

# OBSCENITY LAW AND ITS CONSEQUENCES IN MID-NINETEENTH-CENTURY AMERICA

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The conventional history of obscenity and pornography in America begins about one hundred thirty years ago with the passage of the Comstock Act in 1873, which banned obscene literature from the mail.<sup>1</sup> A resulting climate of sexual repression prevailed until the middle of the twentieth century, when the United States Supreme Court's decision in *Roth v. United States*,<sup>2</sup> and later in *Miller v. California*,<sup>3</sup> loosened restrictions on the sale of

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<sup>1</sup> An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, 17 Stat. 598 (1873) [hereinafter Comstock Act]. Its popular name reflects the critical lobbying role played by America's most famous and aggressive censor, Anthony Comstock, in securing passage of the Act and his more than forty-year tenure as a special agent of the Post Office overseeing its enforcement. For informative studies of Comstock, see NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* (1997); PAUL S. BOYER, *PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE* (2d ed. 2002); HEYWOOD BROWN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* (1927); HELEN LEFKOWITZ HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA* (2002); Craig L. LaMay, *America's Censor: Anthony Comstock and Free Speech*, 19 COMM. & L. 1 (1997). For analysis of historiography on nineteenth-century obscenity regulation, including the Comstock Act, see Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369 (2002).

<sup>2</sup> 354 U.S. 476 (1957).

<sup>3</sup> 413 U.S. 15, 24 (1973). *Miller* identifies the current test for obscenity as follows:

(a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable

sexually explicit material to adults. The standard narrative picks up again in the late twentieth century with the efforts of feminist theorists and activists Catharine MacKinnon and Andrea Dworkin to suppress pornography as a violation of women's civil rights.<sup>4</sup> It ends with present-day controversies over the flood of sexually explicit images on the Internet and panic over child pornography.<sup>5</sup>

However, a significant untold history of both sexual representation and obscenity prosecution precedes the usual starting point of this narrative.<sup>6</sup> This early history helps to explain how pornography emerged as a cultural and economic phenomenon in American life.<sup>7</sup> It also offers

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state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.*

<sup>4</sup> See generally ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); IN *HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS* (Catharine A. MacKinnon & Andrea Dworkin eds., 1998); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *MACKINNON, FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *ONLY WORDS* (1993); CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2005).

<sup>5</sup> For perceptive discussions of contemporary panic over child pornography, see Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001); MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH* (2001).

<sup>6</sup> For a detailed history of erotic publishing and obscenity prosecution in pre-Comstock era New York, see Donna I. Dennis, *Obscenity Regulation, New York City, and the Creation of American Erotica, 1820-1880* (2005) (unpublished Ph.D. dissertation, Princeton University) (on file with author). My forthcoming book on commerce in pornography and obscenity regulation in nineteenth-century New York, *Licentious Gotham*, is under contract to Harvard University Press. For important early recognitions by cultural and literary historians of the existence of a market for erotic literature in antebellum New York, see TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920* (1992); DAVID S. REYNOLDS, *BENEATH THE AMERICAN RENAISSANCE: THE SUBVERSIVE IMAGINATION IN THE AGE OF EMERSON AND MELVILLE* (1988). For a revealing study of wide-ranging conversations about sex and struggles over sexual speech in nineteenth-century America, see HOROWITZ, *supra* note 1.

<sup>7</sup> Pornography is often treated as a marginal practice, yet nothing could be further from the truth. See *Sixty Minutes: Porn in the U.S.A.* (CBS television broadcast Nov. 21, 2003), available at [www.cbsnews.com](http://www.cbsnews.com) ("It is estimated that Americans now spend somewhere around \$10 billion a year on adult entertainment, which is as much as they spend attending professional sporting events, buying music or going out to the movies."). For a recent scholarly recognition of the centrality of pornography to American society, economy, and culture, see *PORN STUDIES* (Linda Williams ed., 2004).

valuable perspectives on the meaning and function of obscenity law, fundamental issues that continue to bedevil American law and policy. In particular, the legal history offered here illuminates the ways in which obscenity prohibitions often encouraged, rather than suppressed, the growth of an American pornography trade.<sup>8</sup> It also demonstrates the significant role that obscenity law played in shaping commercial and cultural constructions of sexual desire.

Part I of this Article provides a brief summary of the doctrine of obscenity as it arose in English common law and developed in the United States in the first half of the nineteenth century. In essence, nineteenth-century American jurists, following the lead of English treatise writers, routinely asserted that government officials had the authority to suppress any speech or conduct that had a tendency to corrupt public morality, including the authority to punish the sale of “obscene” publications. Relying solely on these elite expressions of law and on the language of state statutes that purported to regulate morality, one might well conclude that state and local governments seamlessly exercised the power to police morality and suppress indecency in nineteenth-century America.<sup>9</sup>

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<sup>8</sup> A note about terminology is in order. While “obscenity” was a widely used term in mid-nineteenth-century America, “pornography” was not. Indeed, “pornography” did not appear in any version of Noah Webster’s *American Dictionary of the English Language*, the leading American dictionary throughout the antebellum period, from its first edition in 1828 through 1860. When “pornography” first appeared in 1864, it was narrowly defined as “[l]icentious painting employed to decorate the walls of rooms sacred to bacchanalian orgies, examples of which exist in Pompeii.” See entry for “Pornography” in *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 1013 (Springfield, G. & C. Merriam 1864). Nonetheless, as this Article makes clear, erotic writing and pictures circulated in the United States even before the Civil War. Rather than call such representations “pornographic,” nineteenth-century Americans commonly referred to them as “fancy.” When possible, this Article employs nineteenth-century usage. However, the word “pornography” sometimes appears as shorthand to describe those publications that presented sexual behavior or sexual organs in overt form and in ways that violated the moral and social taboos of their day. This definition represents a slight adaptation of one offered by historian Peter Wagner, who has characterized eighteenth-century pornography as the “written or visual presentation in a realistic form of any genital or sexual behaviour with a deliberate violation of existing and widely accepted moral and social taboos.” PETER WAGNER, *EROS REVIVED: EROTICA OF THE ENLIGHTENMENT IN ENGLAND AND AMERICA* 7 (1988). While Professor Wagner’s formulation is apt in most respects, I have deleted the emphasis on realism because it conflicts with the highly metaphorical, often quite flowery, language of many erotic works sold in the United States in the nineteenth century, even those that directly referred to sexual behavior.

<sup>9</sup> For example, in his prize-winning book, *The People’s Welfare*, William Novak argues that antebellum morals regulation was pervasive and all-powerful. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149-89 (1996). However, Professor Novak relies heavily on the formal language of state

But fully understanding the operation of obscenity law in American culture and society requires looking beyond formal law.<sup>10</sup> Part II therefore examines the ways in which obscenity doctrine was applied “on the ground” in the context of specific criminal prosecutions involving the sale of obscene books in New York City between the early 1840s, when significant numbers of obscenity cases first arose, and the start of the Civil War in 1861. This discussion relies heavily on data compiled from the unpublished District Attorney Indictment Papers for the principal criminal court in New York County at that time, the Court of General Sessions.<sup>11</sup>

New York City provides a natural focal point for this inquiry for several reasons. By the middle of the nineteenth century, it was not only the largest city in the United States; it was also the site of the country’s principal financial, manufacturing, and cultural institutions.<sup>12</sup> In addition, in

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statutes and municipal ordinances, supplemented by the uninterrogated pronouncements of elite jurists who wrote appellate cases and compiled treatises on various areas of legal doctrine, such as criminal law and nuisance law. As a result, for all its virtues, *The People’s Welfare* largely neglects to explore whether the law “on the books” was actually enforced or how it worked in practice. See Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823 (1997) (book review) (pointing out the need for historians to investigate enforcement of laws cited in *The People’s Welfare*).

<sup>10</sup> A number of instructive studies have highlighted the importance of investigating how criminal law enforcement actually operated in the nineteenth-century United States. See GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* (1989); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857 (2000).

<sup>11</sup> The Court of General Sessions had jurisdiction over felonies and all other indictable offenses except for capital crimes. Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J. L. & SOC’Y 443, 443 (1995). See also MIKE MCCONVILLE & CHESTER MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 18-43* (2005) (describing the organization of the criminal justice system in antebellum New York County). For the period considered in this Article, the borders of New York County were equivalent to those of present-day Manhattan.

<sup>12</sup> EDWARD K. SPANN, *THE NEW METROPOLIS: NEW YORK CITY, 1840-1857*, at 313 (1981) (“By the 1850s, New York had become a metropolis, a great organization of powers and skills that strengthened its commercial and cultural dominance of the nation while making it a major presence in world society.”). On the centrality of New York, see also SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850-1896*, at 19 (2001) (New York in the 1850s was “the center of the nation’s trade, information, and transportation networks. Indeed, in contrast to all other urban areas in the United States, New York dominated not only its hinterland and the northeastern region but also the nation as a whole.”); AMY BRIDGES, *A CITY IN THE*

the decades leading up to the Civil War, New York established itself as a communications capital, pushing aside its chief rivals, Boston and Philadelphia, to lead the nation's burgeoning publishing industries.<sup>13</sup> Most importantly for this Article, by the start of the Civil War, New York had emerged as the headquarters for an ambitious, entrepreneurial network of publishers who pioneered the production and marketing of sexual writing in the United States. The city's preeminence in the field of sexually stimulating publications was widely recognized by the early 1860s, when its publishers and dealers earned national notoriety for exploiting the escalating demand for mail-order erotica among Civil War soldiers.<sup>14</sup>

In an effort to delineate the early meaning of obscenity, Part II goes on to explore a wide range of non-legal primary sources, including rare surviving examples of erotica, pulp fiction, popular guides to health, anatomy, and reproduction, moral reform tracts, and advertising circulars of publishers who specialized in pornography. Together with evidence from obscenity indictments, these documents clarify how government officials in the antebellum era first drew the boundaries between illicit, "obscene" speech and indecent, but legally permissible (*i.e.*, non-"obscene") speech. In particular, they reveal the type of representation that lay at the heart of antebellum constructions of the obscene, namely, overt depictions of female passion and pleasure. At the same time, they show that government authorities generally tolerated several other forms of writing that many mid-nineteenth-century moral reformers vociferously condemned as indecent and immoral. Examples of genres that escaped prosecution for obscenity include health manuals that provided advice on birth control and abortion

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REPUBLIC: ANTEBELLUM NEW YORK AND THE ORIGINS OF MACHINE POLITICS 39 (1984) ("New York was the commercial, financial, and by 1860 the industrial center of the union, extending its tentacles of trade over its continental hinterland and in the process becoming the economic center of a fledgling world power.").

<sup>13</sup> On New York's preeminence in book publishing, see RONALD J. ZBORAY, *A FICTIVE PEOPLE: ANTEBELLUM ECONOMIC DEVELOPMENT AND THE AMERICAN READING PUBLIC* (1993). By 1856, New York City publishers produced nearly forty percent of the total dollar value of all books made in the United States. *Id.* at 12. On New York's preeminence in newspaper publishing, see generally DAN SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM* (1981); MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 12-60* (1978). On New York's role as an information center, see ALLAN R. PRED, *URBAN GROWTH AND THE CIRCULATION OF INFORMATION: THE UNITED STATES SYSTEM OF CITIES, 1790-1840* (1973).

<sup>14</sup> See ANDREA TONE, *DEVICES & DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* 4-5 (2001).

and sensational novels that combined graphic violence with euphemistic sex.

Part III analyzes the social, economic, and cultural consequences that attended the rise of obscenity prosecutions.<sup>15</sup> This section demonstrates that, rather than eradicating lewd writing, legal restrictions on obscenity paradoxically promoted the proliferation of erotic representations in at least three distinct ways. First, obscenity prosecutions inspired entrepreneurial publishers of illicit sexual literature to turn to new methods of interstate advertising and distribution via the U.S. mail. Designed to circumvent local regulation, these strategies had the additional effect of extending markets for erotica across the nation. Second, obscenity prosecutions spurred the production of new genres of sexually stimulating publications. These innovations included America's first pornographic periodical, which sought to profit from legal prohibitions on female eroticism by disseminating forbidden stories of independent, sexually assertive women to mail-order customers throughout the United States. They also included luridly sensational, so-called "racy" novels, which self-consciously skirted the perceived border of obscenity and eroticized graphic violence as a substitute for illicit depictions of sex. Third, obscenity cases generated valuable publicity for New York's erotic publishing industry just as it was establishing itself as a new medium of commerce and communication. Each of these developments subverted the formal power of antebellum governments to suppress indecent publications, even while treatise writers and other legal commentators championed state authority to restrict such commerce under the law of obscenity.

## I. THE DOCTRINE OF OBSCENITY

Throughout the nineteenth century, elite sources of American law made sweeping doctrinal pronouncements declaring that states and localities had inherent power to regulate morality.<sup>16</sup> Treatise writers

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<sup>15</sup> My thinking on this subject has been greatly informed by the important body of scholarship on the constitutive effects of law. For two landmark articles, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57-125 (1984); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas R. Kearns eds., 1993).

<sup>16</sup> On strong support for morals regulation in nineteenth-century legal doctrine, see NOVAK, *supra* note 9, at 149-89; Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427 (1997).

frequently cited the suppression of indecency through the prosecution of obscene speech as a paradigm of morals regulation.<sup>17</sup>

A major source for obscenity doctrine in the United States was the English common law of obscene libel. In England, the King's Bench first recognized obscenity as an offense in 1727.<sup>18</sup> The occasion was the conviction of the notorious British pornographer Edmund Curll for printing Jean Barrin's anti-Catholic novel about a group of sexually overheated nuns, seductively entitled *Venus in the Cloister; or The Nun in her Smock*.<sup>19</sup> Over the next century, English jurists developed a broad definition of obscene libel. Francis Ludlow Holt, a leading English authority on libel, included a chapter on "Libels Against Morality and the Law of Nature" in his landmark treatise, *The Law of Libel*. As a general matter, Holt explained, an "indictment at common law may be supported for any offence which is against public morals, decency, and good manners."<sup>20</sup> Obscene libel, by extension, "comprehended every species of representation, whether by writing, by picture, or by any manner of sign or substitute, which is indecent and contrary to public order and natural feeling."<sup>21</sup> While blasphemous and seditious libel were understood as attacks on religion and the state, respectively, an obscene representation was perceived as an affront against "public decency," "public order," and "natural feeling." As another nineteenth-century English authority described the wide-ranging offense of obscene libel, "[i]t is now fully established, that any immodest

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<sup>17</sup> See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 596 (1868) ("The preservation of public morals is peculiarly subject to legislative supervision, which may forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized.").

<sup>18</sup> Obscenity was the last form of libel to emerge as a crime. The other forms were individual libel, seditious libel, and blasphemous libel. See Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEG. HIS. 36 (1991) (providing background on the emergence of the common law of obscene libel in England).

<sup>19</sup> *R v. Curll*, (1727) 2 Str. 788 (K.B.). On the popularity of this work and the erotic content of much anti-Catholic literature in eighteenth-century Britain, see WAGNER, *supra* note 8. Curll's edition of *A Treatise of the Use of Flogging* also appears to have triggered his indictment. Manchester, *supra* note 18, at 39.

<sup>20</sup> FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 63 (1812).

