The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech

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It was the policy of the American Civil Liberties Union (ACLU) during the 1920s to contest only those obscenity regulations that were "relied upon to punish persons for their political views."[1] So stated a 1928 ACLU bulletin, reiterating a position to which the organization had adhered since its formation in 1920. For the majority of the ACLU's executive board, "political views" encompassed the struggle for control of the government and the economy, but not of the body. The early ACLU was not interested in defending avant-garde culture, let alone sexual autonomy.

Only three years later, however, the ACLU was the undisputed leader of the anticensorship campaign and an aggressive advocate of artistic freedom and birth control. With that shift, the ACLU inched closer toward a new

1. American Civil Liberties Union (ACLU) Bulletin 63, "Civil Liberty and the Courts: Obscenity and Political Opinions," November 1928, in *American Civil Liberties Union Records and Publications, 1917–1975* (Glen Rock, N.J.: Microfilming Corporation of America, 1977) (hereafter ACLU Records and Publications), reel 2.

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model of civil liberties: one that celebrated individual expressive freedom over substantive social change. Thus transformed, the civil liberties movement finally attracted widespread public support, paving the way for a pluralistic turn in politics as well as personal morality.

What happened in the intervening years to change the ACLU's agenda so completely? The catalyst, I argue, was a postal censorship dispute, resolved by the Second Circuit's 1930 speech-friendly decision in *United States v. Dennett*.[2] When the ACLU announced its successful appeal in *Dennett* in March 1930, many Americans considered the news a victory for justice. Although few knew it, it was justice of an uncommonly poetic sort. The case was the ACLU's first important attack on postal obscenity censorship, and the Second Circuit's seminal decision was a significant achievement for the organization and its client. Newspaper accounts heralded Mary Ware Dennett as the protagonist.[3] But Dennett's role in the struggle was quite different from what she and her civil liberties allies might have predicted. For years, the pioneering birth control activist—a former secretary of the ACLU's predecessor organization, the National Civil Liberties Bureau (NCLB)—had lobbied unsuccessfully for revision of the postal censorship laws. In the end, it took a criminal prosecution of Dennett herself to mobilize public opinion and effect legal change.

The object of the legal dispute was Dennett's sex education pamphlet, *The Sex Side of Life: An Explanation for Young People*, which was widely regarded as the best available tract on the subject. Postal authorities declared the pamphlet obscene despite effusive praise by medical practitioners, religious groups, and government agencies for its frank and objective style. When Dennett continued to circulate it by mail in defiance of the postal ban, she was prosecuted for obscenity. The ACLU came to her defense.

At the time, however, the organization's leadership was unconcerned with Dennett's broader goals. The ACLU was founded, according to early organizational documents, to assist in the "struggle of labor" by facilitating orderly progress toward revolutionary social change.[4] By the late

2. *United States v. Dennett*, 39 F.2d 564 (Second Circuit, 1930).

3. Newspaper accounts of the *Dennett* decision were virtually unanimous in their support for Dennett, and the few critics lamented that public opinion was squarely on Dennett's side. See below note 148. For a discussion of Dennett's opponents, see Leigh Ann Wheeler, "Rescuing Sex from Prudery and Prurience: American Women's Use of Sex Education as an Antidote to Obscenity, 1925–1932," *Journal of Women's History* 12 (2000): 173–96 (describing opposition by Reverend William Sheafe Chase).

4. Proposed Reorganization of the Work for Civil Liberty, in American Civil Liberties Union Records, The Roger Baldwin Years, 1917–1950, Seeley G. Mudd Manuscript

1920s, it had moved beyond its initial commitment to the "right of agitation," which had encompassed workers' rights to organize collectively. For strategic and ideological reasons, the organization increasingly had emphasized less controversial values, such as religious and academic freedom. In the realm of sexual morality, however, most members of the ACLU were untroubled by state regulation, and few were eager to challenge obscenity laws. ACLU board members agreed to sponsor Dennett's case because, in their view, *The Sex Side of Life* was not obscene. On the contrary, it instructed the youth on an issue of social importance. Censoring the pamphlet interfered with established progressive projects such as the dissemination of scientific knowledge and the promotion of happy, stable marriages. At the same time, it curtailed parents' authority to educate their children in accordance with their own values.[5] In short, defending *The Sex Side of Life* was an uncontentious opportunity to challenge the government's suppression of disfavored ideas.

