capital punishment and the complaint that the lack of the death penalty made the trial "aesthetically" disappointing because it did not produce any kind of public catharsis. Intense as the public reaction was to this event, it brought no new practices about, simply "arguments" to be used by those who had traditionally supported stricter censorship.

Most English libertarians feel that pressure groups designed to rid England of obscene material, such as the Public Morality Council and the Catholic Teachers Federation, are not very influential where the local police are apathetic about obscenity statutes. They are more than willing to assist the police in uncovering obscenity, but usually have not resorted to private prosecutions. The overwhelming majority of prosecutions against obscene publications are taken by the police, even though initiative may originally stem from a pressure
group. When police prosecute they are required by the Prosecution of Offenses Regulations of 1946 to report to the Director of Public Prosecution. The Director is empowered to advise police on whether to prosecute, and occasionally, if he thinks the case is sufficiently important, take up prosecution himself. The Director classifies allegedly obscene works reported to him into four different categories: 1) material for which previous destruction orders have been made; 2) material for which destruction orders have been refused; 3) new material which he thinks should be put before the court; and 4) new material which has been reported as obscene but which the Director thinks is not obscene. Local authorities may, however, reject the Director's "advice." The Select Committee in its recommendations urged that the Director not only advise on such prosecutions, but that obscenity should be added to the list of crimes which cannot be prosecuted without his consent. The Committee, and libertarians in general, were anxious to promote uniform standards since most of the more repressive obscenity prosecutions come from local police officials. The Children and Young Persons Act of 1955, for example, required permission of the D.P.P. before
any prosecution can be instituted, and the Select Committee argued that since the Director had tabulated information on which to advise local officials under this law, it would not be a great addition to administrative labor for him to decide whether to allow prosecutions for obscenity. The government successfully resisted any such implementation on the ground that the definition of obscenity is necessarily so imprecise that it would be improper for the executive to usurp the court's task of deciding what is obscene by screening all prosecutions.121

But even if prosecutions were under centralized control, determining precisely who initiates prosecutions would still be difficult. Just as in sedition cases, the Home Office is in some ways the government department concerned, since the police forward all reports of convictions and detention orders to the Home Office which maintains records and statistics. The Home Office is also notified of seizures by H. M. Customs and the Post Office, and actions of the Director of Public Prosecutions. It is also the designated authority to act in the name of the United Kingdom under the International Convention for the Suppression of Pornography and communicates with other
states about obscene material being distributed. In this international role, the Home Office reportedly circulates a list of books which it believes to be obscene, although no prosecution has been launched against such books. The American novel, Lolita, was never prosecuted in England, for example. The Home Office simply wrote to France about this "highly obscene book," in order to secure the suppression of an English-language version being printed in France.122

Conclusion

Nature of the Crime

Legally the crime of "obscenity" is at once a very broad concept, since it is not restricted to sex; on the other hand it is now a quite technical notion denoting only the effect a thing has on a probable recipient. The telescoping nature of the offense is compounded by numerous statutes used to attack the same problem. A thing may be "indecent," i.e., not sufficiently corrupting to be obscene in the technical sense, and still bring punishment to an individual under the Post Office Act, or the Vagrancy Act, or the common law charge of corrupting
public morals. Recipients of questionable material may lose them when passing through customs, or be forbidden to import English translations of them, based on a criteria known only to the Home Office.

The profusion of statutes which can be applied, together with the diffusion of the power to prosecute, increases the variable nature of the offense, and is the chief reason libertarians prefer centralized application of obscenity laws—better one national censor than many parochial censors. But even where prosecution is under the OPA where the defense of "public good" is allowed, the burden of proof is still on the defendant to demonstrate socially redeeming value.

In between indecency and technical obscenity there is the ambiguous notion of "inherent obscenity" which turns up in common law prosecutions where a "publication" is not necessary but an intent to corrupt is. Intent here would presumably be based on evidence, i.e., a magazine or picture, etc., which, since its effect is irrelevant, would be evaluated on a reasonable guess as to its consequences. This criterion remains as unannounced as that of the Home Office.
Role of the Bench

Judicial interpretation has occasionally altered application in a liberal direction, such as when Justice Stable used his instructions to the jury in the Philanderers Case to prohibit the old OPA from preventing the publication of serious literature simply because it might be harmful to young children. The OPA of 1959, however, has usually been bent in the other direction—almost to a right angle in R. v. Shaw. The "Ladies Directory" holding seemed to establish that the tendency to deprave and corrupt means any aid given to those who are corrupt already and are seeking depravity. Since Justice Ashworth held that a man can be corrupted more than once (and by implication in more ways than one), the offense of obscenity can be constituted by simply facilitating the desire of others to intensify their depravity. This is not a totally absurd point of view, since most of the time obscene material is not paraded before unadorned innocence, but before those whose expectations of depravity make them seek out situations in which they can become probable recipients. But it is an awkward doctrine in the Shaw case. As Lord Reed (the only dissenter among the Law
Lords in this case) pointed out, the directory itself is not inherently obscene, nor is resorting to prostitutes an offense; but the conviction punished the act (of inviting others to prostitution) as a conspiracy to corrupt public morals, and the actual printed invitation((the directory) is held to deprave and corrupt (i.e., is obscene). This in itself, Lord Reed stated, is a "novel doctrine," but his basic objection centered around the wide power given both to the bench and the jury. Reed was upset with what he viewed as judicial usurpation of the delicate question of how far the law ought to punish immoral but basically private acts. This, he argued, was properly a legislative problem which the Law Lords has made a problem of common law. But more important, he insisted, the case negated judicial power at precisely the juncture where it was most needed—in defining such terms as "corrupt" and "deprave." The meaning of words is normally, and should have been in this case, a question of law. Juries are not allowed to use their own definitions of such things as negligence, and to Lord Reed, giving them such power in obscenity cases erodes the certitude of criminal law. The law loses its ability to inform a
man what conduct is and what conduct is not criminal. The holding, Reed correctly points out, makes the jury a censor morum: "the law will be whatever any jury may happen to think it ought to be. . . ." 123

In Calder v. Powell, which held that "Cain's Book" was obscene because it could tempt readers to experiment with drugs, and later in the "Chewing Gum" case, the scope of obscenity was greatly extended. In Calder the grounds for forfeiture came close to saying that the work "advocated" something which Lord Parker, and in the case of drug abuse most others, believed to be socially harmful. Using the logic employed to justify these cases any speech in Hyde Park which advocated the positive aspects of narcotic addiction would be illegal, not only on grounds of corrupting public morals, but because the statements themselves would be obscene. Obscenity with this kind of construction emerges as a concept which seeks to delineate legal punishments for attempts to deprave Her Majesty's subjects in all senses. There is more than one path to depravity, and enticing subjects down a particular path can be illegal. Phrased in this metaphorical fashion, the concept is certainly not a new one to Anglo-American
jurisprudence; enticing an individual to murder another individual has long been held to be punishable behavior, but it is important to realize the someone who "entices" another to murder is guilty of murder. What raises enormous problems with the concept of obscenity is that where it is defined as enticing someone down a particular road, it is not always clear that the situation at the end of that road is illegal. With narcotic addiction it would be perhaps clear, but it is difficult to say that whatever exists at the end of the sexual road to depravity is illegal, unless the judges and the prosecution are making assumptions about criminal sexual activity. If these assumptions do exist they are not sufficiently examined to be stated as part of the rationale for the concept obscenity.

Several judicial rulings had the consequence of undermining the liberal aspects of the OPA. The creative use of common law in R. v. Shaw, the tip to police by Lord Parker in R. v. Clayton to use common law rather than the OPA, and Parker's "error in law" holding against the Middlesex Justices in the Copper case reflect a judicial determination not to be cavalier about depravity in England.
The latter case especially reflects Lord Parker's attitude about "pure filth"—under the guise of a fine point of law.

The Bench's own felt need to restrain itself has interesting consequences in obscenity cases. The restraint is always most pronounced when it acts to sustain convictions. In instances such as the Copper case the appellate justices are not so willing to defer to the judgment of lower courts. In other instances, such as the Straker case where Parker apparently felt that the material was not obscene, judicial humility triumphs and the conviction stands.

This judicial deference to the prosecution is especially dangerous considering that the rationale used against any attempts to centralize prosecution of obscenity cases is that it would be an interference with the courts. The national government's deference to the courts and the bench's deference to both the prosecution (on the appellate level) or to the jury create a round-about abdication of responsibility in this area.
The notion that law should punish activity which tends to deprave and corrupt is obviously an idea which is still very much alive in the United Kingdom. The specific content of what is "obscene" is dependent not only on the general tenor of the times but also on the particular jury. Also, the seriousness of the problem of obscenity tends to fluctuate between serious assaults on human depravity and sporadic reminders that the sword of state is sharp enough to cut paper (or celluloid, as the case may be). But the basic idea that it is a legitimate function of government to protect the public from corruption and depravity is usually not challenged even by British libertarians. A legal concept is simply a demarcation of authority in this area remains fairly constant, while the specific content encircled in the crime of obscenity is highly variable. It is much more variable than the same notion in the United States, because as social mores about sex change, the content of obscenity in the United Kingdom has moved progressively away from simple candor about sex to a concern about violence, sadism and drug abuse. Whether something depraves is a much more
inclusive question than whether something is simply prurient. It is this variable nature of the content of obscenity in the United Kingdom which led English playwright and former MP Benn Levy to describe the implementation of obscenity law in Britain as a search for "a crime to fit the punishment." 124

While obscenity law could probably be described as "punishment" in search of a crime" in almost all cultures, Levy's witticism seems especially accurate for Britain. The deferential political culture and the libertarians in that culture once again seem to concentrate on how reasonable the particular exercise of authority is, not whether that power belongs to government at all. In Britain, while there have certainly been objections to censorship, the longevity of the censorship power of the Lord Chamberlain and the present existence of the Board of Film Censors would seem to indicate that questions of obscenity are not formulated with the initial assumption that prior restraint is necessarily an infringement of civil liberty. While prior restraint may be more acceptable to English libertarians because it is more accepted in English law, the cultural propensity to construe liberty
not as a matter of reluctantly mandated authority but as "reasonableness" of those who govern has meant that the libertarian attack on obscenity law has focused on the more antiquated institutions of censorship rather than on the constitutional propriety of protecting the public from themselves.

English obscenity law is punishment in search of a crime because concern about obscenity symbolizes a sense of rectitude, if not self-righteousness. But this motivation would be as true of other cultures, even though "Victorian" is a phrase thoroughly English in origin. In another sense, different from Levy's meaning, English obscenity law is legal punishment poised before changing targets not only because the concept is statutorily broader, but because the English take the sword of state more for granted.
Seditious Speech in the United States

Doctrinal Influences Prior to 1945

Seditious Libel

The exact status of the English common law crime of seditious libel was not definitively settled in the United States until 1964 when the Supreme Court ruled, in New York Times v. Sullivan, that there was no such concept in American law.¹ This had long been a view urged by judges such as Holmes in his dissenting opinion in Abrams v. U. S. (1919) and Jackson in Beauharnais v. Ill. (1952), and it received support from such prestigious American constitutional scholars as Zechariah Chafee.² Some historians, such as Leonard Levy, disagreed, arguing that the framers of the Constitution were "nurtured on the crabbed historicism of Coke and the narrow conservatism of Blackstone."³ Others argued that since the fines levied under the Sedition Act of 1798 were repaid by an Act of Congress (on the ground that the Sedition Act had been unconstitutional), and since Jefferson pardoned all those convicted
under the Act (even though he was willing to see his Federalist opponents prosecuted for seditious libel in the various states), the concept had atrophied long before 1964.\(^4\) In any case punishment for seditious speech in the U. S. has not historically been tied to the notion of "libel"—the more commonly used rubric was "espionage."

The Search for a Judicial Rule

"Clear and Present Danger"

The Espionage Act of 1917 gave birth to a cluster of famous Supreme Court decisions in which the judges began their quest for guidelines on freedom of expression. This Act, applied during the aftermath of World War I and the Russian Revolution, was part of the general "Red Scare" hysteria that swept the nation and penalized many forms of utterance. Under its provisions over 1,900 people were prosecuted for alleged subversion, and many radical publications were excluded from the mails. It was in sustaining the application of this Act against a socialist who had mailed circulars to eligible draftees urging them to resist conscription that Justice Holmes enunciated his homely analogy about shouting "fire" in a crowded theater
to demonstrate that speech cannot have absolute protection in all circumstances. Since the First Amendment is not to be understood as an unqualified right to verbalize regardless of consequences, Holmes defined the issue, in Schenck v. U. S. (1919), as whether:

... the words are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This is an important approach to the problem because what is being evaluated is not merely the content of what a speaker says but the circumstances in which he is speaking. These circumstances, not the words themselves, can justify removal of the speaker if (and presumably only if) they present a clear (not ambiguous), and present (immediate) danger that they will bring about some substantive evils the Congress or a state has a right to prevent (with the assumption that they do not have the right to prevent all substantive evils). With reference to Schenck, however, Holmes hastily concluded that when a nation is at war, "... many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured. ..."
Holmes also wrote two other unanimous opinions for the Court urging that the same standard be applied to uphold convictions under the Act. Later, in 1919, Holmes, along with Brandeis, began to pen dissents claiming that the majority of the court was not correctly applying the "clear and present danger" test. The doctrine was to become characteristic of Holmes-Brandeis dissents in free speech cases and was to be most explicitly stated in Whitney v. California (1927), where Brandeis insisted that the "danger apprehended" must be not only "serious" but so "imminent" that the proper remedy for fallacious speech, namely "more speech," could not avert the danger. It is open to conjecture as to whether Holmes really believed that people such as Schenck did present a clear and present danger to the country. Holmes may have realized that the Court wished to uphold convictions under the Espionage Act, regardless of rationale, so he yielded on the conclusion (making a unanimous court and a much stronger position for the doctrine than if it had simply been a dissent), but formulated a judicial standard which could have libertarian consequences in less hysterical times. Whatever the motives, it is important to realize that while the
Holmesian formula was logically quite libertarian, its successive statements during this time were, in the words of C. Herman Pritchett, "eloquent but ... kept no one out of jail." 10

"Bad Tendency"

While Holmes and Brandeis were busy clarifying their doctrine, the Court majority began to evolve a new standard, frequently called the "remote possibility" or the "bad tendency" test which as a theoretical formulation was considerably more restrictive of freedom of speech than the Holmesian test. Enunciated by Justice Stanford in Gitlow v. New York (1925), which upheld the conviction of a radical pamphleteer under the New York Criminal Anarchy Act, this formula emphasizes the possible consequences of a particular speech rather than the probability of a specific evil. Silencing utterances which call for violent overthrow of the government are not arbitrary or unreasonable exercises of authority, according to Stanford, because such measures seek "to extinguish the spark without waiting until it has ... blazed into conflagration." 11 Thus if the speech has the "tendency," even though remote, to lead to disorder, it is in the public interest to prevent such
speech. Under this formula it was not necessary to demonstrate an actual relationship between speech and disorder, simply to demonstrate a relationship between the content of the speech and the possibility of disorder at some future date.

The Search for a Judicial Role

Judicial Activism v. Judicial Restraint

Initially the clear and present danger doctrine was not a test for the validity of legislation, but only a test for determining "how closely words had to be related to illegal acts in order to be infected with their illegality."\(^{12}\) In Schenck, Abrams and Gitlow, Holmes did not challenge the statutes in question; he merely in the latter two cases doubted whether they were correctly applied. Brandeis in the Whitney case, however, extended the clear and present danger doctrine from a rule guiding the application of statutes to a rule evaluating the constitutionality of the statutes themselves. In Whitney, Brandeis claimed that declarations by state legislatures that certain kinds of speech and assembly do in fact create a danger is merely a "rebuttable presumption."\(^{13}\) The clear and present danger
test by Brandeis was to be used to determine whether the conditions alleged by the legislature in fact existed. The Whitney concurrence was to set forth a doctrine by which courts and citizens could challenge any law abridging free speech and assembly by "showing that there was no emergency justifying it."¹⁴

This formulation of the clear and present danger doctrine moved it away from simply being a standard to evaluate speech and into the most sensitive area in which a court can move; namely, a theory about its own power. While judicial review gives the Supreme Court the power to nullify legislation, it also gives it the burden of justifying the use of that power in terms which spare the Court the image of being arbitrary or political. The traditional way the Court approached this problem had been to claim that there exists a presumption of constitutionality of all statutes, and that this constitutionality must be upheld if the actions of the legislature were "reasonable." To strike down a statute on any other ground other than that it is hopelessly arbitrary or grossly unreasonable was to engage, some believed, in judicial legislation, superceding the legislative branch.
Both the clear and present danger doctrine and the criteria of legislative reasonableness ironically trace their origins to Justice Holmes. His operating assumption about the proper role of the Court was that it leave statutes alone unless, as he said in his dissent in *Lochner v. New York* (1905), "... a rational and fair man would necessarily admit that the statute proposed would infringe fundamental principles as they had been understood by the traditions of our people and our law."^{15}

While there is no contradiction in the ultimate logic of claiming that when possible courts should leave legislature alone, and when possible legislatures should leave individuals alone, to stop the second is obviously to transgress on the first, and so cases involving First Amendment freedoms were to perennially raise two sorts of questions. The first question involved judgments about the permissible limits of speech, while the second involved judgments about the proper function of the Supreme Court. While these two arguments did not address themselves to the same question, they frequently had opposing consequences in the disposition of free speech cases, and an attempt to resolve this conflict was not attempted until the time of the Roosevelt court.
"Preferred Position"

After 1937 such new appointees of President Roosevelt as Justices Black, Douglas, Murphy, and Rutledge, aided by Chief Justice Stone, began to reassert the clear and present danger test. But since the doctrine, at least as it was formulated after Whitney, implied an active role for the court in nullifying legislation; and since the new appointees were hostile to the older court's assumption that it had an active role to play in declaring social and economic legislation unconstitutional, the Roosevelt court was left with the problem of justifying judicial activism in one area and not in another. The "preferred position doctrine" emerged as the judicial theory to explain this apparent paradox and served as the larger theoretical fabric on which the clear and present danger doctrine could be pinned.

The ultimate logic, if not content, of the preferred position doctrine occurred in a footnote penned by Justice Stone in United States v. Carolene Products Co. (1938) in which he noted that the Court is always to presume legislative judgment as constitutional when it affects ordinary commercial transactions unless obviously
unreasonable, but that there may be a "narrower scope of operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments..." 16 Walter F. Berns is quick to note that there were other periods in constitutional history when the Bill of Rights was elevated over the assumption of legislative reasonableness, such as the time when the Taft Court gave so much emphasis to the Fifth Amendment and its concern for property, and suspects that the transfer of Stone's logic from a footnote to a central doctrine is more motivated by libertarian wishes than constitutional fact. 17 Stone's footnote, however, provides only the structural scaling of the doctrine. The actual design of the interior came later through the efforts of Stone, Douglas and Rutledge, the latter of whom gave the most concise statement of the doctrine in Thomas v. Collins in 1945. 18

In this case, which concerned the validity of a state law requiring all labor organizers to secure permits before soliciting members, the Court held the statute to violate the First Amendment, and Rutledge justified this
action with reference to the special status of First Amendment liberties.

This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the state power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedom secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other context might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.¹⁹

This doctrine, and the clear and present danger test, laid the foundation for an active libertarian role for the Court in its interpretation of the First Amendment.

Speech and Disturbances of the Public Order

Access to the Public

Permits

The mode of speech rather than its content is frequently subject to regulation in the interest of public tranquility or order. But because "content" and "mode" are frequently
difficult to separate, the issuing of permits poses First Amendment problems. The simple "volume" of speech, for example, can develop community pressure to stop the speech. The Supreme Court approached this aspect of the problem in 1948 when, in *Saia v. N. Y.*, it overturned the conviction of a Jehovah's Witness minister who used loudspeaker equipment without a proper permit. Justice Douglas, speaking for a narrow majority, held the authorizing ordinance to be an unconstitutional "previous restraint" because no standards were prescribed for the exercise of discretion by the police chief in defining "abuse."

A year later, however, in *Kovacs v. Cooper* (1949), a Trenton, New Jersey, ordinance outlawing sound amplification devices, if they emitted "loud and raucous noises," was held to be constitutional.

Frankfurter, in a concurring opinion, took the opportunity to attack the preferred position doctrine which had, "... uncritically crept into some recent opinions. ..." This "mischievous phrase," Frankfurter asserted, subtly implied that any law touching communication was infected with presumptive invalidity. This point of view, he stated, had never been accepted by a majority of
the Court, since Justice Rutledge only represented the opinion of four judges in *Thomas v. Collins*, and the phraseology of the doctrine was a gross misunderstanding of both the clear and present danger doctrine and the judicial philosophy of Justice Holmes.

Black, Douglas and Rutledge dissented, with Black claiming the Court had denied "constitutionally-sheltered speech the power of amplification."

When the issue appeared to focus more on the content than the loudness of speech the Court was more willing to strike local ordinances. In *Kunz v. New York* (1953), for example, a majority of the Justices reversed the conviction of a Baptist minister who held outdoor worship services in New York City without the proper permit. Kunz, after a hearing before the police commissioner, was denied a new permit on the ground that he had "ridiculed and denounced other religious beliefs" in his meetings. The city ordinance regulating permits did not specify this as a criterion for permit revocation, but it did, in clear language, allow the police commissioner to exercise discretion in denying permit applications. This ordinance was, to the Supreme Court, an invalid prior restraint because it
vested an administrative official with too broad a discre- tion.

Justice Jackson, labeling the majority's opinion as a "quixotic tilt at windmills which belittles great principles of liberty," relied heavily on the fact that Kunz was frequently indiscreet in his attacks on Roman Catholics and Jews. To Jackson such "sermons" were "intrinsically incendiary and divisive," and speech which was simply a "name-calling contest without social value" was not protected by the Constitution.

The ACLU, while lauding this decision, was quick to point out that Kunz was arrested shortly after the court's opinion on grounds of disorderly conduct. The New York Civil Liberties Union carried the case to the Supreme Court, but appeal was denied. The ACLU claimed that the police had "simply found another way to suppress a speaker they do not like," and that Kunz was "suffering from a hostile discrimination not applied to other collectors of crowds." 23

**Injunctions Against Demonstrations**

Many of the Court's decisions about injunctions involved attempts at economic persuasion, rather than moral
or political persuasion, and thus were inevitably tied to considerations about legitimate restraints of trade rather than the probable disorder caused by such "speech."

Injunctions against clearly political kinds of events were dealt with by the Court in 1968, however, when it reversed a 10-month restraining order which prohibited the National States Rights Party from holding rallies in Princess Anne County, Maryland. The party, a "white supremacist" organization, was subject to a 10-day ex parte restraining order after it made militantly racist speeches at a racially-mixed outdoor rally. At the end of the 10 days a Maryland Circuit Court extended the injunction for 10 months, also in ex parte proceedings, and the Supreme Court held such action to constitute an unwarranted prior restraint on speech. Justice Fortas, speaking for the majority, emphasized that while there are limited circumstances in which speech is so "interlaced with burgeoning violence" that it is not protected by the First Amendment, in ordinary circumstances criminal penalties imposed after the freedom to speak has been grossly abused are sufficient. If the conditions are not ordinary, then such mechanisms as an injunction bear a heavy presumption against their constitutional validity, and in this case, the Court felt that
even the 10-day restraining order could not be sustained. Even though the Court had ruled a year earlier that demonstrators who had proceeded with a protest march in the face of an injunction should have sought judicial review of the order rather than disobey it, the ex parte proceedings in this case were felt to be unnecessary. Some of the justices, such as Douglas in his concurrence, suggested that the net effect of such a temporary injunction is to give the state the "paralyzing power of a censor."

Breach of the Peace

"Fighting Words"

Justice Murphy had made it clear, in Chaplinsky v. New Hampshire (1942), that not all random utterances deserved protection when he ruled that the "lewd and obscene, the profane, and libelous, and insulting or 'fighting' words," are not "speech" within the meaning of the First Amendment. But "fighting words" are always linked to the mood of the audience, and several controversies have forced the Supreme Court to deal with the nature of legal rights when a provocative speaker meets a belligerent audience.

In 1947, for example, the Court overturned, by denying certiorari, the action of peace officers in Lacona, Iowa,
who prevented a group of Witnesses from entering the town to hold a Sunday religious meeting because their meetings on four previous Sundays in a public park had evoked heckling and physical attacks by the townspeople. A Federal District Court found that the local sheriff had acted within the scope of his authority because the "threat of mob violence in Lacona was apparent and real," but the Federal Court of Appeals felt that the disorder in the park was due to the failure of the local and state authorities to police the park when unpopular people gave Bible lectures.

The strongest, and some critics would say most "mechanical," application of the clear and present danger doctrine to this type of problem was probably the Court's 1949 decision in Terminiello v. Chicago, which reversed the conviction for inciting a breach of the peace against a suspended Roman Catholic priest after he delivered a speech in a city auditorium under riotous conditions. In the face of a volatile crowd-situation Terminiello started to give a speech, which was strongly anti-semitic, and explanations of what ensued ranged from "an increase in the riotous situation" to "total pandemonium." The police reportedly asked Terminiello to stop, but he refused, and the police,
reasoning that he was the immediate cause of the riot, arrested him.

Justice Douglas, in delivering the majority opinion, focused on the failure of the trial judge to define breach of the peace in terms of the clear and present danger test. The judge instructed the jury that the offense included speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." This formulation of the question, according to Douglas, was unconstitutional, because the "function of free speech under our system is to invite dispute."²⁹ Counsel for Terminiello had not argued this point, but for Douglas that was immaterial. It wasn't so immaterial for Justice Frankfurter, who thought the Court should stick to deciding questions asked of it, and was joined in dissent by Justices Burton and Jackson. The latter, after giving a lengthy description of the situation in which Terminiello attempted to deliver his address, warned that if the Court did not "temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact."³⁰

The deaths of Justices Murphy and Rutledge in 1949
and their replacement by Justices Clark and Minton meant that only Justices Black and Douglas remained active supporters of the preferred position doctrine. The remainder of the Court examined restrictive statutes on the basis of "reasonableness" with the presumption that all such laws were valid until proven otherwise." This shift in presumptions about constitutionality became especially apparent in two 1951 decisions on free speech written by Chief Justice Vinson.