<sup>21</sup> *Id.*

and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable.”<sup>22</sup>

In the United States, as early as the second decade of the nineteenth century, appellate courts began to cite the English common law of obscenity with approval. In 1811, James Kent, chief judge of the Supreme Court of New York, wrote a widely admired opinion in *People v. Ruggles*<sup>23</sup> upholding the importation of English common-law doctrines that enabled state and local authorities to punish immoral speech. Although *Ruggles* dealt specifically with blasphemy, Kent warmly sanctioned prosecutions against other publications “which corrupt moral sentiment,” such “as obscene actions, prints and writings.”<sup>24</sup> In rejecting the claim that New York’s republican form of government and constitutional protection for religious liberty prevented criminal charges for blasphemy, Kent’s opinion

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<sup>22</sup> 2 THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 155 (1813).

<sup>23</sup> *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811). Ruggles was convicted of blasphemy for declaring: “Jesus Christ was a bastard, and his mother must be a whore.” In his defense, he relied on the provision of the New York Constitution protecting religious liberty:

And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

N.Y. CONST. of 1777, art. XXXVIII.

<sup>24</sup> *Ruggles*, 8 Johns. at 297. In upholding Ruggles’s blasphemy conviction, Kent affirmed the validity of a seventeenth-century English precedent that had established Christianity as part of the common law. *R v. Taylor*, (1676) 1 Vent. 293. For a more extensive discussion of the *Ruggles* case, see LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE (1993); Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682 (2000) [hereinafter Gordon, *Blasphemy*]; Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).



invoked a fundamental opposition between liberty and license.<sup>25</sup> By classifying blasphemy and obscenity as dangerous forms of “license” or “licentiousness,” Kent justified suppression of immoral speech as a vehicle for preserving, rather than threatening, republican liberty.

Soon thereafter, the highest courts of Pennsylvania and Massachusetts expressly recognized the English common-law crime of obscene libel on American soil.<sup>26</sup> In *Commonwealth v. Sharpless*, the first American appellate case to deal directly with the legality of commerce in sexual representations, the Supreme Court of Pennsylvania affirmed the conviction of six men from Philadelphia for exhibiting a painting of a “man in an obscene, impudent, and indecent posture with a woman.”<sup>27</sup> In reaching its decision, the court held that any offense “may be punishable, if in its nature and by its example, it tends to the corruption of morals.”<sup>28</sup> In 1821, the Supreme Judicial Court of Massachusetts upheld the conviction of a printer for publishing a “lewd, wicked, scandalous, infamous and obscene printed book.”<sup>29</sup>

In a matter of decades, the law of obscene libel was well established in the criminal law of American states. Francis Wharton’s influential *Treatise on the Criminal Law of the United States* tersely but strongly

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<sup>25</sup> The opposition between liberty and license was central to eighteenth-century political thought, especially civic republicanism, and deeply influenced American political and constitutional theory throughout the eighteenth and nineteenth centuries. *See generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 23 (1969) (discussing meaning of license in eighteenth-century republican theory). For further analysis of the importance of this distinction in American jurisprudence on blasphemy, see Gordon, *Blasphemy*, *supra* note 24. *See also* NORMAN ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* (1986) (discussing importance of the liberty-license opposition in the context of nineteenth-century libel law); Sarah Barringer Gordon, “*The Liberty of Self-Degradation*”: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America, 83 J. AM. HIST. 815, 817-23 (1996) (discussing distinction between liberty and licentiousness in the context of antipolygamy sentiment). As indicated in note 23, *supra*, this distinction was incorporated into the original New York constitutional provision protecting religious liberty.

<sup>26</sup> *See Commonwealth v. Sharpless*, 2 Serg. & R. 91 (Pa. 1815), *reprinted in* EDWARD DE GRAZIA, *CENSORSHIP LANDMARKS* 35-39 (1969); *Commonwealth v. Holmes*, 17 Mass. 336 (1821), *reprinted in* EDWARD DE GRAZIA, *CENSORSHIP LANDMARKS* 40-41 (1969).

<sup>27</sup> *Sharpless*, 2 Serg. & R. 91, *reprinted in* DE GRAZIA, *supra* note 26, at 35.

<sup>28</sup> *Id.* at 38.

<sup>29</sup> *Holmes*, 17 Mass. 335 (1821), *reprinted in* DE GRAZIA, *supra* note 26, at 40-41. The book in question was *Memoirs of a Woman of Pleasure*, which is discussed further in Part II, *infra*.

reaffirmed the validity of the common-law principles first articulated in *Sharpless*: “It is an indictable offence at common law to publish an obscene book or print; or to publicly utter obscene language; and so of any offence tending to corrupt the morals of the people.”<sup>30</sup> Consequently, on the doctrinal level, obscene libel provided an expansive tool that state and local officials could use to ban seemingly “indecent” or “immodest” expression that injured no particular person, but merely had a tendency to corrupt “the morals of the people.”<sup>31</sup>

In addition to obscene libel, local and state officials seeking to restrict supposedly indecent or immoral publications could tap the longstanding common-law tradition of criminal nuisance. William Blackstone, the leading authority on English law for antebellum Americans, described this doctrine as permitting governments to suppress “such inconvenient or troublesome offenses, as annoy the whole community in general.”<sup>32</sup> Among the earliest forms of criminal nuisance recognized by American courts were public displays that violated a community’s norms of decency and morality. As the Supreme Court of Errors of Connecticut declared in 1808, “[e]very public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law.”<sup>33</sup> By 1850, the United States Supreme Court summarily concluded that “[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government.”<sup>34</sup> Moreover, unlike other types of criminal nuisances, prosecutions involving moral nuisances required no showing of harm to the “community in general,” aside from the morally offensive example of the challenged speech or conduct.

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<sup>30</sup> FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 841 (1855).

<sup>31</sup> See generally DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997) (describing the “bad tendency” test and its widespread use by nineteenth-century jurists to punish many kinds of purportedly dangerous or immoral speech).

<sup>32</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES \*167.

<sup>33</sup> Knowles v. State of Conn., 3 Day 103 (Conn. 1808).

<sup>34</sup> Phalen v. Virginia, 49 U.S. 163, 168 (1850).

## II. OBSCENITY LAW IN PRACTICE: DEFINING THE OBSCENE IN THE NATION'S PUBLISHING CAPITAL

In the twentieth century, Justice Potter Stewart famously claimed the meaning of obscenity was self-evident, remarking "I know it when I see it."<sup>35</sup> For much of the nineteenth century, the formal definition of obscenity was similarly open-ended, though even more expansive than what Justice Stewart had in mind. As discussed in Part I, antebellum jurisprudence broadly defined obscenity as any representation that had a tendency to promote indecency or corrupt public morality, without troubling to develop a more precise standard.<sup>36</sup> Given the seemingly limitless reach of this formulation, one might expect that a vast range of representations were condemned as obscene. However, this was not the case.

As a general matter, the intense censorship of sexual writing engineered by Anthony Comstock during the last three decades of the nineteenth century, which involved the destruction of more than thirty-six tons of obscene books,<sup>37</sup> has meant that few of the erotic texts that circulated in the nineteenth century, including the antebellum period, have survived. Fortunately, however, the indictment papers of the New York County District Attorney have preserved a significant number of extracts from texts identified as obscene, providing scholars with valuable evidence to reconstruct the meaning of obscenity in its formative era. These records, together with rare instances of extant erotic books, publishers' catalogues and advertisements, newspaper articles about obscenity prosecutions, sensational novels, moral reform tracts, and other primary sources from the

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<sup>35</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>36</sup> The first attempt by an American court to define obscenity beyond its general tendency to corrupt morality appeared in 1879 in *United States v. Bennett*, a case in which freethinker D.M. Bennett challenged the constitutionality of his conviction under the Comstock Act for distributing a pamphlet discussing free love and contraception in the mail. *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879). *Bennett* adopted a test first devised by the Queen's Bench of England in 1868: "[T]he test of obscenity 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." *R. v. Hicklin*, (1868) 3 L.R.Q.B. 360, 371. Critics charged that the new standard was just as vague and all-encompassing as the old one, and perhaps more so, in that it focused on the tendency of obscene material to "deprave and corrupt" those populations thought to be especially vulnerable to corruption, such as male and female adolescents.

<sup>37</sup> See *The Twenty-Seventh Annual Report of the New York Society for the Suppression of Vice* 6 (New York, 1901).

period, illuminate the initial distinctions drawn between obscene and non-obscene speech. These distinctions had important consequences for the development of the pornography trade in both New York and the nation at large.

### A. The Obscene: “Fancy” Books and Female Desire

A review of antebellum indictments reveals that New York grand juries identified twenty separate books (listed in Table 1) as obscene between 1842, when municipal officials began to prosecute obscenity cases in substantial numbers, and the Civil War.<sup>38</sup> Most of these books were originally printed in England or France.<sup>39</sup> New York publishers likely pirated the texts, set them onto stereotype plates, and reprinted the books at will, common practices in the publishing industry in an era before the United States adopted an international copyright law.<sup>40</sup> Whatever their provenance, publishers’ circulars and other advertisements indicate that dealers commonly marketed these titles as “fancy,” a nineteenth-century term for what we might now describe as extreme or “hard-core.”<sup>41</sup> But what

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<sup>38</sup> See appendix, *infra*, for the titles of books named in New York County obscenity indictments, 1840-1860. A discussion of the causes of obscenity prosecutions is beyond the scope of this Article, but this issue will be addressed in my forthcoming book on obscenity regulation and the pornography trade in nineteenth-century New York.

<sup>39</sup> For descriptive bibliographies of erotic books named in antebellum New York indictments, see generally HENRY SPENCER ASHBEE, *CATENA LIBRORUM TACENDORUM* (Documentary Books 1962) (1885); Haven Hawley, *American Publishers of Indecent Books, 1840-1890* (2005) (unpublished Ph.D. dissertation, Georgia Institute of Technology) (on file with author).

<sup>40</sup> The United States did not take steps to protect foreign authors and publishers from piracy until 1891, when Congress passed the first international copyright legislation, known as the Chace Act, 26 Stat. 1106 (1891). Even then, obscene material was not subject to copyright protection. On the American practice of stereotyping texts, see Michael Winship, *Printing with Plates in the Nineteenth-Century United States*, 5 *PRINTING HISTORY* 15 (1983).

<sup>41</sup> Years later, an undercover agent for Anthony Comstock’s organization, the New York Society for the Suppression of Vice, conveyed this meaning of the term “fancy” when he asked a target of an investigation: “Those pictures you have exhibited are well enough, but can’t you get something for us a little ‘stronger’ or more fancy?” D. R. M. BENNETT, *ANTHONY COMSTOCK: HIS CAREER OF CRUELTY AND CRIME* 1047 (Da Capo Press 1971) (1878). For a mid-nineteenth-century example, see a New York publisher’s circular from c. 1860 captioned *Genuine Fancy Books*, held at the American Antiquarian Society in Worcester, Massachusetts [hereinafter *Genuine Fancy Books Circular*]. It advertises titles such as *Fanny Hill*, *The Lustful Turk*, and *The Cabinet of Venus Unlocked*.

do these indictments tell us about what made a particular book “fancy” to publishers and “obscene” to regulators?

First, the court records reveal that almost all of the forbidden books either described or directly referred to sexual conduct. Many of the activities they depicted would have been regarded as quite transgressive at the time, such as sex between women, orgies, masturbation, and public sex. The book that provoked the most prosecutions, John Cleland’s eighteenth-century English classic, *Fanny Hill or Memoirs of a Woman of Pleasure*, included graphic accounts of no less than thirty-nine different sexual encounters.<sup>42</sup>

Second, the specific passages identified in the indictments as obscene often focused on female sexual desire or sexual pleasure, usually narrated by women in the first person. As historians of gender have made clear, new middle-class norms that arose in the first half of the nineteenth century prescribed sexual purity and “passionlessness” for women.<sup>43</sup> Indeed, a primary cultural achievement of the antebellum bourgeoisie was its assertion of fundamental sexual differences between men and women. By eliding sexual difference and highlighting feminine pleasure, erotic tales narrated by women flew in the face of bourgeois conventions enshrining female piety and chastity.

The first grand jury indictments issued against publishers of obscene books in New York County, both from 1842, are illustrative. The defendants were Richard Hobbes, a publisher from Westchester County who supplied bookstore and bookstand proprietors in the city with erotica, and Henry R. Robinson, a celebrated political caricaturist and lithographer

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<sup>42</sup> See Peter Wagner, *Introduction* to JOHN CLELAND, *FANNY HILL OR MEMOIRS OF A WOMAN OF PLEASURE* 28 (Peter Wagner ed., Penguin Books 1985) (1748-49) [hereinafter *FANNY HILL*].

<sup>43</sup> The reference to female “passionlessness” comes from Nancy Cott’s path-breaking article on this topic. Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 *SIGNS* 219 (1978) (arguing that evangelical women helped to create ideology of female passionlessness in order to elevate cultural status of bourgeois women in antebellum America) [hereinafter Cott, *Passionlessness*]. The literature on sexual difference, domesticity, and bourgeois class formation is extensive. See especially NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780-1835* (2d ed. 1997) [hereinafter COTT, *BONDS OF WOMANHOOD*]; BARBARA LESLIE EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA* (1981); MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1981); KATHRYN KISH SCLAR, *CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1973); Cott, *Passionlessness*, *supra*.

who operated a large retail print shop in Manhattan.<sup>44</sup> The district attorney's files in these two cases provide an excellent guide both to New York's inventory of bawdy literature and to the legal construction of obscenity at the onset of municipal efforts to regulate sexual publications.

The indictments against Hobbes and Robinson identified the same nine books, a coincidence that suggests these titles comprised the entire corpus of erotic works sold by New York publishers that authorities considered obscene in early 1840s New York.<sup>45</sup> All of the books named were published originally in England or France, a sign that American authors had not yet begun to develop sexually arousing themes, at least for commercial distribution.<sup>46</sup>

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<sup>44</sup> People v. Richard Hobbes, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. Henry R. Robinson, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). For additional background on Hobbes and Robinson, see Dennis, *supra* note 6, at ch. 4; HOROWITZ, *supra* note 1, at 211-12. In addition to the two publishers, the same grand jury presented indictments on charges of "Obscene Books" against five print shop owners and bookstand operators whom the publishers had supplied. See People v. Francis Kerrigan, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. Cornelius Ryan, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. Hiram Cure, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. James Jones, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. Charles Heustis, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); People v. William Bradley, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>45</sup> The following are the titles named in the indictments: *Memoirs of a Woman of Pleasure*; *Memoirs of the Life and Voluptuous Adventures of the Celebrated Courtesan Mademoiselle Celestine of Paris written by herself*; *The Cabinet of Venus Unlocked*; *The Curtain Drawn Up, or The Education of Laura*; *The Confessions of a Voluptuous Young Lady of High Rank*; *The Amorous Songster or Jovial Companion*; *The Lustful Turk*; *The Amorous History and Adventures of Raymond De B—and Father Andouillard*; *The Auto-Biography of a Footman*.

<sup>46</sup> For background on the European publishing history of these texts, see ROBERT DARNTON, *THE LITERARY UNDERGROUND OF THE OLD REGIME* (1982); ROBERT DARNTON, *THE FORBIDDEN BESTSELLERS OF PRE-REVOLUTIONARY FRANCE* (1995); IAIN MCCALMAN, *RADICAL UNDERWORLD, PROPHETS, REVOLUTIONARIES AND PORNOGRAPHERS IN LONDON, 1795-1840* (1993); PETER MENDES, *CLANDESTINE EROTIC FICTION IN ENGLISH, 1800-1930: A BIBLIOGRAPHICAL STUDY* (1993); LYNDA NEAD, *VICTORIAN BABYLON: PEOPLE, STREETS AND IMAGES IN NINETEENTH-CENTURY LONDON* (2000); LISA Z. SIGEL, *GOVERNING PLEASURES: PORNOGRAPHY AND SOCIAL CHANGE IN ENGLAND, 1815-1914* (2002); WAGNER, *supra* note 8; *THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800* (Lynn Hunt ed., 1996); Hawley, *supra* note 39.