Unexpectedly, however, the litigation unleashed a far more sweeping anticensorship initiative. Dennett's heavily publicized conviction, overturned by the Second Circuit on appeal, generated popular hostility toward the censorship laws. ACLU attorneys recognized that a more aggressive anticensorship initiative would improve the organization's political and financial standing. Moreover, the debate surrounding Dennett's prosecution prompted a re-evaluation of why civil liberties mattered. The swift success of the new approach convinced many civil libertarians that speech should be protected regardless of its social value. *United States v. Dennett*, in the words of ACLU co-counsel and emerging free speech leader Morris Ernst, was a "test-case of vital importance."[6]

Library, Public Policy Papers, Princeton University, Princeton, N.J. (hereafter ACLU Papers), reel 5, vol. 43 ("The industrial struggle is clearly the essential challenge to the cause of civil liberty today."); see, generally, Laura Weinrib, "The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940" (PhD diss., Princeton University, 2011).

5. On the novelty of constitutional arguments based on family privacy and self-determination, see Martha Minow, "We, the Family: Constitutional Rights and American Families," *Journal of American History* 74 (1987): 959–83. Regardless whether they were precedented, the ACLU was aware of significant conservative support for such claims in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See Weinrib, "Liberal Compromise," 204–8.

6. Appellant's Second Circuit Brief, 59, in Women's Studies Manuscript Collections from the Schlesinger Library, Radcliffe College, Series 3: Sexuality, Sex Education, and Reproductive Rights, Part B: Papers of Mary Ware Dennett and the Voluntary Parenthood League, ed. Betsy B. Covel (Bethesda: University Publications of America, 1994) (hereafter Dennett Papers), reel 23, file 490.

An Organizational Agenda in the Making

It is well established in the historiography of civil liberties that the early leadership of the ACLU was not interested in protecting cultural expression.[7] Whatever motivated the ACLU's founders to champion free speech—a complicated and contested question—artistic freedom and "moral" autonomy were peripheral concerns at best. Within a decade, however, the ACLU was unqualifiedly committed to the fight against censorship. Many of its supporters were reluctant to defend Communists but eager to endorse artistic freedom.

No historian of free speech has provided an account of how and why the organization branched out into this new realm.[8] Meanwhile, obscenity scholars have related changing public mores during the 1920s and 1930s to a relaxation of obscenity regulation, but they have not connected the liberalizing trends to legal developments in the broader context of civil liberties.[9] In this article, I offer a potential explanation for the shift in the civil liberties agenda during the late 1920s and early 1930s. The ACLU's new vision of civil liberties, I suggest, was inspired by the unexpected popularity of its victory in *United States v. Dennett*. That case is often overlooked in histories of free speech, perhaps because it never reached the Supreme Court, was not decided on First Amendment grounds, or its implications for the broader civil liberties

7. David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (New York: Cambridge University Press, 1997), 310; Samuel Walker, *In Defense of American Liberties: A History of the ACLU*, 2nd ed. (Carbondale: Southern Illinois University Press, 1999), 68. Cf. Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991), 144 (noting Zechariah Chafee's belief that obscenity did not warrant First Amendment protection because it implicated only individual, as opposed to social, interests).

8. Because contemporary academic discussion has continued to focus primarily on the political, public-interest implications of free speech (see, generally, Graber, *Transforming Free Speech*), it is unsurprising that many historical accounts have neglected the expansion of civil liberties advocacy to include issues like obscenity, which more directly implicate individual rights.