The first, *Feiner v. New York*, concerned the conviction of a college student on the charge of disorderly conduct in Syracuse, New York. In Vinson's interpretation of the trial record Feiner, "gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they raise up in arms and fight for equal rights." These statements in such a racially-mixed audience stirred up some "excitement," and some of the onlookers chided police on their inability to handle the crowd, and at least one threatened violence against the speaker if the police did not act. After three requests by police to stop speaking, Feiner was arrested "in order to prevent a fight." To a majority of the Court, the arrest
was not motivated by any content in Feiner's speech but by the situation which it engendered.

Frankfurter, sensing shades of Terminiello in some of the dissents, wrote a concurring opinion in this case which argued strenuously that it was not a constitutional principle that protection of free speech meant that police must proceed against a crowd, whatever its size and temper, and not against the speaker. 33

Justices Douglas, Minton and Black dissented, with Black objecting to the Court's "blind acceptance" of the trial court and the judge's testimony on all the important points. It is the Court's prerogative, he felt, in spite of its desire to review only questions of law, to examine evidence itself when the case involves fundamental constitutional guarantees. The pertinent facts, for Black, were that Syracuse had granted a permit to a former Assistant Attorney General to speak in a public school building on the subject of racial discrimination and civil liberties. On the day of the proposed address, however, the authorities cancelled the permit, and the Young Progressives, under whose auspices the meeting was scheduled, then arranged for the person to deliver his speech at a
local hotel. According to Black the gathering on the street and Feiner's speech was a protest against the cancellation of the original permit and to publicize the meeting at the hotel. Black remained highly suspicious of police testimony to the effect that the crowd was "restless," "pushing," "shoving and milling around," and claimed that there was nothing in the record to indicate that Feiner used the phrase "in arms" except for innuendo by the prosecution. The majority of the Court reasoned, according to Black, that police may, if they reasonably conclude that a serious fight or riot is imminent, stop a speech in order to prevent a breach of the peace. As a general principle Black found this unarguable, but maintained that it was "far-fetched" to suggest that the facts showed any imminent threat of uncontrollable disorder. An isolated threat of assault on a speaker did not, he insisted, "forbode disorder."^34

In Edwards v. South Carolina, when a city manager ordered a civil rights demonstration to disperse because some onlookers were in his view "possible troublemakers," the 1963 Supreme Court overturned convictions of the 187 demonstrators for breach of the peace after they failed to
disperse. This situation was, the Court insisted, "... a far cry from ... Feiner." The demonstrators were parading on the South Carolina State House grounds, and since the crowd of three hundred onlookers made no threatening remarks or hostile gestures and there was adequate police protection, the protestors were, in the words of Justice Stewart, convicted of an offense "so generalized" that it was "not susceptible of exact definition" and upon evidence which proved nothing more than that some members of the community were probably opposed to the views of the demonstrators.

Justice Clark dissented and viewed the case as a simple application of the clear and present danger test by the city manager to prevent a public brawl. The fact that the demonstrators responded with defiance rather than with cooperation created, in his view, a new situation which was more dangerous than the one which already existed. The city manager might have been honestly mistaken as to the imminence of the danger, Clark stated, but the implication in the majority opinion that police may not intervene until the riot has occurred overlooks the "almost spontaneous combustion in some southern communities," and
is "... like keeping out the doctor until the patient dies."

The Court was much more divided, however, in two 1965 cases stemming from a protest rally in Baton Rouge, Louisiana, in which 2,000 Southern University students, led by E. Elton Cox, an ordained Congregational minister, were protesting the arrest of 23 students who had been picketing segregated lunch counters the previous day. Cox was arrested and convicted on three separate charges: 1) disturbing the peace; 2) obstructing public passages; and 3) picketing before a courthouse. The Supreme Court reversed all three charges, but with greatly varying degrees of consensus. The Court unanimously reversed the breach of the peace conviction using the same criteria put forth in Edwards, but on the second charge the Court divided 7-2. At least five of the Justices felt that the obstructing public passages statute was basically a permit statute which gave too much discretion to local officials and was not applied to all groups equally. The issue of picketing before a courthouse, dealt with separately in Cox No. 49, was narrowly overturned. Justice Goldberg, speaking for the 5-4 majority, claimed that while the state
has a legitimate interest in protecting its judicial system from "pressures which picketing near a courthouse might create," in this case police gave demonstrators permission to gather where they did, and to sustain conviction would be to approve entrapment.

Justice Black, along with Justices Clark, White, and Harlan, angrily dissented, claiming that he could not understand how the majority could reverse the conviction because of, "... a permission which testimony in the record denies was given, which could not have been authoritatively given anyway, and even if given was soon afterward revoked." 37

The majority of the Court was to reaffirm the Cox rationale in 1966 when it overturned by a 504 majority the conviction of five Negro demonstrators for breach of the peace after they refused to leave a public library. 38 Justice Black, who argued in dissent that tranquility in a library should take precedence over the expression of dissident ideas, was to be vindicated later in the same year when a majority of the Court held picketing before a jail to constitute trespass. 39 In Adderly v. Florida, Justice Black, speaking for the majority this time, drew
a distinction between Edwards and the present case by noting that the speech took place in front of a publicly-financed building, but that it was "public" in the sense of being designed for security purposes, not "public" in the sense of being open to the public. In this context, Black warned, the fundamental fact of the First Amendment is that it does not create a constitutional right for propagandists to protest "whenever and however and wherever they please."

Justice Douglas, joined by Warren, Brennan and Fortas, felt that a jail was a "seat of government" and as obvious a center of protest as executive mansions and legislative chambers.

The Court seemed to continue in the tradition of Edwards, however, in a 1969 case which overturned the conviction of Dick Gregory and others for refusing to stop a demonstration when police feared that the conduct of the spectators might lead to a severe breach of the peace. The controversial Chief Justice Warren, speaking for six of the judges, thought the essential fact in this case was that the defendants were charged with disorderly conduct when not even the police claimed that their conduct was in fact disorderly. However, reasonable the police request may have been, the Court felt that the charge
disorderly conduct, rather than a more accurate charge, such as refusal to obey a police officer, negated conviction. There were no dissenting opinions, but Justice Black in his concurrence underscored the fact that the holding was tied to the lack of narrowly-drawn statutes to handle the problem of "obnoxious conduct" which do not collide with the broad rights guaranteed in the First Amendment. The holding was not a construction of the First Amendment, he insisted, which would "subject all the people of the nation to the uncontrollable whim and arrogance of speakers, and writers, and protestors, and grievance bearers." The authority of government is not "so trifling," he warned, that it elevates the interest of those with complaints above the community's interest in tranquility; especially the tranquility of those spots which Black thought people have selected to "escape the hurly-burly of the outside business and political world," or other buildings that require "peace and quiet to carry out their functions." For Black a list of such places would have to include at least hospitals, schools, courts and libraries, and an individual's home, even a Mayor's, should be free of uninvited dialogue about social change.
While discourse is to be left free, so that public matters can be discussed with impunity, picketing and demonstrating can be, according to Black, "regulated like other conduct of men."

**Incitement**

The charge of inciting disorder usually assumes a sympathetic audience which a speaker wishes to lead in some illegal action, but there have been cases where the charge was used when police suspected that a speaker deliberately planned on the reaction of a hostile audience to create disorder. In 1966, for example, a state District Court of Appeals reversed a "conspiracy to riot" charge leveled by California authorities against members of the American Nazi Party. The charge, along with charges of assault (which were sustained), stemmed from an incident which took place when defendants, wearing Nazi uniforms, steel helmets, and carrying provocative and derogatory signs, pushed their way through a crowd of persons who had congregated outside a meeting hall to await the beginning of a celebration of the fifteenth anniversary of Israeli independence. In the wild melee which ensued a number of the members of the crowd and police officers were injured,
but the Court of Appeal, relying heavily on the Supreme Court criteria set down in Terminiello, insisted that picketing and the carrying of signs, even though derogatory, were legitimate forms of free expression, and ruled that the simple fact of membership in the American Nazi Party or the wearing of uniforms (even steel helmets) did not per se constitute a conspiracy.

On the issue of "provocative" speech the American Civil Liberties Union insists that unless the most obnoxious have freedom of speech, it cannot be guaranteed for others. In the context of innumerable defenses of George Lincoln Rockwell and his American Nazi Party's right to hold outdoor speeches and demonstrations, the Union has stated that in its view,

... speech can be limited only when a speaker urges immediate violent action and there is a real danger that his followers will act then and there on his incitement. This 'clear and present danger' applies only to violence urged by the speaker. It does not apply to threats of violence by his opponents (or even actual attempts to carry out such threats), although, of course, opponents of the speaker have every right ... to peacefully express their views.43

The Union opposed the cancellation of permits, etc., to controversial speakers on the grounds that they may create violence because of the strong feelings they may evoke in
their audience. To deny a speech or demonstration on these grounds, such as Mayor Wagner's refusal to grant Rockwell a public park permit in New York City because he was "an invitation to riot," the Union maintained was to sacrifice freedom of speech to the "threat of mob action." In 1968, the Supreme Court, by denying certiorari, upheld New York State's prosecution for incitement of William Epton. Epton, in the wake of a racial disturbance in New York City, was alleged to have actively participated in the formation of a group dedicated to armed revolt against the police. Police claimed the riot was under the direction of "block captains" and "terrorist bands," equipped with Molotov cocktails which Epton himself had explained how to use. He was convicted and sentenced to serve three concurrent one-year terms; one for conspiring to riot, one for advocating criminal anarchy, and one for conspiring to engage in advocacy of criminal anarchy. In the Court's per curiam decision, two justices wrote opinions--Stewart concurring with the denial and Douglas dissenting from the Court's decision. Stewart felt that the riot conviction presented no substantial federal question and, in a footnote, asserted it was probably arguable
that a state could convict someone for criminal conspiracy without first "demonstrating some constitutionally unprotected overt act in furtherance of the alleged unlawful agreement." Instruction in the use of incendiary devices, however, could make no "serious claim to constitutional protection." Douglas, however, reasoned that, since many of the alleged overt acts consisted in part of speeches made by Epton and his participation in preparation and distribution of certain leaflets, the indictment was improperly inflated. Douglas argued that the Court should have approached the question of whether an overt act required to convict on a conspiracy charge can be an activity which is customarily protected by the First Amendment (with a strong implication that he thought not).

In later cases, however, the Supreme Court was quick to overturn cases in which inflammatory speech was simple political hyperbole not followed by disorder. A "threat" on President Johnson's life made in the context of a rally to protest alleged police brutality in Washington, D. C., was held by the Court not to violate the federal statute making it a felony to willfully threaten the President, and racist remarks of a leader of the Ku Klux
Klan were held to be inadmissible as evidence of violation of an Ohio criminal syndicalism statute. In the latter case, Brandenburg v. Ohio, the defendant's rhetoric even took place at a cross-burning rally at which some of the participants carried firearms. The Court chose this case to overrule the longstanding precedent of Whitney v. California and declare that the First Amendment forbids states to proscribe advocacy of the use of force or law violation except where such advocacy was clearly related to "imminent lawless action." While Brandenburg was unanimous in result, Black and Douglas each concurred separately on what they believed to be the confusion in the venerable phrase "clear and present danger." Douglas, using this concurrence to scold the Court for its holding in U. S. v. O'Brien (to be discussed later), even stated that the formula had become "so twisted and perverted" that it should have "... no place in the regime of the First Amendment.

In 1970 the Supreme Court overturned the disorderly conduct conviction of some anti-Vietnam War demonstrators because the trial judge's instructions to the jury failed to distinguish speech from other forms of conduct in the
demonstration. Thus it would appear that the Court, while not claiming that disorderly conduct can be "speech" (because of the "fighting words" criterion), insists that rhetoric, short of incitement, be clearly separated from other actions (such as lying across a public sidewalk in this case), so that conviction is free from any taint of a jury's disapproval of a demonstration's "point of view." 48

Libel and Freedom of Expression

Group Libel

Politically-related speech and the rubric "libel" were to cross paths in 1952, when the Supreme Court upheld a state statute prohibiting the

... manufacturing, publishing or exhibition in any place of any publication portraying depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which ... exposes citizens ... to contempt, derision or obloquy or which is productive of breach of the peace or riots. ... 49

At issue in Beauharaais v. Illinois was the conviction of a president of the "White Circle League" because of leaflets he distributed in downtown Chicago asking the Mayor and the City Council of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. ..."
The trial court, proceeding on the assumption that the material in question was libelous in character, instructed the jury to decide only the question of publication. On appeal, the Supreme Court, by a narrow majority, found the Illinois statute valid since it prohibited speech "liable to cause violence and disorder" and this "paraphrased" the traditional justification of criminal libel. Justice Frankfurter, speaking for the majority, noted that the classes of speech reiterated in Chaplinsky are all utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In such a balance, Frankfurter concluded, an individual's interest in hurling epithets is outweighed by society's interest in order and morality.

Justice Black, dissenting along with Reed, Douglas and Jackson, feared that minority groups would hail the decision as their victory and quipped, "Another such victory and I am undone." The majority, he said, condoned an expansion of state censorship by "painstakingly analogizing it to the law of criminal libel," but this "sugar-coating" did not make "censorship less deadly."
Jackson, in his dissent, subscribed to the validity of the notion that a "group" could be libelled, but felt that the clear and present danger test should have been invoked to assess the consequences of such libel. It would appear impossible, however, to sustain any group libel conviction using the clear and present danger doctrine as an interpretation of the First Amendment since, if correctly applied, if would prevent any state action against group defamation, except as another label for incitement to a breach of the peace. This was the rationale applied by the ACLU when it listed the case as an "unfavorable decision" in its annual report. 50

The notion of group libel usually receives the most support from those, like Richard B. Wilson, who also object to the clear and present danger formula as the most appropriate criterion for approaching free speech problems. 51 Wilson, for example, would prefer to relate basic First Amendment values to the maintenance or improvement of the nation's "capacity for self-government" and since group defamation is, in his view, anti-democratic in character, it reduces a community's capacity for self-government and should not be tolerated on First Amendment (democratic)
grounds. Even Wilson felt, however, that much of Frankfurter's analysis of libel was incorrect.

But Loren P. Beth, who shares Wilson's hostility to the clear and present danger doctrine as the dominant interpretation of the First Amendment, nonetheless concluded that since group libel laws are unlikely to achieve any substantial results and do involve suppression of speech they are unjustified. Beth was willing to grant that consideration of free speech in a value hierarchy does not automatically rule out the possibility of dealing with the problem of group vilification, but he posed the problem as a choice between the value of free speech and the value of racial equality. Wilson, and the defenders of the notion of "group libel," seek to make the two values not only compatible, but complementary, and for Beth a democratic process (since "practically if not philosophically" free speech is more basic to self-govern-ment than equality) can (though it should not) function without equality.

It is noteworthy that Frankfurter, while insisting that Beauharnais was convicted under valid libel law, refused to allow him the protections normally provided in
a libel procedure. Even if the criterion is restricted to the truth or falsity of statements made rather than the intent of the speaker, the very nature of such statements, as Beth pointed out, makes it almost impossible to prove them either true or false. 52

Even though the validity of "group libel" was sustained, it is a rare charge, and what was viewed in 1952 as libeling a group would probably, if applied consistently, be viewed as hyperbole—if only because invective against groups (especially if the Establishment or "effete snobs" are groups) is so widespread.

**Political Speech and Individual Libel**

In addition to the flat declaration that the notion of seditious libel is inconsistent with the First Amendment in *New York Times Co. v. Sullivan* (1964), already mentioned, the Supreme Court unanimously ruled that since erroneous statements are probably inevitable in any public debate, the First Amendment protects even false statements "honestly made." In this case the Court overturned a libel conviction against the New York Times which published a paid advertisement criticizing the treatment of Negroes in Montgomery, Alabama, by the police in particular. The
ad contained some factual errors and the local Commissioner, though not mentioned in the ad either by name or specific reference to his office, contended that the criticism constituted a libel of him. The issue as Justice Brennan formulated it for a majority of the Court was whether the constitutional protection given to debate on public issues was withdrawn if some of the statements were erroneous. To follow a rule which would compel any critic of official conduct to guarantee the truth of all of his factual assertions on pain of libel judgments, would impose, said Brennan, a "pall of fear and timidity . . . upon those who would give voice to public criticism."

In concurring opinions Justices Black, Douglas and Goldberg were willing to go further, with Black claiming that the press must have an absolute immunity for criticism of public officials and viewing state libel laws as a threat to the very existence of freedom of the press. The "actual malice" test, he insisted, was an attempt to create an "elusive, abstract" exception to the First Amendment. Goldberg expressed concern that freedom of speech could not be effectively safeguarded by a jury's evaluation of the speaker's "state of mind."
Civil Liberties Union, which submitted a friend-of-the-court brief in this case (as did numerous newspapers), hailed the decision as one of their most important victories as well as a landmark decision in civil liberties law.\textsuperscript{54}

The Union's general position on libel suits is that they do not raise civil liberties questions, but that suits which involve "political" figures, criminal libel and "group libel" all threaten freedom of speech because government becomes the arbiter of truth in what is usually "politically-related speech." While "... defamatory attacks on individuals have little relation (if any at all) to the purposes for which freedom of speech is safeguarded," according to the Union, in civil suits involving people in political life, and in criminal libel "there exists an overriding public interest" in maintaining the "widest scope of criticism and free discussion."\textsuperscript{55} By implication, at least, the Union would not wish to prohibit suits by political figures totally as long as greater proof, in the form of "convincing clarity," were required by courts to establish "actual malice."

In 1964 the Court extended the "actual malice" rule to criminal as well as civil libel, and in 1966 it
reversed a conviction which defined criminal libel as "any writing calculated to create a disturbance of the peace." In 1968 the Court overturned a defamation action brought against a candidate for public office who charged in a televised speech that a local deputy sheriff had a criminal relationship with a local labor union officer. The allegation was false and the sheriff sued, but Justice White, speaking for six members of the Court, ruled that the defendant had relied solely on an affidavit given by a union member without verifying the information; and even though he gave no consideration to the consequences of his statements, he fell short of demonstrating a reckless disregard for accuracy.

Black and Douglas concurred, but argued on grounds of freedom to criticize official conduct rather than "actual malice." Justice Fortas dissented, claiming there should exist on speakers a burden to check the reliability of their statements.

While "group libel" is a precedent, it has tended to remain only a precedent. The Court's handling of individual libel when such speech even hints at being "political" or "official" would indicate no propensity to
use, or to let local governments "use," libel as a device to narrow the dialogue on public policy.

**Figurative Speech**

**Speech Plus**

Even justices thoroughly devoted to the spirit of the First Amendment find difficulty in deciding what constitutes "speech." The idea of "speech plus" was first developed by the Supreme Court in labor picketing decisions, and in the accompanying difficulties with such phenomena as picketing, potential breaches of the peace, permits for demonstrations, etc., which were not simple verbal or written communication but part of a more encompassing activity. Some, such as Harry Kalven, have found the dichotomy between "pure speech" and "speech plus" worthless, because all speech, since it can be interpreted as noise by someone else, is necessarily "speech plus." But even though speech which tends to be politically and legally significant is usually inherently social and thus involves other dimensions, the distinction is useful, as Pritchett suggests, precisely because it draws attention to a wide range of speech situations. The distinction, for example, helps to emphasize that a demonstration, while
certainly an expression of a point of view, is also a gathering of people which can create problems simply because it is a gathering of people regardless of any ideas which may have motivated such an assembly. Injunctions, for example, were issued and sustained to control both the time, route, frequency and numbers involved in Martin Luther King's open housing marches in Chicago in 1966. In the same year Chicago enjoined George Lincoln Rockwell from demonstrating in Jewish neighborhoods during Jewish high holidays.

Some scholars who are not notably illiberal, such as Pritchett, have criticized the Court for its decision in Gregory v. Chicago by arguing that the sheer numbers involved in that incident could have constituted an invasion of privacy. Even though it may be claimed that a public official has no private life, the reasoning would hardly extend to citizens unfortunate enough to live next to that public official. To Pritchett, Gregory's method of making contact with the Mayor had "less the character of a petition and more that of harrassment, intimidation, and coercion."
Sit-ins

If picketing is "speech plus," the variations of picketing (protesting), such as the "sit-in" (a technique used widely by the Negro civil rights movement after 1960 which consisted of refusal to leave segregated lunch counters or other places when service was denied), would have to be labeled speech "plus-plus." Such action usually led to the demonstrators being charged with either breach of the peace or criminal trespass. The Supreme Court, in a series of decisions between 1960 and 1964, was reluctant to find such modes of "speech" illegal, even when such reluctance was somewhat embarrassing legally. In cases where the charge was breach of the peace, as in Garner v. Louisiana (1961), the Court easily held the charges invalid if the demonstrators were not disorderly. Until 1964 the Court was able to directly avoid dealing with the trespass issue by holding that since segregation was legally required by the state or municipality and was thus a state action in violation of the equal protection clause of the Fourteenth Amendment, no trespass occurred because the demonstrators were entitled to service.

In Bell v. Maryland, however, the Court received
a clear case of criminal trespass in the restaurant where the decision not to serve Negroes was entirely a private choice of the owner. In earlier cases the judges had noted that demonstrations conducted on private property over the objection of the owner would not constitute protected speech, and the groundwork was clearly laid for the Court to uphold this sit-in conviction. The Court was able to avoid this, however, by claiming that the owner had engaged in illegal activity because a Baltimore ordinance prohibited racial segregation, and there was thus no basis for the trespass charge. This was a particularly clumsy way out of the problem because the Baltimore law was passed five months after the trespass convictions were affirmed by the Maryland Supreme Court. This was apparently the rationale of three of the Justices, with Warren, Goldberg and Douglas concurring to make a majority but arguing that restaurants, since they are devoted to public use, are not private and are controlled by the equal protection clause of the Fourteenth Amendment. Black, Harlan, and White dissented, insisting that the Fourteenth Amendment "standing alone," did not "prohibit privately-owned restaurants from choosing their own customers."
Symbolic Speech

The Court was less malleable when novel methods of protest focused on something other than racial segregation. The principle that even peaceful picketing and protest can be enjoined if it interferes with the effectuation of valid state policies was the basis for the Court's upholding of a draft card-burning conviction of 1968. In *United States v. O'Brien* 64 four persons who burned their draft cards as an expression of opposition to the Vietnam War were tried and convicted under a 1965 Congressional statute passed in order to stop such activity. Even though both the draft card burners and Congress viewed mutilation of draft cards as an expression of contempt, the Court did not view it as speech. By a 7-1 vote, with only Douglas dissenting and arguing that the Court should have dealt with the constitutionality of conscription in the absence of a formal declaration of war, Chief Justice Warren held that the draft cards were sufficiently important to the administration of the Selective Service System to deserve protection. There is not, according to Warren, a "limitless variety" of conduct which can be labelled "speech" simply because the conduct expresses an idea. As
in the picketing cases, when speech and non-speech elements were combined, the interest was in regulating the non-speech element, and draft cards, Warren submitted, serve as proof of registration and identity, and give the address of the local board. Destruction of the cards would also, the Court argued, make tracing the illegitimate use of draft cards for identification more difficult. A Circuit Court of Appeal had declared the Congressional statute unconstitutional because the conduct it sought to punish was already punishable, but with less severity, under existing law. The Supreme Court felt, however, that it was within Congress' power to enact such a statute in the interest of the smooth functioning of the Selective Service System. The Court never really touched on the issue of Congressional intent (which was not a concern for smooth administration) nor did Warren explain why the functions of a draft card, which were largely inflated since there are other ways of determining registration and identity, were so essential to smooth administration of the system.

Even though the Court had made it clear in O'Brien that one man's symbol may be another's essential tool of administration, the use of arm bands to protest U. S.
involvement in Vietnam by high school students was held to be constitutionally protected speech. In *Tinker v. Des Moines Independent Community School District* public school officials suspended students who wore armbands on the grounds of maintaining order and decorum in the school, but Justice Fortas, speaking for the majority, found no evidence of actual disruption, and claimed that the "apprehension of disturbance is not enough to overcome the right to freedom of expression." Black, however, thought the majority was undercutting the power of school officials over pupils, and in his dissent expressed concern that schools in the country would be subject to the "whims and caprices of their loudest-mouthed but maybe not their brightest students."

Presumably, the rationale in *Tinker* was that neither society, government, nor the public schools had a genuinely valid purpose which was interfered with because of students wearing armbands, but in another case involving destruction of the American flag, the Court showed signs of indicating that the symbolic destruction of a symbol was not deserving of constitutional protection. In *Street v. New York*, the Court by a 5-4 majority
overturned the conviction of Street, who after learning that James Meredith had been shot in 1966, burned an American flag on a Brooklyn street while shouting the words, "We don't need no damn flag." The statute in question punished mutilation of the flag, but also prohibited anyone from casting "contempt upon the flag by either word or act." Justice Harlan, expressing the view of the narrow majority, felt the statute was overbroad because it included "by word," and there was no way of telling whether it was Street's words, which are protected by the First Amendment, or his actions which were the basis of his conviction. The Court was thus able to skirt the issue of whether flag desecration could be punished, but even for the majority there was the strong implication that it could. This case is also interesting because of its unusual voting alignment. Harlan's fine distinction, which enabled the Court to skirt the basic question, was not unusual since the Court frequently relied on him for fine distinctions, but it did put him among an unusual majority, with Warren, Black, Fortas and White composing a rare combination in dissent. Warren, Black and Fortas wrote separate opinions and all took notice of the trial record's emphasis
on "burning" as opposed to "words." To these justices Street was in fact convicted of "burning," and such a conviction was in their view constitutional. Justice White felt that the action punished was not speech alone, and that the conviction for Street's "plus" activity was legitimate. Warren simply stated that he believed government had the power to protect the national emblem, but he didn't state reasons because the majority had refused to meet the central issue. To Justice Black it was simply beyond "... belief that the Federal Constitution bars a State from making the deliberate burning of the American flag an offense." Fortas attacked the notion that flags were simply private property to be disposed of as one pleases by insisting that a flag may be property, but that it is property "burdened with peculiar obligations and restrictions." Fortas did not say why a flag is so "burdened," only that property has always been subject to reasonable regulation when competing interests are involved—without mentioning what the competing interests are. Fortas mentioned that if a state made it a misdemeanor to burn one's shirt on a public street, it could hardly be asserted that the citizen's constitutional right would be violated,
but the tone of his dissent suggests that his concern about flag burning was not really based on a desire for cleaner streets or less air pollution.

