

Winter 2008

Roth at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine, 41 J. Marshall L. Rev. 393 (2008)

James R. Alexander

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [First Amendment Commons](#), [Fourteenth Amendment Commons](#), [Fourth Amendment Commons](#), [Jurisdiction Commons](#), and the [Legal History Commons](#)

Recommended Citation

James R. Alexander, Roth at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine, 41 J. Marshall L. Rev. 393 (2008)

<https://repository.law.uic.edu/lawreview/vol41/iss2/4>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

ROTH AT FIFTY: RECONSIDERING THE COMMON LAW ANTECEDENTS OF AMERICAN OBSCENITY DOCTRINE

JAMES R. ALEXANDER*

I. INTRODUCTION

For the past fifty years, Justice Brennan's dictum in *Roth v. United States*¹ has directed both the structure and the substance of American obscenity law which, upon reflection, made even Brennan himself quite uneasy.² The *Roth* test, against which all subsequent court decisions were measured, stated that materials were obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³ It was a standard Brennan identified as already established by prior court decisions⁴

* Professor, University of Pittsburgh, Johnstown.

1. 354 U.S. 476 (1957).

2. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79-80 (1973) (Brennan, J., dissenting). After ten years, Brennan had apparently despaired at the prospect of a workable definition of obscenity that did not allow suppression of socially valuable ideas. David L. Hudson, Jr., *Is Anything Obscene Anymore? Justice Brennan's "Significant Departure" and Warning of an "Evisceration,"* 10 NEXUS 93, 95 (2005). The exact same concern was expressed by Lord Campbell when he proposed the 1857 Obscene Publications Act in England, as discussed below. See M. J.D. Roberts, *Morals, Art, and the Law: The Passing of the Obscene Publications Act of 1857*, 28 VICT. STUD. 609 (1985) (discussing the parliamentary debates surrounding the Act).

3. *Roth*, 354 U.S. at 489. The *Roth* test became the foundation of the three-pronged *Memoirs* test of whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book Named "John Cleland's Memoirs of a Woman's Pleasure" v. Massachusetts*, 383 U.S. 413, 418 (1966) [hereinafter *Memoirs*].

4. *Roth*, 354 U.S. at 489; see also *Parmelee v. United States*, 113 F.2d 729 (1940) (noting that the work as a whole must be interpreted in its own time and circumstances); *United States v. Dennett*, 39 F.2d 564 (1930) (determining that the use of the materials must be measured against the purpose of the statute); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (1933) [hereinafter *Ulysses I*] (noting that interpretation of the work as a whole can determine the author's purpose); *United States v. Levine*, 83 F.2d 156, 157-58 (1936) (finding that the jury must weigh the merits of the work against its

and one that explicitly rejected the earlier leading standard of *R. v. Hicklin*.⁵ *Hicklin* provided that material should be "judged merely by the effect of an isolated excerpt upon particularly susceptible persons."⁶ The *Roth* test became the prevailing statement of legal doctrine for obscenity cases, exerting controlling authority because courts had acceded to and utilized it as such and, inadvertently or not, thereby enhanced it.⁷

defects, and not necessarily "yielding to the most susceptible mind"); *Walker v. Popenoe*, 149 F.2d 511, 512 (1945) (noting that "the dominant effect of the entire publication determines its character," citing *Parmalee*, *Ulysses I*, and *Levine*); *Commonwealth v. Isenstadt*, 318 Mass. 543, 557 (1945) (finding that even in a work of literary merit, obscene content can pervade to such a degree "as to give to the whole a licentious quality calculated to produce harm which the statute is intended to prevent"). This line of doctrinal development is described in detail in William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).

5. (1868) 3 L.R.Q.B. 360.

6. *Roth*, 354 U.S. at 488-89. As will be shown below, this is hardly a complete or even accurate portrayal of the *Hicklin* standard. When initially adopted by American courts in *United States v. Bennett*, 24 F.Cas. 1093, 1102 (C.C.S.D.N.Y. 1879) (No. 14,571), the *Hicklin* standard was that materials were judged obscene if they tended "to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall." For example, obscene materials would "do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds." *Hicklin*, 3 L.R.Q.B. at 371. The *Hicklin* precedent was applied in several subsequent American cases as supporting criminal scrutiny of the corrupting effect of materials as gauged by the tendency of isolated passages rather than the work as a whole, precluding consideration of the author's purpose, the actual effect on respective audiences, or any collateral positive societal benefit that may result. *Bennett*, 24 F.Cas. at 1102; *United States v. Clarke*, 38 F. 732, 736 (1889); *United States v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913). As a precedent case, *Hicklin* has been read as precluding consideration of the author's or publisher's intention in favor of relying on a jury's anticipation of the harmful effect (tendency) on the minds of those likely to be exposed to the materials. This interpretation also overstates the *Hicklin* decision which, in English common law, would not have precluded consideration of intent. See *Hicklin*, 3 L.R.Q.B. at 373 (discussing the intention of an author in publishing an obscene work).

7. The presumption here is that *Roth* established the fundamental structure of review for all subsequent obscenity cases which was then implemented in *Memoirs*, 383 U.S. at 418. It was also a decidedly content-neutral decision, in that the Court did not address whether the materials were obscene. *Roth*, 354 U.S. at 481 n.8. It has been argued that the principal arguments underlying the *Roth* test were undermined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and as many as five distinct definitions of obscenity have been offered by the Court between *Roth* and *Miller v. California*, 413 U.S. 15, 24 (1973). See *Miller*, 413 U.S. at 24 (stating materials are obscene if: (a) they appeal to prurient interest in sex when taken as a whole and judged by contemporary community standards from the perspective of the average person; (b) are patently offensive in their display of sexual conduct; and (c) lack serious literary, artistic, political, or scientific value). All of these definitions are variations of the *Roth* doctrinal structure

Brennan substantiated his conclusion by a sequence of points he portrayed as placing obscene materials outside the constitutionally protected areas of speech and press under the First Amendment: first, that the constitutional intention was not that all utterances were to be protected because libelous utterances were not protected;⁸ second, that whereas obscenity law was not as fully developed as libel law, there was sufficient evidence in the case law that obscenity was beyond intended protection;⁹ and third, that all ideas having the slightest redeeming social importance were accorded full protection unless excludable because they encroached on more important interests.¹⁰ Obscenity was, by definition, “utterly without redeeming social importance.”¹¹

and none reaches for an operative definition supportable under due process. See Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1343-44 (1991) (explaining Brennan’s attempt to provide a better, more protective way to analyze First Amendment issues).

8. *Roth*, 354 U.S. at 483 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)). As stated above, as the reach of protected speech evolved in case law, Justice Brennan himself ultimately undermined this argument in *Sullivan*, finding that original intent did provide basic constitutional protection for libelous utterances against public officials unless knowingly false and maliciously made. 376 U.S. at 279-80.

9. *Roth*, 354 U.S. at 483 (citing *Knowles v. Connecticut*, 3 Day 103 (Conn. 1808); *Commonwealth v. Holmes*, 17 Mass. 335 (1821); and *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815)). It is difficult to discern whether Justice Brennan was differentiating obscenity law (yet undeveloped) from libel law (already developed) or identifying obscenity law as an undeveloped subset within libel law. As will be shown, the latter is the appropriate classification.

10. *Roth*, 354 U.S. at 484.

11. *Id.* at 484-85 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). *Chaplinsky’s* identification of categories of speech outside First Amendment protection, widely cited as definitive within the doctrine of obscenity law, was also dictum. 315 U.S. at 571-72. The creation of such a category without differentiating standards presented obvious dilemmas in discerning inclusiveness beyond jurisprudential intuition, such as Justice Stewart’s summative “I know it when I see it,” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), an admission that the definition of obscenity, if not its status under First Amendment guarantees, was an unsettled area of law. Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L. J. 1023, 1026 (1996). From *Roth’s* reading of the previous cases (*supra* note 4), one would presume the category included those expressions that did not contribute social value to public discourse, the parameters of which began to dissolve with the emergence of mass culture and mass literacy in the mid-nineteenth century. See, e.g., ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE: AMERICA’S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART* (Hill and Wang 1996) (detailing the evolution of traditionally private matters into the public sphere and how obscenity affected that development). See also three texts on contemporaneous social dynamics in England: ALLISON PEASE, *MODERNISM, MASS CULTURE, AND THE AESTHETICS OF OBSCENITY* (Cambridge U. Press 2000) (analyzing famous authors’ works from the eighteenth through

The fact that doctrines of American obscenity law are currently in a quandary is not surprising. If we assume that obscene materials are not protected under First Amendment guarantees as a matter of definition, the principal constitutional question becomes how we can, with due process, differentiate the obscene from the non-obscene, after which we still face the inevitable questions of exceptions and marginal calls.¹² The initial judicial effort to state a workable standard in the American courts was in *United States v. Bennett*,¹³ which drew directly from the language of *Hicklin* with little examination of its historical legal context or the principles of common law on which it was based.¹⁴

twentieth centuries demonstrating the categorical progression of sexually explicit works from pornography to art); THOMAS RICHARDS, *THE COMMODITY CULTURE OF VICTORIAN ENGLAND: ADVERTISING AND SPECTACLE, 1851-1914* (Stan. U. Press 1990) (detailing the "new commodity culture" of the nineteenth and early twentieth centuries and how that culture was driven by advertising); and LISA Z. SIGEL, *GOVERNING PLEASURES: PORNOGRAPHY AND SOCIAL CHANGE IN ENGLAND, 1815-1914* (Rutgers U. Press 2002) (discussing the evolution of pornography and the reasons for its progression).

12. These questions always arise when materials that have arguably obscene content also include political argument or artistic or literary expression, and courts become ensnared in attempts to differentiate 'level[s] of protection' to certain forms of expression. See, e.g., Steven Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM & MARY BILL RTS. J. 647, 705-06 (2002) (discussing the conflict in First Amendment jurisprudence surrounding content-neutrality and distinguishing speech that should be regulated only when it invades the rights of others). Inevitably these considerations become more complex and perhaps insoluble when juries are asked to apply the "average person applying contemporary community standards" test to expression that contains elements of transgressive sexual (prurient) interest, or to consider waiving the test altogether in areas in which imminent harm can only be intuited, such as in child pornography cases. *Miller*, 413 U.S. at 24; see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 923 (2001) (noting that "subversive advocacy cases concerned core political First Amendment speech, whereas child pornography law is about 'sordid' sexual cravings"); and Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (questioning the parallels between the growth of child pornography law and the increase in child sexual abuse). These considerations also extend to whether violence as an expressive mode exacerbates societal harms in certain areas of conduct (e.g. sexual) or with regard to certain groups (such as children), and warrants diminished constitutional protection. See KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* (Duke U. Press 1996) (discussing violence in the media in connection with obscenity and the First Amendment) and, more recently, his *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (N.Y.U. Press 2003) (examining different kinds of speech – from obscenity to hate speech – and the consideration of children when it comes to the First Amendment).

13. 24 F.Cas. at 1102.

14. *Infra* notes 86-97. As *Roth* became recognized as guiding obscenity doctrine by its reference and elaboration in *Memoirs*, so also did *Hicklin* only become recognized in English common law doctrine by its direct quotation in

Since that point, courts have gingerly handled the inevitable central questions of tendency (largely in the context of an assumed decline in the moral discipline of society) and effect (including debates over the definition of serious literary or artistic merit) without much wholesale change in the basic elements of the regime.¹⁵

But what exactly are the basic elements of the regime? The courts seemed so relieved to be rid of common law precedent in their cautious navigation among statutory challenges that they too often did not pause long enough to investigate the legal history and the common law foundations of *Hicklin*. If they had, they may have been less sanguine about how far we have traveled doctrinally from *Hicklin* and more thoughtful about the structure of common law and how it sought to balance factors in much the same manner as jurisprudential regimes today.

Obscenity per se is not a crime; it is the publication of obscenity that renders it criminal. Publication alone, not content, brings obscenity under the criminal law of libel. The dilemma of who shall decide what is sufficiently obscene to constitute a criminal offense, as well as the standard to be adopted when making that decision, remain problematic. However, if we recognize that the core element of the crime is in the publication itself, then we can fruitfully explore the common law antecedents to American obscenity law doctrines.

II. THE OFFENSE OF OBSCENE LIBEL AT COMMON LAW

Temporal crimes regarding obscenity, especially those concerning sexuality, are of fairly recent origin in English common law and, one might argue, were precipitated as incremental expansions of nuisance law into the broader realm of public morality. Questions of moral behavior were traditionally the province of ecclesiastical courts, but the statutory reduction in their criminal jurisdiction and the relative absence of gradations of workable sanctions (beyond, for example, excommunication)

Steele v. Brannan, 7 L.P.C.P. 261 (1872), and subsequently in American law in *Bennett*, 24 F.Cas. at 1104.