9. For example, Jay Gertzman, *Bookleggers and Smuthounds: The Trade in Erotica, 1920–1940* (Philadelphia: University of Pennsylvania Press, 1999), examines the ACLU's National Committee for Freedom from Censorship and its effect on obscenity regulation, but it does not address concurrent developments in the regulation of political speech, nor does it discuss the architects of the free speech movement, such as Zechariah Chafee and Roger Baldwin. Leigh Ann Wheeler discusses the regulation of sex education literature as well as commercial sexually explicit materials, but she is principally concerned with the relationship between the antiobscenity movement and women's political power, identity, and sexuality in *Against Obscenity: Reform and the Politics of Womanhood in America, 1873–1935* (Baltimore: Johns Hopkins University Press, 2004).

movement were not immediately apparent.[10] And yet, *Dennett* fundamentally redefined the way that lawyers, judges, and activists understood the category of civil liberties.[11] It introduced the possibility of a free speech agenda premised on personal autonomy, a cause that resonated strongly with mainstream Americans, rather than economic equality, which polarized them. Within a matter of years, the ACLU would recast its political and economic cases to comport with this new rationale. And the payoff was swift and spectacular. When *Dennett* was decided, the ACLU was a fringe group and the civil liberties it defended were often maligned as un-American. A mere decade later, President Roosevelt would stand before the nation and declare that the first of the fundamental human freedoms was the freedom of speech.[12]

10. See, for example, Edward G. Hudon, *Freedom of Speech and Press in America* (Washington: Public Affairs Press, 1963); Judy Kutulas, *The American Civil Liberties Union and the Making of Modern Liberalism, 1930-1960* (Chapel Hill: University of North Carolina Press, 2006); and Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, Connecticut: Greenwood Publishing Co., 1972) (none of which list Dennett in the index). In her history of censorship laws designed to protect the youth, Marjorie Heins, *Not in Front of the Children: 'Indecency,' Censorship, and the Innocence of Youth* (New York: Hill and Wang, 2001), 42–44, briefly describes *Dennett*'s importance as a doctrinal bridge. Walker's history of the ACLU devotes a page to the case; Charles Lam Markmann, *The Noblest Cry: A History of the American Civil Liberties Union* (New York: St. Martin's Press, 1965), affords it a paragraph.

11. Two published works deal with *Dennett* at length: a 1995 article by John Craig and a biography of Dennett by Constance Chen. John M. Craig, "'The Sex Side of Life': The Obscenity Trials of Mary Ware Dennett," *Frontiers* 15 (1995): 145–66; Constance M. Chen, *The Sex Side of Life: The Story of Mary Ware Dennett* (New York: New Press, 1996). Chen focuses on Dennett's life and legacy, with particular attention to her birth control activities. Craig points to many of *Dennett*'s important themes but is more interested in its effects on the birth control movement and obscenity law than its broader implications for civil liberties advocacy and the meaning of free speech. Leigh Ann Wheeler's illuminating account of the complicated relationships between Mary Ware Dennett, the social hygiene movement, and antiobscenity activity is sensitive to the concerns and rationales of Dennett's adversaries, but it discusses her court battle only in passing and does not explore the origins of the ACLU's emerging liberalism. Wheeler, "Rescuing Sex"; Wheeler, *Against Obscenity*.

12. Franklin D. Roosevelt, "Annual Message to Congress," January 6, 1941, Records of the United States Senate, Record Group 46, National Archives and Records Administration (hereafter, NARA) I, Sen. 77A-H1. Morris Ernst considered Roosevelt's Four Freedoms to be an important civil libertarian project and, in conjunction with the White House, pursued a book project exploring the connections among them and the best means of achieving them. Morris Ernst to Franklin D. Roosevelt, September 21, 1943, in Morris Leopold Ernst Papers, 1888–1976, Harry Ransom Humanities Research Center, University of Texas at Austin (hereafter Ernst Papers), box 97, folder 3. At the time of publication, the Ernst papers were closed for processing. After the collection is recatalogued, citations may differ.