The Court could presumably have found easy logic to construe O'Brien as a de facto attempt to inhibit symbolic expression, and thus have held that flag burning was constitutionally protected. Public opinion would probably have been outraged, but certainly no more than in the Court's prayer decisions or rulings on criminal due process. Even though Street's conviction was overturned, the fine distinctions drawn in the majority opinion, together with the holding in O'Brien and the dissents in Tinker, indicate a warning to dissident groups that they must choose their symbols very carefully.

**Direct Action**

There is frequently a great deal of confusion surrounding differences between simple challenges to laws, either as applied or on grounds of unconstitutionality, and other challenges justified in the name of "direct action" or "civil disobedience." Direct action, stemming from Martin Luther King, and ultimately Ghandi, refers to a technique used to establish sufficient tension in a community
so that the community is forced to confront the issue which
a given political group wishes to dramatize. Such activity
can be legal or illegal, violent or non-violent. In the
case of the early civil rights movement it was usually non-
violent protest involving the use of the sit-in or street
demonstration. Further confusion arises when some view
activities such as sit-ins as acts of civil disobedience,
since there is a deliberate violation of either criminal
trespass, or (as in the early sit-in demonstrations in the
South), a violation of a local law (requiring segregation).
Others would argue, however, that such challenges to laws
were simply techniques to force application of federal and/
or constitutional law, and thus were not acts of civil
disobedience but merely activities which were legal in all
respects, but not respected as legal in certain areas of
the nation.

The advent of confrontation politics and the
decision of protesting groups to move from simple forms of
assembly and picketing to tactics of "direct action" in
which laws are violated in order to dramatize a political
issue compounded the problem of legitimate free expression
not only for the courts but also for the American Civil
Liberties Union. The Union opposed an automobile "stall-in" which sought to block traffic approaching the World's Fair in 1963. The Union's position was that such action was a violation of the "legal protections of the public's right to movement," and that stall-ins "exceed the limits of constitutional guarantees." The Union's general position on "direct action" was set forth in a 1963 pamphlet entitled "How Americans Protest" which, while condemning the physical obstruction to the public's "free access," emphasized with almost equal ink that "disorders" are usually the result of "pervasive discrimination that public officials and the public itself have done little to combat." After the World's Fair "stall-in" for example, the ACLU statement of disapproval of the tactic was hidden in a rhetorical flourish which insisted on "bold action to remove the bias that prompted such forms of protest." The New York Civil Liberties Union spent most of its energy attacking Mayor Wagner for attacking the demonstrators. "Criticism," said the affiliate is no "substitute for affirmative action." "The dominant forces in our community, and especially its elected officials," the Union said, cannot,
... escape responsibility for harsh events by pointing an accusing finger at the lawless acts of Negroes and their supporters. They must understand that if lawlessness occurs, it is a direct consequence of the failure of the community, and especially its white majority, to implement the laws of the land, the laws of human decency and the laws of social experience. Public officials must recognize the simple truth that men who have been brutalized by their society will not always act in a peaceful fashion; men who feel they have little at stake in their society will not always act conservatively for they have little to lose.67

The ACLU uses the "concentrate-on-the-causes-of-the-incident-rather-than-the-incident-itself" argument a great deal, but there is some evidence that they apply this argument with a kind of evenhandedness, especially if the ultimate blame is placed on government for failing to investigate the "true causes." The Union was critical, for example, for President Johnson's suggestion that Congress investigate the Ku Klux Klan after the murder of a civil rights worker in 1963. The Union suggested that "trial by publicity" and the methods of HUAC would be hostile to civil liberties and suggested that the real need was to "probe the underlying reasons for the encouragement which overt criminal acts now enjoy in some Southern states."68

In 1968 the Union issued a statement on civil disobedience, specifying two categories in which it would not
undertake a defense of an individual. One category was when an individual engaged in a deliberate violation of law based on his belief that the law was unjust even though it was constitutional. The second category involved violation of laws which the individual did not find intrinsically objectionable but violated in order to call attention to some other evil. Examples of conduct which the ACLU felt to be beyond its concern were such things as refusal to take part in civil defense drills, to pay federal taxes as protest against military expenditures or refusing to register for military service. The very decentralization of the Union, however, and fierce internal conflicts which began to be apparent with the fragmentation in local affiliates when confronted with such things as the New York City school strike make it difficult to predict the behavior of any local branch. The Union agreed, for example, to defend Benjamin Spock in the 1968 antidraft conspiracy prosecution as well as some defendants in the "Chicago Eight" trial.

Speech and National Security

Anti-Subversion Legislation

The "Smith Act"—the Vinson Court's approach to the problem of civil liberty, and that of the older Roosevelt
Court, were to be most apparent in cases involving members of the American Communist Party and federal loyalty and security programs. The Court, between 1946 and 1953, operated almost "entirely within the tradition of the strong legislature-weak judiciary formula..." 69 The Vinson Court also deferred to the "democratic" authority of legislatures at a time when American public opinion was more sensitive to the notion of a foreign threat using internal mechanism than it had been since the period immediately preceding World War I. Participation in World War II with the Soviet Union as an ally acted to blunt pre-war fears about Communism, but the beginning of the "Cold War," U. S. involvement in Korea and along with the improbable career of Senator Joseph McCarthy, all coalesced to create an atmosphere in which, in the words of Justice Douglas, "suspicion (had) taken the place of good will." 70 The federal government brought indictments against 145 leaders of the American Communist Party and was successful initially in securing 89 convictions. The "Smith Act," technically the Alien Registration Act of 1940, was the first law to be used against the Communist Party (though it was initially designed with Fascists in mind) and makes
it a criminal offense to advocate or teach the overthrow of the United States government by force or violence, to print or distribute written matter advocating the same, to organize or knowingly become a member of any group which advocates the same, or to conspire to accomplish any of the aforementioned. It is this statute which, in the view of Zechariah Chafee, Jr., contains "the most drastic restrictions on freedom of speech ever enacted in the United States during peace." 71

The prosecution of 11 leaders of the American Communist Party under the Smith Act, which some speculate was the Truman Administration's technique to under-cut Republican charges of being "soft on Communism," 72 resulted in a tumultuous trial marked by exchange of insults, bickering, and criminal contempt citations that ranged from thirty days to six months' imprisonment, as well as the disbarring of attorneys. 73 The central figure in this case, Lawrence Dennis (who had already been convicted in 1947 for failure to comply with a House Un-American Activities Committee Subpoena), 74, was General Secretary of the party, and he and his co-defendants were convicted; their conviction was upheld by the Court of Appeals of the
Second Circuit, with Judge Learned Hand (probably America's most respected jurist) writing the opinion. The Supreme Court granted certiorari but limited review to the question of whether the Act violated the First Amendment free speech guarantee of the Fifth Amendment because of indefiniteness. 75

On both counts the Court was to answer, "Nol", and in the process created a new formula for interpreting free speech under the Constitution. Chief Justice Vinson, after a lengthy discussion of the clear and present danger doctrine (with the implication that he was applying it) invoked instead the rationale of Judge Hand. Under this formulation the question is not whether a danger is imminent, or even whether the speech tends to create public disorder, but "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." In other words, what is advocated is as important as when, and since for Vinson the government's existence was at stake, there was no need to wait until a "putsch" was about to occur. Justices Frankfurter and Jackson, in separate concurrences, attacked the application of the Holmesian danger test to this type of case: the former argued that the doctrine
was "a sonorous formula" which disguised an inability to solve concrete cases; and the latter; while holding the doctrine useful in dealing with "street corner ... zealots," claimed that its use in this case would have placed government in a "judge-made verbal trap." Black and Douglas, in dissents, indicated they would have applied the clear and present danger test, and using this would have struck down the Smith Act, since it is aimed at advocacy, not overt acts.

The ACLU actively opposed the Smith Act at the time of its enactment, scolded the Communist Party for approving the use of the Smith Act against Trotskyites in 1943, and continued to press for repeal after the Dennis decision. The Union attacked the majority's decision in Dennis on the grounds that it "permitted punishment of advocacy in the absence of a clear and present danger." It also argued that the jury should pass on the question of a clear and present danger, and that the new formulation of a "clear and present danger" was unwise and ultimately hostile to a constitutional tradition which elevates First Amendment guarantees to fundamental values of the society. 76

After the favorable ruling in Dennis, the government went after the Communist Party's second string. Over 100
convictions were obtained before the Court intervened with a clarification of Dennis in Yates v. United States in 1957. In this case the Court granted certiorari without limitations and found the conviction of 14 California Communists defective because the trial court judge had failed to distinguish simple advocacy from "advocacy of action." Justice Harlan, writing for the majority, claimed that the Act, to be constitutional, must be directed at advocacy of action, not ideas. Mere doctrinal justification of forcible overthrow of government was, for Harlan, "too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis."

Clark dissented on the ground that the Smith Act was basically directed at conspiracy, and that the same conspiracy existed in Yates as in Dennis. Clark found Harlan's opinion to be a confusing "artillery of words," and since there was little substantive difference between the cases, he correctly suspected that the majority was subtly pushing some kind of new doctrine.

The more stringent evidentiary requirements laid down in Yates led to the reversal of many convictions in
federal circuit courts and even impeded denaturalization proceedings against naturalized citizens accused of Communist Party membership. 78

The addition of Warren and Brennan to the Court created a large minority hostile to the Smith Act, and in 1961 the majority, while holding the membership clause of the Act constitutional, did so in a fashion which made simple membership in the party an unacceptable basis for prosecution. Justice Harlan, in *Scales v. United States*, 79 reasoned that the Smith Act membership clause was not repealed by the section of the Internal Security Act of 1950 which said that mere membership in any Communist organization would not be a violation of that law, because the Smith Act was directed only at "knowing, active" membership, not simple membership. The Smith Act can't mean mere membership, according to Harlan, because if it did it would be unconstitutional; and since it isn't unconstitutional, it can't mean that. Harlan's technique of changing the Act by interpretation in order to keep it constitutional irritated Douglas, who didn't want to save it; but in a companion case, *Noto v. United States*, Harlan and the majority were to hold the act unconstitutional as
applied because evidence indicated that the defendant only engaged in the "abstract teaching of Communist theory."\(^{80}\)

The distinction between various types of "memberships" made in the Scales decision was welcomed by the ACLU as a hopeful sign that the Supreme Court would not tolerate "wholesale prosecution of members of the Communist Party," but the Union still maintained that regardless of how the government chose to implement the Smith Act, the Scales verdict, "strikes at the very heart of the First Amendment guarantee that freedom of association, unrelated to the performance of an illegal act, is inviolate." The decision, the Union argued, "vitiates the First Amendment by placing every individual on notice that he joins organizations under peril of future criminal prosecution."

It puts a premium on an ignorant, not an enlightened citizenry. It requires that a person who considers joining any organization must do so either without regard for its stated purposes or, to protect himself, attempt from the outside, to look behind such purposes to find the 'real' motives of the organization. Either procedure places extra burdens on the right of free association.\(^{81}\)

**Internal Security Act of 1950**

The "Cold War" atmosphere induced Congress to enact
the most comprehensive legislation on Communism in the Internal Security Act of 1950 (the McCarran Act). This Act (title one) and the Emergency Detention Act (title two), was, due to the deft skill of Representative Richard Nixon, passed over President Truman's veto, and makes it unlawful to "knowingly combine, conspire or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship." This phraseology was designed to avoid the "force or violence" test of the Smith Act, since in Nixon's view Communists had developed techniques for taking over governments illegally, but without using force or violence. No prosecutions were ever brought under this section, which was fortunate since the proviso contains what Pritchett has called a "loose definition of sedition" which is "rather clearly unconstitutional. . . ."82

This Act also established the Subversive Activities Control Board (SACB) to designate Communist action organizations and "front" organizations both of which would then be required to register with the Attorney General. The proviso that Communist Party membership per se would not
constitute a violation was the Congressional technique of satisfying the Fifth Amendment guarantee against coerced self-incrimination.83 The order to register also meant that the organization must disclose the names and addresses of its officers and give an accounting of the sources of its finances. Other sanctions under the Act included the labeling of mail, radio and television broadcasts of registered groups as subversive propaganda; prohibition of members from working in defense plants; and withholding of passports.84

This Act always received opposition from the ACLU and while the Union usually did not oppose the findings of the Board (other than to point out the "semantic spectacle" of the hearing on whether the Communist Party was a Communist organization), they consistently attacked the registration requirements and the other provisions of the law as violative of free speech and association.85

The Communist Control Act of 1954

In 1954, Congress (led by Senator Hubert H. Humphrey) finding the Communist Party to be "an instrumentality of a conspiracy," statutorily held it to be a "clear and present, and continuing danger." The Communist Control Act of 1954
added to the McCarran Act's category of Communist organiza-
tions the label "Communist-infiltrated" organizations,
and also contained the interesting phrase that the party
"should be outlawed." Since it is specifically not outlawed
in the McCarran Act (or it couldn't be asked to register),
this emerges as Congress' moral judgment rather than its
legal command. This attempt to "keep the party legal
enough so that it can be successfully prosecuted for its
illegalities. . . ." was hardly the product of pristine
libertarianism. If it were an unequivocal offense, the
law would at least be clear in its command to citizens,
and Communists would be entitled to the due process pro-
tections of courts rather than the "non-punitive" techniques
of Congressional committees; and a statute of limitations
could prevent people from being harassed who had flirted
with radical politics twenty years earlier. In the sub-
sequent hearings which attempted to register the Communist
Party as a Communist action organization, numerous problems
as to admissible evidence and the use of governmental
informers, ex-Communists and professional informers (whose
names would not be divulged) created significant questions
about a fair hearing and evidentiary requirements. The
Supreme Court, for example, remanded a case, requesting the introduction of additional evidence in 1956 when it was persuaded that three government witnesses had been discredited and the findings of the Board had been based on their evidence.87

In round two the Board found again that the Party should be required to register, and on appeal the Supreme Court upheld the order by a 5 to 4 vote in 1961. Justice Frankfurter, writing for the majority, rejected arguments that the Act was a technique for "outlawing" the Party. Frankfurter also refused to consider the constitutionality of any of the sanctions which the Act applied to registered organizations, on the ground that they were hypothetical, since the Communist Party had not yet registered. The sanctions incurred by a registered organization were all problematical because, Frankfurter argued, no one could foresee what denial of tax exemption would mean, whether the Party would wish to utilize the mails, whether its members would ever seek employment in a defense facility or a labor union, or whether they would ever apply for a passport. Frankfurter was more interested in attacking the notion that the First Amendment enjoyed a preferred
position in the Constitution, since this was the "activist" premise of those who wanted to anticipate unconstitutional consequences of the Act before they occurred. He urged his brethren to balance the competing interests at stake, and in his view the government's interest in protecting itself outweighed the social and individual interest in freedom of expression (at least, of Communist expression).

So, eleven years after the Act had been passed by Congress, the Communist Party was registered, opening the door for litigation about the constitutionality of the consequences which followed from registration. After the 1961 decision individual Party officials refused to register, and the SACB gained conviction but was reversed by a Court of Appeals in 1963 on the grounds that the act of registration was necessarily incriminating and no individual could be forced to register the Party. The Supreme Court denied certiorari, so the ruling held.

In 1965 the government, not to be outdone by judicial ingenuity, again brought action, claiming that two FBI informants within the Party would volunteer to register the Party if asked, and presumably, because of their affiliation with the FBI they would not be incriminating
themselves. A federal District Court convicted the Party on this evidence and levied the maximum fine of $230,000, but this conviction was reversed by a Court of Appeals in 1967 on the grounds that the McCarran Act contravened the Fifth Amendment's guarantee against self-incrimination, even if it was registered by FBI informants. The government, showing signs of fatigue, decided not to appeal this decision to the Supreme Court.  

The McCarran Act also stipulates that if a Communist action organization does not register as ordered, then individual members of the organization must register and, since no one voluntarily took this step, the SACB brought action against two individual Party members in Albertson v. SACB in 1965. The Supreme Court, in a unanimous decision, held that this procedure constituted compulsory self-incrimination, and that it was not premature to raise the question even though they had not registered, because the individuals would be incriminated if they registered and punished if they didn't.

The ACLU supported the appeal of Albertson, arguing that compliance with the SACB's order would force disclosure of political associations without any showing a "grave
public necessity" to justify such disclosure. Prior to accepting the Albertson appeal the Supreme Court had side-stepped a case which could have raised questions about the legitimacy of requiring "communist-front" organizations to register, and the ACLU urged Attorney General Nicholas de B. Katzenbach to discontinue legal action against such groups on the grounds that such a "futile pursuit" failed to meet the clear and present danger test; failed to distinguish between a communist-front and a communist action organization; and because it sought to penalize a vague and uncertain range of actions.\textsuperscript{92} In the same year the SACB attempted to register the American Committee for the Protection of Foreign Born and the Veterans of the Abraham Lincoln Brigade without success.\textsuperscript{93} In 1966, however, in a per curiam decision, the Court sustained a move by the Attorney General to petition the SACB for an order requiring the DuBois Clubs of America to register.\textsuperscript{94} The plaintiffs attempted to bypass the Board by suing in District Court, alleging that the Communist-front registration provisions of the Subversive Activities Control Act were unconstitutional. A three-judge District Court dismissed the appeal. The Supreme Court also refused to enjoin
the Attorney General and the Board from proceeding, with seven of the judges holding that since the Act provided full evidentiary public hearings and a review process, the DuBois Clubs had not exhausted administrative remedies and thus could not challenge the constitutionality of these proceedings. The DuBois Clubs had relied on a 1965 ruling in Dombroski v. Pfister, in which the Court held that it is not necessary to exhaust all administrative remedies if the action had a "chilling effect upon the exercise of First Amendment rights." In the present case, the Court maintained the complaint constituted no more than a "conclusory allegation" that the purpose of the threatened enforcement of the Act was to "harass" the appellants.

While the total Act remained constitutional on its face, application became impossible because of judicial truncation. In 1964, the Court declared the passport provision of the statute unconstitutional. In the same year the Court struck down the defense facility employment proviso on the ground that it indiscriminately lumped all types of association with Communist action groups together, "without regard to their quality or degree of membership . . ." which, the Court held, was literally establishing guilt by association.
In 1968 the Court applied the same criterion and ruled that the Coast Guard had exceeded its authority by inquiring into the beliefs and associations of an individual before granting a common seaman's license. At the end of eighteen years of costly litigation, the only operative part of the Internal Security Act seems to be the registration provision, which is only applicable if the individual voluntarily chooses to register. It emerges as one of the few pieces of legislation in history which is dependent for its effect upon the consent of those to whom it would be applied. After 21 years the SACB has no function which is constitutional, but still receives an appropriation of $450,000. This, plus the renomination of Otto Otepke, small hero of the subversive hunting right wing in American politics, led Marquis Childs to equate the SACB with a kind of lavish unemployment compensation for career anti-communists.

"Gravity of the Evil" Test

Comment on the Dennis decision was, of course, extensive, and there appears at least a general consensus that Vinson's decision was a substantial alteration of the Holmes-Brandeis doctrine, and that the pivotal test was
really Learned Hand's "gravity of the evil" formula. Some, in considering the majority's opinion, claimed that any "danger" judges perceived was entirely divorced from any notion of "present," and for others the case marked the second "red menace" in American legislative-judicial history.

The "gravity" test was defended by Elliot L. Richardson, who argued that proof of probability that some illegal activity will occur is one sort of judgment, but that it is also useful to arrange these illegal activities in some sort of hierarchy. Richardson, for analytic purposes, posed walking on the grass at one end of a continuum and violent overthrow of the government at the other. Both, though they are different requests that a speaker may make, contain a common idea; namely, a direction to violate the law. When a person speaks and encourages his listeners either to walk on the grass or overthrow the government, he can be clearly punished, "provided the probability that the utterance will bring it about approaches certainty." Supposing that the degree of probability is the same, but not certain, Richardson argued that it should make a difference whether we are
talking about revolution or unrestricted grass-walking. Since revolution is a greater evil, it needs less probability than some lesser and more probable offense.101

Nathaniel L. Nathanson, in a much less ornate argument than Richardson's but one closer to the basic issue, supported Douglas's view that the trial was essentially a conviction for the crime of seditious conspiracy, but used another statute which did not require as much proof for conviction.

"Doctrine" v. "Action"

The majority's distinction between advocating "doctrine" and advocating "action" in Yates was well received by Walter Gellhorn who in somewhat livelier language than the Court dramatized the distinction as follows:

One can recognize a qualitative distinction between a speaker who expresses the opinion before a student audience that all law professors are scoundrels whose students should band together to beat them within an inch of their lives, and a second speaker who, taking up the theme, urges the audience to obtain baseball bats, meet behind the law faculty building at three o'clock the next Thursday afternoon, and join in attacking any professor who can then be found. The first speaker (in the Yates Court's view), should not be prosecuted; the second has stepped over the line between advocating a belief and advocating an illegal action.
But Learned Hand, perhaps realizing that Yates comes close to a clear and present danger test by another name, claimed there may be times when a speaker loses his privilege even though he confines himself to "principles divorced from action." The hypothetical situation which Hand posited is that of a man who denounces an inept and corrupt government before a crowd which he knows to be "ripe for a riot," and that he has been told that what he proposes to say would probably set it off.102

Loyalty and Security

Loyalty Oaths and Security Programs

By Executive Order 9835 President Truman set up in 1947 a loyalty program for federal employees in which employees and applicants were required to undergo a loyalty-security check, and the Department of Justice prepared a list of subversive organizations to aid the Loyalty Review Board of the United States Civil Service Commission in making determinations about security risks. This list, known as the Attorney General's list, was made public in 1948 and contained 82 organizations; by 1953 the number had grown to over 250. This list is important, since tax-exempt organizations that find themselves on the list
lose tax-exemption privileges, and it is also used to
decide admission policy for aliens wishing to visit the
United States, as well as by some private employers.¹⁰³
Thus the loyalty program not only involved issues of due
process to civil servants but also due process vis-a-vis
the groups on the Attorney General's list. In 1951 the
Court dealt with this program in *Joint Anti-Fascist Refugee
Committee v. McGrath*,¹⁰⁴ and by a 5-3 decision held that
three organizations had been improperly placed on the list.
The majority reasoned that the Attorney General could only
designate groups after "appropriate investigation and
determination," and since this had not been performed,
the Attorney General had acted arbitrarily, and the
defendants were denied due process. Justice Black, in his
concurrence, held that the publicized findings of the
Attorney General, regardless of their truth or falsity,
"are the practical equivalents of confiscation and death
sentences for any black-listed organization;" he viewed
the existence of such a list as a bill of attainder.

The dissenters argued that the list was only a
criterion for federal employment and did not constitute
guilt by association or a bill of attainder, since no
"punishment" was forthcoming; there was no constitutional
"right" to a federal job. On the same day the Court split (Clark did not participate), and thereby sustained a Court of Appeals ruling which upheld a removal for disloyalty but affirmed the doctrine of United States v. Lovett by holding that a loyalty board order barring individuals from federal service for a three-year period was a bill of attainder.

During the Eisenhower administration the standard for discharge was changed from "disloyalty" to "security risk." This new rubric made discharge possible if a person's employment was not "consistent with the interests of national security;" it included sexual immorality and perversion, drug addiction, excessive intoxication, "criminal, infamous, dishonest, or notoriously disgraceful conduct," conspiring to commit acts of treason, sabotage, sedition or espionage and membership or affiliation with any subversive group as indicators of security risk status.

The ACLU opposed all attempts to make "loyalty" a criteria for governmental employment, and commended the Eisenhower administration for, "... recognizing a principle" it had long advanced, namely, "... that the
necessary test is not one of loyalty—which results in inevitable incursion upon freedom of speech and association without any compensating gain to national security—but one of security." The Union also applauded promises by the Administration that it would attempt to transfer possible security risks to non-security positions, but did criticize the new security program for its lack of centralized review procedures which would have helped to insure uniformity in the application of security criteria.  

The Warren Court, in a number of rulings on loyalty dismissals, usually avoided constitutional questions but managed to overturn dismissals on procedural and evidentiary grounds. Lack of statutory authority was used to overturn dismissals in "non-sensitive positions," or, in other cases, failure to follow proper administrative procedures.

In 1959, by a 5-4 vote, the Court even reinstated a Department of the Interior employee because the departmental hearing included questions about the employee's feelings about Negroes, Jews, college admission quota systems, Franklin Roosevelt, Norman Thomas, Henry Wallace, and other matters which Justice Harlan could not believe were related to the question of national security. The
Court also insisted on tighter measures in loyalty hearings connected with private manufacturers doing government work, but when a commanding officer of the Naval Gun Factory in Washington revoked the security clearance of a civilian cafeteria worker without any hearing or any other type of procedure, the Court upheld this action on the ground that in a military establishment the government has "unfettered control" over personnel and operations.

The number of loyalty oaths in the United States, as well as punishment for disloyalty, is an indication of the seriousness with which Federal, state and local lawmakers, and some private member organizations, took the notion of "subversive activity." Indiana's demand for a loyalty oath from professional wrestlers; the loyalty oath requirement for membership in the Screen Actors Guild of America (invalidated by a federal court in 1966); as well as New York State's suspension of drivers' licenses for anyone who advocates violent overthrow of the government, serve as cases in point.

The loyalty oath provision of the Taft-Hartley Act reached the Supreme Court in 1950, in American Communications Association v. Douds. The Court sustained the
constitutionality of the requirement that all officers of labor organizations annually sign an affidavit disclaiming any affiliation with the Communist Party or any other organization which believes in or teaches violent overthrow of the government.