15. While the basic elements of the regime remain fairly constant, there has been little agreement on how each can be defined or how each should be weighted in particular cases, as demonstrated most radically in *Jacobellis*, in which the only plurality agreement gained on substantive argument was two justices. 378 U.S. at 185. On the constellation of elements in basic obscenity cases, see generally Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1 (1960) (examining the Supreme Court's decisions from the late 1950s regarding the constitutionality of legislation that made obscenity a crime); and Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189 (1983) (looking at the content-based and content-neutral distinction in First Amendment analysis and the role "communicative impact" plays regarding content-based restrictions).

reduced those courts' effectiveness in regulating morality. By that point, the regulation of moral behavior was already being absorbed under the jurisdiction of the Star Chamber and later the new Court of the King's Bench as misdemeanors against public order at common law – in effect differentiating between sinful and criminal behavior.¹⁶ In large part, this expansion came in two areas: public nuisance law and laws of defamation. The latter (manifest as slander and libel) related to public statements that vilified an individual and brought him into ridicule or hatred, both generally regarded as tending to threaten public order because he, or his relatives and friends, would be inclined to seek revenge and resort to breaches of the peace that could not be avoided by normal enforcement of laws. Over time, the court extended the misdemeanor of libel to cover critical or contemptuous statements regarding the government (as political and seditious libel), religion and elements of faith (as blasphemous libel), and public expression or conduct that challenged or threatened public morality (as obscene libel).¹⁷

A. *Temporal Offenses Contra Bonos Mores*

In 1663, the regulation of immoral behavior was brought irreversibly under jurisdiction of the King's Bench in *R. v. Sedley*,¹⁸

16. The standard and most comprehensive works on this development at common law are GEOFFREY ROBERTSON, *OBSCENITY: AN ACCOUNT OF CENSORSHIP LAWS AND THEIR ENFORCEMENT IN ENGLAND AND WALES* (Weidenfeld and Nicolson 1979) (considering obscenity's definition, the rise of obscenity law, pornography in the marketplace, and media censorship); NORMAN ST. JOHN-STEVAS, *OBSCENITY AND THE LAW*, (Secker & Warburg 1956) (discussing the history of obscenity, the rise of obscenity law, and various countries' approaches to obscenity), supplemented by three articles by Colin Manchester: *Lord Campbell's Act: England's First Obscenity Statute*, 9 J. LEGAL HIST. 223 (1988) [hereinafter *Lord Campbell's Act*] (discussing the opposition to the Obscene Publications Act of 1857 because of its potential overbreadth); *Obscenity Law Enforcement in the Nineteenth Century*, 2 J. LEGAL HIST. 45 (1981) [hereinafter *Obscenity Law Enforcement*] (detailing the efforts of private bodies and the authorities in their enforcement of obscenity law and how little seemed to have changed by the century's end); and *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36 (1991) [hereinafter *History of the Crime*] (following obscene libel's development in England, including the offense's background and elements). Other useful sources on the history of obscenity law in England include: ALEC CRAIG, *THE BANNED BOOKS OF ENGLAND AND OTHER COUNTRIES: A STUDY OF THE CONCEPTION OF LITERARY OBSCENITY* (Allen & Unwin 1962) (considering literary obscenity's conception and its negative effects upon serious literature and intellectual freedom generally); DONALD THOMAS, *A LONG TIME BURNING: THE HISTORY OF LITERARY CENSORSHIP IN ENGLAND* (Routledge & Kegan Paul 1969) (attempting, in part, to formulate the proper definition of "pornography"); IAN HUNTER, DAVID SAUNDERS, AND DUGALD WILLIAMSON, *ON PORNOGRAPHY: LITERATURE, SEXUALITY AND OBSCENITY LAW* 57-91 (St. Martin's Press 1993).

17. *Supra* note 16.

18. Initially cited as *R. v. Sidley*, (1663) 82 Eng. Rep. 1036 (K.B.), derived

a case involving lewd public conduct in which the court summarily declared its jurisdiction as the *custos morum* of the King's subjects over conduct threatening public morality (*contra bonos mores*).¹⁹ Based on the principle that its civil authority reached moral behavior and its consequences, the court progressively broadened its consideration of immoral conduct beyond incidents of outrageous public behavior (traditionally prosecuted as public nuisances at common law) into areas of more permanent expression as matters of libel.²⁰ The Court maintained that public expression could be considered a criminal offense if it tended to corrupt the morals of the King's subjects, despite the absence of demonstrable injury to a specific individual (as would be required

from two separate nominate reports: *Le Roy v. Sr. Charles Sidley* (1663) 1 Sid. 168 and *Sir Charles Sydlyes Case* (1663) 1 KEB. 620. The defendant, Sir Charles Sedley (1639-1701), would later become a renowned minor British poet, lyricist, and comedy playwright, infrequently referred to as Sidley, but by the 1670s, the spelling in publication (and based on his signatures) had settled on Sedley. Court records subsequently corrected the spelling to Sedley in Curll (*infra* note 22), to which all primary and secondary legal sources have adhered since that time. Here and hereafter referred to as *Sedley*.

19. While *custos morum* (guardianship of morals) was claimed jurisdictionally by the Court at Kings Bench in *Sedley, id.*, it was referenced as appropriate jurisdiction in passing in earlier cases, e.g. *James Bagg's Case*, (1616) 77 Eng. Rep. 1271 (K.B.) (considering public words and gestures of contempt as *contra bonos mores* and worthy of punishment but not disfranchisement without due "course of law"). Even after *Sedley*, it is difficult to ascertain the type of behavior that would in subsequent application be considered a threat to public order, since the offending behavior in *Sedley* included raucous, blasphemous shoutings from a balcony of a public house, public exhibition of nakedness, and casting bottles of urine on passersby below. Any/all of these actions may have caused crowds to storm the public house demanding some form of retribution. See Leo Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 41-43 (1938) (stating that blasphemous expression and public lewdness had not yet been firmly established as offenses under public nuisance law, public urination was easily a nuisance, and the crowd reaction – as reported in apparently some exaggeration (*infra* note 22) – demonstrated some degree to which public order was threatened). See generally *Offences Contra Bonos Mores*, 2 J. C. L. 609 (1938) (discussing *contra bonos mores* in general and detailing specific cases for illustration).

20. Whether the offense in *Sedley* was moral-based or merely a public nuisance was critical to the determination of the range of the Court's *custos morum* jurisdiction. In *R. v. Read*, (1748) 92 Eng. Rep. 777 (K.B.), the Court continued to adhere to traditional ecclesiastical (rather than temporal) jurisdiction over the morality of public expression, arguing that there were no statutory laws under which it could punish the behavior at issue, no common law decisions to guide its consideration of principles, and no specification of individuals (or alternatively the Crown or the government, as in seditious expression) against whom a defaming libel may have been committed. *Id.* To reach that conclusion, the Court in *Read* narrowly interpreted *Sedley* as a simple case of a public nuisance (albeit with moral overtones) and was the last major case in which the Court refused to accept jurisdiction over moral-based behavior at common law. *Id.*

under the civil laws of libel) and/or specific evidence of a breach of peace.²¹

First enunciated in *Curll* in 1727,²² the criminal offense of obscene libel was explicitly recognized as a temporal offense because it involved impious behavior or expression that would tend to cause a breach of peace by challenging religion, thereby weakening the bonds of civil society, virtue, and morality.²³ By equating public order with public morality, *Curll* doctrinally defined *Sedley* as bringing all issues of public morality under temporal law and expanded the temporal jurisdiction of libel law beyond public writings or expressions (“utterings”) to include publications in general, including the written word and pictorial depictions.²⁴ The newly created criminal offense at common law was therefore an amalgam of impiety in expression or conduct and a tendency toward a breach of peace, which had little to do with either licentious behavior or writings per se.²⁵ Subsequent court

21. *Sedley*, *supra* note 18.

22. *R. v. Curll*, (1727) 93 Eng. Rep. 849 (K.B.). The State Trials record of *Curll* includes detailed recorder notes on both *Read* and *Sedley*, including some skepticism about the degree of crowd anger in response to *Sedley*'s actions. (1727) 17 St. Trials 154, 155, 157-58.

23. *Curll*, 93 Eng. Rep. at 851. This becomes dictum in *R. v. Rogier and Humphrey*, (1823) 107 Eng. Rep. 102 (K.B.) (finding court jurisdiction over any practice that tends to injure public morals, and the basis of all cases of obscene libel at common law until the passage of the Obscene Publications Act of 1959, 7 & 8 Eliz. 2, c. 66 (Eng.). See generally RALPH STRAUS, THE UNSPEAKABLE CURLL, BOOKSELLER (London 1927); ST. JOHN-STEVAS, *supra* note 16, at 22-25 (discussing the recognition of obscene libel at common law); THOMAS, *supra* note 16, at 78-85 (detailing *Curll*'s professional undertakings – questionable literary publications – and the famous case in which a unanimous verdict was entered against him); CRAIG, *supra* note 16, at 26-32 (discussing Edmund *Curll* and his interactions with authors as well as his case's importance regarding obscene libel); *History of the Crime*, *supra* note 16, at 38-40 (noting the development of obscene libel by discussing *Curll* and how *Curll* himself had little chance of acquittal).

24. *Curll*, 93 Eng. Rep. at 851.

25. Initially, the Court still relied on arguments founded on the tendency of injured parties to seek retribution (thus anticipating a breach of peace) as stated in *R. v. Topham*, (1791) 100 Eng. Rep. 931, 932 (K.B.) (“[t]he chief cause for which the law so severely punishes all offenses of this nature is the direct tendency of them to a breach of the public peace. . . .”). Later, the Court relied more generally on determinations of broadly defined immoral tendencies that weakened the bonds of civil society rather than findings of clear or imminent breaches of the peace. By common practice however, the jurisdictions of the spiritual and temporal were still considered exclusive and, at common law, crimes involving immorality alone could not find their way into the temporal courts without an explicit accompanying temporal offense or aspect. See, e.g., *R. v. Crunden*, (1809) 170 Eng. Rep. 1091 (lewd exposure on a beach that could be seen from nearby row houses); *R. v. Holmes*, (1853) 169 Eng. Rep. 697 (lewdness exhibited on a public omnibus); *R. v. Delaval*, (1763) 97 Eng. Rep. 913 (conspiracy to place an eighteen year old girl into prostitution); *R. v. Mears and Chalk*, (1851) 169 Eng. Rep. 426 (public conspiracy to seduce a girl

decisions increasingly relied on a broader and more generalized definition of immoral expression, including licentious behavior or writings that portended no particular tendency toward breaches of peace other than generally being “calculated to undermine public morality.”²⁶

By the mid-nineteenth century, obscene materials, however loosely referenced to conventions of piety, became subject to criminal prosecution if they were in some permanent fashion presented in public (“published”). Such prosecutions could be, and most often were, initiated at common law by offended private parties.²⁷ By this time, the Court had already accepted a broadened definition of when materials could be considered published, moving beyond the initial and obviously explicit action

into prostitution). In many cases, immoral (or obscene) behavior was considered insufficiently criminal (e.g. prostitution itself not being an indictable offense) unless it took place or was the subject of public utterance in public and/or was assumed to cause public harm (*ad commune nocumentum*) or an outrage to common decency that went beyond that of a incidental nuisance (as would blatant solicitation of prostitution in public places).

26. By the more secularized nineteenth century, the prosecution of immoral behavior reached beyond violations of traditional religious norms – primarily disrespect for religion and religious institutions (as exhibited by blasphemous comments or writings) and contempt for the sanctity of marriage (as exhibited by licentious or obscene behavior) – to embrace broader behavioral conventions of public decency and decorum associated with the emerging middle class. See, e.g., *R. v. Saunders and Hitchcock*, (1875) 1 Q.B.D. 15, 17 (prosecution of crude language used to lure patrons into an exhibit); *Worth v. Terrington*, (1845) 153 Eng. Rep. 328, 333 (finding that the indecency of public utterings was dependent on their circumstances rather than simply their indecency per se); *R. v. Grey*, (1864) 176 Eng. Rep. 472, 473 (public display of a diseased corpse considered disgusting and a public nuisance, yet not immoral); and *R. v. Elliot and White*, (1861) 169 Eng. Rep. 1322 (sexual intercourse in a public place was considered an outrage to public decency).

27. See *Obscenity Law Enforcement*, *supra* note 16, at 46-52 (detailing the “Society for Suppression of Vice and the Encouragement of Religion and Virtue” and how it dealt with prosecutions of obscene materials); *Lord Campbell’s Act*, *supra* note 16, at 224-29 (considering the Proclamation Society’s efforts in dealing with obscene libel and how the “Vice Society” superseded it to carry on prosecutions); *History of the Crime*, *supra* note 16, at 40-44 (noting the significant role the Proclamation Society, and later the “Vice Society,” played in instituting obscene libel prosecutions). The most active among organized efforts to initiate obscenity indictments in the first half of the nineteenth century was the Society for the Suppression of Vice. M.J.D. Roberts, *Making Victorian Morals? The Society for the Suppression of Vice and Its Critics, 1802-1886*, 21 HIST. STUD. 157 (1984); see also ST. JOHN-STEVAS, *supra* note 16, at 34-38 (discussing the “Vice Societies” and the fact that many prosecutions were brought and many convictions resulted). The operative difference in defamation law between slander and libel was that the former was expressed in spoken words within the immediate hearing of the incident audience and the latter was expressed in writing, a mode of expression that expanded the potential audience both geographically and temporally, creating an “effect” long after their first appearance.

of printing materials for sale²⁸ and encompassing related actions, such as showing the materials to a potential customer²⁹ or displaying them in a shop window, and interactions between authors, artists, and publishers indicating their intent to sell their work through the publisher. These actions, in turn, rendered legally vulnerable those who engaged in literary or artistic expression and made their work available to others in any context.³⁰ During that same period, the Court accepted as publications subject to the law of obscene libel not only books and pamphlets, but 'also magazines, newspapers, pictures, prints, etchings, and other forms of graphic presentation.