This chronology turns on its head the conventional wisdom that protection of free speech in America began with "political" speech and steadily expanded toward more personal liberties.[13] Civil liberties advocacy groups, including the ACLU, did indeed follow that trajectory. But the public did not. Rather, it was civil libertarians' successful defense of popular, nonpolitical (as the authors of the 1928 ACLU pamphlet understood that term) causes, such as the dissemination of scientific and sexual knowledge, that paved the way for popular tolerance of political dissent.

Of course, understanding how and why the civil liberties movement changed during the interwar period entails understanding what it was changing from. The figures at the forefront of the interwar civil liberties movement were a varied group, and their prewar sympathies and activities had ranged across a broad spectrum. The majority, however, had considered themselves progressives, and as such, despite their many disagreements, they had shared a common hostility to the federal courts[14] and to constitutional rights-based claims. These they identified with corporate and judicial opposition to protective labor legislation, epitomized by the Supreme Court's notorious decision in *Lochner v. New York*,[15] which invalidated a New York maximum-hours law because it interfered with an implicit constitutional "right to free contract." Such cases prompted reformers to seek social progress through state action rather than the judiciary.

That the progressives distrusted constitutional adjudication does not mean that they opposed free speech. On the contrary, under peacetime conditions, most progressives favored robust public discussion, at least as a policy matter. The Progressive Era had witnessed a rapid transformation of social, scientific, and cultural values. Many widely accepted theories in the 1910s had been marginal, if not repressed, a few decades earlier. Social progress was fundamentally dependent on the formulation and

13. See, for example, Ken I. Kersch, "How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech," *University of Pennsylvania Journal of Constitutional Law* 8 (2006): 255–97; 266, summarizing dominant narrative ("[W]hereas free speech protections were largely focused on core political speech in the early twentieth century, they were expanded to protect other forms of speech, such as (anti) religious (blasphemy), sexual (indecency), artistic, commercial, and other forms of speech.").

14. They were not, however, opposed to courts that administered socialized (as opposed to individualized) justice. Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003).

15. Lochner v. New York, 198 U.S. 45 (1905). Notwithstanding revisionist claims about popular reaction to *Lochner* in the immediate aftermath of the case (see, for example, David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* [University of Chicago Press, 2011]), it is clear that by the 1910s progressive antipathy toward the case had crystallized.

expression of new ideas. When war was declared, however, their broad commitment to social welfare and their corresponding support for President Wilson led many progressives to condemn dissent, or at least to support the right of a majoritarian government to quash it.[16]

Repression during the war years hit anarchists and socialists most heavily, as it had for decades. But the wartime prosecutions were far more aggressive and targeted a wider range of speech. Moreover, many dissenters were denied the opportunity to defend themselves. The Espionage Act of 1917 authorized the Post Office Department to act unilaterally in denying mailing privileges to suspect newspapers, journals, and other outlets of dissent.[17] Postmaster General Albert Burleson proved a willing and enthusiastic censor,[18] and many leftist and antiwar publications were forced to shut down. Perhaps the best known example, *The Masses*, was edited by Max Eastman, brother of Crystal Eastman, who, along with Roger Baldwin, cofounded the ACLU. Although Judge Learned Hand famously decided, as a matter of statutory interpretation, that the suppression of *The Masses* based on its antiwar editorials and political cartoons exceeded the authority of the Espionage Act, his decision was reversed by the Second Circuit on appeal; the journal, deprived of its second-class mailing privileges, had no choice but to close its doors.[19] Episodes of this kind were

16. Not all progressives were majoritarian. In fact, many advocated the expansion of the regulatory state precisely because the efficiency and autonomy of administrative agencies were shielded from popular influence. For them, the postwar turn to civil liberties meant shifting their confidence from agencies—which, they discovered, were more prone to political influence than they had believed—to the courts.