The Taft-Hartley oath, which was the center of the controversy in Douds, was repealed in 1959; it had proved ineffective because Communists were willing to take the oath, and perjury sanctions proved difficult to establish. Pursuing the same objective, Congress then made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union, but this action was struck down as a bill of attainder by a narrow Supreme Court majority in 1965. 113

Oaths disclaiming membership in the Communist Party in order to obtain state and local employment were upheld by the Court in 1951 114 as "sufficiently relevant to effective and dependable government . . ." to justify their existence, but blanket endorsement of such oaths was quickly qualified in 1952 when a unanimous court held that oaths must encompass "knowing" association as opposed to mere membership in order not to offend the due process
In 1958 the Court overturned California's ingenious scheme to require those seeking exemptions from state property taxes to sign a loyalty oath, reasoning that such legislation shifts the burden of proof on to the individual and necessarily has the effect of encouraging citizens to avoid controversial associations. A Florida Act prohibiting "aid, support, advice, or counsel" to the C. P. was struck down on the grounds that it was not "susceptible [to] . . . objective measurement," and the Court used vagueness as the criterion to overturn loyalty oaths requiring school teachers to swear that they were not "subversive persons" and that they would "by precept and example promote respect for the flag . . . reverence for law and order and undivided allegiance to the government of the United States." In a 5-3 decision in 1966 the Court made an "apparent" reversal of its 1951 holding that a state had a legitimate interest in discouraging public employees from having membership in the Communist Party; it ruled an Arizona loyalty oath (which provided punishment for anyone who took the oath and later became a member of a proscribed organization) as unconstitutional.
A statute, known as the Feinberg Law, required
the New York State Board of Regents to 1) promulgate rules
for the removal of ineligible public school employees;
2) draw up a list of "subversive" organizations; 3) make
membership in any listed organization \textit{prima facie evidence}
of disqualification to held any position in the public
school system. Although no dismissals had been made
under the law, action was brought to have the statute
declared unconstitutional and to enjoin enforcement by
the Board of Education of New York City in \textit{Adler v. Board
of Education}. Justice Minton, speaking for the majority
of the Court, felt that since a teacher works in a sensi-
tive area, shaping the attitudes of young minds toward
the society in which they live, teaching is a vital con-
cern of the state and the terms laid down by the statute
were reasonable. If individuals do not "choose to work
on such terms, they are at liberty to retain their beliefs
and associations and go elsewhere," he claimed.

In \textit{Slochower v. Board of Education} (1956), how-
ever, the Court overturned a conviction of a New York City
college professor who had been dismissed because he had
taken the Fifth Amendment before a Senate committee which
sought information about his political associations, and in 1958 the Court narrowly upheld dismissal of a subway conductor and a school teacher. Both invoked the Fifth Amendment plea when questioned about Communist party membership, and for the majority such refusal could be at least partial evidence of unreliability and incompetency. The same rationale was applied to the discharge of Los Angeles County employees who failed to answer questions before the House Un-American Activities Committee. Justice Clark, in the latter case, laboriously separated the constitutionality of the California Code (which required public employees to give testimony relating to subversive activity on pain of discharge) from the Court's ruling in *Slochower* by claiming that dismissal for refusal to testify is a "built-in" inference of guilt and not allowed, but if the state statutorily declares the same action to be "insubordination," then such dismissals do not violate the Fifth Amendment.

In 1967 a Supreme Court much less dazzled by arguments of legislative reasonableness overturned *Adler v. Board of Education* and declared New York State's updated "Feinberg law" unconstitutional. In *Keyishian v. Board*
of Regents of the University of the State of New York,

Justice Brennan, speaking for the narrow five-judge majority, claimed (even though the State in 1965 announced that no person would be deemed ineligible for employment "solely" because he refused to sign the disclaimer affidavit) that a state's legitimate interest in protecting its educational system from subversion "cannot be pursued by means that broadly stilly fundamental personal liberties when the end can be more narrowly achieved."

The New York Civil Service law, in seeking to establish removal procedures for "treasonable or seditious" behavior, was dependent on an ambiguous penal law in which the meaning of sedition had "virtually no limit." One committed a felony in New York, Brennan noted, if he "publicly (displayed) a book ... containing or advocating, advertising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means." Brennan asked what would happen to a teacher who carried a copy of the Communist Manifesto on a public street. To argue that the statute would not be applied to arrest that teacher is insufficient, said Brennan, because it means that the potential effect of
obscure wording depends on the "conscientious and scrupulous" nature of those who would apply the statute. The essential point, Brennan insisted, is that the teacher could not know where the line was drawn between "seditious" and non-seditious utterances and acts. Using Communists Party affiliation as prima facie evidence for disqualification, approved in Adler, was rejected, and the doctrine that public employment may be denied under "any condition, regardless of how unreasonable, has been uniformly rejected," according to the majority because it failed to distinguish "knowing membership." Justice Clark, joined by Harlan, Stewart and White in dissent, found Brennan's opinion a "blunderbuss" of words, since the majority struck down a law on the basis of a certificate and other practices which were no longer in use. To Clark, no court had "ever reached out so far to destroy so much with so little."

The effects of Keyishian are difficult to assess, since it was a close decision, which means that a change in personnel, or heart, could make it short-term law; but, as Clark seemed to sense, the majority here was mostly interested in evaluating the language of statutes such as
the Feinberg Law, even when the safer course of action might have been to view them as moot.

In 1967 the Court declared unconstitutional a Maryland law requiring state employees to swear that they were not subversive, and in 1968 it struck down a Texas loyalty oath for state employees, but upheld a New York oath requiring prospective employees to swear to uphold the federal and state constitutions. In the Maryland case, Justice Douglas, speaking for the majority, found that since the oath required an applicant to swear that he was not engaged in political subversion, it was unconstitutionally vague because "subversive" as defined by Maryland statute included attempts to "alter" the government. On the other hand, to Harlan, and Stewart and White who also dissented, the Maryland oath was a meticulous attempt on the part of the state to conform to the requirement set down by the Court in 1951 in which oaths which sought to bar only those who seek overthrow of the government were sustained. The majority's focus on "alteration," according to Harlan, "artistically avoids" past doctrine, and the only thing which shone through the majority's thinly-veiled legal reasoning was that it did "not like loyalty oaths."
The use of loyalty oaths in federally-assisted programs aimed at the general welfare was also not overlooked by Congress as a technique to rid the nation of subversion. Loyalty oaths for students seeking aid under the National Defense Education Loan Act were required until numerous private educational institutions refused to participate in the program and Congress repealed the provision in 1962. Until 1965 numerous programs under the Economic Opportunity Act required a disclaimer oath, and a loyalty oath can statutorily be required for citizens seeking benefits under the Medicare Act of 1965, but the Department of Health Education and Welfare has decided not to use failure to answer the disclaimer question on the application form as a basis for disqualification. 125

Even though numerous private associations reflected concern over "loyalty" and "Americanism" in the 1950's, such as the Westchester County American Legion attack on both faculty and students of Sarah Lawrence College as being "strongly communist-tinged," the ACLU felt that the most dangerous over-reaction on the part of private groups in the year 1951 involved the loyalty oath restrictions of numerous Bar Associations which sought to disbar attorneys who commit "acts of disloyalty." 126
The denial of admission to the bar in order to become a practicing attorney has also raised free speech issues when the refusal is based on the applicant's personal beliefs or association or his refusal to answer questions about such matters. The Supreme Court has held that admitted membership in the Communist Party cannot be the sole criterion for "bad moral character," but it has also ruled that while bar examiners cannot construe the silence of an applicant to constitute bad character or disloyalty they may, if they specify clearly that answers are required because they have substantial relevance to his qualifications, deny admission (to the same applicant) because of non-cooperation, or simple stubbornness. 127

What makes the entire issue of loyalty programs and employment an especially difficult problem is that very few people insist that there is a constitutional right to employment, public or otherwise, in the sense that such employment cannot be proscribed except for some criminal offense. Government can certainly insist on certain attitudes, even political, in certain of its functions, especially those directly related to national
security. But two factors emerge as extremely important in discussing loyalty dismissals. The first is that public employment in the modern welfare state, which increasingly includes more and more citizens, and this, together with some sort of loyalty test for the other services of the welfare state, could create an informal network of "punishment" that would be broader in scope and effect than any criminal legislation. The second factor is that while no one may have a right to a job, and that ordinary dismissal is not and should not be considered "punishment," dismissals for reasons relating to loyalty or security, as Pritchett has noted, take on the character of punishment because of the social stigma attached to them. Being discharged for simple incompetence, regardless of task, need not imply that the individual is unsuited for other tasks, but a discharge for "loyalty" carries with it the same kind of "character" implications that a person would inherit if he had been convicted of criminal conduct, and in some cases social sanctions would probably be more severe. 128

The impact of loyalty security programs is probably greater than most realize. Arval A. Morris has
stated that as of 1958 a few more than 1,600,000 professional people (scientists, teachers, lawyers, engineers, etc.) had occupations dependent upon their ability to meet some type of loyalty criteria. To these he added seven and a half million people in federal, state and local government plus four and a half million people who are required to meet industrial security tests. As applied to a work force of 65 million this "means that at least one person out of five, as a condition of his current employment, has taken a test oath, or completed a loyalty statement, or achieved official security clearance or survived some undefined private scrutiny." He also noted that about 11,500 people, of which the largest single group involved private employment in firms which received federal contracts, had failed loyalty tests. Statistically this worked out to the barring of one person in 2,500 on security grounds. Between 1948 and 1958 approximately 500 teachers, including primary, secondary and college, were dismissed because of refusal to answer specific questions or take loyalty oaths as conditions of employment. 129

Congressional Investigations

Perhaps the most controversial of all techniques
of official government to protect itself from subversion surrounded the uses and abuses of Congressional investigatory power by such celebrated committees as the House Un-American Activities Committee (not the House Committee on Internal Security) and the Senate Permanent Sub-Committee on Investigations under Senator Joseph McCarthy of Wisconsin. While many of the complaints against these committees involved questions about the extent of Congressional power, the nature of the contempt power, and the self-incrimination privilege; the most general objection was the "trial" atmosphere that pervaded the committees' investigations, the "exposure" techniques which guaranteed attention in the media and the personal aggrandizement of committee members. Inquiry into individual beliefs ranged far beyond any conceivably valid legislative purpose and brought charges that Congress was doing by investigation what it could never achieve by laws which would have been constitutional. Similar charges were levelled against committees in numerous state legislatures.

The Supreme Court never declared such investigatory committees unconstitutional (although it came close), but
usually chose to overturn contempt citations on grounds that Congress, or state legislatures, had to limit inquiries to things which were pertinent to the committee's mandate. Since a committee such as HUAC had a mandate which was so broad as to be practically meaningless, the Court could have easily voided all contempt convictions from such committees on grounds of an unconstitutionally vague mandate; this looked like the probable direction of the Court in 1957.  

The desire of the Committee to "expose" subversive elements had long been opposed by the ACLU as an illegitimate goal, and in one case, which they sponsored, they raised this issue, but also sought, unsuccessfully, to have the case turn on the legality of compelling testimony from anyone about the activities of others.

By 1959, reacting to Congressional threats to curb its jurisdiction as well as considerable public criticism, the Court swiftly retreated and sustained contempt convictions on both the state and federal level and suddenly found the authorizing resolution of HUAC clear enough to warrant response from hostile witnesses who invoked the First Amendment rather than the Fifth Amendment as their rationale for refusing to testify.  

After
these decisions, the ACLU began a massive campaign to influence public opinion, including the placement of magazine articles, distribution of hundreds of thousands of copies of newspaper articles, editorials, testimony, and public statements as well as a filmed television debate between HUAC and anti-HUAC spokesmen. HUAC itself did much to structure the dialogue, however, by sponsoring the film *Operation Abolition* (about a student demonstration against the Committee in San Francisco) which gave local ACLU affiliates numerous opportunities to argue for, and occasionally get, "equal time." After 1961, however, the Court seemed to return to its more restrictive criteria for the pertinence of legislative inquiry by reversing numerous contempt convictions.

Travel

Denial of passports to citizens because of Communist Party membership, as already mentioned, was voided by the Supreme Court, but the government's interest in refusing to issue passports to any citizen to travel to restricted nations was upheld by the Court in 1965. The State Department could refuse to issue passports to those wishing to travel to restricted areas, but it could
not prosecute those who had passports and went anyway, according to a decision in 1967. Later in the same year a Federal Court of Appeals ruled that the State Department could not deny a passport to individuals (such as Staughton Lynd) who had previously violated area restrictions and who wished to travel to a non-restricted area (even if they intended to proceed to a restricted area from the non-restricted area).

"Disloyalty" Sanctions Against Aliens

Deportation and denaturalization proceedings are another governmental alternative to punish the subversive. The Supreme Court sustained deportation orders against an alien for past membership in the C. P. and upheld several post-war denaturalization proceedings with only Justices Murphy and Rutledge claiming in dissent that the government's power to naturalize did not connote a power to denaturalize.

The Immigration and Nationality Act of 1952 took over some of the categories of the Subversive Activities Control Act and added some others but generally had a mitigating effect because it provided alleviations for persons who had joined the proscribed organizations.
"... involuntarily, or while less than sixteen years of age, or for the purpose of obtaining employment or the essentials of living, or who had for at least five years prior to application for entry actively opposed the doctrines of these organizations. ..." The people wishing to enter the United States as aliens who fell into any of the above categories could be granted visas if the appropriate consular officer and the Attorney General found it to be "in the public interest." 140

Deportation for past membership in the Communist Party was again upheld by the Supreme Court in 1952, and in 1960 the Court approved the deportation to Finland of a 52-year-old alien who had lived in the U. S. since childhood on grounds of his Community Party membership between the years 1937 and 1939. 141

Conclusion

Free Expression and National Security

What is immediately apparent after surveying the plethora of federal and state legislation, as well as loyalty oaths and loyalty-security programs designed to protect the nation from domestic subversion, is that Americans take the problem of "subversion" much more
seriously than the English. To some extent the duplication of legislative effort on the state and federal levels reveals overlapping jurisdictions and competition for favorable public attention. But the pervasiveness of the concern about domestic subversion in the United States was much greater than in England during the same period, and there seems little evidence to indicate that the danger of subversion in America was in fact greater than in the United Kingdom.

Harold M. Chase, in trying to assess the nature of what the public felt to be a serious "Communist menace," concluded that there was no significant internal threat of Communist revolution in the post-war period. Official estimates of Communist Party strength in the United States indicate that there were never more than 100,000 Party members in the nation, and that membership had progressively declined from a high point in 1932. J. Edgar Hoover estimated that Party strength went from 54,174 members in 1950 to 23,000 in 1954. Mr. Hoover, however, had consistently warned that the size of the Party was relatively unimportant because of the enthusiasm and discipline with which they pursue their objectives. In 1947 he revealed
a statistic which, if not startling, was at least designed to be startling, to the effect, "That in 1917 when the Communists overthrew the Russian government there was one Communist for every 2,277 persons in Russia. In the United States today there is one Communist for every 1,814 persons in the country." Chase was quick to note that the use of these figures to show that there were proportionately more Communists in the United States than there were in Russia in 1917 implied a belief that the total situation in Russia then and in the United States after World War II were analogous. A belief that the situations were analogous, Chase noted, would have to mean, among other things, that the FBI was as inefficient as the Czarist police; that economic conditions in the United States made people ripe for revolution; and that a significant number of Americans would have helped to perpetrate a coup. Chase concluded that none of the three propositions could withstand examination, and that there was no danger from Communists in the United States in the sense of probable revolution. 142 But events, such as the Hiss inquiries, the Rosenberg trial, etc., despite all the spectacular demagoguery and hysteria, did reveal that
secret papers were ending up in places they ought not to be, and that the danger of espionage and sabotage was real, if not as vivid as some members of Congress thought. Statutes such as the Smith Act and the Internal Security Act were aimed primarily at the prevention of revolution by abridging important liberties which were "a greater danger to the nation than the unlikely revolution they (were) intended to prevent," while the failure of Congress so solve such problems as the easy illegal entry of anybody (especially Russians) across the Mexican border led Chase to conclude that the national government has "too frequently fought the wrong battle in the wrong place."

Chase was extremely critical of President Truman and the Democratic leaders of Congress for responding to criticism about loyalty and security in the administration only with the "red herring" argument. In 1947 and 1948, when a security problem began to be evident, the nation was still relatively calm about the Communist threat. For Chase, in the myriad of wild charges by the Un-American Activities Committee, there were occasionally serious and "foreboding revelations," and he blamed the Democratic leaders for failing "to face up to the realities of the Communist threat."
They evidently felt compelled to deny any and all evidence of Communist infiltration in order to discredit the wilder allegations about the motives and loyalties of the Democrats. Consequently, there came a time when every revelation, no matter how substantial, like the warnings received about Alger Hiss, was dismissed as 'red-baiting.' Of course, the excesses of those searching out the Communist menace were a real provocation, but hindsight makes it clear that the intransigence that refused to allow an objective examination of the evidence from whatever source derived was dangerous to the nation and injurious to the Democratic Party. 143

The American concern over subversion and disloyalty obviously involved and involves more than simple disagreement about the nature of a supposed threat to national security. The fact that conviction under the Smith Act could have such subsidiary consequences as denial of burial in Arlington Cemetery even if the deceased was a decorated World War II hero 144 would seem to indicate that the issue went far deeper than merely the defence of the nation—as deep as the defence of an appropriate national character.

The pluralistic nature of the American polity, together with its "plebicite" notion of democracy, has always created fertile soil for a nationalistic demagogue who, because Americanism could not be translated as a culture, religion, or race, capitalized on an immigrant population's propensity to over-identify with available symbols and
translated "sense of nation" into a common idea system rather than a common background. To belong to the nation means to believe certain things (or more accurately not to believe in certain things) rather than simply to reside in a common territory. The English perimeter of nationality, since it involves race and religion as well as geography and long history, is arbitrary, but it is also relatively clear and final. The American notion of national self--more open, fluid, even egalitarian--was, during the early 1950's, to belong to a certain segment of public opinion.

But American nervousness about loyalty was also more than (or less than) a side effect of ethnic pluralism. For reasons which Louis Hartz has tried to give the most cogent explanation, the very narrow width of the American political dialogue (when compared to that of Europe) also created factors which were curiously to make the narrow dialogue narrower still. The historic enunciation of the value that opposing points of view are necessary to democracy also created a very restricted view about what was legitimate "loyal opposition." Much of the "second red scare" was a curious blend of nationalism, a restricted view of "legitimate" criticism, and old fashioned dirty
politics. To view your political enemies as "treasonous" was not beyond Jefferson, let alone Joseph McCarthy or Martha Mitchell.

When the Supreme Court by unanimous action in 1966 reversed the Georgia State Legislature's attempt to exclude Julian Bond from membership (even though appropriately elected) because he had opposed the federal government's policy in Viet Nam and the Selective Service system, it was curbing a deep American instinct to narrow the political competition by making it illegal. Georgia had argued that, by majority vote (thereby making it democratic), it had a right to exact a higher standard of loyalty from its legislators than it could perhaps constitutionally require from ordinary citizens, but the action was probably motivated by considerations of race as much as those of loyalty. V. O. Key once suggested that the highly charismatic demagoguery of southern one-party states was caused by the lack of party opposition and the resultant "multi-factional" internal politics which placed a premium on attention-getting devices for electoral success. The fact that the American political system, as well as its culture, is highly fragmented
(multi-factional), could place a premium on demagoguery in national politics. The usual assumption is that the multiplicity of forces involved in national politics leads to moderation rather than excesses. But multi-factionalism can also tempt politicians to adopt an extreme and volatile style which exploit symbolic conflicts and achieve consensus by transcending "mundane" political issues and focusing on emotive, symbolic (and even romantic) questions. Civil liberties questions are primarily symbolic issues. Since McCarthy was the first truly national demagogue, in a nation which abounded in flamboyant regional political leaders, the issue by which he gained national prominence emerges as especially important.

Psychologically, if not logically, the subversive hunts merged with class politics. The career of Senator McCarthy was in no small way a manifestation of hostility to elite politics (the State Department, Harvard, etc.) and loyalty oaths and scrutiny of teachers had heavy overtones of simple anti-intellectualism and the suspicion that "bookish" types felt they were "more than equal."

The entire judiciary, as well as the Supreme Court, while balking at times under congressional threats and
internally divided about their proper role in all this, nonetheless emerged on the whole as a critical libertarian force. While structurally the Supreme Court is supposed to play a more important role than courts in the United Kingdom, it could have played a much less spectacular role than it did; even in the cases which deferred to legislative reasonableness, the vigorous dissents were at least a source of literary inspiration for libertarians.

While rarely striking down legislation in this area on its face, the insistence that the Smith Act distinguish between mere membership and "active" membership; that the Internal Security Act's registration provision must be "voluntary" in order to avoid violating the Fifth Amendment; that the State Department's right to establish restricted areas doesn't include the authority to enforce them, were not-so-subtle techniques to void the original intent of such legislation and policy.

Speech and Public Order

The problem of trying to elucidate a criterion for a general problem based on the Supreme Court's experience with several specific cases is not only that each case is different, but that different Courts and occasionally the
same Court will approach the problem on different "levels."

C. Herman Pritchett, for example, has suggested that the Court's approach to breach of the peace problems reveals three different "stages" of judicial analysis. In this typology the Court decides first whether the speech involved enjoys constitutional protection at all; second, whether the ordinance used is valid, i.e., narrow and not permitting overbroad discretion; and third, if the law is valid, both on its face and as applied, and the speech is protected, whether the danger to the peace is sufficient to override the claims of constitutional protection.147

Presumably the Court would use the Chaplinsky list to establish whether the speech had sufficient social utility to claim First Amendment protection. If the speech is held not to be lewd, obscene, profane, libelous, insulting, or inciteful, then attention is turned to the validity of the statute in question. Cases such as Terminiello can be viewed as stopping at the second level, with the dissenting Justices vigorously arguing that the Court should move to the third stage and analyze whether a breach of the peace was imminent. Stage three involves a factual assessment, which Pritchett implied the Court used in
Feiner, but in cases such as Edwards and Cox, the Court chose to dispose of the problem within the context of stage two.

Since stage three involves the probability of violence, the Court faces the awkward problem of substituting its assessment of a condition for that of the police or jury. If the issue is disposed of at levels one or two, the government's assessment of probable violence, be it correct or incorrect, is not germane.

Cases such as Adderly v. Florida can be viewed as a variation of Pritchett's third level, wherein the justices balance the utility of what would normally be constitutionally protected speech against the community's interest in tranquility as well as the prevention of disorder. Black in this case did make reference to the "danger" presented to the jailhouse, but the real crux of the matter for him was that places such as jails, libraries, etc., have functions other than the facilitation of the exchange of ideas.

Thus the decision to analyze the problem at any of these stages or any of their variations can have great consequences for the holding in particular cases, because
it is at this juncture that the Court decides what it is deciding. Its answer to this question is frequently more important than its decision within a particular level, since disagreement within a level tends to be so minimal as to make the conclusion almost pre-ordained.

With the exception of the decision on group libel and the symbolic speech cases, the Supreme Court was fairly consistent in insisting that some concrete evidence of probable disorder, beyond simple apprehensiveness on the part of authorities that a particular event could lead to disorder, was necessary before speech could be constitutionally intercepted. It usually did this by insisting that the legitimate aim of authorities could be achieved either by more narrowly drawn statutes, or in the case of Jehovah's Witnesses in Lacona, Iowa, or anti-Semites in Chicago, better police protection for the target of the community's hostility. In some cases, such as Black's dissent in Feiner or the majority's opinion in Edwards or Gregory v. Chicago, the judges were quite willing to impute unconstitutional motives to the local police—or simply disagree about the explosiveness of the situation. Even though Justice Black was making it clear
that the "whim . . . of . . . grievance bearers" was not to take precedent over the community's interest in tranquility, the basic dispute in the court involved where speech may take place, not the content of the speech. Keyishian was an example of the Court leaping to bring a case into First Amendment territory, and Bell v. Maryland demonstrated very creative use of jurisdictional rules to protect a group for which the majority had obvious sympathy.

The only exceptions to the Court's general pattern of negating governmental and private action when it either interferes directly with speech or has a "chilling effect" on the spirit of free discussion are the upholding of the validity of the concept "group libel" (which even though infrequently used is still a notion with great restrictive potential), and the apparent sanctity of the flag and draft cards. Since Americans from the time of Garrison have been attracted to small-scale arson as a technique to dramatize their complaint, such statutes could receive widespread use in the future.

While there was also a propensity for English libertarians to play a political role, i.e., that of defender of the individual citizen against the power of
government or the vociferous majority, this role seems to be accentuated in the American context. The generally more "legalistic" political environment (and the more politicized legal environment) in the U. S.; the role of the judiciary and judicial review; the perpetual jurisdictional jealousies created by a federal system; and checks and balances in the national government, are no doubt factors in conditioning this "adversary" role. Whether the role produced a certain "conception" of civil liberties or the conception of civil liberties in America helps produce this role is less important than the penchant to view the problems of individual liberty in an "adversary" context.

Even some of the judicial analogies about civil liberties: "the free marketplace of ideas," "sword of state" pitted against the "shield" of the Bill of Rights, indicate a basic referent steeped in attempts to delineate legitimate rules of conflict, rather than in rules to facilitate communication through speech. The English perceive freedom of speech as a value of interaction--Americans, as a value of collision. This is a subtle difference which certainly cannot explain all dissimilarities, but it may
have subtle consequences which over an extended period of time can have great impact.

The traditional libertarian response to the threats of espionage in the 1950's, as Chase pointed out, was to claim that conservatives were engaging in their traditional role of claiming that their enemies were subversive. Standard response A (enemy within) brought standard response B (no enemy within). The adversary syndrome encouraged a network of affirmations and denials which acted to increase the atmosphere of hysteria because groundless accusations became merged with legitimate ones. This had the disastrous two-fold effect (depending on public opinion) of either validating all claims about an internal danger or validating none.

A similar "set response" characterizes some of the American libertarian response to New Left "confrontation politics" and black revolutionary movements. The automatic assumption that every indictment against a Black Panther or Yippie is a governmental attempt to truncate the American political spectrum, is more than the simple assumption of innocence until guilt is proven, it is the assumption that guilt cannot be proven, which inevitably
leads to a hostility to trials per se.