The incorporation of the moral crimes of blasphemy and obscenity into the criminal jurisdiction of libel at common law became solidified into a jurisprudential regime in the nineteenth century. Indictments for crimes of blasphemous libel were initially prosecuted against public expressions of speech or conduct as disrespect for the institution and basic doctrines of religion or as publications that challenged the moral authority of religion as the

28. Seminal cases of writings prosecuted as blasphemous and/or obscene libel include: *R. v. Hill*, (1698) 2 Strang. 790 (Rochester's POEMS ON SEVERAL OCCASIONS); *Read*, 92 Eng. Rep. at 777 (THE FIFTEEN PLAGUES OF THE MAIDENHEAD); *Curll*, 93 Eng. Rep. at 849 (THE NUN IN HER SMOCK); *R. v. Williams*, (1797) 26 St. Trials 653 (Thomas Paine's THE AGE OF REASON) and *R. v. Richard Carlile*, (1819) 106 Eng. Rep. 621 (also Paine's THE AGE OF REASON); *R. v. Moxon*, (1841) 4 St. Trials 693 (Shelley's poem "Queen Mab"); *Hicklin*, 3 L.R.Q.B. at 360 (THE CONFSSIONAL UNMASKED); *R. v. Bradlaugh and Besant*, (1877) 2 Q.B.D. 569 (Knowlton's FRUITS OF PHILOSOPHY). Also included were cases prosecuted against publication of transcripts of libel cases in which the materials challenged as obscene or impious were read aloud into the court record in their entirety. See, e.g., *R. v. Mary Carlile*, (1821) 106 Eng. Rep. 624 (transcript of the trial of Richard Carlile); *Steele v. Brannan*, 7 L.R.C.P. at 261 (transcript of the trial of George Mackey in 1870, with augmentation, regarding seizure of THE CONFSSIONAL UNMASKED). Ironically, the profitable practice of publishing court reports of salacious and scandalous trials was well-established by the eighteenth century, honed to a fine practice by Edmund Curl. See Peter Wagner, *The Pornographer in the Courtroom: Trial Reports About Cases of Sexual Crimes and Delinquencies as a Genre of Eighteenth-Century Erotica*, in *SEXUALITY IN EIGHTEENTH-CENTURY BRITAIN* 120-40 (P. Bouce, ed., Manchester 1982) (explaining how partly pornographic and obscene literature were being published as legal and scientific documents).

29. See *R. v. Rosenstein*, (1826) 172 Eng. Rep. 187 (involving indecently illustrated snuff boxes); *R. v. Alfred Carlile*, (1845) 1 Cox C.C. 229 (involving a potential purchaser requesting and being shown indecent items possibly for sale).

30. See, e.g., *Wilkes v. R.*, (1769) 2 Eng. Rep. 244 (private printing of a poem was still considered publication, despite the fact that there was no explicit intent to distribute it to the public, because the simple act of placing the materials into a publisher's hands indicated an intent to publish – or render in published form – regardless of intent to distribute).

foundation of the State.³¹ By the 1840s, in part reflecting the secularist movement and challenges to traditional norms by industrialization and democratization, blasphemous conduct and expression gradually embraced a more cultural and literary (and less doctrinal) definition of immorality, and its prosecution became a benchmark statement of a desire to maintain cultural mores rather than protections of the Church.³² Similarly, indictments for

31. By the mid-nineteenth century, the temporal offense of blasphemy was specified by the definitive legal treatise of the time as the publication of "profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to corrupt the public morals, to shock and insult believers, or to bring the established religion into hatred and contempt." W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 394 (Melville M. Bigelow, ed., Little, Brown 1881) (amplifying the preceding classic treatise THOMAS STARKIE, LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMORS 326 (Collins and Hannay 1832) American reprint of the 1821 edition, which argued that "[i]t is now fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal Courts"). That argument was considered a direct challenge to temporal authority as initially enunciated in Justice Hale's dictum "Christianity is part and parcel of the law of England." *R. v. Taylor*, (1676) 93 Eng. Rep. 882. This was reaffirmed in *R. v. Woolston*, (1729) 93 Eng. Rep. 881, but clarified to the fundamental doctrines of Christianity rather than simply differences of opinion. Authors were at liberty to temperately express sincere opinions regarding religion and to seek truth on religious matters if, in the course of doing so, they showed "proper respect to the religion and government of the country." *R. v. Burdett*, (1820) 106 Eng. Rep. 873, 887; *R. v. Hetherington*, (1840) 4 St. Trials (N.S.) 563. See Courtney Kenny, *The Evolution of the Law of Blasphemy*, 1 C. L. J. 127, 128-34 (1922) (noting that at one point, just to express disbelief in Christianity was to commit criminal blasphemy).

32. See, e.g., *Atwood's Case*, (1791) 79 Eng. Rep. 359 (blasphemous disrespect of clergy in public); *Williams*, 26 St. Trials at 656 (publication of Paine's THE AGE OF REASON considered prima facie blasphemous as irreverent); *R. v. Gathercole*, (1838) 168 Eng. Rep. 1140 (finding criminal blasphemy only required attacks against religion in general rather than a specific religious doctrine or a specific church or denomination); *Hetherington*, 4 St. Trials at 596 (blasphemous attitudes reflected in the non-literal interpretation of the Old Testament); *Moxon*, 4 St. Trials at 694 (publication of unexpurgated version of Shelley's poem "Queen Mab" expressing youthful exasperation with God); *Hicklin*, 3 L.R.Q.B. at 360 (publication of anti-Catholic pamphlet); and later less restrictively circumscribed in *R. v. Ramsay and Foote*, (1883) 15 Cox C.C. 251 (finding that criminal blasphemy required willful intent to subvert religious values rather than mere discussion of religious issues). The final step in the progression from religious to cultural regulation of expression came with the statutory removal of all defamation cases from ecclesiastical courts to the jurisdiction of the King's Bench in 1855. See JOSS MARSH, WORD CRIMES: BLASPHEMY, CULTURE, AND LITERATURE IN NINETEENTH-CENTURY ENGLAND 208-15 (Univ. of Chicago Press 1998) (discussing the use of religion, particularly, the Bible, in a way to suggest it was obscene); S. M. WADDAMS, SEXUAL SLANDER IN NINETEENTH CENTURY ENGLAND: DEFAMATION IN THE ECCLESIASTICAL COURTS, 1815-1855 13 (Univ. of Toronto Press 2000) (noting that attempts were made to reform different

obscene libel, initially prosecuted as statements considered offensive to religious-based mores, likewise gravitated toward more secular definitions of acceptable cultural mores and began focusing on topics regarding sexuality.³³

During this period, it was often difficult to differentiate between an expression that was considered threatening to public morality in general and an expression that simply outraged norms of public decency and would normally be prosecuted as a public nuisance at common law.³⁴ To a large degree, the emerging legal regime reflected the cultural, economic, social, and political

areas of the ecclesiastical courts, but that defamation was the first area of their jurisdiction to be fundamentally reformed). See generally R. B. Outhwaite, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500-1860* (Cambridge Univ. Press 2006).

33. One of the most complex cases in this regard was *Bradlaugh and Besant*, in which the plaintiffs were prosecuted for cheap publication and distribution of copies of Charles Knowlton's *FRUITS OF PHILOSOPHY*, a tract containing birth control information that prosecutors claimed would encourage wanton behavior by married and unmarried couples and plaintiffs argued would actually strengthen marriage bonds, encourage the marriage state by reducing the social and economic stress of uncontrolled conception, and protect the health of women and children. 2 Q.B.D. at 569. The transcript of the appeals trials was initially published as *THE QUEEN V. CHARLES BRADLAUGH AND ANNIE BESANT* (Freethought Publishing 1877), and later in edited version in *ROGER MANVELL, THE TRIAL OF ANNIE BESANT AND CHARLES BRADLAUGH* (Horizon Press 1977); see also *ST. JOHN-STEVAS*, *supra* note 16, at 70-74 (explaining that the prosecution of the Besant-Bradlaugh case represented a new type of prosecution for the publication of "sex manuals").

34. See, e.g., *Sedley*, *supra* note 22 (lewd behavior); *Herring v. Walround*, (1682) 22 Eng. Rep. 870 (public exhibition of deformed children); *R. v. Wiseman*, (1718) 92 Eng. Rep. 774 (sodomy); *R. v. Gallard*, (1733) 25 Eng. Rep. 547 (naked 'in a common way' not per se *contra bonos mores*); *R. v. Lynn*, (1788) 100 Eng. Rep. 394 (disinterring a buried corpse, as burial considered a public function); *Crunden*, 170 Eng. Rep. at 1091 (public exhibitionism); *Worth*, 153 Eng. Rep. at 333 (indecent utterings in public); *Mears and Chalk*, 169 Eng. Rep. at 426 (encouraging prostitution); *Holmes*, 169 Eng. Rep. 697 (naked exhibition in a public place); *Elliott and White*, 169 Eng. Rep. 1322 (sexual intercourse in public); *R. v. Howell and Bentley*, (1864) 176 Eng. Rep. 513 (outrage to public decency by encouraging prostitution); and later *Saunders and Hitchcock*, 1 Q.B.D. at 15 (crude language luring patrons to an exhibition); *Languish v. Archer*, (1882) 10 Q.B.D. 44 (discussing *Holmes* which involved naked exposure from a public carriage). Closely related to these were public advertising of brothels and other types of establishments of ill-repute, prosecuted under the Disorderly House Act of 1751, 25 Geo. 2. See, e.g., *R. v. Higginson*, (1762) 97 Eng. Rep. 806 (involving a public exhibition of game cock fighting indictment for nuisance); *R. v. Barrett*, (1862) 169 Eng. Rep. 1389 (holding separately let rooms in a house do not constitute a brothel when the owner plays no role in tenant's immoral transactions); and *R. v. Stannard*, (1862) 169 Eng. Rep. 1426 (finding that property owner was not a "keeper" of a disorderly house under law). Prosecutions also occurred when a keeper of a public amusement was open on the Lord's Day under the Theatre Act of 1843. See *Wigan v. Strange*, (1865) 1 L.R.C.P. 175 (finding dance with music does not fall under dramatic presentation as would require public licensing).

movements of the time, not the least of which were concerns over the destabilizing behavior of the burgeoning working class, the apparent secularization of English society, concern for standards of moral behavior, and the increased social and economic mobility of the middling classes and their aspiration to the moral standing of the traditional aristocracy in literary and artistic values. One could argue that these tensions dovetailed with expanding literacy of the population and the concomitant market accessibility of publication, especially the penny press.³⁵ There is little doubt that the expansion of libel law into areas of more general cultural mores was a direct reflection of (or reaction to) the democratization of society and the crumbling traditional standards of cultural values long assumed to govern public expression and behavior.

B. *Statutory Intervention: The Obscene Publications Act of 1857*

On occasion, Parliament made some effort to rectify the resulting ambiguities in how civil law should treat public expression by passing statutes regarding some forms of public behavior and specifying procedural aspects of consideration in both public nuisance and libel law that proved a “rougher fit” in these more contemporary (and generalized) applications.³⁶ Among

35. By the 1880s, blasphemy indictments focused primarily on violations of cultural mores in reaction to the coarseness of language and tone and disrespectful satire found in cheap publications such as the *Freethinker*, founded in May 1881 and indicted the first time in 1882. See MARSH, *supra* note 32, at 138-62 (describing the *Freethinker* as “[giving] the world the shop-counter, below-stairs version of religion”); see also DAVID VINCENT, *LITERACY AND POPULAR CULTURE IN ENGLAND 1750-1914* 204 (Cambridge Univ. Press 1989) (noting that penny dreadfuls were well-suited for those readers with little education); Gavin Sutter, *Penny Dreadfuls and Perverse Domains: Victorian and Modern Moral Panics*, in *BEHAVING BADLY: SOCIAL PANIC AND MORAL OUTRAGE – VICTORIAN AND MODERN PARALLELS* 159-69 (Judith Rowbotham and Kim Stevenson, eds., Ashgate 2003) (explaining that the press was thought of as a moral guide and that penny dreadfuls were aimed at younger members of the population using objectionable topics).

36. Most statutes regarding public nuisances specified procedures for indicting and subsequently punishing offenders and continued to rely on the common law for the definition of the offenses themselves, for example, the Vagrancy Acts of 1824, 5 Geo. 4, c. 83 and 1838 1 & 2 Vict. c. 38 (banning indecent exhibitions in public view), the Metropolitan Police Act of 1839 2 & 3 Vict. c. 47 (banning the exhibition for sale of obscene materials), various acts regulating “disorderly houses” (neighborhood misbehaviors surrounding domiciles used for prostitution, though prostitution itself was not illegal), and various acts licensing theatres, e.g. 10 Geo. 2, c. 28; 25 Geo. 2, s. 36; 28 Geo. 3, s. 30; and 6 & 7 Vict. c. 68; each statute expanding the operative definition of what constituted “entertainment of the stage” by law requiring licensing. The dilemma of continuing to use common law definitions of offenses was reflected in the Court’s labored effort to apply conventional definitions of theatre performance to new theatrical forms, as in *Wigan*, 1 L.R.C.P. 175 (concluding that “ballet divertissement” was more likened to dance-with-music than to drama, thus requiring no license and allowing no regulation under current

these, and the benchmark in the evolution of obscenity law, was the Obscene Publications Act of 1857.³⁷ By the mid-nineteenth century, prosecutions for obscene libel followed a traditional procedural regime. Under common law, an indictment could be brought by public officials or private persons against anyone publishing materials that might be considered obscene.³⁸ In practice, because the obscene nature of the publication was considered a question of fact to be determined by the magistrate and the nature of its publication or its tendency (effect) toward the corruption of public morals was a matter of summary judgment or jury consideration, procedural questions regarding due cause often jeopardized swift or successful prosecution. At the same time, application of common law sanctions – appropriate fines and possible jail sentences – seemed to have little effect on the economic growth of the market for salacious materials.

Determined to bring orderliness to prosecutions and more effectively deter future distribution, the 1857 Act attempted to focus prosecution on taking cheap and salacious obscene publications out of circulation while, at the same time, providing some procedural safeguards against arbitrary charges at common law against holdings of respectable works of art or literature. Those initiating the charge were required to present evidence under oath to the local magistrate that such materials were being held for purposes of sale, upon which the magistrate would issue a warrant allowing entry of police (or even the accusing private persons) into commercial or private premises for seizure of the materials. After seizure, the court issued a summons to the proprietor of the location from which the materials were seized, calling upon him to show cause why the materials should not be destroyed and, in effect, asking him to plead that the materials were not obscene, were not intended to corrupt morals, or were of compensating social value or benefit to society regardless of their obscene nature.³⁹ Under section 4 of the Act, magistrate decisions

law) or the court's continuous hair-splitting over whether the owner of a domicile used by prostitutes was the "keeper" of the house as in *Stannard*, 169 Eng. Rep. 1426 (holding that an owner not living on premises was not a keeper as understood in common law and therefore not legally an accessory after the fact to the bawdy nuisance created by prostitutes engaged in their trade).