17. The Espionage Act, which was the basis for many of the wartime prosecutions of dissenters, made it criminal to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States." Espionage Act of 1917, ch. 30, 40 Stat. 217. Most historians assume that Congress anticipated or intended the prosecution of peaceful political speech. For a contrary view, assigning responsibility to the judiciary, see Geoffrey R. Stone, "The Origins of the Bad Tendency Test: Free Speech in Wartime," *Supreme Court Review* (2002): 411–53.

18. See Paul Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: Norton, 1979), 98–99.

19. Hand emphasized that he was not deciding whether Congress was constitutionally empowered to prohibit "any matter which tends to discourage the successful prosecution of the war" if it chose to do so; rather, at issue was "solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered." *Masses Publishing Co. v. Patten*, 244 F. 535, 538 (Southern District of New York, 1917), rev'd, 246 F. 24 (Second Circuit, 1917). Nonetheless, Hand's reasoning was later incorporated into the Supreme Court's constitutional analysis. On the *Masses* case, see, generally, Gerald Gunther, "Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27 (1975): 719–73; and Gerald

highly publicized and prompted a growing contingent of journalists and politicians to resent the suppression of speech in general and bureaucratic censorship in particular.[20]

In the conventional narrative, World War I generated a new and powerful alliance between progressives and liberal lawyers on behalf of expressive freedom.[21] Concerns mounted when the end of hostilities abroad failed to stem the nationalist hysteria. In a climate of heightened social tensions, marked by a wave of labor strikes and the Chicago race riot, anti-immigrant and anti-Communist sentiments escalated. Wilson's attorney general, A. Mitchell Palmer, instigated the notorious Palmer Raids in response to anarchist bombing attacks on his Washington home, among other targets.[22] Between November 1919 and January 1920, the federal government arrested several thousand suspected radicals and deported hundreds of foreign nationals, including Emma Goldman and Alexander

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Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994). Burleson's censorship practices were upheld by the Supreme Court in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

20. See "Senators Oppose Sedition Bill as Gag on Free Speech," *New York Tribune*, May 1. 1918. The National Civil Liberties Bureau cautioned against the increased censorship authority conferred upon the postmaster general by the Sedition Act, explaining that "[s]uch arbitrary power in the hands of a single appointed officer has never before existed in the history of this republic, nor of any other nation under a democratic constitution." "Gives Power to Stop Mail Delivery," *New York Evening Post*, April 30, 1918.

21. Murphy, *Origin of Civil Liberties*, 18–21, contains a useful review of the literature prior to 1980. More recent accounts include Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008); Kutulas, *American Civil Liberties Union*; Graber, *Transforming Free Speech*; Rabban, *Free Speech*; Richard W. Steele, *Free Speech in the Good War* (New York: St. Martin's Press, 1999); Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton & Co., 2004); and John Witt, "Crystal Eastman and the Internationalist Beginnings of American Civil Liberties," *Duke Law Journal* 54: 705–63 (2004). Historical scholarship has established that legal claims to free speech premised on the First Amendment rarely succeeded in the federal courts in the nineteenth and early twentieth centuries. During that period, some lawyers defended radical expression in a language that mobilized the Constitution and that resembled, anachronistically, the understanding of civil liberties that emerged after World War I, but these efforts made little headway in the courts. See, generally, Rabban, *Free Speech*; and John Wertheimer, "Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States" (PhD diss., Princeton University, 1992).

22. The Palmer Raids outraged Felix Frankfurter, who joined with eleven other prominent attorneys to author a "Report upon the Illegal Practices of the United States Department of Justice." National Popular Government League, *To the American People: Report upon the Illegal Practices of the United States Department of Justice* (Washington, D.C.: National Popular Government League, 1920).