The Hobbes indictment began with three passages from one of the central texts of the antebellum market for “fancy” books, *Memoirs of a Woman of Pleasure*, better known today as *Fanny Hill*.<sup>47</sup> This work, which Cleland wrote in 1748 to get out of debtors’ prison in London, recounts the life of the eponymous heroine, a humble country girl forced to move to the city after the death of her parents and become a prostitute.<sup>48</sup> The first excerpt depicted a scene in which the young Fanny’s heterosexual desires are aroused by spying on her brothel companion having sex with an Italian customer.<sup>49</sup> The second selection was plucked from Fanny’s extensive description of an orgy among four couples in Volume Two, while the third offered an explicit account of her experience of anal intercourse.<sup>50</sup>

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<sup>47</sup> *People v. Richard Hobbes*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). It was not until 1964 that the New York Court of Appeals, by a four-to-three vote, declared that *Fanny Hill* was not obscene. It reversed an appellate decision that had granted a request by the corporation counsel and district attorneys of New York City to enjoin Putnam’s publishing house from selling or distributing the book in the city. *Larkin v. G. P. Putnam’s Sons*, 200 N.E.2d 760 (N.Y. 1964). Even then, the Court of Appeals ruling provoked two outraged dissents, one of which described *Fanny Hill* as “one of the foulest, sexually immoral, debasing, lewd and obscene books ever published, either in this country or abroad.” *Id.* at 765. (Scileppi, J., dissenting). Two years later, the U.S. Supreme Court reversed a Massachusetts decision that banned the sale of Cleland’s work, finding that it was not obscene. *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Com. of Mass.*, 383 U.S. 415 (1966).

<sup>48</sup> For background on Cleland and the circumstances of *Fanny Hill*’s production, see FANNY HILL, *supra* note 42, at 1-30.

<sup>49</sup> As Fanny relates:

The young Italian (still in his shirt) stood gazing and transported at the sight of beauties that might have fired a dying hermit; his eager eyes devoured her, as she shifted attitudes at his discretion; neither were his hands excluded their share of the high feast, but wandered, on the hunt of pleasure, over every part and inch of her body, so qualified to afford the most exquisite sense of it.

*People v. Richard Hobbes*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). The quoted passage, with small changes, can be found in FANNY HILL, *supra* note 42, at 67.

<sup>50</sup> The second passage in the indictment, taken from the orgy scene, ends abruptly in mid-sentence:

And as he kissed, he gently inclined his head, till it fell back on a pillow disposed to receive it, and leaning himself down all the way with her, at once countenanced and endeared her fall to her. There, as if he had guessed our wishes, or meant to gratify at once his pride in being the

According to the indictment, this Hobbes edition of *Fanny Hill* also contained “wicked, false, feigned, impious, impure, bawdy, and obscene prints, representing and exhibiting men and women in the act of carnal copulation, in various attitudes and postures.”<sup>51</sup>

The Hobbes indictment transcribed additional excerpts from three other allegedly obscene books. One was chattily entitled *The Cabinet of Venus Unlocked in a Series of Dialogues Between Louisa Lovestone and Mariana Greedy, Two Cyprians! Of the Most Accomplished Talent in the Science of Practical Love*.<sup>52</sup> The selection chosen by the district attorney, which conveyed a rapturous, quasi-religious narration by a woman of her delight in sexual intercourse and mutual orgasm, seemed well calculated to offend the bourgeois sensibilities of the grand jury, accustomed as they were to public affirmations of female piety and purity.<sup>53</sup>

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master, by title of present possession, of beauties delicate beyond imagination—.

It was surely no accident that the district attorney truncated this passage right before the moment of revelation, with the man’s “discovery” of the woman’s breasts. As the sentence continues in the full text, “he discovered her breasts to his own touch and our common view.” FANNY HILL, *supra* note 42, at 152. The final selection, though intended by Cleland as comedy, was also the most explicit. While working at a “refined” brothel for rich gentlemen, Fanny becomes frustrated with her clients’ increasingly elaborate sexual fetishes (her last customer had been obsessed with deflowering virgins), and offers herself free of charge to a sailor in a public house. When the sailor attempts anal intercourse, she at first protests. To her complaint, he makes a nautical quip: “Any port in a storm.” See *People v. Richard Hobbes*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); FANNY HILL, *supra* note 42, at 178. Many of the indictments against the other defendants charged with selling obscene books in 1842 repeat the three passages from *Fanny Hill* quoted in the Hobbes indictment. See *People v. Francis Kerrigan*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); *People v. Hiram Cure*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); *People v. William Bradley*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>51</sup> *People v. Richard Hobbes*, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>52</sup> In eighteenth and nineteenth-century pornography, “cyprian” was a common term for prostitute. The author is not aware of any surviving copy of *The Cabinet of Venus Unlocked*.

<sup>53</sup> The excerpt in the indictment reads as follows:

Oh, what rapturous exquisite delight as I took it, when it rushed in and filled the whole deep cavity where I felt it swell and throb as if it would burst with its exertions within. I strained and struggled with him to the



Another part of the indictment quoted a scene from *The Confessions of a Voluptuous Young Lady of High Rank*. Though no copies survive today, the full title of this book, *The Confessions of a Voluptuous Young Lady of High Rank. Disclosing her Secret Longings and Private Amours Before Marriage. Forming a Curious Picture of Fashionable Life and Refined Sensuality*, emphasized the theme of female ardor. According to Henry Spencer Ashbee, the leading nineteenth-century bibliographer of erotica, the text of this work related the sexual confessions of an unusually amorous “heroine-authoress, Tilly Touchitt.”<sup>54</sup> Like the “obscene” excerpt from *The Cabinet of Venus Unlocked*, the one taken from *The Confessions* highlighted a detailed narration by the female protagonist of her experience of sexual penetration.<sup>55</sup>

The Hobbes indictment concluded by noting that the “most gross and filthy scenes of lewdness and obscenity” from *Memoirs of the Life and Adventures of the Celebrated Courtesan Mademoiselle Celestine of Paris* were “not fit or proper to be used, named, or mentioned in any language, or in any Court of Justice.”<sup>56</sup> The same reticence marked the district attorney’s treatment of the Hobbes editions of *The Lustful Turk* and *The Auto-Biography of a Footman*, reflecting a strategy that would become increasingly common in the coming years.<sup>57</sup>

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utmost of my strength, and seemed inspired beyond my natural powers in every effort. I screamed with excessive extacy [sic], and, oh! god of burning lust! At the last flush and overwhelming flow of bliss that gushed into me from him, my senses were wholly entranced and the whole world of love seemed swallowed up in the heavenly sweet delirium.

People v. Richard Hobbes, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>54</sup> ASHBEE, *supra* note 39, at 305-06. The excerpt in the indictment recounted the heroine’s first sexual experience, which took place after she had been caught admiring the naked body of her male cousin through a keyhole. *Id.*

<sup>55</sup> People v. Richard Hobbes, Sept. 28, 1842, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>56</sup> *Id.*

<sup>57</sup> The exclusion of “obscene” materials in order to preserve the “chastity” of court records was a recognized exception to the requirement that indictments specify the nature of the offensive language or conduct with precision. See *Commonwealth v. Holmes*, 17 Mass. 335 (1821).

The bill against Hobbes also declined to offer an example from *The Curtain Drawn Up, or The Education of Laura*, an asserted translation of another libertine Enlightenment classic, Mirabeau's *Le Rideau Levé ou L'Education de Laure*.<sup>58</sup> Fortunately for scholars, accompanying indictments against a print shop owner and a bookstand operator who sold this book included three allegedly obscene selections from the edition produced by Hobbes.<sup>59</sup> Just as the Hobbes indictment defined obscenity in terms of female sexual knowledge and desire, the other indictments focused on passages from *The Curtain Drawn Up* that conveyed the heroine's preoccupation with sex and her eager erotic spectatorship.<sup>60</sup>

Turning to obscenity prosecutions for the 1850s, five of the books condemned in the earlier cases—*Memoirs of a Woman of Pleasure*, *The Curtain Drawn Up*, *The Lustful Turk*, *The Confessions of a Voluptuous Young Lady of High Rank*, and *Memoirs of the Life and Voluptuous Adventures of the Celebrated Courtesan Mademoiselle Celestine of Paris*—also appear in indictments for this decade, an indication that they constituted a core of popular erotic texts that authorities regarded as

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<sup>58</sup> A London copy of *The Curtain Drawn Up, or The Education of Laura* is held at the Kinsey Institute for Research in Sex, Gender, and Reproduction in Bloomington, Indiana. The title page indicates it was translated "[f]rom the French of the Comte Mirabeau" and published in 1818. The place of publication is bawdily described as "London Putitin, Rogers and Co., Nineinch Street."

<sup>59</sup> *People v. James Jones*, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); *People v. Charles Heustis*, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>60</sup> For instance, they quoted this item from Laura's diary, which alluded to female masturbation and described her obsessive observation of male genitalia:

Arrived at home. I failed not to profit by the knowledge I had acquired through Isabella and, like her, procured myself each day the most delicious sensations of pleasure, and frequently my heated imagination urged me to double the dose. I thought of nothing but a man, and I never saw one without fixing my eyes upon that part which I knew contained the idol of my desires, and which the very idea of filled me with a fire that was insupportable.

*People v. James Jones*, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); *People v. Charles Heustis*, Sept. 28, 1842, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

obscene.<sup>61</sup> Other titles, such as *The Adventures of Silas Shovewell* and *The Secret Habits of the Female Sex*, first surfaced in indictments during the 1850s, but then recurred multiple times, suggesting that they were recent additions to the inventory of New York publishers that soon joined the pornographic canon. Moreover, even though at least one New York publisher began to experiment with selling erotica composed by American authors in the mid-1850s, European imports continued to dominate both the New York market for “fancy” print and the records of obscenity prosecutions.<sup>62</sup>

By this second decade, district attorneys routinely declined to include specific passages deemed to be obscene in their indictments, out of an ostentatious concern with protecting the modesty of the court’s records. Though the 1850s indictments are therefore less revealing, the titles of the indicted works suggest that first-person female narrations of sexual desire continued to be a trigger for charges of obscenity. Indeed, the ban on overt representation of feminine sexual agency appeared to apply regardless of the erotic content of the publication. The repeated prosecution of sellers of *The Secret Habits of the Female Sex*, allegedly written by a French physician, Dr. Jean Dubois, is a prime case in point. Despite its salacious title, *The Secret Habits of the Female Sex* was actually an extremely dour, if sensationalized, anti-masturbation tract.<sup>63</sup> Clever marketing by publishers with a reputation for producing “fancy” books, along with the title’s allusions to the mysterious sexual practices of women and its French author, probably misled men into buying it for the purpose of sexual excitement or satisfying their curiosity about female sexuality.<sup>64</sup> Moreover, the book’s

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<sup>61</sup> Nearly three decades later, Anthony Comstock’s first roundup of New York pornography dealers for obscenity involved the sale of two of these titles: *The Curtain Drawn Up* and *The Confessions of a Voluptuous Young Lady of High Rank*. See *People v. James McDermott*, March 14, 1872, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); *People v. William Brooks and Charles Brooks*, March 14, 1872, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives).

<sup>62</sup> See Dennis, *supra* note 6, at tbl. 2.

<sup>63</sup> The practice of marketing ostensibly didactic anti-masturbation tracts as vehicles for sexual titillation dated back to the early eighteenth century in England, when works such as *Onania, or, The Heinous Sin of Self-Pollution, and All Its Frightful Consequences in Both Sexes, Considered* were sold as a kind of soft-core pornography. See WAGNER, *supra* note 8, at 6, 16–19. For further insights on the early publishing history of *Onania*, see THOMAS W. LAQUEUR, *SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION* (2003).

<sup>64</sup> Copies of *The Secret Habits of the Female Sex* sold in New York may also have contained objectionable illustrations. For instance, an extant 1848 edition published in New

discussion of sexually aroused girls and young women, even though it dwelled on the morbid consequences of their physical explorations, ran directly afoul of the emerging legal taboo against expressions of female desire.

## B. The Immoral But Non-Obscene

"Fancy" works containing unambiguous accounts of sex and nudity or featuring female passion and pleasure were not the only forms of sexual discourse available in the antebellum New York book market. In reconstructing the meaning of obscenity, it is therefore instructive to consider not only what kinds of sexual representations triggered prosecutions, but also what kinds did not.

### 1. *Pulp Fiction and the World of the "Racy"*

The proliferation of American sensation fiction in the 1840s and 1850s provides an especially revealing guide to the meaning of obscenity in antebellum New York. This genre originally derived from European "city mystery" novels and British "penny dreadfuls."<sup>65</sup> The American version, often called "yellow-jacket" literature (a reference to the garish yellow covers of these early paperbacks, although they could also come in bright blue, salmon, or orange),<sup>66</sup> reveled in portraying "tales of criminal underworlds, urban squalor, and elite luxury and decadence."<sup>67</sup> The most risqué examples also specialized in graphic, horrifically detailed depictions of violence and torture combined with euphemistic, titillating references to sexual license.<sup>68</sup> The erotic scenes, while elliptical in content, nonetheless

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York and held at the Kinsey Institute for Research in Sex, Gender, and Reproduction in Bloomington, Indiana includes an engraving of a naked, nubile young woman reaching up for a cluster of grapes as its frontispiece.

<sup>65</sup> See generally Kimberly R. Gladman, *Upper Tens and Lower Millions: City Mysteries Fiction and Class in the Mid-Nineteenth Century* (2001) (unpublished Ph.D. dissertation, New York University) (on file with author) (discussing European sources of sensation literature).

<sup>66</sup> See Hawley, *supra* note 39, at ch. 4.

<sup>67</sup> MICHAEL DENNING, *MECHANIC ACCENTS: DIME NOVELS AND WORKING-CLASS CULTURE IN AMERICA* 85 (1987).

<sup>68</sup> REYNOLDS, *supra* note 6, at 212 ("The distinguishing feature of the American erotic writing of the 1840s was its unique combination of prurient sexuality and grisly gore.").

raised highly provocative themes. As literary historian David Reynolds has pointed out, the sexual practices alluded to in sensation fiction included “incest, sadomasochism, homosexuality, group sex, miscegenation, child sex, [and] mass orgies.”<sup>69</sup> Because of its obsession with the dark secrets and sexual excesses of life in the big city, literary critics Joseph Ridgely and Christopher Looby have appropriately termed this body of literature “American porno-gothic.”<sup>70</sup>

The leading publishers of “American porno-gothic” novels were often the same men who published the more expensive, “fancy” books that typically provoked indictments for obscenity. Frequently using a separate imprint to distinguish the genres, they marketed this relatively safe category of indecent sensation literature as “racy” reading. Unlike “fancy” books, which were often bound in cloth and priced at two dollars or more, racy novels were usually issued as slim, paper-covered pamphlets that cost only a quarter and were therefore accessible to a much broader segment of the population.<sup>71</sup> Less than 100 pages long, small enough to fit in a pants pocket, and illustrated only with a few rough woodcuts, they were meant to be read quickly and probably disposed of with similar dispatch.<sup>72</sup>

Native New Yorker George Thompson wrote much of the most sexually scandalous and violent sensation fiction that was published in New York in the late 1840s and 50s. While living in Boston and New York during his twenties and early thirties, Thompson participated in a raucous, bohemian subculture of writers, reporters, actors, and theater producers who

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<sup>69</sup> *Id.* at 223.