37. 20 & 21 Vict. c. 83. For background on the Parliamentary debates on this legislation, see *Lord Campbell's Act*, *supra* note 16, at 223 (noting the "bitter struggle" that took place before the legislation passed and how opponents feared the powers granted under the legislation were too broad); see also Roberts, *supra* note 2, at 616 (discussing the dispute over the legislation, particularly in regard to literature that may actually have artistic merit).

38. See, e.g., S.M. WADDENS, *SEXUAL SLANDER IN NINETEENTH-CENTURY ENGLAND: DEFAMATION IN THE ECCLESIASTICAL COURTS, 1815-1855* 117 (Univ. Toronto Press 2000) (discussing various cases where private persons initiated prosecutions for libelous materials).

39. ST. JOHN-STEVAS, *supra* note 16, at 129-31. In none of the cases prior

upholding the destruction order could be appealed to Quarter Sessions on matters of fact or law and subsequently to the Divisional Court of the Queen's Bench on matters of law.⁴⁰

The Act provided a set of summary procedures administered by magistrates and Justices of the Peace as part of routine policing.⁴¹ Although those procedures established due process by which the owner or purveyor of the seized materials might secure their release, it was clear that the purpose of the Act was to put in place an immediate economic sanction designed to effect greater deterrence, i.e. the legal destruction of the materials should the purveyor be unsuccessful in gaining their release. The only avenue for securing their release was to somehow demonstrate that the materials were not, as Lord Campbell cautioned in proposing the Act, "written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in the well regulated mind."⁴²

During the Parliamentary debates, two criticisms were paramount: first, it was argued that existing structures of regulation (social policing) under the common law were sufficient and there was no need for statutory intervention; and second, it was feared that the legislation created an overly-broad power of search and seizure, lacking safeguards that would confine its execution to standards of common reasonableness. At risk was

to passage of the 1857 Act did defendants or defense counsel take issue with the portrayal of the challenged materials as obscene; instead, they relied on claims that the defendants were well-intentioned in their publication (including that the material had social value), or were not responsible for or were ignorant of the content, when they participated in its distribution. *Id.* Therefore, the initial destruction order cases argued under the 1857 Act were, to a degree, based on uncharted legal grounds regarding an operational definition of what constituted obscene material, leaving this area of law open to interpretation by *dictum* as was provided by *Hicklin*. *Id.* Similarly, prosecutions for importation of indecent or obscene articles under the Customs Act of 1846, 9 & 10 Vict. c. 102, contained no operative definition for what would be considered obscene. *Id.*

40. 20 & 21 Vict. c. 83.

41. *Id.*

42. See *Roberts*, *supra* note 2, at 613 (quoting the Hansard Parliamentary Debates, 146 PARL. DEB., H.L., H.C., (3rd ser.) (1857) 329). Sweeps conducted under the 1857 Act did, in fact, close down many of the most notorious distributors in the Holywell Street section of London, but the trade in pornographic materials rose to a radically expanded market of diverse offerings by the 1880s. See Lynda Nead, *From Alleys to Courts: Obscenity and the Mapping of Mid-Victorian London*, 37 NEW FORMATIONS 33 (1999) (depicting a rise in demand for obscene materials during the Victorian Era); see also Tom Lewis, *Legislating Morality: Victorian and Modern Legal Responses to Pornography*, in BEHAVING BADLY: SOCIAL PANIC AND MORAL OUTRAGE – VICTORIAN AND MODERN PARALLELS 143-58 (Judith Rowbotham and Kim Stevenson, eds., Ashgate 2003) (discussing the Victorian legal response to the publication of obscene materials with a focus on *Hicklin*).

inappropriate application to reputable, perhaps even classic, works of art and literature, raising the specter of a repressive "official morality" and its constraining effect on literary culture.⁴³

The Act created no new legislatively defined criminal offense and provided no legislative guidance for how obscene materials might be differentiated as a matter of fact rather than of law. Instead, it provided magistrates with legal authority to order the destruction of materials they considered obscene as defined by common law.⁴⁴ There was no penalty imposed on the publisher or consumer, but it did place the burden of defense directly on the distributor (arguably the economic stakeholder) to demonstrate why the materials should not be destroyed. The distributor could meet this burden by showing either that such materials were not within the definition of obscene, which was judged by the reasonable doubt standard and applied by the magistrate as a matter of fact, or that although technically obscene, such materials were in their tendency of sufficient social importance as to overcome any potentially corrupting influence. Prosecutors however were obligated to demonstrate that the offending materials were actually made available for sale to the public, excluding privately commissioned sales and private collections.⁴⁵

Although the Act emboldened prosecutions, it left untouched their common law basis in libel and provided no legal definitions regarding the obscene nature of the materials or how one might

43. See Roberts, *supra* note 2, at 619 (citing the Hansard Parliamentary Debates, 146 PARL. DEB., H.L., H.C., (3rd ser.) (1857) 327, 1152-53, 1355-57, and 147 PARL. DEB., H.L., H.C., (3rd ser.) (1857) 1475-84, 1862-66). One of the principal concerns expressed in the Parliamentary debates was whether local police officers and/or magistrates would be able to distinguish between authentic art and literature on the one hand and obscene materials meant to pander to the undisciplined mind on the other, and the degree to which arbitrariness at the initiation stage, by local officials or by private citizens, might lead to legal harassment of those with bona fide collections or holdings. *Id.*

44. 20 & 21 Vict. c. 83.

45. ROBERTSON, *supra* note 16, at 28-29. The latter was critical, for it excluded both the literary gentry and the private bookseller who was commissioned to find a copy of certain material for a selected clientele from the sweep "of the streets" (or specifically Holywell Street). *Id.* In fact, most sophisticated materials of this kind, imported generally from France, were largely beyond the means of the public until more widespread literacy and the rise of mass consumption publications (such as the penny press) made them more accessible by mid-century. *Id.* The final language of the 1857 Act, after amendment specifying that holding obscene materials "for the purpose of sale or distribution, exhibition for purposes of gain . . . or being otherwise published for purposes of gain . . ." 20 & 21 Vict. c. 83, s. 1 (emphasis added) was unlawful, was interpreted to exclude private holdings or collections, regardless of the "publication" (showing to others). See also Roberts, *supra* note 2, at 620-22 (describing the history that led up to the passing of the Obscene Publications Act).

determine their tendency to corrupt morals. Its objective was to regulate, not eliminate, publication of pornography, and said nothing about its production or its private possession. The principal concern was with materials of a peculiar "moral typography" that portended both a moral danger (pornography as a social harm) and a medical pathology, jeopardizing the "moral or ethical self-discipline" of the expanding and socially concerned middle class as well as the debilitating effects on both the individual's body and soul.⁴⁶

The Act's subsequent effects on prosecutions at common law were in its application. The first case in which the common law of obscene libel arose under the procedural safeguards prescribed by the Act was *Hicklin*.

III. THE JUXTAPOSITION OF COMMON AND STATUTORY LAW

Hicklin evolved from the complaint of a police officer who, at the direction of a Borough Watch Committee, had seized 252 copies of a pamphlet entitled *The Confessional Unmasked* and delivered them for judgment to the magistrates in Wolverhampton.⁴⁷ The pamphlet already had been published in a number of editions for over twenty years (initially in 1836) and these particular copies initially had been purchased from William Strange by the Protestant Electoral Union (PEU), which in turn sold copies to Henry Scott.⁴⁸ The copies in question were seized

46. HUNTER, SAUNDERS, & WILLIAMSON, *supra* note 16 at 64-66; Lynda Nead, *Bodies of Judgment: Art, Obscenity, and the Connoisseur*, in LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 203-25 (Costas Dousinas and Lynda Nead, eds., Univ. of Chicago Press 1999). This concern carried over into debates over aesthetic qualities in art and literature in the latter part of the nineteenth century. The debates focused on the kind of aesthetic distance needed to reach higher moral narratives, as opposed to more subjective, emotion-based approaches to expression which appeal to basic instincts. This distinction becomes the basis of legal actions regarding artistic legitimacy and whether art can be pornographic and/or subject to criminal prosecution under obscene libel. See PEASE, *supra* note 11 (describing the relationship between aesthetics and obscenity from the eighteenth century to present and highlighting the way in which early-twentieth century writers incorporated a sexually explicit discourse into their works); LINDA MERRILL, A POT OF PAINT: AESTHETICS ON TRIAL IN WHISTLER V. RUSKIN (Smithsonian 1992); see also TIM BARRINGER, READING THE PRERAPHAELITES (Yale 1998); ELIZABETH PRETTEJOHN, ROSSETTI AND HIS CIRCLE (Tate 1997) (discussing the entire literary debate over the Pre-Raphaelite "fleshy school" of art); CELIA MARSHIK, BRITISH MODERNISM AND CENSORSHIP (Cambridge Univ. Press 2006) (examining the degree to which literati began to engage in self-censorship to avoid the social or economic onus of claims their works graphically appealed to sexuality or sensuality).

47. 3 L.R.Q.B. at 362.

48. Copies of *The Confessional Unmasked*, designed "to protest the teachings of the Romish and Puseyite systems, which are un-English, immoral and blasphemous; and to maintain the Protestantism of the Bible and the

from the possession of Scott and ordered destroyed by the magistrates as an obscene libel under the Obscene Publications Act of 1857.⁴⁹ The destruction order was appealed by Scott to Quarter Sessions as provided by Section 4 of the Act.

In Quarter Sessions, all parties conceded the obscene nature of at least half of the pamphlet, but the Recorder, Benjamin Hicklin, Esq., concluded that Scott's intention was not to corrupt morals but rather to promote the PEU and its political message and ruled in Scott's favor.⁵⁰ The case then moved to the Divisional Court of the Queen's Bench (QBD) on a question of law because a finding that the pamphlet was obscene and its publication was a misdemeanor offense should have automatically sustained the destruction order. At common law, a finding of obscenity was a judicial finding of fact, unmitigated by intent or effect under criminal libel law. By using the common law understanding of obscenity in an application of the Act, the Recorder became entrapped in the juxtaposed common law language that seemed to call for a second finding – that the distributor had intended to corrupt public morals. Procedurally, the Court was being asked if the initial magistrate's decision was reasonable, i.e. that the material at issue was of such a character as to fall under the law of obscene libel, and if publication of such material would warrant prosecution as a misdemeanor. If so, the magistrate could order seizure and destruction of the materials under the 1857 Act – the last step of a judicial intervention designed to prevent "vexatious prosecutions."⁵¹

liberty of England" and support candidates for Parliamentary seats committed to defeating "the deep-laid machinations of the Jesuits" were sold on the street at cost by the PEU as a public lobbying technique, on the basis of which a number of subsequent obscene libel charges were filed, as in *Steele v. Brannan*. See generally HUNTER, SAUNDERS, & WILLIAMSON, *supra* note 16, at 66-73 (discussing the development of obscenity law).

49. *Hicklin*, 3 L.R.Q.B. at 362.

50. *Id.* at 360.

51. *Id.* at 374. During Parliamentary debates, Lord Campbell's Act was presented as a statement of principles in response to his observation of the number of unsuccessful prosecutions for obscene libel and paid little heed – in statutory language – to how those principles might be applied (or misapplied) by local magistrates in the future, as first manifest in *Hicklin*. See Roberts, *supra* note 2, at 626-28 (examining the *Hicklin*'s application of the Obscene Publications Act). *Hicklin* was one of a number of cases in which those prosecuted for publication of an obscene libel were not the kinds of "panderers of salacious filth" that Lord Campbell professed to have in mind in proposing the statute. *Id.* The defense initially argued, and the Recorder Benjamin Hicklin accepted, that, in the absence of criminal intent, the publication could not be considered a misdemeanor offense and the warrant for seizure was thereby from the outset outside the magistrate's jurisdiction. *Id.* The legal dilemma posed by the 1857 Act was that such warrants were issued by magistrates in response to sworn testimony by those initiating the action that materials were qualified by subject matter for prosecution as obscene libel,

The decision at Queen's Bench, written by Chief Justice Cockburn, focused almost entirely on the question of whether an honest or public-serving purpose could justify what had already been determined to be an obscene libel - the publication of obscene material. The definition of what was deemed obscene was never at issue. In fact, it was considered to be commonly understood and conceded that half of the pamphlet itself - based solely on the topics addressed therein - was obscene. The question of whether an obscene libel could nevertheless be justified was considered a matter of intent, with the presumption at law being that

when the act is in itself unlawful . . . the proof of its justification or excuses lies in the defendant; and in failure, the law implies a criminal intent . . . everyman, if he be a rational man, must be considered to intend that which must necessarily follow from what he does . . . [and] if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view [as] the immediate and primary object of the parties of a different and of an honest character.⁵²

Cockburn's instructions to the jury regarding the features of a publication subject to a charge of criminal obscenity ultimately became obiter dictum, the operative (and ubiquitously cited) standard in proceedings related to the common law offense of obscene libel. The instruction stated: "I think the test is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁵³

Cockburn's focus on the issue of criminal intent, rather than an operative definition of obscenity, can fairly be inferred from the common assumption that moral health could be damaged by exposure to obscene words and images as defined by social norms falling into two specifications: (a) the mental/moral attributes of those most vulnerable upon exposure, and (b) those public spaces in which those most vulnerable were most likely to be exposed. Although the former was left undefined and may have lead (as it does today) to a circular argument, it is fairly clear that Cockburn was referring particularly to young persons⁵⁴ rather than opening

only after which a jury could consider intent. *Id.*

52. *Hicklin*, 3 L.R.Q.B. at 364, 366, 370.

53. *Id.* at 371.