One of the effects of this posture toward problems of individual liberty, for example, is that it lends itself more easily to a "fixed role" in which the libertarian response is more likely to be doctrinaire than illuminating. When the adversary conception of civil liberties springing from a "suspicious" as opposed to a "deferential" polity is the perennial response to problems, it can quickly lead to a network of allegations and denials, which can transcend, and many times avoid, real problems.
CHAPTER VI

OBSCENITY IN THE UNITED STATES

Obscenity, Official Action and the Law

Public Pressure for Censorship

While our concern will be focused on official and unofficial attempts to prevent the public distribution of material felt to be harmful because it violates acceptable notions of sexual propriety, it is important to realize that in the United States, as in the United Kingdom, there are many other rationales which can motivate attempts to stop the distribution of a particular work. Movies in particular have been the target of censorship on grounds not related to obscenity: In the 1950's Jewish groups protested the "anti-Semitic overtones" of the British film Oliver Twist so vehemently that it was withdrawn from the market for a year. The American Humane Association protested the depiction of cruelty to animals in The Brave Bulls; the NAACP objected to Birth of a Nation. The Catholic War Veterans resented the depiction of Catholicism in Bicycle Thief. The American Legion picketed
Spartacus because of its "revolutionary message" and were even successful in stopping exhibitors in New Jersey from showing any films of Charlie Chaplin because of his "left-wing affiliations." Numerous groups boy-cotted Ingrid Bergman movies because of her "lax morals," and a Chicago police chief successfully prevented the showing of No Way Out on grounds that it might inflame race relations. Simple "objections" of course do not necessarily discourage either the production or the showing of controversial movies, but frequently the pressure of private groups is easily translated into the command of public officials, such as the celebrated declaration by the New York City Commissioner of Licenses that the movie The Miracle was "blasphemous" and would result in the suspension of the theater's license if shown in the future. This action, unanimously declared unconstitutional by the Supreme Court in 1952, is only one of the more ostentatious manifestations of public and personal pressure to restrain the communication of political and religious points of view. When the criterion shifts to sexual candor, the federal courts and government in general have been more obliging.
Defining Obscenity

"Roth Test"

Between 1942 and 1956 Congress enacted 20 obscenity laws, and the various states had obscenity laws which dove-tailed with local licensing procedures all of which, as in Britain, are supported in principle by international agreements between 50 nations. The modern concept of obscenity in the United States can be most conveniently traced from a Supreme Court ruling in Roth v. United States in 1957 in which the American standard for obscenity was clearly divorced from any dependency on the Hicklin test. As early as 1934 lower Federal courts were holding that the Hicklin rule should not apply to the importation of such works as Joyce's "Ulysses" because, according to Augustus Hand, the work was sincere, erotic material presented was not the dominant theme of the work, and taken as a whole it did not have a libidinous effect.

Roth, which concerned the conviction of an individual for violation of the federal obscenity statute prohibiting the mailing of any material which is "obscene, lewd, lascivious, filthy...or indecent" on pain of a $5000 fine and/or five years' imprisonment, was to lay down a new
definition of obscenity in keeping with the *Ulysses*
decision. Justice Brennan, speaking for the majority, up-
held the conviction, but stipulated that the new con-
stitutional test of obscenity is whether the material
appeals to the "prurient interest" of the "average person,"
applying "contemporary community standards" and consider-
ing the "dominant theme of the material taken as a whole,"
not isolated passages.

This is a new, and stricter standard which the First
Amendment requires, according to Brennan, but the concept
"obscurity" itself is not incompatible with the First Amend-
mend because it is one of those "well-defined and narrowly
limited classes of speech" which were listed in *Chaplinsky*.
The First Amendment was designed to protect "unorthodox
ideas, controversial ideas, even ideas hateful to the
prevailing climate of opinion," but obscenity is utterly
without socially redeeming importance. We know this, Brennan
implied, because so many states and nations have made it
punishable. By declaring obscene speech to be without
socially redeeming importance, and by declaring the First
Amendment to apply only to speech with socially redeeming
importance, Brennan effectively took prurient material out
of range of the First Amendment. Argument about "consequences," such as whether the material presents any kind of danger, clear or otherwise, to the community, are not germane because they are questions which are relevant only in deciding whether speech with social value is outweighed by other community interests. Just as libelous utterances do not require a demonstration of danger to the community, neither do obscene materials. In this case all of the judges were willing to assume the "fact" of the obscenity of the material in question. To the majority the issue was the proper definition and the relationship to the First Amend-
ment. Black and Douglas, in dissent, did not question the factual basis of the case, either, but simply argued that government should be concerned with anti-social conduct, not utterance or "thoughts," regardless of what they are labelled. In short, for Douglas and Black there is con-
stitutional protection for obscenity just as for other speech.

Things were more complex for Justice Harlan, who concurred in Alberts, but dissented in Roth, on the grounds that the standard for obscenity should not be the same on the state as on the federal level and that the federal
government was more limited because the dangers of federal censorship are greater and because the First Amend-
ment applies specifically to federal action, while the Fourteenth is more vague and leaves states more leeway.
Harlan was not attacking the concept of obscenity but he urged that on the federal level everything should be protected except "hard-core pornography," which, he felt, could not characterize Roth's wares.

The Roth test, it should be noted, was more a theo-
retical formulation and defense of the concept of obscenity than a concrete application. Lower courts had to assess the same material under the Roth standard; but they often disagreed about the proper conclusion, as when Henry Miller's "Tropic of Cancer" was declared not obscene in California but obscene in Florida. The Supreme Court held the work not to be obscene but was extremely divided on a rationale, with Brennan and Goldberg claiming that it did not meet the Roth test; Black and Douglas arguing that no book could be reached by injunctive proceedings (or any other); and Stewart arguing that obscenity is limited to hard-core pornography. 7

The ACLU's response to the Roth case took the form
of a policy formulation by the national Board in 1957. In their view all expression should be protected by constitutional guarantees of free speech and press and there should be no special category of obscenity or pornography to which different constitutional tests apply.

To be constitutional, an obscenity statute at the very least, must meet the requirement of definiteness; and also require that, before any material can be held to be obscene, it must be established beyond a reasonable doubt that the material presents a clear and present danger of normally inducing behavior which validly has been made criminal by statute.  

Implicit in the Union's approach to this problem is that the relationship between allegedly obscene literature and anti-social conduct is tenuous; that standards designed primarily to protect youthful persons should not be imposed on literature or entertainment available to adults; and that the problem (what little of it is left) should be handled by individual prosecutions in which obscenity would be a judicial determination rather than "advice" from a public or private board.  

The ACLU's claim that obscenity statutes should only be applied to material which demonstrably incites anti-social action, while never embraced by the Supreme
Court, was on occasion, successful on the local level. In 1958, for example, the ACLU of Northern California, while handling the defense of a bookstore owner who sold Howl and Other Poems, by Allen Ginsberg, convinced San Francisco Municipal Judge Clayton Horn that the proper test of obscenity was whether the material "presented a clear and present danger of inciting anti-social action."^{10}

"Patent Offensiveness"

While the Roth holding was "liberal" in the sense that serious works of art could no longer be judged by the effect of isolated passages on the most easily corruptible person legal minds could imagine, it also tended to raise more questions than it answered. The most immediate effect was to impose a national standard, which, among other things, would make state statutes aimed at "portraying sexual immorality in a favorable light" (New York's rationale for banning the film version of Lady Chatterley's Lover) unconstitutional because such legislation restricted an "idea."^{11} But the exact meaning of Roth became the issue in Manual Enterprises v. Day in 1962;^{12} the mail distribution of a magazine designed to appeal primarily to homosexuals was stopped when the Postmaster General barred
it from the mails. The Court, in this case, granted injunctive relief to the publishers, but once again could not form a majority agreement on the rationale. The separate opinion of Justices Harlan and Stewart argued that while Roth made "prurient interest" the key test for obscenity, it was not the sole test, and in keeping with what they believed to be the purpose of Roth, i.e., to tighten obscenity standards, they urged that before material could be adjudged obscene it must also be "patently offensive." Patent offensiveness was required, according to Harlan, because without it many worthwhile works could be deemed prurient and withheld from the public. The particular work in question, even with nude photographs of male models, was "dismally unpleasant, uncouth, and tawdry," but not "patently offensive," because it did not clearly affront current community standards of decency.

"Social Value"

The meaning of "socially redeeming importance" as well as the relevant community in the phrase "contemporary community standards" was "clarified" by the Supreme Court (and in the process greatly altered) in Jacobellis v. Ohio in 1964 when a state obscenity conviction for the showing
of the film *Les Amants* was reversed.\textsuperscript{13} There had been confusion in *Roth* about whether the "social value" standard was a test for obscenity or simply an explanation of why obscenity was not constitutionally protected, in which case something might have some social value but still be obscene. In this case, however, Brennan made it clear that if a work had literary, scientific, artistic or other social importance, it was protected by the First Amendment. Courts could not weigh something's social utility against its prurient appeal because if it had any social value, it could not be obscene. The majority also indicated that community standards implied the "society at large."

Stewart, in his concurrence, again insisted that obscenity statutes can only ban "hard-core pornography," and in a rare instance of total judicial candor, said he probably could not define "hard-core pornography," "but I know it when I see it. . . ."

In 1966 the Supreme Court turned its attention to clarifying what it meant in its various judicial elaborations on the *Roth* standard. In a case involving civil proceedings against the book *Memoirs of a Woman of Pleasure* in Massachusetts, in which the state supreme court conceded that the book may
have had some literary value but that this did not give it sufficient social importance to be protected speech, the Supreme Court reiterated formally three independent standards for obscenity. Justice Brennan, speaking for the majority, explained that before material could be labelled obscene it must be (1) without any socially redeeming value (from Jacobellis), (2) must appeal to prurient interest (as explained and qualified in Roth), and (3) must be patently offensive (from Manual Enterprises). These criteria are to be applied independently, not with reference to one another, according to Brennan, and even a "modicum of social value" prevents a work from being obscene. The work also must be judged in terms of the audience to which it is expected to appeal.

Justices Clark and White, in dissent, felt that the social value test was not an independent criterion, and Clark even quipped that such a standard protects "well-written" obscenity and intercepts only poorly-written filth.

"Average"

On the same day the Court rendered a short clarification of what "average person" meant in the attempt to establish prurient appeal.¹⁴ Mishkin v. New York involved
the conviction of a publisher of a magazine catering to sado-masochists who argued, among other things, that his publication would not have prurient appeal to the "average" person because it was designed for those with more bizarre and morbid tastes. Justice Brennan and four other Justices simply qualified Roth to include the prurient interest of the group most likely to receive them, and the conviction was sustained.

"Pandering"

The third and most spectacular of the Supreme Court's 1966 rulings was the affirmation of the conviction of Ralph Ginzburg, publisher of Eros magazine for using the U. S. mails to distribute obscene material. Ginzburg engaged in several sales gimmicks, such as seeking mailing privileges from the postmasters of Intercourse and Blue Ball, Pa., and a "money-back-guarantee" if one of his publications - The Housewife's Handbook on Selective Promiscuity - failed to reach a purchaser because of Post Office censorship—none of which helped establish his serious artistic purpose, in the minds of the federal judiciary. Even the government admitted that the magazine, as well as the books advertised in it, were not clearly
obscene under the Court's previous standards, but a five-
man majority held that in close cases evidence of commercial
exploitation of non-obscene material could substantiate
the charge.

Justice Brennan, speaking for the majority, found
Ginzburg's advertising approach permeated with the "leer
of the sensualist;" this was sufficient to establish an
intent to sell material based on its salacious appeal, and
this "sordid business of pandering" enjoyed no First Amend-
ment guarantees. By adding the criterion of pandering,
Brennan took a large step toward negating the restrictive
scope of obscenity laws which he and the Court had pains-
takingly tried to establish with its "prurient," "patently
offensive," and "no social value" rules.

Pandering became not only the fourth test, but by
implication overrode the other three. The concept emerged
in an entirely new context where the heart of the offense
is not producing a particular thing which is obscene, but
selling any material by implying it has prurient reward.
As a criminal offense obscenity moves from corrupting minds
to specialized kinds of false advertising. The clear intent
of the majority, which received considerable support from
such venerable opinion producers as the New York Times editorial board, was to get at the "business" of pornography. They were much less concerned with the material itself, and more interested in the profiteering, which most agree is considerable, which results in attempts or promises to satiate the prurient interests of those willing to be, or already, corrupted.

The ACLU of Pennsylvania, in its amicus brief before the U. S. Circuit Court of Appeals in the Ginzburg case, did not argue with the finding that Eros was obscene (i.e., that it did pander) but challenged the conviction on the ground that Ginsburg's various enterprises had some socially redeeming importance and that the severity of the sentence, five years' imprisonment and a $28,000 fine, would inhibit other publishers of material dealing with love and sex to an extent which would create de facto hostility to the First Amendment.¹⁶

Justices Black, Douglas, Harlan and Stewart all wrote separate dissents, with Harlan arguing that the federal government can ban only "hard-core pornography." The dissents of Douglas and Stewart were extensions of some of the points made in one of the angriest dissents
Justice Black, who authored many, ever penned. Even if one is prepared to overlook the fact that the federal government is not constitutionally empowered to prohibit any expression of speech or ideas (which, according to Black should have been enough to reverse this case), the fact still remains that "neither Ginsburg nor anyone else" could possibly have known pandering to be a federal offense since there was no such crime until the majority of his brethren created one in disposing of this case. Brennan had cited United States v. Rebhuhn (1940) a case involving pandering by authors of works describing sexual aberrations designed for psychiatric and anthropological scholars. Even that prosecution was unsuccessful. For Black the introduction of a new, hopelessly vague standard, in an area where government has no business anyway, gave unbridled discretion to the judge or jury which tries an individual for obscenity; the fourteen separate opinions handed down in the cases of Ginzburg, Mishkin, and Fanny Hill should make it abundantly clear that "not even the most learned judge, much less a layman, is capable of knowing in advance...whether certain material comes within the area of "obscenity" as that term is confused by the
Court today."

Black, in an apparent attempt to deal with an exasperating situation, even suggested that the lack of certitude in this aspect of criminal law was great enough to warrant clear censorship to avoid compounding constitutional transgressions.

As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal of freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted.

Variable Obscenity

Even when one puts to use the four parts of the Court's complex formula for obscenity, one question still unanswered is: "Can a state set more restrictive standards for minors by prohibiting the sale to persons under 17 years of age of material which appeals to the prurient interest of minors; is patently offensive to the prevailing standards in the adult community as to what is suitable material for minors; and is utterly without redeeming importance for minors". New York State, which had such a "variable obscenity" statute, received approval from the
Supreme Court in *Ginsberg v. New York* in 1968. The issue in this case was not the fact of obscenity, since the defendants made no challenge on this ground, but simply whether a citizen's freedom to read can be made to depend upon age. Such an adjustment of the definition of obscenity, according to Brennan and the majority, simply brings the concept in line with "social realities" by permitting assessment of the material in terms of a specific age group. That the well-being of children is within a state's constitutional power cannot be questioned, and while parents are primarily responsible for their children, they are also entitled to the support of laws "designed to aid in the discharge of that responsibility."

In a separate concurrence, Justice Stewart warned against a "doctrinaire, knee-jerk application of the First Amendment." The basic value of the First Amendment is that it guarantees a society of free choice, but such a society presupposes the capacity of its members to choose. A juvenile audience, because of lack of development, is like a captive audience, i.e., not possessed of that full capacity for choice which the First Amendment presumes, and the same rationale which permits government to regulate
sound trucks can sustain the regulation of the reading matter of minors.

Douglas and Black dissented, with their traditional objection to the notion that obscenity is unprotected by the First Amendment, and Fortas dissented on the ground that the court should have tackled the question on whether the magazines were in fact obscene. Obscenity may be variable, but so may abridgement of constitutional rights, Fortas warned.

It was unfortunate that neither the defendants nor the judges decided to challenge the fact of obscenity, because New York had a concrete and reasonably clear (as these things go) statutory definition of obscenity which made it an offense to depict, "...female...buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple...."

Such precision gets away from the Court's attempts to make prurient relate to the total milieu of sexuality, and if reviewed by the Supreme Court would have led either to a reassertion of the basically "attitudinal" as opposed to the anatomical approach to prurience, or at least have
called forth Justice Brennan's views on the exact status of the areola.

Some interpret Ginzburg and Ginsberg to be judicial reactions to attacks on the "permissiveness" of the Warren Court, but in the 1967 term, for example, the Court reversed thirteen state and federal obscenity convictions - one of which concerned a ten-year sentence for sending obscene material through the mails. But the court also sustained a ban of a film which it viewed as hard-core pornography and the conviction of a sculptor who displayed life-sized erotic sculpture in his yard.\textsuperscript{19} Even "variable obscenity," the Court insisted, must not be so vague as to give unfettered discretion to local authorities to determine what minors shall think. In 1968 the court struck down a city ordinance which empowered a motion picture licensing board to ban exhibition of films to minors in which the portrayal of brutality and sex would tend to incite crime and encourage sexual promiscuity among youths. Such undefined terms as "sacrilegious" and "sexual promiscuity," the Court held, made the ordinance defective because of vagueness.\textsuperscript{20}
Possession

In *Mann v. Ohio*\(^1\) the Ohio affiliate of the ACLU submitted a brief which sought to have the case overturned by striking as unconstitutional the state statute prohibiting possession of obscene material. Although some of the justices indicated skepticism about the law's broad scope, the Court disposed of the case on Fourth Amendment grounds.\(^2\) But in 1969 the Supreme Court, in *Stanley v. Georgia*, reviewed a state statute which punished possession of obscene matter.\(^3\) This attempt to get at the problem through the consumer was found unconstitutional because the Fourteenth Amendment prohibits the making of mere private possession a crime. The material in this case consisted of films which state officers seized after federal and state agents had found them in the defendant's home which they searched pursuant to a search warrant issued to investigate the defendant's alleged bookmaking activities. There were no dissents in this case, and the concurrences of Stewart, Brennan, and White were based on illegal search and seizure and inadmissible evidence considerations. Justice Marshall, however, expressing the view of six members of the court, claimed that while *Roth* did declare
that obscenity is not protected speech, it meant this in the context of government's "important interest" in regulating commercial distribution of obscene material. Without really explaining why government's interest, if that substantial when dealing with commercial distribution, could not also extend to private possession (since the material still lacks social value, etc.), Marshall simply asserted that the First Amendment guarantees the right to receive information and ideas regardless of their social worth. While it could easily be argued that preventing a citizen from being sold such material would also violate the First Amendment, Marshall indicated that the basic right of privacy was also involved and quoted Justice Brandeis' dissent of 1928 which claimed that the "right to be let alone" was "the most comprehensive of rights and the right most valued by civilized man."

Stanley was an interesting case because there were "dicta" which indicated that the Court looked at this question the way Black and Douglas would have handled all obscenity cases. Marshall asserted, for example, that the state had no right to control the moral content of a person's
thought, and Georgia's claim that exposure to obscene material could lead to deviant sexual behavior and crimes of sexual violence had "little empirical basis." Marshall also reintroduced the clear and present danger test to the discussion by claiming that although Roth had made such considerations clearly irrelevant, if the issue involved private possession the state must establish a clear probability of anti-social conduct. The rationale for requiring different rules for private possession as opposed to distribution and sale was that in the latter case there was the risk that material might fall into the hands of minors or that the "material might intrude upon the sensibilities or privacy of the general public." The argument here, which Marshall implied but did not spell out, is presumably that distribution, sale, and all related advertising are "public" dimensions and therefore fall under public regulation, if not public taste; whereas obscene material in the home effects only individuals, not the general public. While this is a quite reasonable distinction, since even a libertarian with the most libertine of tastes should not object to such things as regulation of advertisements outside movie theaters where the public is part of the semi-captive street
audience, it is an interesting development because it is almost a total reversal of the original motivation of obscenity statutes. As Louis Henkin has pointed out, "obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for...the salvation and welfare of the 'consumer.' Obscenity at bottom is not a crime. Obscenity is sin."24 The holding in Stanley would seem to indicate that the Supreme Court has divorced the concept from its quasi-religious basis and made it a crime directed at a particular form of public interaction, most generally described as pandering. Just as in English law, where the activity of corrupting is considered criminal even if being corrupted isn't, the American concept is directed at exploitation of prurient material rather than prurient material itself.

Methods of Control

While always reaffirming the validity of the concept of obscenity, the Supreme Court has made numerous rulings about the methods authorities may use to combat that which is patently offensive. It insisted, for example, that a state cannot prohibit the selling of works to the
general public on the grounds that the works would be harmful to minors. In the same year, however, it approved the use of injunctive proceedings against the sale of obscene material. In Smith v. California (1957) the Court struck down a city ordinance because it did not clearly specify that a bookseller must knowingly sell obscene material and therefore it failed to meet the proper "scienter" requirements. Requiring a bookseller to inspect personally all the works he sold, the Court reasoned, placed an unrealistic restriction on the free flow of ideas. In this case the Court also scolded the trial court judge for refusing to allow expert testimony as to the fact of obscenity. Since the offense is dependent upon an assessment of prevailing community standards, etc., this question cannot be answered without expert testimony, and a denial of such testimony, according to Justice Frankfurter, violated due process.

In 1963 the Court dealt with one example of the numerous "informal" sanctions applied by various pressure groups on booksellers to discourage them from handling certain publications. In Bantam Books, Inc. v. Sullivan, the issue was the propriety of Rhode Island's Commission
to Encourage Morality in Youth, a legislative invention charged with "educating" the public about obscene publications.\textsuperscript{28} Part of the curriculum in this educational endeavor consisted of notifying book distributors that certain material handled by them had been found objectionable for sale to minors. The notification, on official stationery, thanked the distributors for their cooperation in this matter and reminded the recipient that the commission had a duty to recommend prosecution of the sellers of obscene material. The Commission claimed that it was merely advising distributors, not engaging in censorship, but a majority of the Supreme Court found that such "advisement" was motivated by a desire to use the threat of criminal sanctions to achieve what probably could not be achieved by the criminal sanctions themselves and avoided any of the procedural safeguards of criminal proceedings.

Even though the Court had approved of injunctive proceedings when a trial quickly followed the seizure of material, it was quick to declare defective proceedings in Missouri which gave police the power to seize publications with warrants based simply on complaints rather than any specific description of the material to be seized.\textsuperscript{29}
In 1964 injunctive proceedings were again reaffirmed when they involved genuine judicial supervision of specific material to be seized, but the Supreme Court also required the hearing on the question of obscenity to take place before warrants were issued rather than after, thus tightening the restrictions on confiscation of material.  

Obscenity and Movies

The status of motion pictures in American law differs somewhat from other modes of expression because of an early constitutional history, dating back to 1915, in which they were not viewed as either the "press" or as "organs of public opinion." This insistence that movies were more entertainment, but also entertainment "capable of evil," withdrew the cinema from First Amendment considerations and was the basis of prior restraint in this area. Some dicta by Justice Douglas in a 1947 decision, however, indicated a willingness of at least some of the justices to consider movies as equal to newspapers and radio as protected media of thought. In Burstyn v. Wilson (supra) the Court was willing to call movies a "significant medium for the communication of ideas," but the holding was restricted to the negation of censorship based on the belief that the material is
"sacreligious." But in 1961 a narrow majority of the Court, in Times Film Corporation v. City of Chicago, reaffirmed by implication the unequal status of films by holding that prior censorship per se was not unconstitutional.33 This was not a clear ruling, since the defendant sought an injunction to prevent a Chicago censorship board from preventing him from showing films which he refused to submit to the board for approval, and the majority seemed to rely partially on the notion that no abridgement of a right would be clear until pictures had been submitted to the board. Such a rationale presumed, however, that a state has some legitimate interest in reviewing motion pictures, and the majority alluded to obscenity as perhaps the only proper object of prior restraint. Justice Clark, writing for the majority, seemed to justify the holding in the case by invoking the doctrine that films were not subject to the same rules as other methods of expression and that have some latitude as to how they shall deal with films. Chief Justice Warren, joined by Black, Douglas and Brennan, did not agree that the distinction between film and other media rose to the dignity of a constitutional matter; they viewed the majority's holding as an endorsement of censorship.
The *Times Film* ruling was upheld in theory but greatly limited in practice when the Supreme Court established elaborate procedural requirements for film censorship in *Freedman v. Maryland* in 1965.\(^{34}\) Since refusal to submit films to censorship boards had failed to force the issue of prior restraint of films squarely before the Court, the tactic this time was to show the movie anyway. This conviction was overturned because, on the appellate level at least, the argument of the defense was not that there could exist no prior restraints on movies, but that the particular Maryland procedure was an invalid prior restraint because it presented "a danger of unduly suppressing protected expression." Justice Brennan, for the majority, found the Maryland system defective because it contained no time limit for completion of review and the elimination order did not provide for judicial participation or the assurance of prompt judicial review. "Unlike a prosecution for obscenity," Brennan stated, "A censorship proceeding puts the initial burden on the exhibitor or distributor," and the burden actually is on the censor to prove that a film is unprotected. The Court also required censors to seek a restraining order if they wished a film banned, so that their actions
would not, even in a de facto sense, have the effect of finality, and the procedure must assure a quick judicial decision. Justices Douglas and Black concurred, but argued that no type of censorship, "speedy or prolonged," is permissible in a nation guided by the First Amendment.

Chicago's attempt to enjoin the showing of such epics as "Rent-A-Girl" and "Body of a Female" with a censorship ordinance it felt was written in accordance with the Freedman rules was overturned in 1968 when the Supreme Court found the procedure to lack the necessary promptness or guarantee of a final judicial decision.35

Even though a majority of the justices have been unwilling to move against a state's power to censor motion pictures, they have done things which greatly weaken it. For example, they have consistently stated that the constitutionality of laws imposing prior restraint is more suspect than that of laws which simply provide for subsequent punishment on grounds of obscenity. The burden is heavy in normal obscenity prosecutions, and the same standards for "what is obscene" apply to movies, and the procedural requirements laid down in Freedman increase the load on the state's
machinery to justify its intervention.

There is some judicial authority stemming from lower federal courts indicating that laws seeking to regulate motion pictures may distinguish between what is acceptable to adults and to children. But the Supreme Court in 1968 struck down a city ordinance which classified films as "suitable for young persons" (under 16) and "not suitable for young persons" and required a special license for the "not suitable" films. The definitions of what constituted "not suitable" things was unconstitutionally vague, according to the Court, and having the vagueness divided into two categories did not make it less objectionable. If a statute is not otherwise vague, variable obscenity would also apply to attempts to regulate films prior to showing.