<sup>70</sup> Christopher Looby, *George Thompson's "Romance of the Real": Transgression and Taboo in American Sensation Fiction*, 65 AM. LITERATURE 651 (1993); Joseph Ridgely, *George Lippard's The Quaker City: The World of the American Porno-Gothic*, 7 STUD. LITERARY IMAGINATION 77 (1974) (coining term “American porno-gothic”). A sub-genre of “American porno-gothic” literature focused on the secrets and horrors of urban life, especially in major centers like New York City. Scholars generally refer to these mid-nineteenth-century American novels as “city mysteries.” For insightful discussions of city-mysteries novels in Europe and America, see generally Gladman, *supra* note 65; Paul Joseph Erickson, *Welcome To Sodom: The Cultural Work Of City-Mysteries Fiction in Antebellum America* (2005) (unpublished Ph.D. dissertation, University of Texas) (on file with author).

<sup>71</sup> *Compare* Genuine Fancy Books Circular, *supra* note 41 (describing “fancy books” as “richly bound in cloth” and listing prices between one and four dollars per book) with *Venus' Miscellany*, May 23, 1857, at 2 (advertising “Rich, Rare, and Racy Reading” and listing prices of 25 cents per book).

<sup>72</sup> David S. Reynolds & Kimberly R. Gladman, *Introduction* to *VENUS IN BOSTON AND OTHER TALES OF NINETEENTH-CENTURY LIFE* xi-xii (David S. Reynolds & Kimberly R. Gladman eds., 2002).

made their living from popular entertainment.<sup>73</sup> For his part, Thompson churned out lurid blends of graphic violence and euphemistic sex with titillating titles like *The Ladies' Garter* (c.1851), *The Gay Girls of New York* (1854), and *The Bridal Chamber, and Its Mysteries* (1856).<sup>74</sup>

In what he described as his "own peculiar style," Thompson perfected the art of inverting conventional sources of mid-nineteenth-century moral and social authority.<sup>75</sup> In blatant mockery of those who envisioned the city as an orderly, well-governed society, Thompson's novels presented the metropolis as bizarre, carnivalesque, and terrifying. It was a world where ministers were always licentious and immoral, middle-class women were always faithless and lecherous, and judges were always lawless and unjust.<sup>76</sup> Sex and violence, often linked together, were Thompson's signature vehicles for expressing these themes of disorder and darkness. As his leading biographers, David Reynolds and Kimberly Gladman, have asserted, Thompson's works are "filled with gore, sex, and perversity to such a degree that Thompson can be identified as the most shockingly sensational and openly erotic American writer of his day."<sup>77</sup> In particular, he strove to eroticize many of the most culturally taboo forms of sex, violence, and even death.

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<sup>73</sup> According to his autobiography, Thompson was born in New York in 1823. GEORGE THOMPSON, MY LIFE: OR THE ADVENTURES OF GEO. THOMPSON (1854), reprinted in Reynolds & Gladman, *supra* note 72, at 315. For a full discussion of Thompson's life and work, see *id.* at ix-liv; REYNOLDS, *supra* note 6, at 219-24.

<sup>74</sup> Henry Spencer Ashbee estimated that Thompson may have produced a hundred books; references to more than sixty of these survive today along with twenty-five novels in their entirety. ASHBEE, *supra* note 39, at 219; Reynolds & Gladman, *supra* note 72, at xi-xii.

<sup>75</sup> *Editorial Salutation*, THE WEEKLY WHIP, Feb. 12, 1855, at 1. Literary scholars have vigorously debated the political implications of Thompson's self-consciously iconoclastic style. Compare REYNOLDS, *supra* note 6, at 211-24 (interpreting Thompson's novels as politically oppositional and subversive) with Looby, *supra* note 70, at 666-67 (arguing that Thompson's novels served a reactionary function by channeling political opposition into voyeurism and by reaffirming the value of bourgeois domestic ideology while pretending to critique it).

<sup>76</sup> For example, in Thompson's novel, *City Crimes*, a wife "becomes so bored and sexually frustrated by her proper husband, whom she calls a 'canting religionist' always 'discouraging upon the pleasures of the domestic circle, and such humbugs,' that she arranges with her daughter Josephine to have him killed so they can lead a life of shameless promiscuity." Reynolds & Gladman, *supra* note 72, at xxxv.

<sup>77</sup> *Id.* at xi.

Unlike the authors of “fancy” books, however, Thompson wrote about sex with coy allusiveness and naughty winks to the reader. In a characteristic passage from one his most popular novels, *City Crimes*, Thompson related an incestuous sexual triangle comprising a lecherous mother, her equally lascivious daughter, and the captain of a ship whom they have seduced: “And clasping both ladies around the waists, he kissed them alternately, again and again. That night was one of guilty rapture to all the parties; but the particulars must be supplied by the reader’s own imagination.”<sup>78</sup> In contrast to this elliptical treatment of sex, Thompson lavished extensive detail on descriptions of violence, horror, and torture.<sup>79</sup>

The preoccupation of mid-nineteenth-century American sensation fiction with sexual transgression, violence, and crime often led moral reformers and other critics to condemn it as immoral and dangerous.<sup>80</sup> They were especially concerned about the dangers such books presented for young, working-class readers. In their eyes, shop girls and mechanics seemed particularly susceptible to the charms of cheap literature, although they acknowledged that the well-off sometimes succumbed to its temptations as well. An anonymous 1855 book by a Chicago doctor, *The Confessions and Experience of a Novel Reader*, was emblematic of growing concern over the harms of sensation novels:

If any one has any doubts as to the fearfully rapid increase of this public poison—a demoralizing literature, the real “Pandora’s box of evil passions”—the flood-gate, from beneath whose slimy jaws runs a stream of pollution, sending forth its pestilential branches to one great ocean of immorality, let such a one take a trip with me through the length and breadth of our land.<sup>81</sup>

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<sup>78</sup> GEORGE THOMPSON, *CITY CRIMES; OR LIFE IN NEW YORK AND BOSTON* (1849), reprinted in Reynolds & Gladman, *supra* note 72, at 105, 248.

<sup>79</sup> In Part III, *infra*, this Article analyzes how sensation novelists like Thompson learned to substitute violence for the sex that the law forbade.

<sup>80</sup> Indeed, Karen Halttunen has argued that the sadomasochistic tendencies of American sensation fiction arose precisely because middle-class moral reformers, such as anti-slavery advocates, were developing new humanitarian sensibilities that made representation of pain immoral and revolting. In this sense, the grotesque violence featured in racy novels flew in the face of all that antebellum moralists were trying to achieve. KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION* 60-90 (1998).

<sup>81</sup> Reynolds & Gladman, *supra* note 72, at xxvi (quoting *CONFESSIONS AND EXPERIENCE OF A NOVEL READER* 11 (1855)).

According to the doctor, the very survival of the nation depended on the suppression of indecent literature. Otherwise, it threatened to “subvert the purity of our Republican institutions” and foment “elements of revolution” that “will crush us in the might and majesty of our fancied security.”<sup>82</sup> Foreshadowing the heated campaigns of Anthony Comstock against “vampire literature”<sup>83</sup> in the late nineteenth century, one New York writer mourned the growing prevalence of what he called “satanic literature”: “Got up in cheap form, rendered attractive by meretricious engravings and exaggerated titles, these pernicious books are thrust into almost every accessible place, and are infecting to the core a large portion of the youth of the country.”<sup>84</sup>

Despite widespread criticism of this sort, the distinctive fusion of sexual allusion and graphic violence in racy pulp fiction failed to provoke the ire of legal authorities in New York. Throughout the antebellum period, obscenity prosecutions targeted only sex, not violence, no matter how gory or eroticized its presentation.<sup>85</sup>

## **2. *Quasi-Scientific Literature on Human Anatomy, Marital Sex, Reproduction, and Family Limitation***

A second major category of writing that touched on sexual matters but largely escaped indictment for obscenity in 1840s and 1850s New York (although not later on)<sup>86</sup> was quasi-medical information, ostensibly designed for married people or “those about to marry,” concerning human

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<sup>82</sup> *Id.* at xxvi-xxvii.

<sup>83</sup> Anthony Comstock, *Vampire Literature*, 153 N. AM. REV. 160 (1891).

<sup>84</sup> *Satanic Literature*, 2 NAT'L MAG. 25, 25 (1853).

<sup>85</sup> After the Civil War, “blood-and-thunder” sensation novels and newspapers containing violent crime reports became major targets of the legislative campaigns of Comstock and other moral reformers. By the 1880s, religious activists had persuaded many states, including New York, to pass laws prohibiting the sale of such publications to minors or their display in the vicinity of minors. *See, e.g.*, N.Y. Sess. Laws § 380 (1884). *See also* Elizabeth Bainum Hovey, *Stamping Out Smut: The Enforcement of Obscenity Laws, 1872-1915* (1998) (unpublished Ph.D. dissertation, Columbia University) (on file with author) (discussing the 1884 New York indecency statute).

<sup>86</sup> In 1868, the first anti-obscenity statute in New York included a ban on advertisements for any “article or medicine for the prevention of conception or procuring of abortion.” N.Y. Sess. Laws § 430 (1868). In 1873, the Comstock Act outlawed the mailing of materials that could be used “for the prevention of conception or procuring of abortion.” 17 Stat. 598 (1873).



anatomy, sexual technique, reproduction, contraception, and abortion. Many of the most popular titles, such as Frederick Hollick's *The Marriage Guide* and Thomas Low Nichols' *Esoteric Anthropology*, were published in New York and sold freely there.<sup>87</sup> Historian Janet Brodie, for instance, has substantiated the increasing volume and explicitness of books on reproductive control and sexual anatomy that became available to lay audiences after 1850, calling it a veritable "boom" in self-help literature.<sup>88</sup> Thinly veiled advertisements for contraceptive devices and abortionists in popular newspapers and mail circulars were also common.<sup>89</sup>

Like sensation fiction, physiological discussions of contraception and abortion were frequently denounced by conservative moral reformers.<sup>90</sup> Nonetheless, there is no record in antebellum New York of any successful prosecution specifically directed at a seller of literature on contraception or abortion. On one occasion in 1847, wealthy abortionist Ann Restell's husband, Charles Lohman, was indicted for selling *The Married Woman's Private Medical Companion*.<sup>91</sup> This tract, published just a few months before under the pseudonym "Dr. A.M. Mauriceau," contained plainly marked sections offering advice on the "prevention of pregnancy" and providing information on methods of abortion.<sup>92</sup> But the case file in the

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<sup>87</sup> FREDERICK HOLLICK, M.D., *THE MARRIAGE GUIDE, OR NATURAL HISTORY OF GENERATION; A PRIVATE INSTRUCTOR FOR MARRIED PERSONS AND THOSE ABOUT TO MARRY, BOTH MALE AND FEMALE; IN EVERY THING CONCERNING THE PHYSIOLOGY AND RELATIONS OF THE SEXUAL SYSTEM AND THE PRODUCTION OR PREVENTION OF OFFSPRING—INCLUDING ALL THE NEW DISCOVERIES NEVER BEFORE GIVEN IN THE ENGLISH LANGUAGE* (Amo 1974) (1850); T. L. NICHOLS, M.D., *ESOTERIC ANTHROPOLOGY: A COMPREHENSIVE AND CONFIDENTIAL TREATISE ON THE STRUCTURE, FUNCTIONS, PASSIONAL ATTRACTIONS AND PERVERSIONS, TRUE AND FALSE PHYSICAL AND SOCIAL CONDITIONS, AND THE MOST INTIMATE RELATIONS OF MEN AND WOMEN* (published by the author, at his Reform Book Store, No. 65 Walker Street 1854).

<sup>88</sup> JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 180-203* (1994).

<sup>89</sup> Kathleen L. Endres, 'Strictly Confidential': Birth-Control Advertising in a 19th-Century City, 63 *JOURNALISM Q.* 748 (1986).

<sup>90</sup> As Professor Brodie notes, while a few publishers of books on reproductive control were recognized as reputable, on the whole the business "was neither openly accepted nor respectable." BRODIE, *supra* note 88, at 194.

<sup>91</sup> *People v. Charles Lohman alias Dr. A. M. Mauriceau*, Sept. 15, 1847. The city directory of New York for 1847 identified Lohman's occupation as publisher. DOGGETT'S NEW YORK-CITY DIRECTORY FOR 1847 & 1848 at 251 (1847).

<sup>92</sup> On Lohman and *The Married Woman's Private Medical Companion*, see BRODIE, *supra* note 88, at 231; AMY GILMAN SREBNICK, *THE MYSTERIOUS DEATH OF MARY*

district attorney's papers make clear that this indictment was triggered by the perception that the book was really just an extended advertisement for the lucrative abortion practice of the notorious "Madame Restell," who was then facing trial for manslaughter.<sup>93</sup> Even under those circumstances, authorities did not pursue Lohman's prosecution for obscenity.<sup>94</sup> Nor did Lohman's indictment impede sales of *The Married Woman's Private Medical Companion*, which went through nine editions between 1847 and 1860.<sup>95</sup>

It should be noted that other antebellum cities showed less tolerance for literature of this sort. In Philadelphia, health reformer Frederick Hollick was indicted for obscene libel in 1846 for distributing a collection of his popular lectures on health, sex, and anatomy, somewhat suggestively entitled *The Origin of Life: A Popular Treatise on the Philosophy and Physiology of Reproduction in Plants and Animals, Including the Details of Human Generation with a Full Description of the Male and Female*

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ROGERS: SEX AND CULTURE IN NINETEENTH-CENTURY NEW YORK 100-02 (1995); HOROWITZ, *supra* note 1, at 209. On Restell, see CLIFFORD BROWDER, *THE WICKEDEST WOMAN IN NEW YORK: MADAME RESTELL THE ABORTIONIST* (1988).

<sup>93</sup> The complainant in Lohman's case, James B. Lloyd, wrote to District Attorney John McKeon, bringing *The Married Woman's Private Medical Companion* to his attention and emphasizing Lohman's connection to Restell: "This book contains about 160 pages and its sole object is the advertising of Madame Restell's pills under the name of M. De Someaux's Preventive to Conception." According to Brodie, the pills were to be used as a douching solution. BRODIE, *supra* note 88, at 231. Complaining that "this Lohman boasts of having sold over twenty five thousand of these books in less than three months" and that Lohman advertised both his book and Restell's abortion practice extensively in newspapers throughout the country, Lloyd implored the District Attorney to take action against the "immense . . . dealings of this couple in wholesale murder." *People v. Charles Lohman alias Dr. A.M. Mauriceau*, Sept. 15, 1847, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). On Restell's prosecution, see *People v. Caroline Lohman alias Ann Lohman alias Madame Restell*, Sept. 7, 1847, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). A transcript of the trial was published as *Wonderful Trial of Caroline Lohman, alias Restell with Speeches of the Counsel, Charge of Court and Verdict of the Jury* [n.p.n.d.]. For another indictment of Restell in 1847, see *People v. Ann Lohman, alias Caroline Lohman, alias Madame Restell*, Dec. 15, 1847, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). See also SREBNICK, *supra* note 92, at 99-107 (discussing the trials of Madame Restell).

<sup>94</sup> *People v. Charles Lohman alias Dr. A.M. Mauriceau*, Sept. 15, 1847, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); BROWDER, *supra* note 92, at 77, 103; HOROWITZ, *supra* note 1, at 209.