54. The broad reference to "young persons" or "youth" in the nineteenth century development of the law of obscene libel defies greater specification, particularly since literacy rates among youth still varied greatly by social class. The appearance of salacious materials in shop windows or in the hands of street hawkers on Holywell Street may well have titillated the imaginations of "working class youth" who were commonly assumed to be undisciplined and subject to emotion rather than reason, but that would not explain societal

a discussion of “particularly susceptible persons,” young and old.⁵⁵

fears regarding religious (as in *Hicklin*), philosophical (as in *Williams and Richard Carlile*), scientific (as in *Bradlaugh and Besant*) or literary (as in *Moxon*) tracts that were commonly prosecuted. The principal concern was largely for the impressionable minds of the children of the emerging middle class, more literate and more mobile by the latter half of the nineteenth century, and perhaps rendered more susceptible by the secularization of English culture. See Roberts, *supra* note 2, at 614-15 (examining the affect on the “youth” who were beginning to experience a longer period of economic and social dependence); *History of the Crime*, *supra* note 16, at 48-50 (discussing the development of law enforcement for obscene publications). Considerable concern was expressed in writing and in statutory law for the moral health and protection of young girls, particularly those legally engaged in prostitution under the age-of-consent law (at age 12, subsequently raised to age 13 in 1875 under 38 & 39 Vict. c. 94) or pressed into white slavery on the continent, resulting in the Criminal Law Amendment Act of 1885, 48 & 49 Vict. c. 69, raising the age of consent to 16 and protecting females of various ages under 18 from sexual abuses. See, e.g., Deborah Gorman, *The “Maiden Tribute of Modern Babylon” Re-examined: Child Prostitution and the Idea of Childhood in Late-Victorian England*, 21 VICT. STUD. 353 (1978) (describing the widespread persistence of juvenile prostitution in late-Victorian England). Concern was also extended to the moral upbringing of young girls of the middle class, still largely educated in the home, regarding the moral narratives of the art and literature to which they might be exposed. See, e.g., CATHERINE ROBSON, *MEN IN WONDERLAND: THE LOST GIRLHOOD OF THE VICTORIAN GENTLEMAN* 154-93 (Princeton 2001) (detailing nineteenth century fascination with young girls); Celia Marshik, *The Case of “Jenny”: Dante Gabriel Rossetti and the Censorship Dialectic*, 33 VICT. LIT. & CULT. 557 (2005) (describing censorship in the late Victorian Era); and THOMAS, *supra* note 16, at 85-91 (explaining the history of censorship in England).

55. *History of a Crime*, *supra* note 16, at 47-51. If the question becomes one of the moral/aesthetic abilities and predispositions of certain audiences, one might be inclined to argue that those of weak will or little education (and therefore social discipline) would be most susceptible to responding to such materials in a lascivious manner damaging to the public welfare in some sense. It may be difficult to determine all those who fall into that “most susceptible” category, except by identifying all those who purchased such materials in public places. By assuming that there are individuals of weak character and/or social discipline, the predominant societal response is to control any negative societal effects by regulating access to materials that may pander to those weaknesses. But then one faces the dilemma posed either by closing off the public space to all those who might fall into that category or by censoring all such materials, the former requiring a predetermination of character traits and the latter precluding access to those of sufficient character and social discipline to confine their subsequent behavior within the bounds prescribed by social norms. If one’s purpose were to prevent the lascivious behavior that might be an undesired result of the consumption (or even the mere exposure to) such materials, one would either have to keep certain purchasers under surveillance after purchase and await the imminent prospect of such behavior, or simply intuit that lascivious behavior would be the expected result and intervene at the point of purchase, again assuming the intent to engage in such behavior from the act of purchase. The problem lies in the diverse composition of those who move even intermittently in the public space. Openly accessible to a populous undifferentiated as to character traits, education, upbringing, and/or susceptibilities, the public marketplace contains

It was more common that a determination of intent would focus in the latter area, complicated by the broad range of persons that might be found in the public space and to whom exposure might be damaging, and the kind of exposure one might confront in those public spaces.

To this extent, certain commercial or other districts with a concentration of purveyors of such materials came under increased scrutiny from social agencies or local police and were subject to individual complaints, periodic sweeps, and closings. The question of intent, therefore, became subsumed in a set of interlocking presumptions about the nature of the content, the impact of such materials, and the qualities of those who might purchase them. Making such materials publicly available for sale demonstrated intent on the part of a distributor/bookseller to pander to those susceptible to lascivious interest. Those who might demonstrate an interest in or actually purchase such materials thereby demonstrated weak character and social discipline and intent to engage in lascivious behavior. In other words, by their presence in such an open marketplace of obscene materials, vendors demonstrated their intent to pander, and consumers demonstrated their intent to engage in lascivious behavior.⁵⁶

Given that the market for such materials had previously been small, discrete, and confined in large measure to the literate and affluent patrons who privately commissioned booksellers to secure copies of selected (largely foreign) publications, the expanded judicial focus on the marketplace itself reflected and spurred the broadening potential market for such materials. This new market included the more literate and affluent middle class and

at any one time those actively seeking out purchase, those who might be enticed to purchase (by window displays, or street hawkers), those who are indifferent to the availability of such materials, and those who may be affronted by their availability in public.

56. In the mid-nineteenth century, the focus was entirely on the content of the materials and the intent of those immediately involved in their distribution or sale. Not at issue was whether a particular author or artist intended to attract the lascivious interest of those who might read or see the work. This rendered any literary or artistic works susceptible to varying interpretations as to their actual or potential impact, opening up a century-long philosophical (but rarely legal) debate over the cultural governance of taste in any given community and how a society can protect its important literature and art. PEASE, *supra* note 11. Arguably, *The Confessional Unmasked* was intended by its author to expose heinous practices of the Catholic Church, practices that undermined the social order. However, at no point was testimony entered or sought regarding what the author intended; instead, judgments focused on the degree to which it visited scandal upon an established institution in British society (an anticipated impact which would have automatically warranted prosecution as an obscene libel under common law) and the manner in which it was at that time distributed (pandered as a lascivious description of intimate sexual details revealed in the confessional).

ultimately the lower classes which, though demonstrably less literate and less affluent, could nonetheless be reached with cheaper cost and less demanding publications such as ribald stories, explicitly sexual illustrations or postcards, and, of course, the scandalous penny press.⁵⁷

IV. OBSCENE LIBEL AS A LEGAL REGIME

The Act of 1857 retained the common assumptions about content in cases of obscene libel and simply provided a procedure for issuing warrants and hearing appeals, the latter of which involved impaneling juries to apply the commonly held standards of public morality of the community to policing actions and magistrate decisions.⁵⁸ The *Hicklin* decision was one of several that established the parameters of the application of the Act,⁵⁹ and Cockburn's clarification was designed to aid the jury in knowing exactly what it was to decide. As in most cases of obscene libel, the Court and the jury deferred to the judgment made initially by the magistrates in issuing the warrant, i.e., that the materials seized were of an obscene nature and appropriately subject to indictment under common law. The role of the jury was to determine the direct role of the plaintiff in the publication of the

57. See IAIN MCCALMAN, *RADICAL UNDERWORLD: PROPHETS, REVOLUTIONARIES, AND PORNOGRAPHERS IN LONDON: 1795-1840* (Clarendon 1993) (describing the marketing of pornography to the lower class); COLETTE COLLIGAN, *TRAFFIC IN OBSCENITY FROM BYRON TO BEARDSLEY: SEXUALITY AND EXOTICISM IN NINETEENTH CENTURY PRINT CULTURE* (Joseph Bristow, ed., Palgrave 2006) (discussing the development of sexually explicit publications in nineteenth century England). A primary motive for Lord Campbell's proposal of the 1857 Act was apparently to simply stem the rising tide of public indecency, evidenced by recurring violations by a number of notorious publishers of radical (libertine) pornography, such as William Dugdale whose conviction was upheld in *Dugdale v. R.*, (1853) 169 Eng. Rep. 638. See SIGEL, *supra* note 11, at 45-48 (including a discussion of William Dugdale's publication of, and resulting conviction for, the PRODUCTION OF REVOLUTION); see also Roberts, *supra* note 2, at 616-18 (noting that Lord Campbell claimed that the material he complained of had absolutely no artistic value); *Lord Campbell's Act*, *supra* note 16, at 226 (examining the reasons why the trade in obscene materials was relatively unaffected by common law prosecutions prior to the passage of the Obscene Publications Act).

58. *Cf. Miller*, 413 U.S. at 24 (indicating how the contemporary community standards aspect added to American obscenity law).

59. See *Steele v. Brannan*, 7 L.P.C.P. 261, and *Bradlaugh and Besant*, 2 Q.B.D. at 569 (quoting *Hicklin*, the Parliamentary debates over the passage of the 1857 Act, and Lord Campbell's justification for it). After *Steele*, *Hicklin* becomes identified as the doctrinal definition for the offense of obscene libel and subsequently quoted verbatim in Odgers' governing treatise on libel in 1881. ODGERS, *supra* note 31, at 404-07.

materials and to consider whether there was convincing evidence to counter the presumption of pandering intent.⁶⁰

The *Hicklin* decision cannot, however, be considered in isolation. As a case at common law, it must be assumed to reflect consistent application of general principles of legal thought over a range of legal issues and court decisions. Too often, based on more contemporary concerns in obscenity law, discussion of *Hicklin* tends to focus on the plaintiff's intent in publishing the materials in two regards: first, whether the Court should be governed by the obscene nature of isolated passages or parts of the materials at issue (as opposed to the broader context of the materials as an integrated whole), and second, whether the intent of the plaintiff in publishing the materials serves some broader societal purpose that should to some degree mitigate the court's subsequent finding or sentencing. Each calls upon the Court to consider the broader societal value of the publication as a mitigating factor regarding materials that contain presumptively obscene aspects. However, neither considers whether the materials themselves meet a commonly understood standard as "obscene" or the legal or common law basis for why "obscene materials" constitute an indictable criminal offense.

Cockburn's decision, often reduced simplistically to what became known as the *Hicklin* test for obscenity, contains a range of elements at common law that can only be understood in that context. While the indictable crime in *Hicklin* was Scott's publication (possession for purpose of distribution) of an obscene pamphlet, the entire case revolved around evidence regarding whether he published it within the meaning of the common law and which parts of it were being identified as obscene. To the degree that the obscenity of parts of the pamphlet was admitted, or at least was not challenged by the defendant, and that his possession with intent to distribute was also admitted, there was, in effect, no contested aspect of the case until the appeal was heard at Quarter Sessions when the Recorder, *Hicklin*, assumed a second level of intent was requisite to conviction: the intent to corrupt morals. This standard did not arise from the statutory language of the Act (which was procedural in nature and did not mention intent) but rather from *Hicklin's* interpretation of what

60. *Hicklin*, 3 L.R.Q.B. at 374. The presumption of the Court in every instance was that the distributor of the materials intended to pander to those of weak constitution, which the defense could counter either by evidence that the materials at question were not obscene as defined under common law or that the materials, though arguably obscene in part, contained literary or artistic insights (or even political information) from which the public might benefit, or by testimony of the defendant or those of public repute as to his moral character and/or public standing in the community, testimony designed to counter the presumption of ill-intent.

was required of a misdemeanor offense *contra bonos mores* at common law, i.e., in the publication of an obscene libel.⁶¹ In this, *Hicklin* would have rightly considered that case law was directive,⁶² as was Lord Campbell's well-publicized rationale for proposing the legislation in the first place.

The question of whether the defendant intended a particular behavioral consequence by his publication of the pamphlet brought to the fore a full range of interlocking issues at common law that were subsumed to the simple finding of fact regarding whether or not the defendant published the materials considered obscene.⁶³ A number of these issues must be examined in both principle and application in order to see the full import of the question before the Court in *Hicklin*.

A. Obscene Libel as a Criminal Offense

Prior to *Curll*, the criminal offense of libel required words that were damaging to the reputation of a specific party and communicated in some permanent form of presentation, i.e., in writing.⁶⁴ *Curll*, however, expanded the reach of the criminal offense by specifying that a libel (or publication) had a public consequence independent of any specific reference to persons - a consequence provoking potentially offended parties to retaliatory

61. Obscene Publications Act of 1857, 20 & 21 Vict. c. 83, § 1. The Act stipulates only that magistrates may issue a warrant for search and seizure of materials "of such a character and description [i.e. obscene] that the publication of them would be a misdemeanor [at common law]."

62. Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEG. STUD. 215, 226-33 (1987). This is not to say that courts at common law were strictly bound by precedent as a straight-forward set of exclusionary (positive) rules but rather as a set of guiding principles that sprang from decisions in analogous prior case circumstances. Lacking statutory guidance, courts were relatively free to apply what they interpreted as patterns of judicial reasoning found in prior cases, recognizing that cases all had unique circumstances that made application of prior reasoning an untidy business. *Id.* Also, prior to the nineteenth century, consistent and complete records of case decisions, particularly those of nominate reports, were not available, and by that time courts had already begun to rely on legal treatises for such guidance. See, e.g., MICHAEL LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850* (Clarendon 1991) (discussing the multitude of common law courts that relied on treatises). In the field of libel law, the two preeminent treatises to which courts referred were STARKIE and ODGERS, *supra* note 31.

63. These interlocking issues are discussed in some detail in ST. JOHN-STEVAS, *supra* note 16, and J.E. Hall Williams, *Obscenity in Modern English Law*, 20 LAW & CONT. PROB. 630 (1955).