Reaction to the Judicial Approach to Obscenity

Reactions to the Court

Congress gave forth occasional rumblings of protest about the number of obscenity decisions overturned by the Court. Senator Everett M. Dirksen, in the context of the
battle over the nomination of Abe Fortas for Chief Justice, proposed an amendment to legislation (to ban the interstate mail order of firearms) which would have stripped the Supreme Court of the authority to review jury findings in federal and state obscenity prosecutions. This move was unsuccessful but received enthusiastic support from such notables as Ohio's Frank Lausche, who claimed that he had not seen any of the material the Court had held not to be obscene, but "senators have told me about them and what they say is unbelievable." 37

In 1967, however, Congress enacted legislation designed to give members of the public who received unsolicited "pandering advertisements" a recourse to enjoin specific delivery. Under this act if a person receives material he believes to be obscene or advertisements based on an obscene appeal, he may request the local postmaster to direct the advertiser to stop sending him the material. If the sender continues to send the material, procedures for obtaining an injunction to stop delivery to the protesting individual were established. Proponents of this legislation argued that the act imposed no censorship
since it deals only with unsolicited mails and enhances the individual right of privacy. The ACLU opposed the act on the grounds that it gave the addressee the power to make the decision about what is obscene and what he shall receive. Lawrence Speiser, director of the Washington office of the ACLU, justified his attack on the law by making a clumsy analogy to the danger to freedom of speech if an addressee could take action to prevent the delivery of offensive circulars. In addition to the fact that that was not the issue with this law, it is extremely dubious that the First Amendment requires citizens to unconditionally accept the presentation of all points of view. The right to speak may in a general sense imply a right to be heard, but it is not necessarily illiberal to suggest that this obligation is moral in nature, not legal, and that it does not involve the right to a captive audience.

Pornography Commission

The Federal Commission on Obscenity and Pornography appointed by the Johnson Administration had some volatile hearings during the process of drawing up its report, such as when a leader of the "Underground Press Syndicate"
dumped a cheese pie on the head of Commission member Professor Otto N. Larsen; but the most spectacular event was the report itself. The majority of the Commission, led by William B. Lockhart, Dean of the University of Minnesota Law School, concluded that pornography was not harmful to individuals and that legal controls for adults were unnecessary. It recommended the repeal of all Federal, state, and local laws pertaining to "consenting adults" who wished to obtain a prurient experience, but voted to retain legal restrictions on public displays, unsolicited mailings and distribution to minors. Charles H. Keating, Jr., a Cincinnati attorney, founder of the Catholic Legion of Decency and President Nixon's only appointee to the Commission, led the six dissenting members and even obtained a temporary injunction preventing publication of the majority report. The majority report, however, was "leaked" to the press anyhow, and Keating's rebuttal consisted of the charge that the Commission's recommendations could lead to "paganism and animalism." Keating also happened to mention that he believed himself to be the "only ordinary citizen" on the Commission, and Attorney General Mitchell and Robert Finch joined in condemning "counsels of
irresponsibility." Vice President Agnew chalked the report up to the "radical liberals," who

...work themselves into a lather over an alleged shortage of nutrients in a child's box of Wheaties--but who cannot get exercised at all over the same child's constant exposure to a flood of hard core pornography that could warp his moral outlook for a lifetime.42

Herbert L. Packer, writing in Commentary, found the Report to be of little value to either side in the control of pornography controversy.43 The dissenters, he claimed, based their case on anecdotal reports by police about the danger of pornography, and the majority invoked lengthy, but frivolous, behavioral data which tried to establish such irrelevant facts as: (1) only two per cent of those interviewed found erotica to be an important national problem; (2) most Americans believe erotica harmful to others; (3) most believe erotica is not harmful to them; (4) the attitude about the harm of erotica correlated positively to age (older), low education, and political conservatism. The behavioral responses to erotica were based primarily on second-hand data in that people were asked their recollections of their reactions to pornography.

Another study compared a group of convicted rapists with
a group of non-criminals and concluded that the mean age of first-exposure-to-erotica is slightly higher for rapists than for college students and members of men's clubs, which Packer thought not very relevant to anything.

One study actually sponsored by the Commission caused a row when some Congressmen learned that funds they had allocated were financing an experiment at the University of North Carolina in which 23 male students were exposed to erotic material while hooked up to a device which measured heart rate, urinary acid phosphates, and condition of the subject's penis. This particular data indicated, according to the researchers, that physiological reaction to erotica decreased as subjects became satisfied with erotica. In short, neither side proved anything, but the liberals were the more sophisticated about not proving anything.

**Pressure Groups**

The best known, and perhaps most highly organized, group supporting government restriction on grounds of sexual (and sometimes when coupled with the concept of sacrilege, religious/political) impropriety is probably the Catholic community. However, the pressure in this
direction is by no means confined to Catholics. Numerous Protestant groups, local Councils for Decent Literature (which can have a secular base), PTA’s, women’s clubs, and fraternal orders combine with the formal mechanisms of state legislatures, courts, license commissions, censorship boards, as well as internal industrial codes, indirect pressure upon theaters, bookstore owners which, together with picketing and boycotts, all coalesce in an attempt to condition American sexual mores.

Pressure from private groups which can have the same effect on authors and filmmakers as governmental censorship posed a delicate problem for the ACLU. When Cardinal Spellman, for example, not only urged Catholics to refrain from attending The Moon is Blue, but also urged a continuing boycott of the theatres where the film was shown in 1951, the Union expressed concern. The simple expression by any individual or group of disapproval of any film or book or any attempt simply to dissuade others from buying it was defended by the Union as being within both the letter and the spirit of the Constitution.

The ACLU also recognizes, as far as legal right is concerned, the use of such orderly and lawful means as peaceful and unobstructive picketing and the organization of a specific and primary boycott, even when they imply some degree of coercion. How-
ever, in view of the fact that the field of communication differs significantly from the general field of industry and commerce, the Union actively opposes, as being especially contrary to the spirit of the Constitution, the use of such means in the following ways: (1) as pressure, or explicit threat thereof, at any time prior to the actual offering of a motion picture, etc., to the public; and (2) even after the actual offering to the public, in the form of a general or secondary boycott—designed, for example to close a theatre entirely or close other theatres whose proprietors ally themselves with the proprietor of the first theatre. The ACLU believes that intimidation and reprisal have no place in the field of ideas.44

In November of 1955, after the Roman Catholic Bishops announced an intent to revive the Church's campaign against indecent pictures, some segments of the movie industry reacted to the Catholic Bishops in an attempt to counter their impact on public opinion. Dore Schary, then executive head of Metro-Goldwyn-Mayer (also a member of the advisory council of the Southern California ACLU), while emphasizing the right of the Bishops to crusade against the morally objectionable, expressed a hope that they would respect the rights of others to make movies as they saw fit. Variety, the weekly show business publication, did an extensive series of articles on local Motion Picture
Councils, whose original function was to make positive recommendations about films which they regarded as especially edifying or entertaining, which claimed that Catholic members of the Councils were trying to persuade the group to issue condemnations of films judged unworthy by the Legion of Decency.45

In some communities the Legion of Decency effectively organized parts of other associations to apply pressure on both law enforcement officials for more stringent application of obscenity laws and against booksellers and movie theater owners to stop the sale of material they considered objectionable. Many Parent-Teachers Associations, for example, delegated this sort of function to "Catholic Mothers Clubs."46

The Legion of Decency characterized the film Baby Doll as "morally repellent both in theme and treatment" and placed it on its "condemned" list in 1956. Cardinal Spellman gave the effort a boost by personally appearing in the pulpit to warn Roman Catholics in his diocese that the viewing of such a film would constitute the commission of a sin. In Albany, New York, there was a 6-month ban on attendance by Catholics to all films in all local theaters.
which had shown *Baby Doll*; Connecticut Catholics were forbidden to attend showings; newspapers in Syracuse and Troy, New York refused advertisements for the film; a New England theater chain refused to book the film; in Jackson, Tennessee the distributor was warned by the city council and Gary, Indiana, refused to allow the film to be shown. The ACLU, in several statements during this episode, enjoyed pointing out that attendance at the same film was only restricted to adults by Bishops in France and England.47

In the 1950's cities such as Baltimore and Chicago used the 500-title list of the National Organization for Decent Literature as a guide for book and magazine dealers when the communities began drives to eliminate the causes of juvenile delinquency.48

The "unremitting war" of the American Roman Catholic Bishops against obscenity was expanded when the Catholic War Veterans joined with the NODL, the Legion of Decency and the Catholic Mothers Clubs in 1957. The CWV's particular assignment included a nationwide campaign to banish books by more than 40 writers from public school
libraries which led to numerous local incidents.49

In 1957 the Union issued a statement charging the NODL with attempting to institute de facto censorship in the United States and taking actions "seriously violative of the principle of freedom." The ACLU emphasized that it did not "presume to object to the NODL advising communicants of the Roman Catholic Church about any publication, but the 1957 statement which was also signed by 150 persons prominent in the fields of publishing, literature, education and the arts, charged that NODL black lists, general boycotts and its "certificates of compliance" to local booksellers resulted in "the judgment of a particular group...being imposed on the freedom of choice of the whole community."50

Not all of the tactics of the Legion of Decency and the NODL are accepted by the Catholic community, however. John E. Fitzgerald, an editor of a Catholic weekly, has long insisted that film classification schemes should be binding only on those who wish to be so bound; i.e., Catholic classifications for Catholics. Another Catholic spokesman, J. D. Nicola, a lay member of the Legion's board of consultants, publicly stated in 1959 that he felt that
classifications which went beyond simply attempts to separate films not suitable for minors "may create more problems than they solve."

The Catholic Church of course has no monopoly on the concern for things decent. The Churchmen's Commission on Decent Literature, a national Protestant group organized to combat objectionable literature, proposed the establishment of "voluntary review boards" along with a published checklist naming specific publications it viewed as obscene in order to combat newstand obscenity. Most of the Commission members were associated with evangelical churches and, according to the ACLU, the National Council of Churches had not given the group its endorsement.

The Citizens for Decent Literature, a secular group favoring stronger measures against obscenity, was formed in Cincinnati in 1958 and inspired more than 100 similar groups in all 50 states. The organization has 17 units in Ohio, 14 in California, and eight each in Indiana and Illinois. Prominent religious and political leaders are frequently listed as local sponsors, as in Portland, Oregon, where the group was called the Mayor's Committee for Decent Literature.
The CDL does not view itself as engaging in censorship, "merely the exercise of every citizen's right to stand up and be counted, to state his belief in what should be allowed and prohibited in society." Publication of lists of "objectionable" works, with the plea that police use such lists in local clean-up campaigns, is the group's most widespread technique. Letter-writing campaigns to public officials and trial judges as well as attendance at obscenity trials are also sometimes used. The latter brought about judicial rebukes and threats of contempt citations in Cincinnati and Indianapolis. The Buffalo Youth Board's Salacious Publications Committee reportedly contained two policemen who "suggested" to retailers that they remove offending magazines and books to avoid "running into trouble." 53

In 1958 the ACLU complained of private pressure group tactics in Oklahoma City, where the chairman of a citizens' volunteer committee said his group would ask retailers to sign a public pledge refusing to sell "indecent" magazines. He proposed to turn over the names of those declining to sign to the county attorney for "whatever action he deems proper." The Union also expressed concern
over a massive letter-writing campaign to trial judges while hearing obscenity cases in Cincinnati. One judge, the ACLU reported, withdrew from hearing three scheduled obscenity trials because of the amount and nature of his mail.  

The ACLU and the NYCLU successfully countered a tactic of the Post Office Department in 1959 when all post offices in New York's Nassau County had posted reprints of an editorial by the Rev. Daniel Poling, editor of The Christian Herald, which opposed the circulation of the unexpurgated version of Lady Chatterley's Lover. The response to the protest was an order removing the Poling reprint as "not in accord with postal regulations" and the pledge that "henceforth (officials) should not post statements by private individuals."  

Although the ACLU is opposed to pre-censorship in any form, in 1960 it considered a new law, which limited the power of the Postmaster General to impound mail allegedly connected with the sending of obscene materials by requiring him first to seek authority from a Federal District Court, as a "qualified victory." In the Union's view the measure
thwarted attempts by the Postmaster General to "increase his vast and often abused powers and deprived him of his previous power to impound mail by his own fiat."56

One interesting example of the determination of groups interested in controlling the flow of "smut," as well as their power to translate their wishes into formal community sanctions, was a case decided by a federal District Court which sought to use the letter of the law to harpoon any First Amendment "spirit." Lower federal court rulings had voided any ordinances which expressly prohibited the showing to adult audiences of films which were not suitable for children. A federal District Court was asked, in 1968, to review a city ordinance which got around these rulings by simply making it illegal for any theater to show "adult" movies to minors and then making it illegal for any theater to deny admittance to minors.57 The city argued that such a denial was "discriminating and against public policy and good morals." The Court, commenting that the "adult moviegoer may not be restricted to the pablum in Mary Poppins," reasoned that such legislation, in addition to being vague, tried to achieve a result which went beyond the child and reached into the protected realm of adult ideas.58
Philadelphia was the site of a literal "bookburning" in 1963 when a group of concerned clergymen burned some magazines they found offensive in order to dramatize the beginning of a local boycott against the sellers of indecent literature. The ceremonial fire, attended by the local police commissioner and the superintendent of schools, was denounced by the ACLU as "an obnoxious symbol of intolerance and bigotry, reminiscent of Hitler and Savonarola."\(^5^9\)

A Texas community had a law which penalized both the owners of movie theaters who admitted minors to certain classes of films and the parents of the minors. In 1959 six large bookstores in San Francisco received bomb threats from a group dubbing itself the Vigilante Committee for Decent Literature, but usually the pressure to clamp down on the flow of obscenity is less flamboyant.\(^6^0\)

All sorts of private groups which are organized to protect and further other interests can become involved in the struggle over obscenity. The American Book Publishers Council is a trade association which has a vested as well as libertarian interest in reducing controls over published material. In 1957, for example, the Council issued a public
warning to the Chief of Police in Springfield, Vermont, that his reported circulation of the NODL list to bookdealers with instructions to stop selling listed volumes was illegal.61

A proposal in 1963 by a Maryland Junior Chamber of Commerce group to establish a national Jaycee "seal of approval" to drug stores which do not "...expose young people to pornography," established a dialogue between the National Junior Chamber of Commerce and the ACLU. The ACLU stated that it felt "a seal of approval for books... particularly obnoxious because it is a weapon that leads to widespread censorship... Thus the will of a private organization by means of economic sanctions, is imposed in the highly sensitive field of communication."

The MJCC eventually decided against issuing any list of undesirable magazines.62

Obscenity and Social Reality

Part of the reason obscenity is taken so seriously, of course, is that it deals with sex, and sex is taken very seriously, at least in legal codes. As Fred P. Graham once slightly over-stated the case:
...it is only a slight exaggeration to say that currently all sex but face-to-face relations between spouses is criminal in this country. Non-cunnubial hanky-panky is outlawed under fornication and adultery statutes in 48 states. The two holdouts are Louisiana and Tennessee. (The presumably wider opportunities for lechery in these two states, however, are dimmed somewhat by the fact that the age of consent for females is set at 21.)

...The situation is particularly critical in Kansas, where an overzealous swain can get one to five years at hard labor for enticing a woman for the purpose of fornication— even if the enticement is not successful. 63

But anyone who has been in the central part of almost any American metropolitan area should be aware that probably no aspect of American life has changed as radically as the apparent decline in the de facto concern over obscenity. A cursory glimpse of some bookstores and movie theaters which not only "pander" but try very hard to deliver on their promises makes the issue of obscenity in courts and legislatures seem largely academic.

Maryland is the only state still to have a movie censorship board, but six states had such boards until the 1950's, and over 200 cities had review boards. Frequently these boards required fees from the movie industry itself to sustain their operation, and in 1950, for example, the
industry paid about $1,800,000 in fees and expenses to comply with state and local censorship boards.64

The application of obscenity statutes is highly sporadic and seems to be largely a periodic gesture on the part of officials to remind society that it is still viewed as a legitimate target of legal action. Occasionally the gestures are successful, as when customs officials seized "I am Curious (Yellow)" when first imported from Sweden at the end of 1967. A federal appellate court ordered it released in November of 1968. But the Supreme Court sustained a state holding that the film was obscene.65 Andy Warhol's "Blue Movie," labelled by Vincent Canby as the film version of Warhol's boredom with life, was not only seized by the New York city police, but the theater manager, the projectionist and the ticket seller were arrested for possession of obscene material.66

The live theater has probably been the recipient of the most "change" in the spectacular shift in conventions about sexual candor and nudity. But along with this new mode of "expressiveness" came some degree of consensus that theatrical nudity was not only not prurient, but even anti-erotic. For example, Walter Kerr's unfriendly review of
"Oh Calcutta" concluded that Kenneth Tynan's attempt to explore the "trick wonderland of sex" was a disastrous failure because the medium of the live theater is itself hostile to nudity and simulated sex play because it places what are almost inherently private acts in a public context. Even if the only goal of "Oh Calcutta" was to be pornographic, it must fail, according to Kerr, because it is anti-erotic. It is anti-erotic because the sexual act itself possesses an autonomous quality which cannot tolerate even partial inattentiveness. On stage an actor is always doing something else (acting), and the totally open confrontation which is the glory and distinguishing mark of the live theater means that when sex is introduced, it "Asserts itself for what it is, exclusive, and thereby ruptures the nature of the event." In literature, Kerr claims, sex is only described by words, and the words protect this exclusiveness. Film is much less exclusive but still more so than the live theater, which may be incapable of producing erotica. 67

Legitimacy of the Concept "Obscene"

Argument of "Democratic Will"

Those who argue that the state has no interest in
relating anything, including prurient material, unless it can be demonstrated that some overt, harmful consequences will occur if action is not taken (such as Justice Douglas) are simply enunciating the central tenet of classical liberalism. The charge that this same formula is not applied to economic regulation overlooks the point that this exception is usually made in the name of some egalitarian principle, and the rationale for making obscenity part of the list of exceptions can hardly be related to egalitarianism.

Some who are opposed to any attempt to regulate pornography are still opposed to the apologetics for pornography, either in the form of arguments that it is a beneficial "escape valve" for the lonely and alienated (which is just as unprovable as assertions about its harm) or "aesthetic" defenses of pornography. Stanley Kauffmann argues that when true pornography (as opposed to erotic material) is stripped of its intellectual cant and the veneer of education which it frequently uses to establish its credentials to be explicit, it emerges as an exclusively masculine form of vindictiveness. It is "...a species of male revenge on our social systems of courtship and
monogamy . . . time out from civilization . . . brutal. . . .

But the conventional view of most libertarians is that while the concept may have some utility as an aesthetic term it is not a valid legal concept. Not liking the concept and deciding who can authoritatively get rid of the concept are different questions, however, and some fall short of calling the concept *constitutionally invalid* on the grounds that the redress should be legislative rather than judicial. Alexander M. Bickel, for example, would agree that the American law of obscenity is in shambles, but finds the cause of this condition to be in the willingness of the Supreme Court to intervene in a policy area. What the judges have managed to do in the obscenity cases, according to Bickel is to substitute their subjective reaction to salacious material for that of the legislators, prosecutors, police or jury. Since obscenity is not and should not be protected speech in Bickel's view, invoking the First Amendment is misplaced, and without such invocation the Court has no grounds for claiming jurisdiction over such questions. Bickel does think that criminal obscenity statutes are sufficiently vague for the Supreme
Court to declare them unconstitutional on due process grounds, because to dispense criminal punishment constitutionally the offense must be clear. But other attempts to control the flow and direction of obscene material in a society, while unwise and probably ineffective, are, for Bickel, constitutional.

...I do not argue for censorship. I would wish—I think I would wish—anyone to have the right to publish or show anything that anyone else may want to read or see, and we would take our chances. But I don't know where to find reasons convincing enough to be enshrined as constitutional law for compelling others, who may be in a majority, to wish as I do. I should hope a majority could be persuaded on prudential grounds that a lot of censorship is unwise, and ineffective to boot, and that a little goes a long way. But the constitutional problem of obscenity, the question of whether and how judges are to decide what a community must tolerate and what it may censor is, I maintain, a baffling one, to which the solution escapes me. 69

The viewpoint that literature and films ought to be beyond governmental regulation because no clear relationship to anti-social conduct can be proved, is, for Bickel, slightly beside the point because many other people believe there is a connection between crime and obscenity. They cannot prove it, but "libertarians" can't prove their case either. Many people, including those who resent regulation
in the name of obscenity, are in favor of intervention to curb the portrayal of violence in movies and comic strips, which Bickel feels reflects a curious one-sided anxiety about crime. Richard Gilman's defense of this apparent inconsistency on the grounds that witnessing aggressive acts has no sublimated manifestation short of violent acts, whereas sexual tension, because of masturbation, is capable of expression without injuring others is, to Bickel, "a hilariously solemn explanation."  

Bickel suspects that some may find such sublimation "not fully satisfying," and that Gilman's point of view reflects a quite widespread belief, shared by those who are concerned about obscenity, that mankind learns from what he reads and now and then acts upon what he learns. The concern, he argues, is the same—a concern for the "aesthetic . . . style and tone of society," which is not very different than the concern with pollution, traffic jams, national forests and open seashores. The mores of a community, where they concern the entire community—which publicly circulated material does—are frequently regulated by law. While too much regulation is bad, and we should learn to tolerate the deviant and eccentric, to regulate taste is
not unconstitutional, and in a democracy, Bickel implies, is even to be expected.

To the more pristine libertarians, who would argue that no type of expression, be it aggressive or prurient, should be subject to regulation because it is not conduct, Bickel argues that distinctions between conduct and speech are convenient but also arbitrary. Regulations of many sorts which regulate "aesthetic" things treat expression and conduct as synonymous, and the only democratic constitutional grounds for interfering with the community's desire to establish such standards is when the speech is "political" in the sense of being essential to the communication of ideas.

"Quality of Life" Argument

Not all defenses of the concept "obscenity" by liberals take the form of deference to majority will. Arguments such as Bickel's usually assume that obscenity statutes are unwise, but allowable, in a democracy, and are usually bolstered by a defense of judicial review (interference) related to an essentially democratic rationale, such as the maintenance of an open political process. Irving Kristol has defended the concept of
obscenity and its legal sanctions by claiming that total sexual candor is not merely a convention of puritanical societies but a reflection of a "unique sense of privacy" which characterizes all cultures and is indigenous to the human race. 71

Kristol, after noting that genuine obscenity is "sexism" and dehumanization of sex into simple copulation rather than an emotional relationship, hypothesizes a situation in which a well-known man had an excruciating and ignominious death which was televised for our enjoyment. Our reaction, Kristol hopes, would be that such a performance would be an undefensible invasion of privacy—that it would be obscene. The same is true of sex, according to Kristol, but he neglects to mention the rather critical fact which helps to make his hypothetical analogy irrelevant; namely, that neither the performer or the performance is voluntary. This point doesn't especially bother Kristol, however, because the root of the problem (for the liberals opposed to obscenity legislation) is a misunderstanding of the true nature of democracy. Any conception of democracy, he asserts, which views the ideal government as nothing but a set of rules and procedures fails to see that the
purpose of any political regime is to achieve some version of the "good life" and the "good society." While such a statement fails to distinguish between a political regime and a political system, Kristol would reject such distinctions as an example of what he calls the "managerial" conception of democracy; i.e., one void of non-procedural content."
The older, truer (and more Greek, even) meaning of democracy is self-rule. This presumes, Kristol says, that the "self is worthy of governing," and requires an obligation not only to educate the individual self in "republican virtue," but that the public not be governed by"the more infantile and irrational parts of themselves." Those who desire the good life and not simply a system which has as its goal "...the endless functioning of its own machinery," must favor censorship. It has not been impossible for liberals to accept the notion that consideration for the "quality of life" necessitate restrictions on individual freedom ranging from economic restrictions to abolition of cigarette advertising on television. The issue, he insists, is not censorship, but whether the proposed censorship is "liberal" or "repressive." Censorship of pornography is essential,
Kristol holds, for two different kinds of reasons; the first relates to the protection of the individual and the second to the preservation of art. The danger to the individual, according to Kristol, is that there might be something as well as total boredom which characterizes the condition of those saturated with pornographic experiences.

The basic psychological fact about pornography and obscenity is that it appeals to and provokes a kind of sexual regression. The sexual pleasure. . .is auto-erotic and infantile. . .a masturbatory exercise of the imagination, when it is not masturbation pure and simple.

. . .infantile sexuality is not only a permanent temptation for the adolescent or even the adult--it can quite easily become a permanent, self-reinforcing neurosis. It is because of an awareness of this possibility of regression toward the infantile condition, a regression which is always open to us, that all the codes of sexual conduct ever devised by the human race take such a dim view of autoerotic activities and try to discourage autoerotic fantasies. Masturbation is indeed a perfectly natural autoerotic activity, as so many sexologists blandly assure us today. And it is precisely because it is so perfectly natural that it can be so dangerous to the mature or maturing person, if it is not controlled or sublimated in some way.72

Kristol goes on to indicate that he thinks the basic question about obscenity involves "civilization itself" and briefly alludes to Nietzsche, "everything is permitted
..." and the struggle between nihilism and civilization. Such a detour into philosophy need not concern us, save to point out that "nihilism" is frequently a philosophical counterpart to the "international communist conspiracy" argument. The danger is usually over-rated, and the proponent argues from ad hominem to ad horrendum.

Kristol's second practical argument is designed to turn the tables on those whose opposition to obscenity legislation stems from a consideration of art and the free development of better art. This argument usually claims that much significant literature has been or would have been lost to the censor's pen, but Kristol thinks very few works of "genuine" literary merit were ever suppressed (although he doesn't explain how he would know about the ones that were suppressed). Good literature can even be at a competitive disadvantage in a society where everything is permitted, and the desire to curb Gresham's Law in the interest of good art leads Kristol to justify penalties for obscenity and censorship in certain areas. The censorship-in-the-interest-of-art argument is taken less seriously by Kristol than it might appear, because he concludes with the statement that he thinks that pornography should be
illegal and available to those who want it badly enough. Liberal enforcement, together with the fact that it is difficult to enforce anyway, will, according to Kristol, perpetuate the existing under-the-counter pornography trade which has gone on for centuries. The dichotomy between the ideal and the real is beneficial to the ideal -- this seems to be Kristol's argument.

Other Attacks and Defenses

Milton Konvitz, rejecting the point of view of judicial "absolutists," claims that "some censorship there must be," and would prefer that this function ultimately be performed by the Supreme Court. Konvitz sees the greatest difficulty with the concept as the assumptions about the effects of obscene material on those who are exposed to them, and he recommends further research. While it is certainly desirable to have constitutional law as well as less basic public policy based on carefully evaluated data, the argument that effects of salacious material cannot be proven and that we should defer to the judgments of legislatures contains several flaws. First it not only assumes that legislatures are engaging in vigorous quest
for data (which is rarely the case), but also that parties to the dispute are really interested in the issue of consequences. To assert that they should be interested in this issue has an aura of scholastic responsibility and a connotation that one is above metaphysical first principles but is also to wait for perfect information in an area where it cannot be obtained, and even if obtained would not solve the problem. Scientifically, as has often been noted, if one has all the results the decision makes itself; imperfect information calls for a judgment about what to do in the interim: a simple desire for more knowledge does not solve this problem. As we have asserted elsewhere, there is a problem among American libertarians because of their doctrinal rigidity. This bad habit does not make them invariably wrong, however (which can be a kind of rigidity parading as pragmatism). With the problem of obscenity the issue goes deeper than simple "absolutism," regardless of which side invokes the procrustian formulas.