<sup>95</sup> BRODIE, *supra* note 88, at 231.

*Organs*.<sup>96</sup> A second indictment charged Hollick with circulating obscene pictures in the form of anatomical illustrations included in the book.<sup>97</sup>

Hollick's philosophy was indeed controversial in its day. In his lectures and writings, he emphasized the importance of sexual pleasure and argued for the right of both women and men to control their own bodies.<sup>98</sup> He also offered advice on contraception, advertised condoms, and promoted the use of aphrodisiacs like tea, coffee, and marijuana to improve sexual performance and enjoyment.<sup>99</sup> Significantly, however, Hollick was never prosecuted in New York, even though *The Origin of Life* was published there and even though he frequently lectured in the city. After moving to New York, he published a second book in 1850, *The Marriage Guide*, which was even more successful.<sup>100</sup> Like his earlier work, *The Marriage Guide* provided candid descriptions of sexual anatomy, offered explicit instructions on contraception, and showed a flair for the sensational.<sup>101</sup> That Hollick was never prosecuted in New York demonstrates the relatively free commerce enjoyed by the city's antebellum publishers in works on health reform, reproductive advice, and sexual physiology.

### 3. *Artistic Representations of Sex*

A final category of writing that escaped prosecution for obscenity was comprised of literary works that contained sexual allusions. A revealing example is Walt Whitman's *Leaves of Grass*, first published in New York in 1855. Many critics charged that Whitman's frank treatment of sexual desire was obscene and some urged prosecution. A review in the *New York Criterion*, for instance, concluded: "Thus, then, we leave this

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<sup>96</sup> April Haynes, *The Trials of Frederick Hollick: Obscenity, Sex Education, and Medical Democracy in the Antebellum United States*, 12 J. HIST. SEXUALITY 543 (2003).

<sup>97</sup> *Id.* at 550. A third bill stemmed from his use of a life-size, papier-mâché model of a naked woman on his lecture circuit. *Id.* at 543, 550.

<sup>98</sup> *Id.* at 552.

<sup>99</sup> *Id.* (characterizing Hollick's philosophy as "sex-positive").

<sup>100</sup> HOLLICK, *THE MARRIAGE GUIDE*, *supra* note 87. On the wide circulation and frequent reprinting of this work, see BRODIE, *supra* note 88, at 201.

<sup>101</sup> Listed among its chapter headings were "The Vagina," "The Penis," "Proper Time for Sexual Indulgence," and "Singular Case of Female Hermaphroditism." It included numerous illustrations, with captions like "View of the Organs with the Clitoris hanging down in its Natural position, when not erect." HOLLICK, *THE MARRIAGE GUIDE*, *supra* note 87.

gathering of muck to the laws which, certainly, if they fulfill their intent, must have power to suppress such gross obscenity.”<sup>102</sup> Commentators heaped similar abuse on Nathaniel Hawthorne’s *The Scarlet Letter*, assailing it as an immoral book that encouraged sexual license.<sup>103</sup> Cultural arbiters opposed to the “licensed libertinism of our established literature” also denounced Byron’s *Don Juan* and Rousseau’s *Confessions*.<sup>104</sup>

The comparative restraint of New York authorities caused the tabloid *National Police Gazette* to complain about an alleged double standard for reputable publishers of poetry and clandestine purveyors of “coarser books”: “The strictly moral may go further than they have yet gone, and seize upon certain editions of modern poetry, and confiscate them for immorality—an immorality that exceeds in its pernicious effects anything that the coarser books, surreptitiously sold on street corners and up sheltering alleys, contain.”<sup>105</sup> Despite invitations of this sort, criminal

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<sup>102</sup> N.Y. CRITERION, Nov. 10, 1855, at 24. Similarly, an 1856 review of *Leaves of Grass* in *Frank Leslie’s Illustrated Newspaper* carped:

We shall not aid in extending the sale of this intensely vulgar, nay, absolutely beastly book, by telling our readers where it may be purchased. The only review we shall attempt of it, will be to thus publicly call the attention of the grand jury to a matter that needs presentment by them....

WALT WHITMAN’S LEAVES OF GRASS 259 (David S. Reynolds, ed. 2005).

<sup>103</sup> See William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 325 (1954); ALBERT MORDELL, NOTORIOUS LITERARY ATTACKS 122-37 (1926) (reprinting 1851 denunciation of *The Scarlet Letter*).

<sup>104</sup> See, e.g., *Satanic Literature*, 2 NAT’L. MAG. 25 (1853). In 1823, an English court of equity denied copyright protection to *Don Juan* on the grounds that it was obscene. See Colette Colligan, *Obscenity and Empire: England’s Obscene Print Culture in the Nineteenth Century* 70-74 (2002) (unpublished Ph.D. dissertation, Queen’s College, Kingston, Ontario) (on file with author). Likewise, in the following decade, American literary critics charged publishers of Swinburne’s *Poems and Ballads* with immorality. A relatively gentle notice in the *North American Review* concluded that this volume portrayed “forms of passion so very abnormal and impure, that the mere contemplation of them seems to smutch and stain.” 104 N. AM. REV. 287, 289 (1867).

<sup>105</sup> *The Immoral Literature of the Day*, NAT’L POLICE GAZETTE, Dec. 8, 1866, at 2. Such attacks gathered fuel from several highly publicized European prosecutions of literary obscenity that took place at the end of the 1850s. In 1857, for instance, French authorities tried the publisher and printer of *Madame Bovary*, as well as Flaubert himself, on charges of obscenity. Though all of the defendants were acquitted, just a few months later French prosecutors obtained a conviction against Charles Baudelaire, who had recently published *Les Fleurs du Mal*, for “offenses against public morality.” See WALTER KENDRICK, THE

authorities in antebellum New York consistently declined to censor artistic works issued by relatively highbrow publishers, even when they offended mainstream moral sensibilities.<sup>106</sup>

### III. THE ROLE AND IMPACT OF OBSCENITY PROSECUTIONS

In assessing the function and consequences of obscenity prohibitions in the mid-nineteenth century, one can identify three arenas in which they had the effect of promoting, rather than restraining, the development of an American pornography industry. Section A below analyzes some of the commercial consequences of legal constraints, in particular the turn by publishers to the U.S. mail as the preferred mode for marketing and distributing proscribed materials. Section B addresses the ways in which interdictions on obscenity encouraged the production of new genres of indecent literature, influencing the content of both “fancy” and “racy” print. Section C highlights the ways in which obscenity prosecutions provided advertising for the emerging pornography trade, disseminating knowledge about sexual publications and generating interest in them among potential consumers.

#### A. New Methods of Marketing and Distribution

By the mid-nineteenth century, New York publishers of “fancy,” forbidden books had come to perceive the law of obscenity as a significant threat to both their liberty and property. Several prosecutions for obscenity in the 1840s had resulted in prison sentences for the defendants. For instance, the publisher that Anthony Comstock later identified as the most prolific pornographer of the nineteenth century, Williams Haines, served three months in jail in 1846 for selling an illustrated copy of *The Curtain Drawn Up, or The Education of Laura* in a public square.<sup>107</sup> By the 1850s,

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SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE 105-15 (discussing prosecutions of Flaubert and Baudelaire).

<sup>106</sup> In 1882, supporters of Anthony Comstock succeeded in suppressing the publication of a new edition of *Leaves of Grass* in Boston by using the threat of obscenity prosecution. See BEISEL, *supra* note 1, at 164-67. Even then, as Beisel astutely notes, the censorship campaign backfired: “Whitman took his book to Philadelphia, where the furor aroused by its suppression in Boston made it an enormous financial success.” *Id.* at 165.

<sup>107</sup> *People v. William Haines*, July 17, 1846, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives); N.Y. TRIB., July 23, 1846, at 2. On Haines’ prominence, see ANTHONY COMSTOCK, *FRAUDS EXPOSED* 388 (Patterson Smith 1969) (1880).

fewer prosecutions ended in incarceration of the defendants, especially those involving major, relatively well-capitalized publishers who occupied the top of the supply chain.<sup>108</sup>

Nonetheless, in the minds of antebellum pornographers, the law of obscenity continued to present very real risks. At a minimum, purveyors of morally objectionable texts wanted to protect substantial investments of capital from police raids and confiscations. This fear was entirely rational, given large seizures of publishers' stock in both the 1840s and 1850s.<sup>109</sup> They also wanted to minimize the need to pay kickbacks to local police, judges, and court officers. Such kickbacks were an increasingly common cost of doing business that consumed a large portion of their profits.<sup>110</sup> Moreover, because they operated in a zone of criminalized speech whenever they marketed or sold "fancy" publications, New York publishers pursued their trade in the omnipresent "shadow of the law" and its punishments, constantly confronted with and responsive to the threat of arrest and imprisonment.<sup>111</sup>

Yet the risk of prosecution for obscenity did not induce these men (or the women who sometimes assisted them) to mend their ways, abandon the obscene book trade, and become virtuous, orderly citizens. Instead, it prompted them to strategize about ways to navigate their business ventures around the law. One critical consequence of the desire of erotica publishers and dealers to evade arrest for obscenity was the development of new

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<sup>108</sup> See Dennis, *supra* note 6, at ch. 5 (providing a detailed account of prosecutions for obscenity in 1850s New York).

<sup>109</sup> See *id.* at chs. 4-5 (providing a detailed account of prosecutions for obscenity in 1840s and 1850s New York).

<sup>110</sup> For example, William Haines's wife told Comstock in 1872 that she and her husband would have been wealthy if they had not been forced to pay blackmail to New York police detectives. See Arrest Records of the New York Society for the Suppression of Vice, Manuscript Division, Library of Congress (entry for "William Haynes") [hereinafter Arrest Records of NYSSV]. See also Letter of Anthony Comstock to Rep. Clinton L. Merriam, dated January 18, 1873, in support of An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use, CONG. GLOBE, 42nd Cong., 3d sess. app. 168-69 (1873) ("[Haines] has for years been the victim of black mail by the detectives of New York city, and in this manner has been practically licensed by them to do this business.").

<sup>111</sup> For a classic account of how social actors operate within the "shadow of the law," see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979). See also MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON 2 (1996) (applying the concept of bargaining in the shadow of the law to a nineteenth-century child custody dispute).

channels for marketing and distributing illicit publications. This impulse led many New York pornographers to attempt to insulate themselves from the point of sale by relying on a network of peddlers to distribute their “fancy” books and prints on streets, docks, trains, and in hotel lobbies throughout the city.<sup>112</sup>

By the mid-1850s, however, the desire to elude obscenity prosecutions had inspired a vanguard of New York publishers to move away from local sales and to embrace the relative privacy, anonymity, and safety of mail-order operations. At this point in time, Congress had not yet taken steps to ban obscenity from the mail or other instruments of interstate commerce. By exploiting the U.S. mail system to advertise and deliver their goods, these men hoped to create an inconspicuous, secure vehicle for marketing and selling publications that municipal authorities considered obscene.<sup>113</sup>

At least one mid-nineteenth-century New York pornographer, an innovative publisher, editor, and all-around sexual entrepreneur named George Akarman, went so far as to abandon local sales of “fancy” materials that he delicately described as “in opposition to law” altogether.<sup>114</sup> By distributing his products through the U.S. mail, Akarman sought to deprive municipal governments, especially officials in New York City, of the legal power to regulate what he hoped would become an exclusively interstate, entirely mail-order business in obscene publications. In the process, he relinquished the profits that could have been gained from participating in New York’s thriving local market for erotica. As he explained his strategy, “none of those books which are condemned by the laws have ever been sold or distributed by me in this city.” Instead, he sold such books only by mail

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<sup>112</sup> See, e.g., *People v. Frederick Brady alias Henry S.G. Smith*, Feb. 12, 1858, District Attorney’s Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives) (including affidavits of peddlers who regularly acquired books from Brady to sell on the streets).

<sup>113</sup> From the opposing corner, this is how Anthony Comstock conveyed the benefits of the U.S. mail for nineteenth-century purveyors of erotica: “*The mail of the United States is the great thoroughfare of communication leading up into all our homes, schools and colleges. It is the most powerful agent, to assist this nefarious business, because it goes everywhere and is secret.*” COMSTOCK, *supra* note 107, at 391.

<sup>114</sup> George Akarman, Letter to the Editor, N.Y. HERALD, Sept. 20, 1857, at 8. For a detailed analysis of Akarman’s life and career, and the pivotal role he played in the development of the American pornography trade, see Dennis, *supra* note 6, at chs. 7-8.

order to individual customers whom he described as “‘gentlemen’ at a distance.”<sup>115</sup>

By the end of the 1850s, William Sanger, a New York physician and public health expert who conducted an extensive study of the city’s commercial sex trade, astutely described how the U.S. postal service enabled publishers like Akarman to survive in the midst of a legal system that criminalized obscene publications. As he observed, police raids on the city’s major suppliers of obscene books simply encouraged pornographers to redirect their business from relatively public, over-the-counter or street-level sales to secret, mail-order advertising and distribution:

More caution is observed now, and the post-office is made the vehicle for distribution. Circulars are issued which describe the publications and their prices, modes of transmitting money are indicated, and the advertiser plainly says that he will not allow any personal interviews on account of the dangers which surround the traffic.<sup>116</sup>

Thus, one consequence of obscenity prosecutions in antebellum New York was to prompt resourceful sexual entrepreneurs to pursue new methods of marketing and distributing pornography, including a system of advertising, payment, and delivery via the mail.<sup>117</sup> In moving to the mails, of course, publishers of erotica not only circumvented local prosecutions for obscenity, but also dramatically expanded markets for sexual print across the nation.

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<sup>115</sup> George Akarman, Letter to the Editor, N.Y. HERALD, Sept. 20, 1857, at 8. The Genuine Fancy Books Circular also emphasized the privacy and security of the mail-order business:

To ensure safety and defy detection, all [fancy] books are sent privately by mail, done up in strong wrappers, closely sealed up with wax, and full letter postage paid on every book. . . . Recollect none of the above articles can be had at my office in New York, or through any agency or bookseller whatever. All orders must come by mail . . . .

Genuine Fancy Books Circular, *supra* note 41.

<sup>116</sup> WILLIAM W. SANGER, THE HISTORY OF PROSTITUTION 522 (1858).

<sup>117</sup> In shifting to the mail, publishers were greatly aided by a fortuitous change in postal regulations in 1851 that allowed bound books to be transported in the mail for the first time. See RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 39 (1995); Richard B. Kielbowicz, *Mere Merchandise or Vessels of Culture? Books in the Mail, 1792-1942*, in 82 PAPERS OF THE BIBLIOGRAPHICAL SOC’Y OF AM. 169, 176-77 (1988).



## B. New Genres of Erotic Representation

The threat of obscenity charges also shaped the editorial and marketing strategies of pornographic publishers, who began to classify erotic texts by their relative risk of prosecution and by their relative attractiveness as more or less “forbidden.” The influence of obscenity law can be traced in both “fancy” publications that violated legal conventions of obscenity and “racy” publications that deliberately skirted the borders of the obscene.

### 1. *Prohibition and Desire: The Erotic Imaginary of Venus’ Miscellany*

Theorists of sexuality long ago explained the importance of prohibition to sexual desire. As Sigmund Freud declared early in the twentieth century: “Some obstacle is necessary to swell the tide of the libido to its height; and at all periods of history, wherever natural barriers in the way of satisfaction have not sufficed, mankind has erected conventional ones in order to be able to enjoy love.”<sup>118</sup> Later in the century, Georges Bataille argued that the pleasure of pornography depends on an accompanying prohibition that it appears to transgress and thereby “completes.”<sup>119</sup> More recently, theorists such as Michel Foucault and Judith Butler have explored the “productive and multiple possibilities of the law,”<sup>120</sup> demonstrating the ways in which ostensible instruments of “repression” and “prohibition” instead publicized sex, promoted sexual

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<sup>118</sup> SIGMUND FREUD, *The Most Prevalent Form of Degradation in Erotic Life*, in 4 COLLECTED PAPERS 203, 213 (Joan Riviere trans., 1959).