64. In general, a libel is a statement that causes harm, as a tort subject to civil action seeking personal damages to the reputation of specific parties or as a crime, indicating its effect - "conducting to a breach of the peace" - must be suppressed for the public good. See ODGERS, *supra* note 31, at 373 (describing the reasons libel is considered a criminal offense).

behavior that would, in turn, necessarily breach the peace.⁶⁵ In effect, the injurious nature of the words published would be related to their general offensiveness rather than a specific challenge to an individual's reputation and would naturally lead (tend) toward breaches of the peace that were impossible to restrain because those persons inclined to engage in retaliatory behavior would do so based on an assumption that such injuries would not and could not be redressed through normal mechanisms of public justice.⁶⁶ The key element in libel law was not the actual content of a publication, but rather its tendency to cause an indelible injury felt by a range of offended parties, an injury that would precipitate in its natural (inevitable) course a retaliatory

65. *Curl*, 17 St. Trials at 154 (citing *De Libellous Famosis*, (1606) 77 Eng. Rep. 250. The Star Chamber was established in 1488 to prosecute libels against the Church (blasphemous libel) and State (seditious libel) that jeopardized civil peace. After the abolition of the Star Chamber in 1641, both civil (tort) and criminal offenses of libel moved under the jurisdiction of the King's Bench, only the former requiring evidence of damage. In *De Libellous Famosis*, Coke established the distinction between personal (private) libels involving damage to individual proprietary interests and more serious political (public) libels that threatened a breach of the peace. 77 Eng. Rep. at 251. Among public libels were included sedition, blasphemy, obscenity (added by *Curl* in 1727), and utterings that would generally lead to a breach of the peace. By Lord Campbell's Libel Act of 1843, 6 & 7 Vict. c. 96, section 6, a defense against a charge of public forms of libel could include truth but only if accompanied by an inclination to produce public benefit. See Van Vechten Veeder, *The History and Theory of the Law of Defamation. I*, 3 COLUMBIA L. REV. 546, 559-67 (1903) (describing the defense of truth in Lord Campbell's Libel Act). See generally Ralph V. Turner, *The Origins of Common Pleas and King's Bench*, 21 AMER. J. LEG. HIST. 238 (1977) (reviewing the history of libel law and the use of truth as a defense).

66. It would be in the nature of such a publication to offend naturally (or inevitably) – in tone and manner, more than in content – an indeterminate number of persons in society. The sheer unpredictability of how many there would be or how and when they may act in a retaliatory fashion made the offense a crime worth suppressing in the interests of public order. The difficulty, of course, was determining which publications might tend to cause such a reaction. That responsibility fell to juries applying the standard of “reasonableness,” that is anticipating how might the average Englishman react to such a publication. However, the assumption in most cases was that the challenged expression or publication was actionable per se and required no evidence regarding actual injury because of the doctrinal imputation of (sinful) malice held over from the jurisdiction of the ecclesiastical courts. As jurisdiction over libel moved to temporal courts, the imputation of malice adopted a legal rather than religious continence. See Van Vechten Veeder, *The History and Theory of the Law of Defamation. II*, 4 COLUMBIA L. REV. 33, 35-36 (1904) (describing the imputation of malice in libel cases). It is critical to note that juries were directed to consider and anticipate tendency, not decipher whether the publication exhibited certain content (i.e. subject matter) or mode of expression (e.g. lewdness).

behavior that would breach the peace and be undeterred by the ordinary enforcement of public laws regarding such behavior.⁶⁷

In *Curll*, the crime of libel reached beyond its traditional (technical) application of words causing personal damage to the reputation of specific parties to a broader platform: written words without personal reference that would naturally cause offense and tend to precipitate disruptions in public order, specifically words regarding religion, civic virtue, or morality. As a criminal offense, libel was now interpreted as creating public harm through the act of publication itself because written or published words (unlike spoken words) had an unlimited range of potential impact over time, and because of that broader range of potential harm, those who published such words had a greater responsibility for anticipating and avoiding the possible harms they may cause.⁶⁸ After *Curll*, it was a small step to anticipate the subject areas in which such public harm might be most easily precipitated by publication of what might be interpreted simply as controversial words to which the common law of libel could be applied: religion

67. The doctrinal emphasis on the effect (rather than the content) of a libel was spawned by Coke's *De Libellous Famosis*, his own case reporting on the seditious libel prosecution of Lewis Pickering for posting polemic verses against the practices of the Church of England and its ecclesiastical courts on the occasion of the death of the Archbishop of Canterbury, a case in which he, as the King's Attorney General, served as chief prosecutor. 77 Eng. Rep. at 251. The principal argument, derived from Roman rather than English common law and upheld in subsequent judgments for the next two hundred years, was that criticism in a public and offensive manner (*contra bonos mores*) leads to breach of the peace and in no circumstance was justifiable. Veeder, *supra* note 65, at 564-65. More specifically, criticism of a public man is a challenge to the judgment of the Crown who is served by that man, a challenge that weakens the hierarchical and monarchical bonds that keep society stable. *Id.* The effect of a libel therefore is to threaten social order in permanent fashion, clearly a criminal offense and one that does not require that consequence (*actus reus*) to actually occur before the sovereign can and should intervene. See *id.* (analyzing the necessity of libel law for maintaining public peace); Alistair Bellamy, *A Poem on the Archbishop's Hearse: Puritanism, Libel, and Sedition after the Hampton Court Conference*, 35 J. BR. STUD. 137 (1995) (discussing the influence of religion on libel law).

68. *Curll* argued that libel need not always be interpreted in the technical sense, i.e. causing personal harm, but rather qualified as a temporal crime if the words were in writing, reflected on religion, virtue or morality, and tended in some manner to disturb civil order, and thereby expanded the traditional reach of libel law by contending broadly that "it is libellous from its being a book, and not from the matter of its contents." *Curll*, 93 Eng. Rep. 849. The temporal nature of criminal libel therefore was derived from its tendency of consequence (its publication *per se*) rather than from its defaming or injurious content. In effect, *Curll* announced that the act of publication provided the civil component required to bring questions of moral behavior under the jurisdiction of the temporal courts, activating common law regime assumptions regarding tendency and intent.

(blasphemous libel), civic virtue (seditious libel), and morality (obscene libel).

B. *Natural Tendency and Intent*

The criminal nature of obscene libel thereby shifted to its tendency to produce a consequent behavior that breached the peace. At common law, the determination of a publication's "natural tendency" to harm the public order was based on a jury's consideration of its "reasonable consequence," a determination that could be and had to be made independent of a defendant's expressed or implied purpose (motive) in the publication.⁶⁹ Also affected was the traditional notion of *mens rea*, which requires a person accused of a behavior that caused harm to have intended that harm.⁷⁰ In the evolving law of obscene libel, indictment for misdemeanor criminal behavior followed from an act of publication that a jury anticipated had a natural consequence of causing harm regardless of whether the accused intended that harm or whether any evidence of actual harm existed or was even claimed. Cockburn said as much in *Hicklin* when he argued "[i]f the work be of an obscene character, it may be questioned whether intention has anything to do with the matter. But, if intention is necessary, it must be inferred that the appellant intended the natural consequences of his act."⁷¹

Cockburn's charge to the jury in *Hicklin* involved all of these elements. He called upon the members of the jury to determine by some reasonable standard whether the material published by Scott would "tend to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a

69. As a carryover from ecclesiastical court jurisdiction over sinful acts, defamation cases assumed malice, as "it is in the last analysis malice which gives the publication a natural tendency to harm . . . Every man must be presumed to intend and to know the natural and ordinary consequences of his acts . . ." and that liability under libel is based on "the tendency of the publication, not . . . the intention of the publisher." ODGERS, *supra* note 31, at 5-6; see also JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* (North Carolina 2004) (discussing Lord Mansfield's holdings in libel cases).

70. *Hicklin*, 3 L.R.Q.B. at 364. To this point, Cockburn cited Lord Kenyon from *Fowler v. Padget*, (1798) 101 Eng. Rep. 1103, 1106, stating, "[i]t is the principle of natural justice and of our law, that *actus non facit reum, nisi mens sit rea*," meaning the act will not make a person guilty unless the mind is also guilty. *Hicklin*, 3 L.R.Q.B. at 364. "The intent and the act must both concur to constitute the crime." *Id.* Cockburn then quoted his own decision on *R. v. Sleep*, (1861) 169 Eng. Rep. 1296, 1301, "[i]t is a principle of our law that to constitute an offense there must be a guilty mind, and that principle must be imported into the statute, although the Act itself does not in term make a guilty mind necessary to the commission of the offense." *Hicklin*, 3 L.R.Q.B. at 364.

71. *Id.* at 368 (citing *R. v. Woodfall*, (1770) 98 Eng. Rep. 398).

publication of this sort may fall.⁷² In so doing, the Chief Justice opened the consideration beyond the factual issues of whether Scott had published (or held with intent to distribute) the pamphlet and whether the material in the pamphlet was “obscene” and into the broader arena of whether the publication of that material may at some time and place have a natural (and harmful) consequence of depraving or corrupting the morals of some persons in society. While he was thereby asking the jury to anticipate a possible harmful consequence, he was not asking them to discern whether Scott directly intended that consequence in his act of publication.⁷³ That issue, he instructed,⁷⁴ was already determined as a finding of fact.

The key issue was whether juries were confined to a determination of tendency, thereby leaving questions of law and intent to the court, or could alternatively consider varying interpretations of intent and motive. It was an issue that had been brewing in the courts through much of the eighteenth century, particularly in cases of seditious libel where the value of political discourse and debate was still venerated. The operative practice was that juries were to calculate the effect (tendency) of publishing the libel, and the court, as a matter of law, would resolve issues regarding intent by intuiting mens rea from the act of publication itself.⁷⁵ But more and more, defense counsels shifted

72. *Id.*

73. As criminal liability rests in part on mens rea, it is necessary to differentiate intention from desire (or motive) in that an actor may intend the action (willfully engaging in the action itself) without specification of what outcome he may anticipate or desire from the action. In traditional common law, intent was technically subsumed in the act itself – if an actor engaged in the action, it was assumed he intended to engage in that action and mens rea was satisfied. See *Woodfall*, 98 Eng. Rep. at 401 (finding criminal intent follows from the commission of the act itself). Criminal law then holds him accountable for the effects of his action, whether or not he desired it or even recognized it. *Id.* Liability for the effects of one’s action comes with the engagement in the action itself, and is unmitigated by a preceding desire (motive) for a possible outcome or, in some cases, evidence of actual harm (actus reus). Furthermore, liability for one’s action requires recognition of all the possible (reasonable) consequences, that to prevent harm to others, one is obligated to consider all possible harms that may result from one’s action. Recognizing but not deferring to harmful consequences might be considered recklessness or criminal negligence if a ‘reasonable man’ would have foreseen those consequences. In this sense, having a pure ‘primary motive’ (a desire for a particular public good outcome) would not mitigate one’s liability for possible harms that may (incidentally also) result from that same action, whether or not the primary outcome desired actually comes about. See R.A. Duff, *Intentions Legal and Philosophical*, 9 OXFORD J. LEG. STUD. 76 (1989) (discussing state of mind in criminal law).

74. See *supra* note 70 and accompanying text.

75. The principle that intent concur with the act was still doctrinally accepted more than a century after *Woodfall*, and was confirmed in Odgers’ treatise which found that, despite a defendant’s earnest motives in the

their arguments from questions of fact to questions of motive and stipulated that the defendant engaged in publication with intent to affect a public good.⁷⁶

Following decades of contentious debate between tradition-bound justices and impaneled juries pressed by defense counsels to consider their clients' higher motives, the issue had arguably been decided in favor of wider jury discretion in Fox's Libel Law of 1792.⁷⁷ Fox's Libel Law empowered juries to give their verdict upon the "whole matter in issue" and "give a general verdict of guilty or not guilty upon the whole matter put at issue . . . and shall not be required or directed . . . to find a defendant or defendants guilty merely of proof of publication."⁷⁸

Against this backdrop, Cockburn's instruction to the jury, including the admonition that intent follows from the criminal nature of the act of publication itself, an axiom of the common law perhaps mitigated by Fox's Libel Law, seems an anomaly. The question was at what stage of the legal discourse could a jury consider evidence of the defendant's motive, and what form could

dissemination of his views, the judge must still consider the effect of the dissemination of those views on the subversion of religion, the destruction of morality, and their capacity "to dissolve all the bonds and obligations of civil society." ODGERS, *supra* note 31, at 395-96. However, the inclination of juries to consider the defendant's motive was already established by the mid-eighteenth century. OLDHAM, *supra* note 69, at 218-30. For example, in *R. v. Owen*, (1752) 18 St. Trials 1203, the jury found that the defendant did publish the material but without seditious intent. *Hicklin's* consideration of a publisher's intent would have been consistent with that trend in doctrinal application, even though traditional doctrine would require that the jury focus attention only on a determination of whether the defendant had in fact published the material within the meaning of the common law.

76. In *Woodfall*, a trial for publishing a seditious libel, the defense argued the publisher's only intention was to inform his fellow subjects and the jury, attempting to navigate its options under the common law, returned a verdict of "guilty of the printing and publishing only," indicating its refusal to presume concomitant guilt of intent. 98 Eng. Rep. at 398. The same scenario was played out again in the seditious libel trial of *R. v. Shipley*, (1784) 21 St. Trials 847, during which Chief Justice Mansfield, following Coke, argued the role of the jury should be confined to effect (tendency) rather than consideration of the defendant's motive which would embroil it in "all the prejudices of the popular cry of the day." OLDHAM, *supra* note 69, at 229. By extrapolation, a jury's inclination to accept a contemporary (well-meaning) motive behind the defendant's action would not have mitigated the defendant's liability for any harm that may have also resulted. *See id.* (discussing Mansfield's attempts to restrain independent-minded juries from exploring and subsequently basing verdicts on the defendant's intent).

77. 32 Geo. 3, c. 60, subtitled "An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel." This Act was proposed and passed with the intention of overcoming the restrictive rulings of Chief Justice Mansfield regarding jury roles in libel cases such as *Shipley*. *See* OLDHAM, *supra* note 69, at 230-35 (describing the enactment of Fox's Libel Law).

78. 32 Geo. 3, c. 60, § 1.

the evidence of motive take. In *Hicklin*, the argument was advanced that Scott's motive was to promote the political viewpoint of the PEU, and there was no evidence, overt or implied, that his motives included the undermining of religious values or the general corruption of morals. Although one might expect any defendant to argue high purpose and disclaim any salacious or emotional appeal, the issue often tended to revert to jury consideration of the actual publication itself and the degree to which it displayed high purpose in its mode of portrayal (by adaptation to literary or artistic conventions of the day) or its pattern of distribution (whether its clientele was discretely chosen). From that, the jury was to form conclusions about the possibly harmful consequences of publication.