Many critics of the Court's obscenity rulings are upset not only with the vagueness of the concept itself but with some of the tests the court has established to determine obscenity. Gerhard Falk, for example, finds the
"community standard" aspect of the Roth test an unworkable fiction in a pluralistic society where there is rarely a community standard about anything, let alone consensus about sexual candor. Konvitz would argue that while there may not be community standards before the Court announces some, after the announcement there are, and the simple fact that they are judicially created doesn't mean they are inaccurate. Konvitz believes it would be more honest for the Court not to pretend to find "a mysterious community standard of the morally tolerable," but that the Court should not ignore its duty to create such standards.

Konvitz shields the concept from the charge of undue vagueness by comparing "obscenity" to "negligence," claiming that both are terms of "legal art" which are summations of a jury's judgment about something and expressed as a "fact." Obscenity as distinguished from the seditious or the libelous is an attempt, in Konvitz's words, to work not from but toward a definition.

...the definition is found not in a verbal formula abstract from the obscene material, but in the material itself; the configuration, the Gestalt, that is "obscene" 'defines' the 'obscene' just as the facts of an automobile collision 'define' 'negligence,' and just as the facts of a fair trial 'define' 'due process of law.'
Another frequent criticism of the Court's practices in the area of obscene speech, even by those who do not believe that obscenity deserves constitutional protection, is that the complex Roth formula, especially the insistence that prurience be based on the impact of the work as a whole on an average person, means that supervision of the formula makes the Supreme Court a "Super Censor." It was this inherited role of the Court which greatly bothered Chief Justice Warren in Jacobellis and led him to suggest that the Court should require only "sufficient evidence" in the trial court record rather than the requirement of "substantial evidence" which would require the Supreme Court to reassess entirely and evaluate material which had already been evaluated by either trial judge or jury. Not only can this lead to substitution of the Supreme Court's judgment for that of the trial judge or jury and thereby erode the appellate nature of the Supreme Court's function, but it is an horribly inefficient use of the judiciary. Konvitz, among others, has argued that any "sufficient evidence" rule would have to forego any review of whether the material was, for example, really evaluated as a whole, etc. Since Konvitz is convinced that there must be censorship, his
argument is reduced to the question of who can best perform this function, and his conclusion is that the Supreme Court is better suited to this purpose because it is less susceptible to pressure groups than states or municipalities.

One of the prices of justifying the concept of obscenity theoretically is that someone is going to have to apply it, and while it probably is preferable to have the Supreme Court make this decision rather than a Chicago board of censors, it gives to the Court a role which, even if constitutionally justifiable, is almost impossible to perform adequately. The Roth standard has the practical effect of making either obscenity unworkable or the Roth standard unworkable, because the court cannot supervise its application in all cases. Konvitz's desire to keep the ultimate decision with the Supreme Court, and the desire of others for national application rather than local, has a similarity to Justice Black's argument for systematic prior censorship on the "if you must... then..." grounds. The basic question is still "if," and keeping a concept under control, while certainly not a frivolous consideration, is not a problem if the concept itself is attacked.
The Legitimate Concern

Obscenity and Ideas

Arguments about the harmful consequences of obscene material usually include assertions about harmful ideas as part of the consequences. Kristol's fear of the consequences is not only that it will lead to infantile behavior, but that it will enhance the notion that infantile behavior is acceptable. Even though the argument is usually phrased in terms which apparently restrict only behavior, this "behavior" is highly ideational. Justice Brennan's most fundamental distinction -- the distinction between those things with socially redeeming importance and those with none -- contains a basic aversion to a particular type of idea which the court has found difficult to express, but which probably corresponds most closely with what Kristol and others label the "dehumanization" of sex. The exact content of the "idea" is as elusive as the notion of prurience, but Stanley Kauffman has probably come closest to describing the ideational content of pornography when he claimed that the complaint that pornography distorts sex by depersonalizing it is inaccurate because pornography
(especially performed) tells the truth about sex. What
is this truth, this idea, communicated by pornography?
The unnerving accuracy of pornography, Kauffman states, is
its perception that sex "... is impersonal, that the
complete identification of love with sex is a romantic
fabrication."

Many people, especially women, could not
begin the sex act with partners to whom
they feel no specific attraction, but the
specifcs fade as the act progresses, and
it ends in the greatest commonality of
the human race. Porno is ruthless. It
proves that love, or anything remotely like
it is not essential to sex, that love is
an invention and has a limited congruence
with sex.

But my own view is that love is a good
invention, the best idea yet devised for
getting through life with minimal lone-
liness. I suppose that plenty of loved
and loving people go to porno shows
occasionally, but still it can be said
that porno is implicitly an attack on love
by an audience of the insufficiently loved,
who get their revenge by insisting that a
screw is only a screw.78

Kauffman is quick to add that he does not like to
see the "love-invention" attacked, but he would not invoke
the sword of the state to protect it. Even though the
members of the Court and others have more difficulty than
Kauffman in putting their objections to pornography into
words, their fear, like Kauffman's, is that obscenity is an
attack on some root ideas of "civilization." The usual rationale declaring obscenity not to be speech is that it is devoid of idea content— that it is the form rather than the content which is being suppressed, just as political speeches by sound truck can be regulated because of the mode, not the content.

The Roth test's insistence that obscenity is not anatomical but attitudinal belies the theory that censorship is an objection to an idea. To caution communities that they must consider the work as a whole and that sex by itself is not obscene reflects less of a concern for biology than for psychology and ethics. It is not actions themselves which are offensive but the way in which they are treated. The more removed sex is from the "love-invention" to use Kauffman's phrase, the more objectionable. The Roth test may not strike at sex itself, but it does strike at sex all by itself.

Because obscenity statutes are aimed at an idea and because they are attempts to protect a particular perception of sex, the argument that they are not speech must fail; and the notion that the idea is not socially redeeming is to be very heavy-handed in the delicate, if
not always subtle, debate about sexual mores. To state that pornography, to be pornography rather than something else, expresses an idea (because it is an idea) is to recognize that it should be protected speech, but is not necessarily to wish the particular idea success. One can hope that it loses favor or simply bores most people and joins the ranks of numerous ideas which democrats allow to germinate but hope will die out naturally. This is of course an "act of faith" of sorts, especially in a time when there is little evidence to indicate that Gresham's law bends to qualitative considerations. Whether this faith negates the "good life" which is the source of that faith is a question that ranges far beyond the simple issue of obscenity legislation and into the very heart of democratic theory. Without exploring the philosophical base, we can simply say that a Court charged with preserving a democracy and a democrat could find constitutional, or if you will, constitutional-democratic grounds for objecting to obscenity laws.

"Public Privacy"

Those who argue that we should curb attacks on the "love invention" are mistaken in calling that plea "democratic," but they are correct in calling it "popular," and it is
"popular" for reasons which go beyond a puritan heritage and self-righteous prudery. What most people recognize, and in a curious way what the doctrine of the Supreme Court in the area of obscenity has come to recognize, is that the fundamental problem is not "obscenity" however defined, but an invasion of personal privacy which most people feel when confronted with pornography. This is not sufficient to apply legal sanctions against those who want to feel this; those who want, and often pay outrageous prices, to attack the concept of sex as related to emotion -- but it is the best of reasons to be concerned about the unsolicited invasion of personal privacy.

One argument sometimes heard for the preservation of obscenity as a legal concept is formulated in the question, "If there is no concept of obscenity, what is the legal charge to be used against those who fornicate in public parks at noon or who display pornographic statues on their lawn or who display pornography from windows, marquees, etc.?" An eighteenth-century libertarian could probably assume that there could be much behavior that wasn't illegal and people still wouldn't do it, but twentieth-century man is better off assuming not only that
some people will do anything, but that they will do it regardless of the state of jurisprudence. Punishment and control (which at least for this problem should be enhanced by punishment) should be attempted, and the rationale is that such behavior invades the "public privacy." "Public: and "private" are in ordinary language used as antonyms, but the notion "public tranquility" connotes "privacy." The sense of public privacy which leads us to be concerned about billboards, ostentatious neon signs, and the location of jet airports and superhighways is a concern for the "quality of life," but the quality as it affects the community, not simply individuals.

What material a person reads or whether he receives it through the mails is a private matter. Unsolicited pornography arriving through the mails is an invasion, and not the only one to arrive by post, of personal privacy. Salacious advertising, be it from a film or a prostitute, is an invasion of public privacy because the individual who feels his privacy is invaded doesn't have the same recourse that he would have if his personal privacy were invaded; i.e., not admitting the intruder. Since he is in public, the law invokes what the public defines as its
standards of privacy. Regulation of material which goes to minors could be handled under the same concept. The complaint is really not that minors will be corrupted by certain material, but that they might be corrupted without their parents' permission. Presumably if someone wants his children exposed to pornography he should be allowed to do so, because it is basically a private matter. But to have others solicit a juvenile audience to sell pornography is to interfere with the personal privacy of others to rear their children in their own way. When the "others" are diffuse but numerous, the concept which protects them could be "public privacy" which is simply applying what are felt to be the community's standards for behavior in public places. This is almost the net effect of the Court's rulings in the area of obscenity since Stanley. This aspect of public policy would have more credibility, as well as being more accurate and less capable therefore of abuse, if it were redesignated "public privacy," and the ponderous notion of "obscenity," along with all of its intricate reformulations, went the way of other legal concepts designed basically for our theocratic and pre-constitutional past.
Obscenity in the American Political Culture

The Suspicious Polity

One feature of American law on obscenity which should not be overlooked is that the concept is, unlike the English notion, restricted to sex. Besides this obvious difference, it would appear that the American approach to the problem has traditionally been restrained by the hostility to the use of political power per se, which in this case is manifested in the Court's greater suspicion of laws imposing prior restraint than of laws providing subsequent punishment.

Fights over the regulation of obscenity as well as the legitimacy of the concept itself tend to take on a highly ritualistic quality. Both those who desire government to regulate sexual mores and those who believe that it is not a legitimate area of public control are frequently more interested in the "symbolic gesture" (either in the name of "moral integrity" or "liberty") than in concrete control of certain forms of social interaction. It is this symbolic nature of the conflict which brings out so much self-righteousness on both sides. On the local level in
particular, it is sometimes less of a battle over specific legislation than it is an opportunity for the guardians of morality and perhaps a traditional life style to square off against the champions of personal autonomy and holders of "modern" belief systems.

Similarly to the polarization and "set response" which characterizes the conflict about seditious speech, the American dialogue about the control of obscenity also reflects a delight in the competition of the struggle. Adversary role-playing is perhaps even more intense in the battles over obscenity because both sides have the opportunity to demonstrate that the other side is either totally evil or totally silly.

The adversary role-playing in the dispute over the seriousness of obscenity as a problem and the propriety of punishment was made especially evident when Lawrence Speiser, director of the Washington office of the ACLU, in urging opposition before Congress to the proposed bill to give a citizen the option to seek an injunction to stop unsolicited advertising for pornography, stated:

... we can't pass laws which could be dangerous when administered by men of little understanding, or hostility to liberty, and trust that no such men will appear.79
This comment seemed hardly applicable to the proposed legislation, but it was a clear indication of the traditional assumption made by American librarians that in a "suspicious culture"--steeped in a tradition which is enthusiastic about the utility of adversary proceedings--if government has powers it will abuse them.
CHAPTER VII

PROTECTION OF CIVIL LIBERTIES IN TWO CULTURES

Two Aspects of a General Problem

The Legitimate Scope of Social Control

We have explored the general problem of what forms of individual behavior constitute the legitimate concern of government in a democracy by analyzing how two different societies approach two different problems. While the problems of seditious and obscene speech do not exhaust the types of civil liberties problems a society may have—any more than the United States and the United Kingdom complete the possible scope of political arrangements in the world—the two problems are central enough to the theoretical heart of all civil liberties problems and the two nations are typical enough of advanced democratic nations, to make some general statements about comparative civil liberties possible. Both of the problems can be viewed as "demands" upon government to inhibit speech on grounds of a particular rationale. This demand
can stem primarily from public opinion, with government being more of a recipient than an initiator of such demands. Other demands can be largely the product of government's perception of a problem. The policy positions of government, interested pressure groups, etc., on these problems indicate their proposed "solutions."

**Security and Propriety**

**Seditious Speech**

Seditious speech is a demand emanating from what is perceived as a threat to national security or public order. Actually the rationale is the same, i.e., preservation of order—except that, when applied to such things as "subversive" groups, the fear of disorder either takes on the cosmic proportions of revolution, the "disorder" of illegitimate government, or the disaster of foreign domination.

**Obscene Speech**

Obscenity is a demand for restraint on individual expression with a rationale related to sexual impropriety. While in Britain the obscene is technically more inclusive, it is still primarily a desire to punish those who transgress on conventions about sexual candor.
The English and American approaches to these problems reflect many common features, because they are common problems and because the societies are somewhat alike, but within certain contexts different patterns seem to emerge in the way the two societies respond to the common stimuli found in all political orders—the tension between the establishment of collective goals and the maintenance of individual autonomy.

**Normative Standards**

**Sedition**

**United Kingdom**

From a comparative perspective, probably the most noteworthy feature of English attitudes about seditious speech is the low salience of concerns about domestic subversion and loyalty along with the acceptance of the idea that "insulting speech" is behavior not deserving legal protection.

Formulated as a normative proposition, the low-key reaction of the English public and the government to the tensions of the cold war indicates a belief that nationality is not primarily a belief system, but an accident (or fortune) of birth. This belief made it
difficult for fears about an "enemy within" to be translated into a political credo. Having the concept "alien" connote geography (or color) rather than a political philosophy helped to sever the notion of "subversive" from nationality and tended to narrow the scope of fears about insidious internal forces to matters of conduct rather than ideas.

The acceptance of punishment for "insulting" and "provocative" speech, on the other hand, not only on the part of courts but also on the part of English libertarians emerges as another major value pattern in the English approach to liberty. The Britton and Malik cases, which did not involve the outbreak of violence or disruption, indicate that the pivotal consideration was the content of remarks rather that the situation in which they were made. Lord Parker, in the Britton case, did talk about the importance of "circumstances" to the proper framing of the offense, but his concern was not with the danger the speech presented (which he assumed from the content) but whether the speech was sufficiently public to be considered "speech." Since Parker's attempt to restrict the concept "insult" to circumstances where there are likely
to be some people who are **actually** insulted drew a negative reaction from Parliament (and he was only trying to formulate an evidentiary rule for evaluating circumstances), it would appear that English law is more than willing to **evaluate the danger of the idea** rather than the **danger of the idea in a certain context**. Lord Parker's defense of the legitimacy of punishment for "insulting words" was based on the analogy to physical assault in which, as he explained in *Jordan v. Burgoyne*, "verbal hits" provoke "revenge" and thereby threaten breaches of the peace. The "threat" on the public order is not evaluated in terms of the context of the words but of the effect the judges think the words would have on individuals in the abstract. Since the holding in *Jordan* did not even require that "insult" be defined with reference to an average, reasonable man (because the particular audience showed signs of being atypical and unreasonable), it appears that the only time an evaluation of the circumstances in which the words were spoken becomes germane is when the insult threshold of the audience is below average. This approach in a curious way becomes an intricate combination of the American "gravity of the evil" formula (i.e., evil = insulting), with the Holmesian assessment of circumstances.
(in terms of their "clear and present danger"), but the latter is a rule which can only mitigate the amount of what is already determined to be a grave danger.

Translated into the American vernacular the English judicial formula for determining the proper scope of permissible speech could best be called the "evil words compounded by circumstances" test. As a theoretical framework, merging as it does the most restrictive parts of the "clear and present danger" test and the "gravity of the evil" formula, this test is a much less libertarian approach to freedom of speech than that found in America, if for no other reason than that the American judiciary tends to use only one restrictive formula at a time.

English libertarians' love-hate relationship with "insulting words" and the Race Relations Act of 1965, and their desire to see such charges involed against anti-semites, fascists and white racists, but not against equally volatile speakers on the Left, has already been noted. Such a position by English libertarians indicates a certain lack of even-handedness, but more important for our purposes, it reflects the importance of the norm that speech should be restricted by considerations of "defamation."
It is important to note, too, that the "compounded evil" formula was motivated by the same kind of consideration, and reflects the English emphasis on protecting individuals from insults and abuse by others. This can be viewed, as we have stated, as a weighing of competing concerns about the rights of individuals, with the right to propagate being subordinate to the right to personal tranquility—a very specialized variety of the right to privacy.

United States

The very number of loyalty oaths, loyalty-security programs and the history of the Smith Act, Communist Control Act, and other federal legislation, as well as the careers of Joseph McCarthy and the members of the Subversive Activities Control Board, indicate that Americans took the problem of domestic subversion much more seriously than the English during the same Cold War period.

In the 1950's, the absolutist interpretation of the First Amendment was unsuccessfully to compete with a judicial theory which held that the extent of governmental power to limit expression was to be determined in every case by balancing freedom against the case for order or
security. This position, initially enunciated by Chief Justice Vinson in *American Communications Association v. Douds*, probably received fullest treatment by Justice Harlan in *Barenblatt v. United States* and tends to put society's interest in freedom of speech, press and assembly on no higher a plane than any other social interest. The basic notion of the doctrine, as expressed by Thomas I. Emerson, is, "that the Court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." Obviously most criteria the judges use in evaluating any type of case involve some sort of "balancing." The clear and present danger doctrine asked the judges to balance a community's interest in protecting itself with the constitutional guarantees of freedom of expression, but at least as the doctrine historically unfolded, the assumption was that statutes which interfere with First Amendment freedoms are what need justification. So the balance, under the clear and present danger doctrine, and also its surrogate, the preferred position doctrine, began with the scales tilted in favor of individual expression. The Vinson Court wished to begin inquiry into free speech cases with the scales empty.
But while the "balancing of interests" formula and the "gravity of the evil" test were to dominate judicial thinking in the early 1950's, the late 40's and the 1960's were less rigid periods, and the judicial standards reflected a desire to discover imminent dangers rather than probable evils before interference with speech could be allowed.

Cases such as Saia, Terminiello, and even Feiner were far different in result and logic from Jordan v. Burgoyne. With the exception of the decision on group libel and the symbolic speech cases, the American bench has been fairly consistent in insisting that some concrete evidence of probable disorder (beyond simple apprehension by authorities that the particular event could lead to disorder), is necessary to sustain criminal punishment. It seems fairly certain, for example, that the events which brought about the charges in Gregory v. Chicago, or probably even Edwards v. South Carolina, would not have been viewed lightly by Lord Parker.

Justice Frankfurter's fear, expressed in Kovacs v. Cooper, that constitutional doctrine would view any law touching communication as "infected with presumptive
invalidity," seemed to be the operating principle of the Warren Court.

Implicit in the Dombrowski decision, for example, was the warning that the Supreme Court would take judicial notice of the "chilling effect" caused by threats to enforce an overly broad criminal statute regulating expression.

The Supreme Court has apparently recognized that the statutes which are unconstitutional on their face or as applied have the potential to generate fear; to the extent that First Amendment freedom of expression is involved, the Court will presume the existence of the fear and the result that necessarily flows therefrom—the citizen's self-curtailment of his freedom of expression.  

Dombrowski, since it validates in a general way the proposition that inquiry into the good or bad faith of a state prosecutor is permissible, lays the groundwork for an evaluation of the motive behind those Congressional investigating committees whose inquiries appear to be geared primarily to gaining the attention of media and demonstrating to the public the importance of committee members, rather than the less spectacular toil of legislative research.

The burden of proof to establish bad faith would presumably always remain with the plaintiff, but the
"chilling effect" rationale in Dombrowski represents a major constitutional decision which could lay down the groundwork for major changes in the Court's approach to the First Amendment. Most important, the decision represents a shift in the role of the constitutional litigator to a position where he can "... take the offensive and root out all of the unconstitutional portion of the statute in a single proceeding."^2

The decision also arms courts with the power to deter any governmental action having a chilling effect which may prevent a large segment of society from exercising First Amendment rights.

This presumptive invalidity has to be counterbalanced by a demonstration not only of imminent disorder, but must meet all the standards of due process, especially avoidance of vagueness, and must be, in the judgment of the courts, the only way to solve the problem. If the threat could have been met with either more narrowly-drawn statutes or different administrative policy, such as more police to protect Jehovah's Witnesses, then these alternative courses of action are required because of the high status of free speech in the constitutional hierarchy of values.
While terms such as "clear and present danger," as Justice Douglas has pointed out, are sometimes used so as to negate the possibility of any meaning, the doctrine as formulated by Brandeis as a standard for evaluating the constitutionality of statutes rather than a simple evidentiary rule would seem to describe the presumptive invalidity which underlay so many of the Warren Court's decisions.

England's Race Relations Act of 1965 was pronounced "intolerable" by the American Civil Liberties Union, and American libertarians generally have supported some variation of the clear and present danger doctrine as a criterion for evaluating the legitimacy of legislation touching on speech, apparently feeling more comfortable when the onus of justification is one the government. Old Holmesian statements about "all speech being an incitement," and Justice Douglas's insistence in *Terminiello* that the "... function of free speech ... is to invite dispute," reflect a consensus among American libertarians that speech is supposed to be provocative.
Obscenity

United Kingdom

The inclusion of drugs and violence under the rubric "obscene" makes the notion of obscenity cover all attempts to deprave and corrupt subjects in the United Kingdom, and in the final analysis the concept is really an attempt to punish even though the particular not be illegal. The theocratic base of the concept is as evident in England as it is in the United States, and the charge of obscenity would have greater clarity, if less legitimacy, if it were labelled "enticement to sin."

As Lord Reed noted in his dissent in the Ladies Directory Case, English judges usually give no help to the jury in defining such terms as "deprave" and "corrupt," and the concept of obscenity in the United Kingdom is not only more variable than the concept in the United States because it is more inclusive, but also because the jury is under the guidance of fewer judicial rules about what the pivotal terms are supposed to mean. In this context, the American Supreme Court may be a "super-censor" because lower court judges cannot figure out how to apply the Roth
standards, but at least Roth has more certitude than the English judges' attempt to clarify the nature of the offense by quoting dictionary synonyms. Another factor to consider is that the latitude vague phrases give to the decision-maker is probably used for more libertarian purposes, or is at least used more consistently, when handled by a review court rather than by a jury.

United States

The Supreme Court's rulings in Ginsberg and Stanley have moved the complex "Roth-plus" formula to cover primarily what I have labelled as invasions of "public privacy" rather than an attempt to control mere possession of prurient material. Even though "pandering" is far removed from the original definition of obscenity, it is probably a better concept to indicate the court's feeling about the true nature of the "problem" of obscenity. Like the English concept of corrupting public morals, "pandering" reflects a displeasure about those who establish a career out of meeting the unsavory needs of the community. Even though the wares of the panderer might not be connected to illegal behavior, the "sordid business" emerges as still objectionable. In the future,
temptation may not emerge as a greater evil than the sin, but the doctrine that temptation must take place without intruding on the public sense of privacy will probably continue far into the future. Attempts to shut off the flow of pornography to the consumer will probably diminish, but modes of solicitation, since they make use of the simple existence of a community, will be subject to regulation. Both the product and the consumer, being basically private matters, will be less important than the producers' behavior in the public marketplace with unsolicited intrusions on the consumer's privacy receiving criminal penalties.

**General Approach to Liberty**

The English desire to create an environment in which minds can meet for purposes of exchange rather than confrontation and the widespread belief in legal sanctions against speech which threatens not only order but decorum, reflects a commitment which emphasizes communication through speech. The desire to keep a minimum of personal respect present on both sides during an argument is held to be essential if the speech is to be meaningful.
Obscenity in England, while a much broader concept than here, is also much more widely accepted as a legitimate concept. English libertarians do not challenge the basic assumption that pornography can be prohibited. The attack on the legitimacy of the concept itself, both judicially and among libertarian pressure groups, is much more common in the United States. In the deferential political culture, criticism tends to concentrate on how reasonably a particular power is exercised rather than on government's authority to have such a power at all.

The differences between the British and American approach as to civil liberties are probably also reflections of more general differences in attitudes toward criminal law. These attitudes were contrasted by New York Times reporter Anthony Lewis who claimed, for example, that the right to counsel for suspects immediately after arrest seemed "utterly strange and unacceptable to most legal authorities" in Britain. Lewis attributes the differing attitudes to the greater suspicion of police and the greater diffusion of policy-making power in the U. S., as well as to the generally more conservative nature of Britain's legal profession. These differences
are also reflected in the disparity in approaches to the criminal process by libertarians in England and America. A case in point is former Home Secretary Roy Jenkins, widely respected by libertarian groups for his activities as a private member of Parliament when he pushed through the reform of the Obscene Publications Act and his activities in fighting to end capital punishment and encouraging legal reform in abortion and homosexuality. But he is also a supporter of measures which probably would not be well received by the American Civil Liberties Union. He was in favor, for example, of eliminating unanimous jury verdicts for criminal convictions; the fingerprinting of all Englishmen; and opposed to the privilege against self-incrimination being used to avoid giving testimony.

**Institutional Influences**

**Written Guarantees**

The fact that prior restraint seems to be more acceptable to legislatures, courts, and libertarian groups is perhaps a manifestation of not viewing civil liberties as a matter of "constitutional guarantees." Having no written list of constitutional proscriptions, the "challenge" to authority on grounds of "unconstitutionality" or
ultimate "illegitimacy" must focus on practices and implementation of policy, rather than grants of authority themselves. Americans, along with a deep tradition of viewing government as restrained by a written document, have constant reference to a convenient decalogue of things government "can't do." The enumeration of specifics in the Bill of Rights, in conjunction with a written constitution designed to issue restraints against authority as well as grants of authority, a historical fear of consolidated political power, and a people historically suspicious of the idea of government, acts in a general way to infect all policy with a presumptive invalidity. Having written constitutional guarantees of basic rights, in addition to being an important device in popularizing the dialogue about civil liberties, is also partly responsible for the adversary-conflict approach of Americans to civil liberties. An early "suspicious polity" tended to institutionalize measures which helped to sustain and nurture suspicion of authority. The English have "expectations" that basic rights will not be abridged by government, but a belief that their expectations will be met. Americans have written "guarantees" that basic rights
will not be abused, but fear that the guarantees will not be honored.