<sup>119</sup> GEORGES BATAILLE, *EROTISM: DEATH & SENSUALITY* 63 (Mary Dalwood trans., 1986) (1957) (“The transgression does not deny the taboo but transcends it and completes it.”). Bataille pointed out how outlets for sexual expression that appear to be subversive, such as pornography, in actuality operate as forms of repression and social control. In this scheme, pornographers want to maintain cultural taboos against frank depictions of sex so that they may offer fulfillment by transgressing them. *See id.* at 36 (arguing that a transgression “suspends a taboo without suppressing it”). *See also* JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 63-66 (1988) (discussing Bataille). For an exploration of similar themes, see HERBERT MARCUSE, *EROS AND CIVILIZATION* (1966).

<sup>120</sup> JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 117 (1997) (“[P]rohibition does not seek the obliteration of the prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects. . . . [T]he prohibition not only sustains, but is *sustained by*, the desire that it forces into renunciation.”).

discourse, and created the conditions for new forms of desire.<sup>121</sup> As Foucault famously reinterpreted Freud's theory of sexual repression, "what is involved is the production of sexuality rather than the repression of sex . . ."<sup>122</sup>

The emergence of obscenity regulation in antebellum America confirms the insights of these theorists. By banning depictions of sexual acts, obscenity prosecutions conveniently interposed a legal prohibition that incited the public's desire for representations of sex. Moreover, by singling out feminine avowals of carnal passion for special condemnation, obscenity prohibitions made such representations seem especially appealing. One result was a new type of American periodical, surreptitiously marketed to bourgeois readers through the mail, that portrayed middle-class American women, particularly middle-class American wives, in a boldly lascivious light.

In 1856, George Akarman set out to exploit the commercial possibilities presented by legal and cultural taboos against expressions of female desire. In that year, he unveiled the nation's first pornographic

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<sup>121</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 158 (Robert Hurley trans., 1990) ("[W]hat we now perceive as the chronicle of a censorship and the difficult struggle to remove it will be seen rather as the centuries-long rise of a complex deployment for compelling sex to speak, for fastening our attention and concern upon sex . . .").

<sup>122</sup> *Id.* at 114. For examinations of the ways that contemporary obscenity law invites and proliferates sexual images through its powers of taboo and transgression, see Adler, *supra* note 5, at 246-50 (discussing the "dialectic between prohibition and transgression" in the context of child pornography law); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 167 (1994) ("Much of pornography's appeal lies in approaching and transgressing the social taboos that we develop to regulate it."). Catherine MacKinnon also describes the relationship between obscenity law and pornography as one in which the former actually "helps keep pornography sexy":

[O]bscenity law, like the law of rape, preserves the value of, without restricting the ability to get, that which it purports to both devalue and to prohibit. Obscenity law helps keep pornography sexy by putting state power—force, hierarchy—behind its purported prohibition on what men can have sexual access to.

MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 4, at 162. For a valuable discussion of Foucaultian and other theoretical insights on censorship, see Robert C. Post, *Censorship and Silencing*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* (Robert C. Post ed., 1998).

periodical, a weekly sex journal called *Venus' Miscellany*.<sup>123</sup> Far more explicit than any periodical yet published in the United States, *Venus' Miscellany* offers a fascinating portrait of the origins of American erotica. It also provides a rich, indeed virtually unparalleled, perspective on the mid-nineteenth-century male sexual imagination, a perspective that challenges much of the received wisdom about the history of pornography.<sup>124</sup> Among other things, the paper's persistent affirmations of female agency call into question those interpretations that identify the subordination of women as the central convention of Victorian erotic writing.<sup>125</sup>

The most distinctive feature of *Venus' Miscellany*, highlighted in the letters to the editor that contained the most graphic sex, was its celebration of female passion and sexual independence. Significantly, the women of *Venus' Miscellany* were never portrayed as prostitutes. Instead, they were valorized as desiring subjects who engaged in sex for their own amusement and pleasure. To be sure, the paper carried a fair number of testimonies from men boasting of their sexual conquests of young virgins. But many more of the letters offered sexual confessions from seemingly respectable, often married, women. Though one strongly suspects Akarman as the author of these confessions, the first-person narration by domestic, "average" American women is nonetheless noteworthy. Indeed, it represented a marked shift away from pervasive negative portrayals of sexually active women in American literature up to this point. In racy novels, for instance, sexually aggressive women were typically limned as monstrous, violent figures who delighted in inflicting pain and in destroying men.<sup>126</sup>

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<sup>123</sup> The first surviving issue of *Venus' Miscellany*, dated January 31, 1857, is numbered Volume I, Whole No. 12. This suggests publication began in November 1856.

<sup>124</sup> For an extended analysis of *Venus' Miscellany* and its implications for the mid-nineteenth-century erotic imaginary, see Dennis, *supra* note 6, at ch. 7.

<sup>125</sup> For scholarship on nineteenth-century pornography that interprets it as a medium that oppressed women, see STEVEN MARCUS, *THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH-CENTURY ENGLAND* (1964) (portraying Victorian pornography as an exclusively male genre in which men control, objectify, and violate women). See also JOAN HOFF, *Why Is There No History of Pornography?*, in *FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY* 30 (Susan Gubar & Joan Hoff eds., 1989) ("Without gender analysis, no analysis or definition of pornography will expose its basic sexism or its function as an ideological representation of patriarchy and an exercise in the 'practice of power and powerlessness.'").

<sup>126</sup> See REYNOLDS, *supra* note 6, at 214-19 (discussing portrayals of sexually voracious women as dangerous and monstrous in 1840s sensation fiction).

A series of correspondence between two married women is emblematic of Akarman's interest in providing positive depictions of women's erotic subjectivity and control over sex.<sup>127</sup> With these letters, Akarman cleverly combined a classic pornographic device, dating back to Aretino's sixteenth-century *Ragionamenti*, of a dialogue between two courtesans, with the modern, democratic tool of reader participation. In the first letter, a woman named "Maria C." reveals that her "husband has a peculiar taste which he desires me to gratify."<sup>128</sup> The "peculiar taste" is having his wife tell him whether she has ever been "naughty" with other men. Maria relates that, while reading a racy book together one night, her husband suddenly urges her to tell him whether she had "enjoyed the delights of love" before their marriage.<sup>129</sup> When she confesses to one affair, he responds enthusiastically.<sup>130</sup> But should she gratify her husband's voyeuristic desires by confessing her dalliances since their marriage? Confused, she solicits advice not from the male editor but from other *female* readers: "If you publish this perhaps some of your readers whose husbands have the same kind of desire, will be able to answer even better than you."<sup>131</sup>

In answer to Maria's request, the very next issue brings a response from a married woman who has seen Maria's letter.<sup>132</sup> Predictably, this woman wholeheartedly endorses Maria's disclosures to her husband and her adultery too. "Be assured," she counsels, "that the greater *pleasurist* your

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<sup>127</sup> This series appeared in the correspondence columns of issues of *Venus' Miscellany*, dated May 9, 1857, May 16, 1857, and July 11, 1857.

<sup>128</sup> *Mr. Editor*, VENUS' MISCELLANY, May 9, 1857, at 3.

<sup>129</sup> *Id.* The book in question was George Thompson's *Amours of Margurite of Burgundy*, which Akarman serialized in early numbers of *Venus' Miscellany* and advertised in book form in the same issue in which Maria C.'s letter appeared.

<sup>130</sup> As she recounts:

[P]resently disrobing me, he smothered me with kisses on every part of my person, and declared it was the most delightful moment he had ever enjoyed with me, nor did he withdraw from the ardor of his embrace till he had three times subdued himself in my arms, all the time whispering to me the delight he felt and urging me to tell him all about it.

*Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *To Maria C.*, VENUS' MISCELLANY, May 16, 1857, at 3.

husband finds you, the more he will love you, and the oftener he will take you to his arms.”<sup>133</sup> Maria’s correspondent then confesses to being an avid pleurist herself, putting a libidinous twist on the free love movement of the 1850s, a middle-class, bohemian cause that opposed marriage and supported sexual relationships rooted in “passional attraction” rather than law.<sup>134</sup> “My husband and I,” she relates, “found out the first night, the true secret of Love. The consequence is, that we are both *pleurists*. He enjoys whom he pleases. Perhaps I sometimes wander myself.”<sup>135</sup> One of the pleasures she describes is that she and her husband, primed by reading the latest issue of *Venus’ Miscellany*, pursue a *ménage à trois* with their female neighbor, Martha, every Saturday night. “[S]atisfied myself,” the writer explains, “I turn my back.” As she blithely puts it, “[w]hy be jealous and wicked?”<sup>136</sup>

Two months later, Maria writes to inform the editor that she has followed her correspondent’s advice about confessing her affairs to her husband.<sup>137</sup> As a result, she and her husband now “enjoy one continued stream of happiness, heightened to the highest degree by pleasurable conversation, and to the height of ecstasy by softly whispered confessions.”<sup>138</sup> Manifesting a new emphasis on the pleasures of reading, Maria and her husband also arouse each other by perusing *Venus’ Miscellany*. As she compliments the editor: “The spicy tales, anecdotes, and correspondence contained in your excellent sheet, bring ten thousand thrills of delight to your readers, and increase the mutual pleasure tenfold.”<sup>139</sup>

But Maria takes her correspondent’s advice about “pleurism” to heart as well, and begins to pursue a torrid relationship with *her* married female neighbor, “Mrs. S.” Indeed, she reports that she and Mrs. S. “have enjoyed each other’s society twenty times since I last wrote to you.”<sup>140</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* On the free love movement, see generally HAL D. SEARS, *FREE LOVE IN HIGH VICTORIAN AMERICA* (1977); JOHN C. SPURLOCK, *FREE LOVE: MARRIAGE AND MIDDLE-CLASS RADICALISM IN AMERICA* (1988).

<sup>135</sup> *To Maria C.*, *supra* note 132.

<sup>136</sup> *Id.*

<sup>137</sup> *My Dear Sir*, *VENUS’ MISCELLANY*, July 11, 1857, at 3.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

When Maria confesses the lesbian affair to her husband, he is not angered in the slightest; on the contrary, the revelation throws him into another “ecstasy of delight.”<sup>141</sup> Given his taste for voyeurism, he of course declares “he must be a witness of the scene.”<sup>142</sup> Generously, Maria agrees that he can watch her and her neighbor make love by “peeping through a hole he had made in the door.”<sup>143</sup> She also provides readers with a description of her mutual oral sex with Mrs. S., including a moment that presumably pleased male audiences by having the spying husband take his wife’s place in “completing the pleasure.”<sup>144</sup>

In his role as editor, Akarman likely had a strong hand in creating these letters. He obviously believed there was a demand among male readers for stories that inverted prevailing cultural norms by eroticizing female agency and male passivity in the sexual sphere. By defying legal as well as moral prohibitions on depictions of erotic knowledge and power among women, it is not hard to imagine that stories like Maria’s provided Akarman’s male customers with a delicious thrill of transgression.<sup>145</sup>

But one pressing question is, were women like Maria purely figments of the male editor’s imagination? In other words, what can *Venus’ Miscellany* teach us about the nature of *female* desire in the mid-nineteenth-

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> As Maria describes the scene:

At length, as we had before arranged, I had her in such a position, her back to the door, and our heads and tails somehow so mixed that we were laying at reverse ends, when my husband crept softly in and assisted me in completing the pleasure, without for the moment her becoming aware of it.

*Id.* Clearly, passages like these were designed both to parody the free love cause and to titillate male audiences with depictions of women making love, a continuing staple of twenty-first-century male fantasy. Another use of the free love movement for the purpose of sexual titillation can be found in George Thompson’s *Fanny Greeley; Or, Confessions of a Free-love Sister Written by Herself*, published by H.S.G. Smith sometime in the 1850s. For a description of *Fanny Greeley*, see ASHBEE, *supra* note 39, at 210-17.

<sup>145</sup> Akarman’s interest in inverting prescribed gender roles also manifested itself in stories about cross-dressing. See, e.g., *Dear Venus*, VENUS’ MISCELLANY, June 6, 1857, at 3. Within a mainstream culture that presented sexual differences between men and women as innate and inevitable, such stories provided a titillating counterpart to normative conventions, at the same time as they offered comic release.

century United States? For instance, it is certainly possible that some American women may have derived satisfaction from reading *Venus' Miscellany*—perhaps, as many of its scenarios suggested, with their husbands or suitors. Several daily papers expressed horror over the apparent appeal of Akarman's publications to women, not just as subscribers, but also as employees, writers, and correspondents. As the *New York Times* reported, “[i]t is a disgraceful fact, that out of 3,300 subscribers” to *Venus' Miscellany*, “nearly one half were females.”<sup>146</sup> Akarman also hired women to create his pornography, employing them “in stitching the sheets of the works and in coloring the plates.” The *Times* likely did Akarman a service by bolstering his effort to portray women as avid readers and eager contributors to the *Miscellany*: “Contributions to the literary content of the paper, in many cases written by females, and of the most obscene description, were also found.”<sup>147</sup> Again, while this article likely exaggerated the role of women in order to shock the public, other evidence supports its assertion that women actively participated in the production and consumption of Victorian pornography.<sup>148</sup>

Moreover, it should be emphasized that female passionlessness was an ideological prescription of the bourgeoisie, not a social reality.<sup>149</sup> We can surmise that numerous antebellum women read sexual advice literature of the sort published by Frederick Hollick, which advocated a wife's right to

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<sup>146</sup> *Immense Seizure of Obscene Works—Ackerman Again in Trouble*, N.Y. TIMES, Sept. 16, 1857, at 5.

<sup>147</sup> *Id.*

<sup>148</sup> For example, Mary Haines, the wife of the largest mid-nineteenth-century pornographer, William Haines, assisted him throughout his career. See entry for “Mary Haynes” in Arrest Records of NYSSV, *supra* note 110. In addition, the wife of William Simpson, one of the leading New York distributors of pornography in the 1860s, was said to specialize in selling and lending obscene books to shop girls. See Affidavit of Anthony Comstock, United States v. William Simpson (S.D.N.Y. Jan. 26, 1874) (Federal Archives) (indictment filed Oct. 7, 1873) (describing activities of William Simpson's wife). Indeed, when Comstock began his crusade against obscenity after the Civil War, he insisted that females, particularly girls and young women, were major consumers of obscene books and prints.