Along similar lines, publications of scientific content with sufficient but not gratuitous detail, especially those containing sexual information or which may have inclined less sophisticated readers away from norms of moral behavior, navigated a fine line between being obviously written for and distributed to a narrow and learned scientific audience and being distributed to a wider and undifferentiated audience with greater informational detail than necessary.⁷⁹ This was a major point of contention in *Bradlaugh and Besant*,⁸⁰ in which their publication of information relating to methods of birth control was indicted as an obscene libel because it contained more sexual detail than the general public needed to or were prepared to know, and it was made readily available to the general public through its cheap price and indiscriminate distribution.⁸¹ The defendants countered - in their published front piece and in their deliberative and extensive arguments before the court - that their motives in publication were clearly not in the direction of the corruption of morals but rather were designed to sustain and strengthen the institution of marriage.⁸² The jury, as in *Hicklin*, attempted to return a split verdict - finding the defendants guilty of publication and not guilty of intent to corrupt morals - but was thwarted by the

79. See GOWAN DAWSON, *DARWIN, LITERATURE AND VICTORIAN RESPECTABILITY* 116-61 (Cambridge 2007) (discussing the relationship between scientific works and obscenity, and the challenges that free thought publications faced when discussing human physiology and reproduction).

80. (1877) 2 Q.B.D. 607.

81. Cockburn explicitly argued this point to Bradlaugh, maintaining that there was a level of detail that medical specialists needed to know but the general public did not, and if it were provided to the general public, it "may be used to corrupt the public mind." MANVELL, *supra* note 33, at 132. Cockburn questioned "whether the same information given to the general public may be of advantage to them, or whether on the other hand it is not calculated to influence them in the opposite direction. That is the argument I think you have to grapple with." *Id.*

82. *Bradlaugh and Besant*, 2 Q.B.D. at 609.

Court's insistence that guilt of publication was necessary and sufficient to presume guilt of intent.⁸³

C. *Precedent and Consideration of the Public Good*

It seemed incongruous that a jury, having materials presented to them by the Court as obscene and thereby a misdemeanor by definition, would then have the latitude to examine the materials for compensating social value. By standard classification, obscene materials were *contra bonos mores* and their publication was thereby a criminal act warranting indictment as a misdemeanor. And yet, by judicial trends codified in Fox's Libel Law, the jury was licensed to examine all contextual factors surrounding the publication in question. While decisions in obscene libel cases were clearly guided by precedent rulings, at the same time, juries were encouraged to and did consider factors outside of what might be assumed to be the binding reasoning of prior decisions in libel cases.⁸⁴ The inclination toward split

83. It was clear from the transcript in *Bradlaugh and Besant* that Cockburn was actually in sympathy with the motives of the defendants and on several occasions attempted to lead Bradlaugh out of his lengthy and impassioned argument about the purity of his own motives and into directly addressing the governing issue of whether the tendency (anticipated effect) of the publication might lead to immoral consequences, the point on which Cockburn knew the case would turn. MANVELL, *supra* note 33, at 123-24. However, Bradlaugh's arguably undisciplined and martyristic zeal prevented him from following Cockburn's lead, and their defense was summarily lost, albeit overturned on a technicality on appeal in 3 Q.B.D. 607 (1878). This same dynamic had been played out in *Moxon*, in which the motivation for publication was clearly literary (he had already published the works of Wordsworth) and in context of the entirety of the published work of Shelley, "Queen Mab," actually provided a meaningful benchmark to the ultimate strength of Shelley's religious faith. 4 St. Trials at 722. Recognizing this, the jury found Moxon guilty of publishing and rendered no decision regarding guilty intention, and while the sympathetic Court had no choice but to render a guilty verdict, Moxon himself was never called for sentencing. *Id.*

84. Under the common law of *stare decisis*, a case at hand would be considered in its particulars as a reflection of basic, self-standing principles by which decisions in that area of law were rendered, with judges bound to reasoning from the principles to the degree that the circumstances in the incident case paralleled prior cases in which the principles had been applied. This produced "regimes of legal thought" that directed court decisions as a "collective normative force" that could be considered settled law only to the degree the principles followed allowed what could be called exclusionary reasoning (firm rules) and/or were buttressed by exclusionary statutory language. In the area of criminal obscene libel, discretionary and moral dimensions were frequently admitted in judicial decision making, indicating that as an area of law, obscene libel was still unsettled and the Court had (and exercised) greater latitude to consider multiple sources of legal authority. Precedent cases, therefore, each reflecting a uniquely weighted collage of both common and deviating circumstances, only provided the Court with a variable range of 'exclusionary scope' within which future cases could be considered. See Perry, *supra* note 62, at 230-36 (discussing the notion that from the

verdicts reflected both the open nature of precedent in the area of obscene libel and that the dictum that emerged from *Hicklin* had actually expanded the range of consideration by adding a proviso regarding the corruption of morals. Until the 1857 Act, indictments for obscene libel had been governed by two aspects of legal regime: first, the materials were obscene, i.e., an outrage to public decency and *contra bonos mores*; and second, they were published. Their obscene nature was a finding of law by the magistrate in the indictment and not subject to jury inquiry. Their publication, on the other hand, was a question of fact presented to the jury, and from which, under common law, the jury was to presume both tendency - without requiring evidence of actual harm (standard procedures of criminal libel law) - and intent, which under common law was inferred from the fact of publication under *mens rea*.

Therefore, cases of obscene libel, at least until *Hicklin*, were procedurally formulaic by the legal regime of criminal libel. This did not, however, preclude impassioned defense counterarguments regarding the defendant's actual intent, which was usually a mechanism for pleading against a harsher sentence. Nonetheless, the decision in each case was ultimately dictated by legal regime rather than by open reasoning or moral arguments.⁸⁵ Cockburn's

positivist view, the courts are obliged to apply pre-existing source-based laws, and further examine the levels of exclusion in a contemporary context).

85. Talfourd's defense in *Moxon* became the prototype of arguments regarding the Court's obligation to consider the "work as a whole" when considering either tendency or intent in cases involving artistic or literary creativity/license. See *Ulysses I*, 5 F. Supp. 182. Critical to consider, Talfourd argued, was both the development and the product of Shelley's (divine) poetic genius which Moxon as publisher had preserved and presented to English society to its own great benefit - as he had in publishing the works of Wordsworth. *Moxon*, 4 St. Trials at 699-715. It was critical, he argued, that the works of Shelley reveal not only the depth of his ultimate Christian faith but also how he arrived at that faith through introspection and periods of doubt, a process that was not only revealing about the human condition but also demonstrated the triumph of examined faith. *Id.* To claim (as the prosecution did) that Shelley's youthful self-doubts (those stanzas in "Queen Mab" indicating the depths of his despair) stood on their own as guiding statements of non-faith ignored his careful and nurtured exhilaration of final faith, as reflected in his poetry and his letters later in life. *Id.* Reading "Queen Mab" in the context of Shelley's entire body of work over his lifetime, Talfourd argued, reinforced rather than challenged the fruitfulness of Christian self-examination. Presaging more modern arguments, Talfourd further maintained that Shelley himself had a right to have his works read as a whole (as they were being published by Moxon) as his legacy, his posterity, and that English society had the right to experience his divine genius unexpurgated by local prosecutors. *Id.* The Court in *Moxon* was forced to straddle the traditional and the more contemporary notions of intent, charging the jury with examining the tendency of specific passages and asking whether those passages were in any immediate context 'neutralized' by faith-affirming passages. *Id.* at 720-22. Absent that, Justice Denham asserted, the offensive

jury charge in *Hicklin* changed the traditional jury consideration of intent by stipulating that publication of obscene materials demonstrated a calculated intent to deprave and corrupt public morals, more specifically, the morals of those most susceptible to immoral enticement and those into whose hands such materials might fall. No longer was the defendant responsible for some indeterminate range of possible harmful consequences of his publication (for which no evidence of actual harm or actual intention was required under criminal libel law) but now the defendant could be accused of a specific type of intent (moral corruption of those most susceptible), causing juries to inquire after evidence of the specific harm claimed or to consider direct testimony and other evidence regarding his actual (and perhaps even well-meaning) intent.⁸⁶

The jury's consideration was thereby expanded to evidence of tendency and intent, both of which concerned the more specific societal harm of corrupting the morals of those most susceptible. More importantly, the legal regimes governing cases of criminal obscene libel did not preclude this latitude because obscene libel was an area of unsettled law that was not exclusionary in its reasoning and had been subject to both moral and legal reasoning in precedent cases. Although substantiation in statutory language often contributed to the establishment of binding legal reasoning in common law, such was not the case in the area of obscene libel. The Obscene Publications Act of 1857, rather than settling issues at law by providing firm definitions and standards, instead simply maintained the existing structure of unsettled law regarding what was and was not obscene. Broader evidentiary consideration of tendency and intent converged when juries weighed the possible range of harmful consequences against defense claims that positive, public-serving consequences may not only occur from the same publication, but also may well have been the direct intention of the publisher.⁸⁷

stanzas in "Queen Mab" were in fact libels and the jury "must adhere to existing law" and find Moxon guilty of a common law misdemeanor. *Id.*

86. ST. JOHN-STEVAS, *supra* note 16, at 141. After *Hicklin*, the first manifestation of this expanded consideration came in *Bradlaugh and Besant*, during which the defendants not only strongly dissented from the portrayal of their publication as corrupting morals, but rather asserted that their publication was demonstrably supportive of dominant English cultural mores, especially those regarding the sanctity of marriage. Cockburn acknowledged these as evidence regarding intent but continued to direct Bradlaugh's attention to the imputation of immoral tendency that some individuals, married or not, may have if in possession of birth control information.

87. The implicit admission by judges (including Blackburn's commentary in *Hicklin*) and juries that published materials can have a range of beneficial as well as dilatory effects on potential audiences in society presaged the 'public good defense' that became legally recognized in the 1879 Criminal Code Commission Report. ST. JOHN-STEVAS, *supra* note 16, at 150-51.

Juries were asked to mediate potential harms and potential goods after having been advised that the materials in question were by law obscene and indictable, and after *Hicklin*, obscene materials were not only considered outrageous and injurious to social mores but also explicitly calculated to corrupt morals. Juries were entrapped by the prospect that published materials were both morally harmful and socially beneficial, which opened the legal regime to a wide range of reasoning and moral arguments from all sides. Prior to *Hicklin*, this would have been impossible because the harm was general and societal and, by definition, admitted no counterclaim. After *Hicklin*, however, the harm was more focused on individuals most susceptible as well as the mitigation of potential harm by potential benefit to others.

V. ADOPTION AND ADAPTATION IN AMERICAN LAW

Even within English common law, the precedential value of *Hicklin* is a complicated calculation. As a case at common law, we would assume it reflected legal reasoning from established and self-standing principles regarding libel law. To the degree that *Hicklin* was governed by precedent, its reasoning would have been directed more by the broad legal principles reflected in previous similar cases than by the specific decisions of those cases or their particular circumstances. In that sense, Cockburn's decision would have been a reflection of both principles of standard criminal libel law and the kinds of contemporary moral balancing one might expect in an area of unsettled common law. In the latter, one must also assume that Cockburn was attempting to adapt the dictates of traditional libel law to what appeared to be added statutory authority from language and intent of the Obscene Publications Act of 1857. However, it quickly became apparent that the Act contributed no authority to obscene libel law, throwing the Court back onto the practices of existing common law, albeit with the added burden of open jury consideration of defendant motive, an element authorized by Fox's Libel Law over a century earlier.⁸⁸

88. Both the language and the reasoning of *Hicklin* continues to pervade obscenity case law in England and provided the basis for the first effort at statutory definition in the 1959 Obscene Publications Act which was designed to supersede the common law crime of obscene libel and replace the provisions of the 1857 Act. Specifically, the Act defines (in section 1) a published article as obscene "if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it" and yet could be justified (Section 4) "as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern" that could be discerned by admitting as evidence "the opinion of experts as to the literary, artistic, scientific or other merits . . ." Obscene Publications Act of 1959, 7 & 8 Eliz. c. 66, § 1, 4 (1960).

Fundamentally, the basic regimes of the criminal law of obscene libel were established prior to *Hicklin*, as the common law stretched to redefine moral offenses such as blasphemy and sedition as temporal concerns. *Hicklin* paid due notice to and faithfully reflected their guiding principles, especially regarding the nature of libel as publication and the degree to which consideration of the resulting public harm was governing by assumptions regarding both tendency and intention. Moreover, these regimes were affected by and reflected cultural dynamics in England during the first half of the nineteenth century, specifically, but not confined to, the democratization of culture, the rise of mass literacy and mass modes of communication, and the secularization of moral values which, by mid-century, were defined more by dominant, retrenching cultural mores rather than by established religion. This environment shifted questions of obscene libel away from challenges to religious doctrine and solidly into the realm of cultural outrage, particularly in literature and art. However, despite the apparent contradictions among the demands of evidence and considerations of motive, *Hicklin* demonstrated that the crime of obscene libel remained one of perpetuating general moral harm against society by permanent contribution to public discourse – *contra bonos mores*.

This remained the central consideration when *Hicklin* was adopted as precedent in American law in *United States v. Bennett*.⁸⁹ In that case, D.M. Bennett was arrested under the Comstock Act⁹⁰ for selling copies of Ezra Heywood's free love

89. *Bennett*, 24 F. Cas. at 1104-05.