**Fragmented Power**

Diffusion of political power in the United States, while theoretically a device for restraining the use of power, in most instances leads to diversity of legislation rather than responsible legislation, and in both the areas of seditious and obscene speech a dimension of the Supreme Court's liberalizing effect has been to remove control over these areas from the states. A unitary form of government is by no means immune from parochial influences, however.

In both Britain and the United States, libertarians, sometimes as a second choice, have sought to centralize control over obscenity in the hope that national standards would at least be preferable to numerous provincial criteria. However, English libertarians also complain about consolidation of power, accountability, etc. In 1965 the NCCL suggested that the Home Office was too complex a body to handle so many problems affecting individual liberty, and claimed that the Home Secretary's responsibilities were so broad that he was "effectively protected from a personal review of all his work."
Role of the Bench

English courts did not significantly truncate any of the legislation we have analyzed. With the possible exceptions of the Quarter Sessions' attempt to formulate a "reasonable audience" rule in Jordan, and Judge Stable's instructions to the jury in the "Philanderer's case," English courts never made any alterations-by-interpretation which narrowed the scope of statutes. Cases such as Jordan, Ward, Shaw and the Chewing Gum Co. indicate that the power to determine the meaning of legislation rarely benefited the defense. Judicial "creativity," which existed in cases such as Shaw or Jordan, was invariably a boost for the prosecution.

Obviously the range within which English courts can maneuver and exercise judicial will as compared to governmental will is much more restricted compared to the United States. But while the scope for maneuvering is almost infinitely greater for American courts, the direction of the movement within which English courts may operate is the opposite of the American direction. The role of English courts as a libertarian influence in the two problem areas we have examined is almost nil. English
courts play a comparatively small role (in leadership at least) in protecting civil liberties in the United Kingdom, and given the direction of their isolated instances of leadership, the fact that they do play a small role is probably fortunate.

American courts have not only played an active role in these civil liberties questions, but generally speaking the Supreme Court and the entire federal judiciary have been a libertarian influence. The Supreme Court's formulas for defining obscenity, while certainly capable of criticism on libertarian grounds, had the general effect of reducing the number of convictions for obscenity by establishing and tightening national standards for other courts to apply. American obscenity law is almost entirely the product of judicial behavior, and, in cases such as Ginzburg, the Supreme Court demonstrated its sovereignty in the area by judicially "legislating" pandering into American criminal law.

While rarely striking down legislation in areas touching on Congress's concern over subversion, the distinction between "active" and "mere membership" in the Smith Act and various loyalty tests and review boards drastically narrowed the scope of such practices. The
government's desire to register members of the Communist
Party and the State Department's right to establish
restricted travel areas were, in a de facto sense,
judicially negated. The Court retreated in the face of
reactions to some decisions on abuses of legislative
investigatory power, but even here the net effect was
certainly not to extend the scope of such activity.

**Political Elites and Responsibility**

Part of the explanation of the great responsibility
shown by English political leaders dealing with problems
of national security and loyalty is to be found in the
good judgment of the professional civil service. The
higher status which accrues to the civil service and the
generally higher "respectability" of government employ-
ment as well as politics itself helps to create an insti-
tutional self-respect which enhances responsibility.

The existence of an "establishment" (in the genuine
sense) in England, when coupled with a professional civil
service, gives the entire English decision-making process
an insular quality which not only acts to limit participa-
tion on specific policy, but also discourages involvement
of the ordinary citizen in questions of education, loyalty, etc., a fact which can have libertarian consequences when the threat to civil liberties stems from inflamed public opinion.

The negative aspect of insular decision-making, of course, is that tracing accountability for specific prosecutions and policy becomes very difficult. Policy just seems to ooze from the giant amoeba called "the Government." But the insular quality of "establishment" policy served the English well when confronted with some localized pockets of hysteria about domestic subversion. While the lower temperature of the English people on this kind of issue is due to cultural factors, some credit must be given to inter-establishment ethics about the proper ways to engage in political warfare, since a political party, especially the out-party, could have thought it could have made political gains by "leading" on such an issue, but did not do so.

**Cultural Factors**

In the deferential polity democracy is less a matter of mandate from the public and more a matter of responsible rule and control. Freedom of expression in
this context becomes a value of social interaction and
basic civility rather than a guarantee to engage in an
adversary-conflict process. Civil liberties become rules
of cooperation rather than rules of conflict.

The "deferential" culture apparently has certain
expectations about leadership. The phlegmatic approach
of the English people to political diversity also makes
them concerned about violations of understood norms of
social propriety and responsibility. Both a subversive
"witch hunt" and the anti-semitic tirade seem to conflict
with a qualitative political style which the English expect
from both those who lead in official politics and street
corner oratory. While this would obviously not apply to
the "leaders" of race riots in Blackpool, it is important
to note that even in the increasingly sensitive area of
race relations in the United Kingdom, leaders such as
Enoch Powell may be racists, but they are not in the
"populist" tradition of Lester Maddox or George Wallace,
and attempts in the American press to create this kind of
analogy reflect a subtle desire to punish the English for
past self-righteousness on this subject. Our point is not
even that such punishment is undeserved, simply that the
"style" is radically different and reflects a deferential polity. "Deference" makes assumptions about responsibility, and in a curious way the responsibility exists because it is expected, and the proposition's tendency to be self-fulfilling strengthens the prediction of responsibility.

Civil liberties criteria in the United States, because of the culture the governmental structure and the greater propensity to have these kinds of questions dealt with in a legal context, emerge as extensions of the accusatorial legal process.

The resolution of civil liberties problems in the context of a suspicious polity creates a generally higher level of surveillance of individual freedoms, but, as we have noted with reference to the set response of some libertarians to the "red menace" hysteria of the 1950's, the adversary nature of this surveillance can harm the libertarian case by making it an inaccurate statement of denials and counter-affirmations about disloyalty to the Bill of Rights.

Liberty and Authority

Trusting a responsible government to protect individual freedom may involve the courage of "faith," but
rigidly adhering to prescriptions which prohibit any attempts to control behavior touching on expression of opinion has its own equivalent of a "leap to faith."
The locus of this faith tends to be placed in frail hopes for a responsible polity rather than a responsible government and the assumption that truth will win out in the competition of the market place. Thomas I. Cook, in the course of arguing, in the 1950's, that the American Communist Party should be outlawed, attacked the weakest link in the chain of arguments used by American libertarians. One does not have to agree with Cook's conclusion about the wisdom of outlawing revolutionary parties to appreciate his recognition of the "intellectual absolutism" of traditional American liberals and libertarians which is "as real, if not as sinister, as those of both heresy-hunters and heretics." The dangers of close adherence to rules, such as a literal interpretation of the First Amendment, or even total adherence to the clear and present danger doctrine, is that observance of the rule becomes an end itself, rather than an instrumental guide to the interests and values those rules were designed to protect. Cook argued, for example, that
liberalism's attempt to defend an open society by proclaiming absolute freedoms divorced from the reality of their achieving an open society, is to argue for empty secondary principles at the expense of the basic premise of liberalism. But his more general criticism of libertarian absolutism is its refusal to take cognizance of the non-rational elements in politics, as well as the ability of all sorts of pressure groups to manipulate and manufacture public opinion. Of such liberals, Cook remarks:

Aware of the non-rational element in man, and properly hostile to irrationalist politics, of the possibility of whose triumph they are perhaps unwarrantedly afraid, they yet cling stubbornly to the rationalist principle that, given complete freedom of expression and of political organization, truth will indeed win out in the competition of the market place. Nevertheless, their overall attitude implies doubts, and their doctrine seems in the event to mean that freedom must be unconstrained regardless of the consequences. We must, they say, collectively confront possible martyrdom though some might not bear it heroically and few would relish its futile suffering.\(^6\)

For Cook personal self-fulfillment and other individual concerns transcend the bonds of society, but the rights necessary to achieve them successfully are always in a social order which, "is both the place and the condition of such fulfillments." Constitutional democracy,
he submits, is a closed system, "secure only within its related postulates." Liberalism and democracy require us to "accept our lack of finality and certainty in knowledge," as well as the "inescapable imperfection in social practice."

Cook is pushed to the conclusion that there are some kinds of advocacy which are "inherently subversive," and the standard he would use in distinguishing the inherently subversive from the dissent which an open society requires is the advocacy of violence. Communists and Fascists, and to update him we would probably have to include the more strident members of the New Left, have no commitment to the open political process, and therefore any attempt to participate reflects only a desire to use the latitude of the process to undo the process. Any standard which, like the clear and present danger doctrine, emphasizes the immediacy of the threat and the directness of the danger may have been appropriate when the issue was simple breaches of the King's peace long ago, but to apply it to a genuine conspiratorial movement in the twentieth century is, according to Cook, to "abandon reality."

Cook's argument, it may be noted, takes the same general form as Korstol's argument for censoring obscenity.
The form of the argument is that rules designed to maximize liberty are not ends in themselves but are means to achieve the purposes which motivated the rules. The values behind prescriptions about liberty are sometimes entitled self-fulfillment, self-government, open society, etc., but for a broad spectrum of individuals liberty is not the fundamental goal, but a way of ensuring that other goals can be met. For others, liberty becomes an end in itself, or becomes the operating fundamental value, even though one may wish that free men will do certain things and not other things.

The entire English milieu makes the operational principles of civil liberties controversies come closer to the approach to democracy which views liberty as an important, but nonetheless instrumental, value. The American milieu encourages operational principles which view liberty as an end in itself.

A full analysis of the things which should be considered in any choice between these two approaches to democracy would take us deep into the subtleties of democratic theory and liberalism itself (where the tension between those who view liberty as a primary goal and those
view it as a secondary goal is very pronounced), but the only point we wish to make here is that these two strands of democratic thought seem to describe the variance in the English and American approaches to civil liberties.

Both cultures have rules, formal and informal, to guide citizen, judge and lawmaker in the area of the individual's relationship to the state and other individuals. Both cultures take the problem seriously and, compared to other cultures, reflect a heavy commitment to the value of individual autonomy. But in one culture the rules emerge as prescriptions about conflict and in the other as prescriptions about consensus.

What is perhaps most unfortunate is that the normative criteria used to approach civil liberties in both cultures could not be somehow reversed. A dysfunctional anomaly exists between a highly pluralistics society that expounds rules which construe democracy and free speech as guarantees to arbitrate, and a more homogeneous society which reflects a concern for its own unity. The society with the most unity and common assumptions about authority does the most worrying about unity and differing assumptions about authority. Expectations of abuses in
one society and expectations about responsibility in the other tend to become curiously self-fulfilling.

These two tendencies pushed to extremes, of course, become untenable. To oppose power simply because it is power is a form of paranoia, just as to defer to government in all circumstances is to engage in a dangerous act of faith. Both the suspicious polity and the deferential polity lack a certain perspective on individual freedom, but along differing dimensions. If we assume that cultures and governments, just as men, must err, it is probably best to err on the side of suspicion. This is not to make an error into a virtue, simply to reiterate the verity of slogans about "eternal vigilance." What is frequently misunderstood is that vigilance may be the price of liberty, and the price may be well worth it, but like all prices, vigilance can get caught in an inflationary spiral which devalues the currency of thought.
FOOTNOTES: CHAPTER I

1 This year marks what Robert McCloskey has called the "third great era of judicial history" wherein the American Supreme Court's primary constitutional occupation became the "relationship between the individual and government," instead of business-government relationships, which characterized the post-Civil War Court and the problems of federalism, which characterized the early Court. See Robert G. McCloskey, The American Supreme Court (Chicago: The University of Chicago Press, 1960), p. 181.

2 What constitutes a "libertarian solution" is a problem we shall deal with presently.


7 Ibid., pp. 70-71. Lipset cites the obvious example of Nazi Germany as having all of the structural factors such as industrialization, urbanization, wealth and education which favor a democratic system, but which lacked, because of certain historical circumstances, the belief system to support democracy.


12 Ibid.


19 For a general outline of the tradition of legal positivism and the tendency to define rights as "legally protected interests" see Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1930).


Beer uses words such as "value" and "belief" as part of his technical vocabulary wherein a value denotes a conception of right or wrong, a belief is a conception regarding what exists. This distinction between normative and existential propositions will not be employed here.

Almond and Powell, *Comparative Politics*, p. 51.
FOOTNOTES: CHAPTER II


5 Ibid., p. 112.

6 Quoted in Lipset, p. 94.

7 Lipset, Political Man, p. 122.

8 Ibid., pp. 97-110.

9 Lenski, The Religious Factor, p. 174. This was valid even when controls for class, religion, etc., were introduced.

10 Ibid., p. 191.

11 Ibid., p. 172.

12 Ibid.
13. Ibid.


15. Ibid., p. 186.

16. Ibid., p. 190.

17. None of the references to the legal system of Great Britain include Scotland, since the legal system there developed from Continental and Roman law and is different from the rest of Great Britain.


19. Ibid., p. 139.


23. Ibid., p. 4.


27. Ibid.


29. Ibid.


31. Ibid., p. 34.

32. Ibid.

33. Ibid.

34. Ibid., p. 32


37. Ibid., p. 80.


42. There is much in the civil libertarian tradition which is anti-majoritarian or even elitist. See for instance, Richard Hofstadter, *Anti-Intellectualism in American Life* (New York: Random House, Vintage Edition, 1966), Ch. 6.


51 Ibid., p. 60.

52 Ibid.


54 Ibid.

55 Ibid., p. 441.
FOOTNOTES: CHAPTER III


2 Ibid.

3 Ibid., p. 10.

4 Quoted in Levy, p. 10.


7 Levy, p. 10.

8 Siebert, p. 271.

9 Ibid., p. 369.

10 Ibid., p. 772.

11 Ibid., p. 271.

12 Ibid., p. 200.

13 Joshua v. Regina (1955) 1 All E. R. 23.
14 Ibid.

15 Ibid., p. 24.

16 Ibid., p. 25.

17 Ibid.

18 Ibid.


20 Ibid.


22 Ibid., p. 4.

23 Ibid., p. 5.

24 Ibid.

25 Ibid., italics added.

26 Ibid., p. 6.

27 Ibid.


Civil Liberty (London: Spring, 1953), No. 12, 15.


Ibid.

Ibid., p. 227.

Ibid.

Ibid.

Ibid. The opening statement which was so pivotal in Lord Parker's ruling, and which was cited in the decision, was as follows: "As for the Red rabble here present with us in Trafalgar Square, it is not a very good afternoon at all. Some of them are looking far from wholesome, more than usual I mean. We shall of course excuse them if they have to resort to smelling salts of first aid. Meanwhile, let them howl, these multi-racial warriors of the Left. It is a sound that comes natural to them, it saves them from the strain of thinking for themselves." Mild statements, one could submit, when compared to American rhetoric—even official rhetoric.

Ibid., italics added.


Ibid.

In addition to rallies, sit-downs, and protest marches the CND has resorted to numerous other devices to make its point. They operated a private broadcasting station which used the frequency of the BBC after normal programming went off the air for a short period of time, and in 1963 the "Spies for Peace" movement developed. In an attempt to ridicule civil defense preparations the CND, for example, published detailed plans for dealing with the aftermath of the nuclear attack on Britain together with some confidential information from a NATO military exercise held in 1962. On the eve of the annual Aldermaston march in April of 1963, the Spies for Peace distributed leaflets giving details of the locations of secret regional seats of government in the South of England. This was a post-nuclear attack contingency program for decentralized governmental control. Many of the leaflets were confiscated and D notices were issued to prevent any of the information from appearing in the newspapers. (D notices are a form of press censorship on defense grounds.) Since the contents were already published in the French press and had been broadcast over Prague radio some felt that the efficiency of this measure on defense grounds was dubious and several of the demonstrators were apprehended by the police for singing out certain forbidden geographic locations. See Geoffrey Marshall, "Britain: The Case of the Nuclear Disarmers," Politics and Civil Liberties in Europe, Ronald F. Bunn and W. G. Andrews, eds. (Princeton, N. J.: D. Van Nostrand Company, Inc., 1967), p. 13. The governmental invocation of D notices to prevent the publication of the civil defense plans uncovered by the "Spies for Peace" was put to great use by Harold Wilson as a technique to embarrassed the Macmillan Government. See 676 H. S. Deb. 5s Col. 25.

45*Civil Liberty*, 1962, p. 15.


47*Civil Liberty*, 1968, p. 9.
48. Ibid., p. 11.

49. Civil Liberty, 1964, p. 32.


52. Ibid.


58. Ibid., p. 23.

59. Ibid., p. 25.


61. Ibid., p. 226.


63. Quoted in Wilson and Glickman, p. 33.
Section 1 of the Official Secrets Act makes a person by statute guilty of a felony who "for any purpose prejudicial to the safety or interests of the state approaches, inspects, passes over or is in the neighborhood of or enters any prohibited place; or makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or obtains, collects, records, or publishes or communicates to any person any secret official code, word or password, or any sketch, plan, model, article, or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy." See Hasbury's Laws, X--Criminal Law, 605.
Some of the Labour party's front bench in Parliament attempted to question Home Secretary R. A. Butler, immediately after the Central Criminal Court issued its opinion in the Chandler case, but he refused comment since appeal procedures were still open. The labor opposition took the position that the trial was at least a symbolic political trial because six people were arbitrarily selected among thousands of people who would "consider themselves equally technically guilty." Butler would not even answer questions about the use of the Official Secrets act as opposed to some other act and would not discuss what he felt to be the proper use of the Official Secrets Act. The Labour Party then turned its attention to the Official Secrets Act itself and in March of 1962 moved for a leave to introduce a bill to amend the Act. Their intention was to create a provision which would make it clear that the Act was intended to be confined to the punishment of spies. The amending bill would have held the Act inapplicable to any case in which it could not be established that there was some connection with espionage. The government's majority prevailed, however, and leave was refused by a vote of 196 to 70. See Marshall, p. 33.

Halisbury's Statutes, 2d ed., 1092.


Ibid., p. 107.

85 *Civil Liberty*, 1968, p. 8.


87 *Civil Liberty*, 1968, p. 8.

88 *Cooper v. Whittingham*, 1880, 15 *Ch. D.* 501.


90 Marshall, p. 31.


92 Ibid.

93 Quoted in Wilson and Glickman, p. 3.
FOOTNOTES: CHAPTER IV


4 Street, p. 127.


9 Ibid.


11 Ibid., p. 687.

12 Street, p. 130.

13 Ibid., p. 135.

15 Ibid., p. 199.


17 Cited in Konvitz, p. 200.

18 Ibid.

19 Street, pp. 137-39.


21 Ibid., p. 333.

22 Ibid., p. 334.

23 Ibid.

24 Ibid., p. 336.


27 Ibid.

28 Ibid., p. 405.

29 Shaw v. Director of Public Prosecutions, 1961, 2 All E. R. 446.


32 Ibid., p. 16.
33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid., italics added.
40 Ibid., p. 502.
41 Ibid.
43 Ibid., p. 694.
44 Ibid.
46 Ibid., p. 696.
47 Straker v. Director of Public Prosecutions, 1963, 1 All E. R. 697.
48 John Calder, Ltd. v. Powell, 1965, 1 All E. R. 159.
49 Ibid.

50 Ibid., p. 160.

51 Ibid., p. 161.

52 Ibid., p. 162.

53 Ibid.

54 Ibid., p. 163.

55 Ibid., p. 162.

56 Ibid.

57 Ibid.


61 Ibid., p. 648.

62 Ibid.

63 Ibid., p. 650.

64 Ibid.

65 Ibid.
66 (1969) 85 LQR 8. There is also a reference here to a note entitled "The Japanese Law of Obscenity" (1959) 75 LQR 183. which explained that Japanese courts have in certain circumstances held that the artistic merits of a book may even add to its tendency to deprave and corrupt, and the Calder decision is viewed as having "much force" because it opens up the same possibilities in English law.


68 Ibid., p. 1039.


71 Ibid.

72 Civil Liberty, 1966, p. 20.

73 Street, p. 59.

74 Ibid., Ch. 3.

75 Civil Liberty, XII, No. 1, Spring, 1952, p. 7.

76 Ibid.

77 New York Times, February 13, 1966, p. 8X.

78 Ibid.


89. *Civil Liberty*, XII, No. 8, 1959, p. 11.
The women of the "Clean Up TV Campaign" called for a "public scrubbing" of a BBC man in Trafalgar Square. Pressure from such organizations, according to the NCCL, "create a situation where it appears that the BBC is being daringly liberal-minded when it allows Kenneth Tynan to commit what the New Christian called "a carefully prepared 'indiscretion.'" See Civil Liberty, Annual Report, 1966, p. 19.
TV critic Robert Ottaway of the Daily Sketch, for example, said "A huge acreage of the human form was revealed, but most of the bodies on display would have persuaded me to take vows of celibacy," and Martin Jackson of the Daily Express commented: "Nothing could be less sexy than the sight of all those saggy bodies and nothing more depressing than the relentless pursuit of the sun in the drizzling English weather." See Syracuse Herald-Journal (N. Y.), October 24, 1968, p. 1.

Civil Liberty, 1967, p. 18.

Ibid., p. 19.


Street, p. 144.

Ibid., p. 132.

Ibid., p. 14t. The novel has since been published in Britain.


FOOTNOTES:  CHAPTER V


6 Ibid.

7 Frohwerk v. United States 249 U. S. 204 (1919) and Debs v. United States 249 U. S. 211 (1919).


10 Pritchett, p. 419.


12 Pritchett, p. 419.

13 Ibid., p. 418.


19. Ibid.


24. **Caroll v. President and Commissioners of Princess Anne**, 393 U. S. 175 (1968).


27. **Sellers v. Johnson** 163F 2d 877 (8th Cir. 1947).

28. Ibid.

30 Ibid.


33 Ibid.

34 Ibid.


41 Ibid.

42 People v. Huss 51 Cal Rptr. 56 (Dist Ct. App., 1966).


44 Ibid.


50. ACLU, By the People, p. 134.


59. Pritchett, p. 455.

60. Ibid., p. 470.


63 Pritchett, p. 483.


67 ACLU, 44th Annual Report, p. 89.

68 ACLU, Tension, Change and Liberty, p. 51.

69 C. Herman Pritchett, Civil Liberties and the Vinson Court (Chicago: University of Chicago Press, 1954), p. 239.


71 Chafee, Free Speech, p. 441.

72 Pritchett, American Constitution, p. 527.

73 Both disbarments were ultimately overturned by the Supreme Court, but one took two separate hearings. See Sacher v. Association of the Bar 347 U. S. 388 (1959), In re Isserman, 345 U. S. 286 (1953) and in re Isserman 348 U. S. 1 (1954).

74 The subsequent conviction was reviewed by the Supreme Court in Dennis v. United States 339 U. S. 162 (1950) because it raised fair trial questions, but the charge was sustained.

76 ACLU, "We Hold These Truths...": Report on Civil Liberties, January 1951-June 1953, 1953, p. 44.


78 Pritchett, American Constitution, p. 532.


82 Pritchett, American Constitution, p. 354.


84 States also took stringent measures against Communists, with Indiana, Massachusetts, Pennsylvania and Texas passing laws exclusively naming and outlawing the Communist Party, with Indiana wishing to "exterminate Communism and Communists, and any or all teachings of the same." The Massachusetts Act made it a crime to remain a member on pain of three years imprisonment, and Pennsylvania and Texas stipulated punishment as twenty years, imprisonment. See Konvitz, p. 142.


90 Pritchett, American Constitution, p. 535.

91 Albertson v. SACB 382 U. S. 70 (1965).

92 ACLU, Tension, Change and Liberty, p. 54.

93 Pritchett, p. 536.


See John A. Gorfinkel, Julian W. Mack, "Dennis v. United States and the Clear and Present Danger Rule," California Las Review

Elliot L. Richardson, "Freedom of Expression and the Function of the Courts,"


Konvitz, p. 591.


FOOTNOTES: CHAPTER VI


3 Annotation: "Modern Concept of Obscenity," 5 ALR 3d 1161.


5 United States v. One Book Entitled Ulysses 72 F2d 705 (1934).


9 Ibid.


17 United States v. Rehhuhn 109 F2d 512.
38 New York Times, September 22, 1968, p. 7E.
40 New York Times, September 13, 1970, p. 5E.
There was much internal conflict on the Commission and "unauthorized" hearings by the minority, etc., and the publication by Stein and Day, Inc., of a volume entitled *The Obscenity Report* which purported to be the Commission's report but gave no authorship. Some believe this work to stem from the dissenting members of the Commission. Others have suggested that the work was a hoax perpetrated by law students. After cursory reading I would suggest that it is somebody's parody of the dissenters on the Commission--that, or the most witless defense of obscenity laws ever penned.

Ibid.


Ibid., p. 13.


54 ACLU, 38th Annual Report, p. 11.


56 Ibid., p. 9.


59 ACLU, 44th Annual Report, p. 20.

60 ACLU, 40th Annual Report, p. 11.

61 ACLU, 38th Annual Report, p. 16.


64 Westin, p. 1.


3 Konvitz, p. 236.


5 Konvitz, p. 231.


FOOTNOTES: CHAPTER VII


2 Ibid.


4 Civil Liberties, 1965, p. 31.


6 Ibid.

7 The same basic point is reiterated by Carl Auerbach, who uses Mill's argument than no one should have the liberty to be a slave, as an approach to a general theory of free speech. Mill had argued that the law should not enforce an agreement under which an individual voluntarily sold himself as a slave, because as a general principle the reason for not interfering, unless for the sake of others, with a person's voluntary acts, is a consideration of his liberty. But since a person in the above category would abdicate his liberty, and forego any future use of it, his action defeats the very purpose which would have been the justification for allowing him to become a slave. "The principle of freedom cannot require that he should not be a slave." Auerbach would argue that the same basic postulate is involved when a democratic society suppresses totalitarian movements, since it is not acting to protect the status-quo, but the interests of freedom of speech. How totalitarian movements should be prevented from being effective is a matter of wisdom, which Auerbach would argue, should be left up to the sole determination of Congress. See: Carl Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," University of Chicago Law Review, XXIII (1956), 173.
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