<sup>149</sup> Several historians of sexuality have ably advanced this point, with a corresponding critique of the notion of a “repressive” nineteenth century. See PETER GAY, *THE BOURGEOIS EXPERIENCE: VICTORIA TO FREUD* (1984-1998); KAREN LYSTRA, *SEARCHING THE HEART: WOMEN, MEN, AND ROMANTIC LOVE IN NINETEENTH-CENTURY AMERICA* (1989); CHRISTINE STANSSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860*, at 171-92 (1987); Carl N. Degler, *What Ought To Be And What Was: Women's Sexuality in the Nineteenth Century*, 79 AM. HIST. REV. 1467 (1974).

sexual pleasure, as well as manuals on contraception.<sup>150</sup> In addition, scores of adventuresome middle-class women in New York City attended meetings that openly discussed free love and the perils of sexual monogamy and marriage.<sup>151</sup> More provocatively, Rachel Maines has demonstrated that many middle and upper-class women eagerly sought out doctors and spas that offered sexual massages and clitoral hydrotherapy treatments in the mid-nineteenth century.<sup>152</sup>

Finally, we should not reject the possibility that the stories in *Venus' Miscellany*, by publicizing same-sex passion, could have enabled subversive readings by women who desired women.<sup>153</sup> In a popular 1854 work on sex and physiology called *Esoteric Anthropology*, health reformer and free love advocate Thomas Low Nichols remarked on the "not unfrequent" occurrence of what he called "Sapphic love." As he described this practice, it was a "passion of females for each other, and their mutual gratification of each other's desires."<sup>154</sup> While *Esoteric Anthropology* categorized such love as a "perversion," the columns of *Venus' Miscellany* presented readers with a more affirmative context in which to fantasize about sapphic sex.

In all probability, when New York's daily newspapers claimed that half the subscribers to *Venus' Miscellany* were women, their motives were

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<sup>150</sup> BRODIE, *supra* note 88, at 102.

<sup>151</sup> See, e.g., *The Free-Lovers' Troubles*, N.Y. TIMES, Oct. 20, 1855, at 2 (describing a large number of women present at a free love meeting broken up by the New York City police).

<sup>152</sup> See RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION 72-81 (1999) (discussing the popularity of sexual massage and hydrotherapy among bourgeois women in the nineteenth century). George Thompson salaciously alluded to this practice in his 1849 novel, *New-York Life: The Mysteries of Upper Tendom Revealed*. He described a particular doctor who developed a flourishing medical practice by attending to the "private parts" of various respectable New York matrons, who "are doctored for no other reason than a liking for the medicine." REYNOLDS, *supra* note 6, at 219 (quoting GEORGE THOMPSON, NEW-YORK LIFE: THE MYSTERIES OF UPPER-TENDOM REVEALED 78 (1849)).

<sup>153</sup> For one account of sexual passion between American women in the period in which *Venus' Miscellany* was published, see LISA MERRILL, WHEN ROMEO WAS A WOMAN 205-42 (1999) (describing intense "sapphic desire" between the actress Charlotte Cushman and a young admirer, Emma Crow).

<sup>154</sup> NICHOLS, *supra* note 87, at 201. In writing this work, Nichols was likely aided by his wife, Mary Gove Nichols. See HOROWITZ, *supra* note 1, at 290-91 (discussing collaboration of T.L. Nichols and Mary Gove Nichols).



heavily sensational. But the shock value of attributing a desire for sexual stimulation to women may also have conveyed an unsettling truth—that female readers *could* use its tales of independent women, its depictions of sapphic passion, and its insistence on a woman's right to sexual pleasure to forge erotic fantasies of their own.

## **2. *Obscenity Prosecutions and Mail-Order Erotica: Creating Pornography for the American Middle Class***

By the time he launched *Venus' Miscellany*, Akarman was well aware of the risks that obscenity law posed for a paper like his. Accordingly, he published it under an alias, "James Ramerio." He also kept plenty of cash on hand to pay bribes to local authorities.<sup>155</sup> In addition, he dreamed of escaping obscenity regulation altogether by creating a subscription-only periodical that traveled exclusively through the discreet, private medium of the interstate mails. As he told readers in an early issue, it was his intention to place the paper "entirely into a subscription circulation, which will insure it to those who want it, and keep it from who do not want it."<sup>156</sup>

Akarman's path-breaking strategy to forego local, street-level commerce in *Venus' Miscellany* did not only alter his methods of distribution. It also affected the ways in which he edited the paper, ways that dovetailed with his ambition to build a national, middle-class audience for erotic journalism. The stylistic ramifications of Akarman's desire to create an interstate, mail-order vehicle for erotica are best appreciated by comparing *Venus' Miscellany* with an earlier breed of sexually themed, disreputable New York periodicals, commonly known as the flash press, which surfaced in New York in the early 1840s. Less explicit than *Venus' Miscellany*, these publications chronicled the rowdy, brazen world of New York sporting men, prostitutes, and brothel keepers.<sup>157</sup>

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<sup>155</sup> Akarman allegedly often "boasted that he had money enough to buy up all the Justices in the city." *Great Seizure of Obscene Literature*, N.Y. HERALD, Sept. 16, 1857, at 5.

<sup>156</sup> *A Model Love Paper*, VENUS' MISCELLANY, Jan. 31, 1857, at 3. See also *A Publishing Establishment Broken Up*, N.Y. TRIB., Sept. 16, 1857, at 5 ("The sheet was not publicly sold, and was only to be obtained by addressing a letter, with the money, to [James Ramerio], Box No. 4,046, General Post-Office.").

<sup>157</sup> Papers like the *Flash*, the *Rake*, the *Libertine*, and the *Sporting Whip* also championed a variety of popular, rough-and-tumble male leisure activities, such as drinking in saloons, mingling in the pits of Bowery theaters, heckling at bare-knuckle boxing matches and cock fights, hanging out in gambling "hells," and frolicking at neighborhood firemen's

One fundamental difference between the flash press and *Venus' Miscellany* was a shift in editorial tone from speaking to a particularized metropolitan or, at most, regional market to speaking to a homogeneous, national one. The flash papers were addressed to a distinctive urban audience and assumed readers' familiarity with the raucous New York sporting scene, offering gritty commentary on local politics, reviews of New York theatrical and sporting events, and detailed information about the location, employees, and cleanliness of various brothels. In contrast, *Venus' Miscellany* rarely mentioned New York people or places. Indeed, Akarman edited the paper in such a way as to remove it from any particular urban provenance and to position it within a hazier, national setting. His chief strategy for achieving this transcontinental reach was to print raunchy letters to the editor from supposed readers in rural hamlets, small towns, and cities across the United States.<sup>158</sup>

A second point of departure was that *Venus' Miscellany* printed erotic fiction and generic sexual humor rather than salacious local gossip. The flash editors reveled in exposing sexual transgressions among the city's financial, religious, and political elite, as well as among their own milieu of urban sportingmen and brothel madams. *Venus' Miscellany*, however, self-consciously avoided printing information about real-life individuals. Instead, Akarman relied on correspondence from purported readers to provide an air of verisimilitude. In so doing, he both widened his potential audience and reduced the risk that an offended party would press to have him indicted for obscenity, as had often happened to his predecessors in the flash press.<sup>159</sup>

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balls. Literature on the New York flash press and the sporting culture it reported on is now quite large. See generally PATRICIA CLINE COHEN, *THE MURDER OF HELEN JEWETT* (1998); GILFOYLE, *supra* note 6, at 92-116; ELLIOT J. GORN, *THE MANLY ART* (1986); HOROWITZ, *supra* note 1, at 125-43, 159-93; REYNOLDS, *supra* note 6, at 168-224; SREBNICK, *supra* note 92, at 53-54; Patricia Cline Cohen, *Unregulated Youth: Masculinity and Murder in the 1830s City*, *RADICAL HIST. REV.* 52 (1992); Elliot J. Gorn, "Good-Bye Boys, I Die a True American": Homicide, Nativism, and Working-Class Culture in Antebellum New York City, 74 *J. AM. HIST.* 388 (1987); Helen Lefkowitz Horowitz, *Another 'American Cruikshank' Found: John H. Manning and the New York Sporting Weeklies*, 112 *PROCEEDINGS AM. ANTIQUARIAN SOC'Y* 93 (2004); Philip Howell, *Sex and the City of Bachelors: Sporting Guidebooks and Urban Knowledge in Nineteenth-Century Britain and America*, 8 *ECUMENE: J. ENVT, CULTURE, MEANING* 20 (2001).

<sup>158</sup> On the construction of national communities of readers (outside the context of pornography) and the importance of imaginatively shared reading practices to modern nationalism, see BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991).

<sup>159</sup> On obscenity indictments involving editors of the flash press, see HOROWITZ, *supra* note 1, at 159-93; Dennis, *supra* note 6, at chs. 2-3.

Moreover, while the flash papers were defiantly lowbrow, loud, and vulgar in their appeal, Akarman projected an audience of readers who were refined, middle or upper-class, and, above all, inconspicuous. This change was at least in part a product of his legal strategy to steer *Venus' Miscellany* away from the type of customers who could buy it from any newsboy on the street, and toward the out-of-town subscribers who possessed the financial resources and sophistication to negotiate mail-order subscriptions and purchases. Akarman's ideal customer was one who wished his copy of *Venus' Miscellany* to arrive in a post office box concealed in a discreet paper wrapper, not to be "thrust in the face" of passersby in the public streets, as peddlers of flash periodicals and racy pamphlets were wont to do.<sup>160</sup>

One of Akarman's most ingenious tactics for reaching a more upscale audience was to develop a new domestic setting for erotic fantasies. Very deliberately, he moved sex out of the street and out of the brothel, which had been the principal subjects of the flash press, and into the newly idealized, middle-class "home." In *City of Women*, Christine Stansell described how the bourgeoisie transformed the traditional household into a "home" in the antebellum period: "The 'home,' their own term for the domestic setting, had become for them a pillar of civilization, an incubator of morals and family affections, a critical alternative to the harsh and competitive world of trade and politics."<sup>161</sup> Many of *Venus Miscellany's*

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<sup>160</sup> Cf. Editorial, *Not Stopped Yet*, N.Y. SUN, Aug. 24, 1842, at 2 (complaining that flash papers were "displayed to the eager eyes of every lad who chose to loiter on his way to school or to work" and "thrust into the very face of every young lady who ventured out for the purpose of taking a walk or making a purchase"). Another newspaper article detailed complaints about similarly aggressive tactics among street peddlers in the 1850s:

Strangers arriving in the City are continually annoyed by the lazy scapegraces who make a business of hawking about obscene publications, and indecent pictures. They haunt every hotel, railroad depot and steamboat landing, and thrust their disgusting wares on all that come in their way. It is in vain to tell them you don't want to buy; they will not only exhibit to you the nastiest daubs they have, but go on to explain them into the bargain: nor will they often refrain from doing so even though you be accompanied by ladies. In fact there are some who frequently expose those things to the ladies themselves....

*Obscene Publications and Pictures*, N.Y. TIMES, Sept. 28, 1855, at 2.

<sup>161</sup> STANSELL, *supra* note 149, at 41. As Mary Ryan also summarized this new idealization of the "private" domestic sphere:

The adjective *public* . . . began to designate an unstructured and intimidating social space. To be in a public space was to be in a crowd of

fictional encounters took place in this recently created haven of safety and affection. In this way, Akarman cleverly appealed to new middle-class tastes by appropriating the accoutrements of bourgeois life as fodder for the sexual fantasies of his desired middle-class audience. Of course, the prevailing ideology of domesticity celebrated the home not only as a source of security and order, but also as the particular sphere of women's moral power, piety, and virtue.<sup>162</sup> *Venus' Miscellany's* association of the middle-class home with female sexual license thus made it especially transgressive and, as Akarman presumably hoped, especially exciting to his intended audience.

One of the remarkable things about Akarman's aspirations for a national, upper-class readership was how well his marketing and editorial strategies appear to have worked. Admittedly, it is difficult to know the actual audience for *Venus' Miscellany* with any certainty. Akarman claimed the paper had a national circulation of 49,000 readers; newspaper reports following his obscenity arrest in 1857 confirm the broad geographic reach and commercial success of the paper.<sup>163</sup> With its flair for the sensational and hyperbolic, the *New York Herald* claimed that

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strangers, adrift in the anarchy of the streets. Middle-class urbanites would beat a hasty retreat from this alien public world; they would seek their refuge in a *private* home.

RYAN, *supra* note 43, at 234. See also COTT, BONDS OF WOMANHOOD, *supra* note 43, at 63-100.

<sup>162</sup> STANSELL, *supra* note 149, at xii ("Designating themselves moral guardians of their husbands and children," bourgeois women "became the standard-bearers of piety, decorum and virtue in Northern society. They claimed the home as the sphere of society where they could most effectively exercise their power."). On domesticity and bourgeois class formation, see also sources cited in note 43, *supra*.

<sup>163</sup> Using a copy of Akarman's subscription book seized by the police (and shared with reporters), journalists identified subscribers in rural locales like Williamsport, Pennsylvania; Bergen, New York; Kensington, Connecticut; and Lane Station, Illinois; small cities like Lexington, Utica, and Wilmington; and major urban centers like Philadelphia and Boston—everywhere, it seemed, but New York City. See *The Seizure of Obscene Literature*, N.Y. HERALD, Sept. 17, 1857, at 5. Akarman's annual revenue was reported to be a hefty \$60,000, equivalent to more than a million dollars today, with estimated profits of \$12,000 for the year, equal to about \$235,000 today. For Akarman's business records, see *The Seizure of Obscene Literature*, N.Y. HERALD, Sept. 17, 1857, at 5; *Great Seizure of Obscene Literature*, N.Y. HERALD, Sept. 16, 1857, at 5; *Immense Seizure of Obscene Works—Ackerman Again in Trouble*, N.Y. TIMES, Sept. 16, 1857, at 5. For the current value of 1857 dollars, see The Inflation Calculator, <http://www.westegg.com/inflation/> (last visited Oct. 24, 2006).

the persons who buy these things are the leading men of the country—preachers, teachers and guides of the people; members of the national Congress; lights of the pulpit, the bench and the bar; thunderers upon the political rostrum; presidents of councils and caucuses and conventions; [and] directors of banks and insurance offices.<sup>164</sup>

As for Akarman's legal strategies, they failed to spare him from arrest after an outraged out-of-town parent whose child had received one of his advertising circulars in the mail demanded that New York officials shut down his business.<sup>165</sup> When the metropolitan police seized the contents of his post office box, they found letters from customers containing "money, postage stamps, orders for *The Venus Miscellany*, contributions to its columns, and orders for obscene books."<sup>166</sup> But despite several run-ins with the police and occasional confiscations of his stock, the wily publisher managed to escape imprisonment throughout his long career. Indeed, for the rest of the 1850s and through the 1860s and early 1870s, he continued to profit from selling erotic publications to the national audience that he had helped to create.<sup>167</sup>

### 3. *The Law of Obscenity and Racy Novels*

Another effect of the interdiction on obscenity was to stimulate demand for a distinct style of salacious, often violent, sensation literature, described in Part II as "racy," that self-consciously skirted but did not transgress the boundary of obscenity. In his important study, *Beneath the American Renaissance*, literary scholar David Reynolds has argued that the indirectness that characterized sexual expression in even the most lurid examples of New York's sensation fiction stemmed from "deep-seated

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<sup>164</sup> *The Moral Condition of the Country*, N.Y. HERALD, Sept. 18, 1857, at 4.

<sup>165</sup> *People v. George Ackerman*, Sept. 25, 1857, District Attorney's Indictment Papers, New York Court of General Sessions (N.Y. Mun. Archives). Although this indictment spells his name as Ackerman, a letter written by Akarman to the editor of the leading New York daily newspaper provides the correct spelling. See George Akarman, Letter to the Editor, N.Y. HERALD, Sept. 20, 1857, at 8.

<sup>166</sup> *A Publishing Establishment Broken Up*, N.Y. TRIB., Sept. 15, 1857, at 5.