90. 17 Stat. 598, 598-99 (1873). In *Ex parte Jackson*, 96 U.S. 727, 732 (1877), the Court held that Congress was empowered to refuse the use of U.S. mails to distribute matter "injurious to the public morals" under the Comstock Act of 1873, 17 Stat. 598, but that case involved lottery tickets rather than obscene publications, the latter having more direct free speech implications. A diverse range of obscene libel cases was tried at the state level prior to *Bennett*, including *Knowles*, 3 Day 103 (exhibition of a picture of a monster outrages decency); *New York v. Ruggles*, 8 Johns. 290 (1811) (malicious blasphemy corrupts morals, including 'the tender morals of the young', and destroys order guaranteed by the sanctions of moral and social obligation, and is an abuse of liberty); *Sharpless*, 2 Serg. & Rawle 91 (display of an obscene painting an immoral act under common law as it corrupts morals); *Holmes*, 17 Mass. 335 (offensive prints published in a book corrupts morals and constitutes a crime under common law); *United States v. Brooks*, 24 F. Cas. 1244 (D.C. 1834) (cursing in a public meeting an offense against public morality); *Commonwealth v. Tarbox*, 55 Mass. 66, 66 (1848) (distribution of papers "manifestly tending to the corruption of the morals of the young"); and *Anonymous*, 1 F. Cas. 1024 (1865) (importation of "fancy boxes" too indelicate for family use and hence unfit for entering the community). See generally Donna Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth Century America*, 16 COLUM. J. GENDER & L. 45 (2007) (examining the history of obscenity prosecutions and their role in creating the American pornography industry).

pamphlet *Cupid's Yoke* through the U.S. mail.⁹¹ In federal district court, the jury was charged with determining not whether the materials could corrupt the minds of the jury or every person, but rather "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall . . . in the young and inexperienced . . . tending to suggest impure and libidinous thoughts."⁹²

Further specification of how to discern such matter was not offered because it was presumed to be within the reasonable judgment of intelligent men, and the jury was asked to focus more particularly on "whether they incite impure desires in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires . . . [and] whether it is of dangerous tendency in the community generally, or any considerable portion of that community."⁹³

91. Bennett had in fact been indicted before for selling the pamphlet by mail but the case was dismissed because of concerns that the pamphlet raised moral issues (perhaps of concern as blasphemous libel) and contained little sexual description that would bring it directly under the Comstock Act. Bennett, editor of the *Truth Seeker* and a member of the National Defense Association, a freethinker group dedicated to constitutional defense of those prosecuted under the Comstock Act, pressed the point by advertising the availability of the pamphlet in his newspaper, to which Comstock covertly responded and purchased a copy, precipitating Bennett's second arrest. See generally DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* 23-41 (Cambridge 1997); HELEN HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA* 419-436 (Knopf 2002); and RODERICK BRADFORD, *D. M. BENNETT: THE TRUTH SEEKER* (Prometheus Books 2006).

92. As cited in the circuit court decision *Bennett*, 24 F. Cas. at 1102. The record of the district court trial is contained in the circuit court decision and its transcript published as *TRIAL OF D. M. BENNETT IN THE UNITED STATES CIRCUIT COURT* by the Truth Seeker Office (1879), reprinted in (Leonard W. Levy, ed., De Capo Press 1973).

93. *Id.* at 1105. The *Bennett* jury was provided with full copies of *Cupid's Yoke* with the challenged passages marked but not set forth *in haec verba* (specific words) in the indictment, consistent with *Holmes*, 17 Mass. 335 (material too obscene to be included in the court record); *Tarbox*, 55 Mass. 66 (substance of the material described but not the actual language); *Sharpless*, 2 Serg. & Rawle 91 (obscene picture not described in detail); *People v. Girardin*, 1 Mich. 90, 91 (1848) (publication in the court record perpetuates the initial crime); *Commonwealth v. McCance*, 164 Mass. 162 (1895); *People v. Kaufman*, 43 N.Y.S. 1046 (1897). However, the jury was instructed to consider the obscenity (and tendency) of the passages marked and not the general scope of the pamphlet. *Bennett*, 24 F. Cas. at 1102. As directed in *Commonwealth v. Buckley*, 200 Mass. 346 (1909), the accepted practice in American law was that the challenged material need not be placed in the court record since the jury, charged with judging the material's degree of criminality, had already seen the material in its entirety.

Upheld at the appellate level,⁹⁴ *Bennett* established the so-called *Hicklin* test – reduced to a determination of the tendency of the challenged matter to deprave and corrupt the minds of those susceptible to that influence and into whose hands it may fall – as the prevailing legal standard for adjudging obscenity in criminal actions under state and federal laws for the next thirty years.⁹⁵ This standard was challenged only intermittently to reflect concerns that rigid adherence would radically restrict public access to bona fide literary and artistic works.⁹⁶ Despite its direct adoption of English common law language of tendency and inferred intent,⁹⁷ the *Bennett* decision was not particularly lucid in establishing a definitive legal standard. This decision's lack of clarity may have been in large part due to its reliance on Starkie's treatise⁹⁸ for statements of controlling precedent in English common law rather than a careful reading of *Hicklin*, the libel case law on which it was based, and the evolution of its legal context.⁹⁹ The precedential value of *Hicklin* was further confused by its careless adoption a decade later in *Muller*, which juxtaposed traditional common law notions of intent with motive when it stated:

We think it would also be a proper test of obscenity . . . is whether the motive of the painting or statue . . . as indicated by it . . . is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities,

94. *Bennett*, 24 F. Cas. at 1102.

95. *People v. Muller*, 96 N.Y. 408 (1884), replicated almost verbatim in *Clarke*, 38 F. at 733-734.

96. *See, e.g., In re Worthington Co.*, 30 N.Y.S. 361 (1894) (world renowned classics cannot be regarded as specimens of pornographic literature); *see also St. Hubert Guild v. Quinn*, 118 N.Y.S. 582 (1909) (“the object of the law which prohibits the sale or publication of immoral literature is to prevent the circulation of literature which is hurtful to the community” and not works “promoting justice and humanity and the reign of reason in public affairs,” such as Voltaire). On numerous occasions and most prominently in the appellate decision in *United States v. One Book Called “Ulysses,”* 72 F.2d 705 (2d Cir. 1934), *affg* 5 F. Supp. 182 (S.D.N.Y. 1933) [hereinafter *Ulysses II*], courts rejected the *Hicklin* precedent because it was seen as precluding consideration of intent qua motive or because it relied solely on isolated passages rather than admitting the matter as a whole, neither position being a particularly accurate reading of *Hicklin* in legal context.

97. Consistent with English common law assumptions regarding intent, the Court in *Bennett* found that obscene matter was “calculated to produce a pernicious effect, in depraving and debauching the minds of persons into whose hands it might come,” regardless of the defendant’s ulterior motive, 24 F. Cas. at 1099-1100, 1104 (citing both *Hicklin*, 3 L.R.Q.B. at 371, and *Steele v. Brennan*, 7 L.P.C.P. 261).

98. STARKIE, *supra* note 31.

99. *See* HOROWITZ, *supra* note 92, at 192 (noting that courts, such as the *Bennett* Court, relied on treatises to ascertain common law traditions in trials involving libel and obscenity).

however attractive, were merely accessory to this as the primary or main purposes of the representation.¹⁰⁰

The "rejection" of the *Hicklin* test, presaged in *United States v. Kennerley*,¹⁰¹ came in the 1930s as courts began to openly give heavier weight to considerations of the social value of the challenged material. In *United States v. Dennett*,¹⁰² the Court found that a pamphlet mailed to a married woman for the purpose of proper sex education of her children was within the obscenity statute's intent to protect children, and although the material in the pamphlet might arouse lustful thoughts in some, the language, tone, and content was dignified and calculated to eliminate ignorance and curiosity.¹⁰³ The last vestige of the more restrictive societal balance identified with the *Hicklin* test was *Commonwealth v. Friede*,¹⁰⁴ which focused on selected passages of Theodore Dreiser's *American Tragedy*. Even though these passages were argued to be an important literary work, they were still found to be criminally obscene.¹⁰⁵

In *Ulysses*,¹⁰⁶ Judge Woolsey's impassioned defense of the work's literary value in context,¹⁰⁷ paralleling Talfourd's defense of Shelley in *Moxon*,¹⁰⁸ became the clarion call for a more balanced weighting of imputed dangers and compensating social benefit. Accepting Woolsey's argument at the appellate level, Justice Augustus Hand read *Hicklin* as ignoring the potential social and literary value of the challenged matter in its insistence on considering isolated passages out of context and judging the tendency entirely on the anticipated effect of those passages on the minds of the individuals most susceptible and scolded *Moxon* for its narrow view of the value of literature in society. Instead, following Woolsey, the Court found that *Ulysses* was "a book of originality and sincerity of treatment" (akin to the tone and character arguments in blasphemous libel cases) and "has not the effect of promoting lust."¹⁰⁹

100. *Muller*, 96 N.Y. at 411.

101. 209 F. 119 (S.D.N.Y. 1913). While following *Hicklin* precedent in *Kennerley*, Learned Hand forcefully lamented that the standard had the effect of "reduc[ing] our treatment of sex to the standard of a child's library in the supposed interest of the salacious few . . ." reflecting the historical concern of legal overbalance in favor of restrictiveness at the expense of the dissemination of knowledge. *Id.* at 121.

102. 39 F.2d 564 (2d Cir. 1930).

103. *Id.* at 568-69.

104. 271 Mass. 318 (1930).

105. *Id.* at 322. The *Friede* decision precipitated changes in Massachusetts obscenity statutes. Lockhart and McClure, *supra* note 4, at 327.

106. *Ulysses I*, 5 F. Supp. 182.

107. See *id.* (detailing Judge Woolsey's determination on having the work read in context).

108. *Moxon*, 4 St. Trials (N.S.) at 699-722.

109. *Ulysses II*, 72 F.2d at 708.

A fair reading of *Hicklin* in its legal context might rather conclude that tendency was to be considered in the prevailing balance of factors called for at common law at that time, a balance that emphasized individual responsibility to avoid negative consequences on society regardless of ulterior beneficial objectives. It would be inaccurate to conclude that consideration of positive societal benefits could not be argued in obscene libel cases under common law because, in many precedent cases, societal benefit was in some measure argued even though in most cases it was found to be insufficient to overcome at sentencing what was, under common law, a relatively automatic finding that obscene matter by definition tended to deprave and corrupt. More accurately, *Hicklin* became a bellwether for the issue of the proper balance of relevant factors because the Recorder's decision took into account evidence of the defendant's personal intent as contradicting the presumption of "calculated tendency," an argument successfully pursued in *Moxon*¹¹⁰ and, arguably, in *Bradlaugh and Besant*.¹¹¹ Over time, responding to changes in cultural mores, courts in both England and the United States began to progressively give greater compensatory weight to the potential positive effect of the challenged matter, especially in cases of scientific, literary, artistic, or educational content, particularly when the portrayed danger to the populous, or vulnerable subgroups within it, was assumed rather than evidenced.

VI. CONCLUSION

As precedent in American obscenity doctrine, *Hicklin* continues to reflect all of the fundamental elements currently debated in contemporary American obscenity doctrine and demonstrates that it is impossible to disintegrate these elements without losing the common understanding of what constitutes the basic reasoning behind obscenity law. Brennan's assertion that the *Hicklin* test was flawed because it did not allow consideration of the materials as a whole is not only misleading (because it was not even part of the reasoning of the Cockburn decision) but also misses the point altogether that consideration of materials in context – either as isolated passages within the context of the whole publication or as the publication itself in the context of the defendant's motivation – was not unusual practice at common law prior to *Hicklin*.¹¹²

110. See *Moxon*, 4 St. Trials (N.S.) at 693 (detailing the indictment against Moxon, which serves as an indication that the calculated tendency argument was adopted).

111. (1877) 2 Q.B.D. 607.

112. In this sense, the continuous argument over whether the challenged matter should be read into the record, a staple of many blasphemous libel cases in the nineteenth century such as *Richard Carlile*, 109 Eng. Rep. 1177,

In *Roth*, we did not finally overcome *Hicklin* in the sense that contextual factors could now be considered by the court or the jury. Rather, what we have seen is a relative shifting in the weighting of contextual factors in an area of unsettled law. Why would we want to consider "the work as a whole" anyway? Is this simply an attempt to give fair hearing to the author or artist, whose motives have always been ancillary to the potential effect of the work in question, or are we truly interested in gauging the effect of the work, assuming the whole work is consumed as the context for any interpretation of how it may influence the way consumers think or behave in consequence?¹¹³ In fact, in the context of common law regimes, it has been and would be reasonable to consider "the work as a whole" in evidence of either tendency (effect) or intent (motive), especially to the degree that they are interdependent factors. As a relevant factor, any focus on the issue of isolated passages only reflects the degree of statutory discretion granted by obscenity law to magistrates or local police which, by the experience of the 1857 Act, inevitably becomes arbitrary and perhaps even capricious in an area of unsettled law.

Brennan's argument that the *Hicklin* test, in its focus on the "most susceptible minds" as a synonym for "youth," was over-inclusive, potentially reducing (as contemporary courts have chided) the national literature to the library of a fourteen-year-old, a concern raised in the Parliamentary debate over Lord Campbell's Act in 1857. Contextual factors were balanced as part of the legal regime during the time of *Hicklin* and continue today to be the focus of debates over moralistic paternalism or the imminence of permanent societal dangers from some quarters, especially in the area of child pornography. It is too easy to simply say that *Hicklin* was wrongly decided, or that its test is arcane or

is a different issue altogether. This is settled in libel law more as an issue of repeating the libel (as a second publication and thereby exacerbating the injury to persons or society in general) and less of 'polluting the record' with vulgar language.

113. Because American obscenity doctrine began with the *Hicklin* presumption that obscene materials deprave and corrupt the minds of those susceptible to that influence, the recurring quandary presented in assessment of the consequences of the publication (public availability) of such materials is whether Cockburn was referring to its influence on an individual's thoughts, an individual's basic norms (ideology), an individual's subsequent behavior, or on society's overall commitment to civility and social order, and in application, whether sufficient danger to the public welfare is produced by this causal relationship to warrant state regulation by statute. See, e.g., Lockhart and McClure, *supra* note 4, at 329-42; Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988). See generally JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW. VOL. 2, OFFENSE TO OTHERS* (Oxford 1985) (discussing the conflict between the focus on the individual and the individual's actions versus society's overall interest).

inappropriate, as found in *Roth*. As a case in common law, *Hicklin* reflects an amalgam of fundamental principles and prior reasoning regarding obscene libel and still instructs us as to the basic parameters of issues in obscenity law today.