<sup>167</sup> See *Names and Description of Persons Dealing in Obscene Literature, not Arrested, but From Whom Stock was Seized During the Year 1872. Also Those Forced to Give Up, and Get Out of the Business, During the Same Year* (entry for "George Ackerman") in Arrest Records of NYSSV, *supra* note 110 (noting Akarman's more than twenty-year career in publishing and dealing obscenity and his success in evading criminal penalties).

guilt" about sexual desire and the "residual repressiveness of a Puritan conscience."<sup>168</sup> This guilt, writes Reynolds, "engendered a notably furtive quality in erotic expression, as seen in . . . the prevalent use of euphemisms like 'snowy globes.'"<sup>169</sup> One is indeed struck when reading these texts by the wide disparity between the vivid, detailed presentation of violence and the allusive, elliptical presentation of sex and the human body. However, the "odd combination of furtive sexuality and unbridled violence"<sup>170</sup> that Reynolds observes in the popular fiction of the 1840s and 50s, rather than expressing puritanical guilt, instead reflected the legal culture in which sensation writers produced their texts and the strategic maneuvering of individuals working in the field of popular entertainment.

For writers and publishers, a crucial feature of late antebellum legal culture was the existence of criminal bans on certain types of sexual representations, especially in explicit form. Even though racy sensation novels were not subject to prosecution in mid-nineteenth-century New York, the genre of the racy was strongly informed by the law of obscenity. In particular, the obscenity bar provided a symbolic prohibition that stimulated a fascination with and desire for sexual representations (especially of female lust), a demand that publishers of racy books rushed to satisfy in a safe, non-criminal context.<sup>171</sup>

In his monumental 1858 work, *History of Prostitution*, physician William Sanger blamed licentious literature for driving men to brothels and fueling the expansion of prostitution.<sup>172</sup> The chief culprit was not explicit sexual writing, which after all was expensive and relatively scarce, but the widespread dissemination of titillating paperbacks that hinted at sexual disclosure but stopped short of "absolute obscenity." Sanger singled out one

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<sup>168</sup> REYNOLDS, *supra* note 6, at 222.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 223.

<sup>171</sup> It should be noted that legal factors were not the only ones influencing the proliferation of racy sensation novels in the late antebellum period. The international publishing success of Eugene Sue's *The Mysteries of Paris* (1843) and G.W.M. Reynolds' *The Mysteries of London* (1844), which served as models for the city-mysteries genre in the United States, also account for the commercial appeal of sensation fiction to New York publishers. Nonetheless, as the discussion below makes clear, New York authors, publishers, and critics believed that a central attribute of American "yellow-jacket" literature was its capacity to manipulate legal prohibitions on obscenity.

<sup>172</sup> For a description of the pervasiveness of prostitution in 1850s New York, see, e.g., GILFOYLE, *supra* note 6, at 119-78.

unnamed novelist as especially dangerous. Like George Thompson, this sly author wrote “in a strain eminently calculated to excite the passions, but so carefully guarded as to avoid absolute obscenity, and embellishe[d] his works with wood-cuts, which approach[ed] lasciviousness as nearly as possible without being indictable.”<sup>173</sup>

Thompson was particularly adept at invoking the law of obscenity in order to invest his tales with an aura of illicit excitement. One of his favorite stylistic devices was to draw attention to a sexual scene and then abruptly “draw the curtain” or “draw the veil.” He often attributed such restraint to a desire to avoid censure by authorities and, presumably, legal censorship. In a typical passage from one of his novels, Thompson begins to describe a dinner party served by naked adolescents that turns into an orgy between the teenagers and the adult guests, a scene he claims has actually taken place in New York. Just as the sexual action takes off, Thompson pulls back: “Our ready pen longs—yea, longs to glide off into the most delicious *details* . . . but Society, like a grim and harsh pedagogue, flourishes its rattan of Censure above our devoted pate, and talks of ‘morality,’ and ‘propriety.’”<sup>174</sup> His calculated omission of explicit sexual acts only heightened the prurience of his plots and invested the point at which he “drew the curtain” or “drew the veil” with extra frisson. At the same time, it helped to fetishize the perceived boundary between the “obscene” and the “non-obscene,” as evidenced by the prolonged leering at partially clothed women, exposed cleavages, and the like that runs throughout his work.

Through such strategies, sensation novelists like Thompson were able to profit from the distinction between those merely suggestive or racy works that “excite[d] the passions” by flirting with obscenity and those works, to use Sanger’s words, of “absolute obscenity” that were frequent targets of indictment. At a basic level, authors and publishers of racy books employed literary indirection because doing so spared them from the threat of prosecution.<sup>175</sup> But producers of such texts more than made up for what they could not show in terms of sex with exceedingly graphic portrayals of violence, which metropolitan authorities did not consider obscene.

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<sup>173</sup> SANGER, *supra* note 116, at 522.

<sup>174</sup> Looby, *supra* note 70, at 658 (quoting GEORGE THOMPSON, *THE HOUSE BREAKER; OR, THE MYSTERIES OF CRIME* 20-21 (1848)).

<sup>175</sup> On the relationship between censorship and literary allusion, see ANNABEL PATTERSON, *CENSORSHIP AND INTERPRETATION* (1984).

Deference to the obscenity taboo also offered the benefit of heightening the public's interest in sexual representations, enhancing the appeal of sensation novels that approached but did not transgress the legally constructed boundary of obscenity.<sup>176</sup> At the same time, by inscribing the prohibition on explicit representations of sex in their writing, racy authors invited its violation in illegal, "fancy" books issued by the same men who marketed racy paperbacks.<sup>177</sup>

Thus, once again, legal regulation of obscenity had the paradoxical effect of expanding the universe of sexual representations available for public consumption. By inciting the production of the racy as well as the "fancy," obscenity prosecutions dramatically increased the sheer *volume* of sexual discourse that was commercially available in the antebellum city. To give just one example, the *New York Tribune* reported that, during a raid on George Akarman's establishment in 1857, the police found not only "several dozens of volumes of the most obscene and filthy stuff that ever disgraced language, with illustrations to match," but also "several thousand specimens of yellow-covered literature."<sup>178</sup> Similarly, Akarman estimated his ratio of "humbler pamphlets" of racy fiction that circulated freely to those bound, "fancy" books that were "in opposition to law" at nearly twenty to one.<sup>179</sup>

Sensation novels also multiplied the *types* of sexual practices that were represented in antebellum culture. At their most tame, racy books re-worked and re-presented the once scandalous subjects of the 1840s flash press—prostitution, sex crimes, the misdeeds of the rich and powerful—but made them more palatable by coating them with a veneer of fiction. At other times, sensation novels thematized subjects that were understood as far more transgressive than prostitution. By eliding the description of actual sex acts, racy novels therefore reproduced sexual possibilities that were at least as provocative as those in the books that prosecutors typically

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<sup>176</sup> See REYNOLDS, *supra* note 6, at 211 (noting the "great vogue" enjoyed by American erotic sensation fiction beginning in the 1840s).

<sup>177</sup> To aid this process, characters in sensation fiction often referred to the titles of forbidden literature. For example, in George Thompson's *The Mysteries of Bond Street; Or, The Seraglios of Upper Tendom* (1857), a cruel seducer installs the innocent heroine in a brothel, which has a library containing copies of *Fanny Hill*, *The Lustful Turk*, *Betty Ireland*, and other "detestable volumes." ATTITUDES TOWARD SEX IN ANTEBELLUM AMERICA: A BRIEF HISTORY WITH DOCUMENTS 148 (Helen Lefkowitz Horowitz ed., 2006).

<sup>178</sup> *A Publishing Establishment Broken Up*, N.Y. TRIB., Sept. 16, 1857, at 5.

<sup>179</sup> See George Akarman, Letter to the Editor, N.Y. HERALD, Sept. 20, 1857, at 8.



regarded as obscene. And they did so in a relatively democratic, inexpensive medium that was increasingly available to a mass audience.<sup>180</sup>

Thus, the interdiction on obscene speech did little to enforce order or improve the morals of the metropolitan community. Indeed, rather than limit indecent sexual expression, it encouraged the production of risqué sensation fiction that permeated antebellum culture with a multiplicity of licentious representations.

### C. Censorship and Publicity

Observers of modern communications often note that censorship creates free advertising for a suppressed publication, boosting publicity and circulation far beyond what it otherwise would have achieved. What is noteworthy is how early this phenomenon became apparent in American law and culture and the crucial role that American pioneers of sexual writing played in bringing it about.

Consider the experience of the popular health reformer and sexual science advocate, Frederick Hollick. As noted in Part II, Hollick was arrested for selling copies of *The Origin of Life*, a collection of his lectures on human anatomy, sexual happiness in marriage, reproduction, and contraception, in Philadelphia in 1846. At his subsequent obscenity trial, the court required Hollick to post \$1,000 in security that he would not sell his book in that city pending the continuation of the trial and admonished that if his lectures “contain language as low and obscene as some that is found in his book[,] he had better suspend them for the present.”<sup>181</sup>

Despite this defeat in the courtroom, the enterprising Hollick soon triumphed over his would-be censors. Rather than stand trial again in Philadelphia, Hollick skipped out on his bail and relocated his headquarters to the more welcoming legal and publishing environment of New York.<sup>182</sup> In the tenth edition of *The Origin of Life*, published in 1846, Hollick proclaimed: “I am happy to state that, during this persecution, my practice has been more extensive than before, and that it is still on the increase. I am now preparing to resume my lectures, at the proper season, and I have also

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<sup>180</sup> On the appeal of sensation fiction to urban, working-class audiences, see generally DENNING, *supra* note 67.

<sup>181</sup> Haynes, *supra* note 96, at 559.

<sup>182</sup> *Id.* at 573.

written and published some new scientific works—for the million!”<sup>183</sup> Hollick later characterized his obscenity prosecution in Philadelphia as “an absurd and bungling attempt” that “not only failed, most completely,” but also “increased the popularity of both books and lectures by a hundred fold, while the would-be monopolists of knowledge became truly pitiable objects of public scorn and contempt.”<sup>184</sup>

Condemnations of obscenity also generated valuable publicity for books that were overtly designed to sexually arouse readers. To appreciate this dynamic, consider a relatively routine, even mundane notice from a popular tabloid paper in 1855 reporting an arrest for obscenity under the heading “Obscene Books”:

James Tivner, of 68 Centre Street, made an affidavit before Judge Osborne, on Thursday last, setting forth that he had called at the store of one John Atcheson, 76 Nassau street, and purchased a book called “The Mysteries of Venus; Or, The Amatory Life and Adventures of Miss Kitty Pry” . . . The collection of books and prints seized . . . were of the most beastly and revolting nature. There are other shops of the kind in the city, which we hope may soon be similarly visited. Such panders to the most degrading of vices, should be severely punished.<sup>185</sup>

A couple of points stand out. First, even though the paper that published this item had a reputation for tawdry and immoral content, it endorsed obscenity prosecutions by egging on severe punishment for the sale of books of “an immodest character.” In addition, the article disclosed the address of the bookseller and the title of the allegedly “beastly and revolting” book, thereby providing curious readers with knowledge about the forbidden literature and precisely where to purchase it.

The capacity of sexual censorship to promote the very object it sought to suppress did not escape the notice of antebellum commentators. Indeed, the most widely expressed objection to obscenity prosecutions (far more than concerns about restrictions on freedom of speech or freedom of the press) stemmed from the realization that they often served to publicize the practices they were intended to eradicate. By the 1850s, some civic

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<sup>183</sup> *Id.* at 573-74 (quoting Frederick Hollick, *Introduction to THE ORIGIN OF LIFE* xxxv (10th ed. 1846)). Though it first appeared in 1846, *The Origin of Life* went through ten editions in one year. BRODIE, *supra* note 88, at 199, 360.

<sup>184</sup> *Id.* at 563 (quoting HOLLICK, *THE MARRIAGE GUIDE*, *supra* note 87, at 420).

<sup>185</sup> *Obscene Books*, N.Y. ATLAS, Feb. 18, 1855, at 2.

reformers began to question the wisdom of condemning obscene texts, given the tremendous publicity that spectacles of police raids, arrests, and book burnings created for alleged wrongdoers.<sup>186</sup> Moreover, observers readily grasped the close connections between prosecuting obscenity and the “natural effect” such actions had in exciting interest in obscene literature. Writing in 1857, on the heels of a raid on Akarman’s publishing firm, the *New York Herald* concluded that it was an “open question” whether obscenity prosecutions were “of any particular benefit to public morals,” especially since the “natural effect of the seizure[s] will be to whet . . . bad appetites, instead of destroying them.”<sup>187</sup>

#### IV. CONCLUSION

The history of obscenity prosecutions in antebellum New York demonstrates the critical role that obscenity law played in the making of the American pornography industry. As publishers of sexual material increasingly oriented their marketing and distribution techniques toward mail-order purchases in order to evade local prosecutions, they helped to forge a nationwide audience of middle-class readers who discreetly consumed obscenity in the privacy of their homes. Savvy publishers also became expert at manipulating taboos on obscene expression in order to incite demand for erotic literature. One paradoxical result of prosecutions aimed at suppressing representations of female desire was the birth of a new type of illicit, sexually explicit periodical that specialized in affirmative portrayals of women as knowing, self-assured sexual actors. Bans on obscenity also inspired the production of a huge body of sexually suggestive “semi-porn” that self-consciously skirted the perceived border of obscenity and eroticized graphic violence as a substitute for forbidden depictions of sex. In these ways, obscenity prosecutions did not clamp down on the production of publications considered morally objectionable so much as they created new markets, new genres, and new audiences for erotic texts.

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<sup>186</sup> See, e.g., *Vice and Crime*, N.Y. TIMES, Sept. 17, 1857, at 4.

<sup>187</sup> *The Obscene Literature Again—Effects of Fourierism*, N.Y. HERALD, Sept. 20, 1857, at 4.

## TABLE 1

TITLES OF BOOKS NAMED IN NEW YORK OBSCENITY  
INDICTMENTS, 1840-1860

(in order of first appearance)

*Memoirs of a Woman of Pleasure**Memoirs of the Life and Voluptuous Adventures of the Celebrated  
Courtesan Mademoiselle Celestine of Paris Written by Herself**The Cabinet of Venus Unlocked in a Series of Dialogues Between  
Louisa Lovestone and Mariana Greedy, Two Cyprians! Of the  
Most Accomplished Talent in the Science of Practical Love**The Curtain Drawn Up, or The Education of Laura (translated  
from the French)**The Confessions of a Voluptuous Young Lady of High Rank**The Amorous Songster or Jovial Companion Being an Entire New  
and Choice Collection of Modern Songs Distinguished for Taste,  
Humour, Mirth and Merriment**The Lustful Turk**The Amorous History and Adventures of Raymond De B— and  
Father Andouillard Detailing Some Curious Histories and  
Disclosing the Pastimes of a Convent, with Some Remarks on the  
Use and Advantages of Flagellation**The Auto-Biography of a Footman**The Married Woman's Private Medical Companion**The Directory or Pocket Companion Containing a List of all the  
Gay Houses and Ladies of Pleasures in the City of New York*

*Life and Adventures of Silas Shovewell*

*La Rose d'Amour*

*How to Raise Love*

*The Voluptuary or Woman's Witchery, A Romance of Passion*

*The Secret Habits of the Female Sex, Letters Addressed to a Mother on the Evils of Solitude and its Seductive Temptations to Young Girls*

*Mysteries of Women or Guide to the [illeg.], Containing Advice to Husbands and Wives, as Regarding the Means of Making the Marriage Bed, the Throne of Venus' Joys*

*The Adventures and Intrigues of the Duke of Buckingham, Charles the Second and the Earl of Rochester*

*Mary Ann Temple*

*The Marriage Bed, or Wedding Secrets*