Berkman. Although public reaction to the raids was generally favorable—according to the Washington Post, "[t]here [was] no time to waste on hairsplitting over infringement of liberty when the enemy [was] using liberty's weapons for the assassination of liberty"—the Red Scare of 1919 pushed the limits of progressive complacency.[23] Disillusioned by the failure of the war to make the world safe for democracy, and distressed by the unprecedented extent of the postwar repression, such civil liberties theoreticians as Felix Frankfurter and Zechariah Chafee reinvented free speech as a means of advancing the public interest and defusing social conflict, notwithstanding their serious reservations about the speakers' underlying beliefs. For the first time, the argument goes, scholars, judges, and public officials imagined a marketplace of ideas,[24] where theories and thinkers would battle it out and the best one would be the last to remain standing.[25]

This standard account captures only part of the story. Certainly, the war and the ensuing Red Scare prompted re-evaluation of the importance of free speech. Organization and advocacy on behalf of civil liberties were in shambles at the close of the war, but as the wartime exigencies dissipated and repression continued, many Americans within and outside the political and legal establishments began to espouse greater tolerance for

23. "The Red Assassins," *Washington Post*, January 4, 1920, 26. President Wilson voiced a similar sentiment, claiming that those who were disloyal to the United States "had sacrificed their right to civil liberties." Quoted in Murphy, *Origin of Civil Liberties*, 53.

24. The concept of the "marketplace of ideas" is generally attributed to Justice Holmes's dissent in *Abrams v. United States*, although he did not explicitly use the phrase. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"). For a compelling review of problems with the market analogy, see Vincent Blasi, "Holmes and the Marketplace of Ideas," *Supreme Court Review* (2004): 1–46, 6–13. The invocation of the market was easily adapted to a libertarian ideal of moral autonomy. Morris Ernst put this to rhetorical use in an argument against the regulation of fortune telling: "The state should not forever be our nursemaid. . . . Fortune telling should be allowed free trade in the market place of thought. It will then live or die on its own merits. Do not let us encourage palmeasies and bootleggers of astrology. Suppression never succeeds." "Take Your Choice—Should We Drive Out the Fortune Tellers?" *New York American*, August 7, 1931, Ernst Papers, box 2, folder 3.

25. Not all civil libertarians endorsed the language of markets, but the analogy touched a deeper vein in postwar political theory. In the years after World War I, a new pluralism (verging at times on relativism) crept into legal and political theory. To borrow from Morton Horwitz's influential account of legal realism, the war disrupted the "self-assurance about values that Progressives were able regularly to muster." Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 191. Some interwar libertarians lauded free speech for its potential to flush out the political vision most compatible with the "public good," but others wondered whether any such ideal existed in the first place.

dissent and stronger adherence to the rule of law. Still, the transformation was a matter of degree rather than kind. In the years after World War I, most proponents of free speech were simply reviving arguments espoused by progressives for the previous two decades. Political pluralism, for them as for their prewar counterparts, was an instrument of social welfare. To be sure, academics and some judges readjusted the rank of expressive freedom in the hierarchy of progressive values; the specter of mob violence and mass hysteria had emphasized the high toll of enforced uniformity on public well-being. Moreover, many converts were motivated by new concerns, including the rapid expansion of the administrative state. The notion of a libertarian democracy provided a valuable foil to bolshevism (and later, fascism), and an important counterbalance to bureaucratic centralization. On the whole, however, the dominant theories of civil liberties in 1920 were neither successful at insulating disfavored speech from prosecution nor new in any significant way.

The ACLU's vision of civil liberties was an exception. Although they began as progressive reformers, the organization's founders had come to share the views of the radical dissenters they defended.[26] In their work for the National Civil Liberties Bureau (NCLB), the ACLU's precursor, they had actively but ineffectually invoked the full panoply of prewar civil libertarian arguments on behalf of their clients. And therefore, when they created the ACLU in 1920, they sought out new solutions for facilitating fundamental social change.[27] They made generous use of progressive arguments and collaborated actively with prominent progressives in authoring pamphlets and drafting legal briefs. At the same time, although they abhorred *Lochner*-style conceptions of individual rights—which emphasized property rights at the expense of such "personal rights"

26. To Crystal Eastman and Roger Baldwin, Wilson's willingness to abandon his prewar principles revealed that the official interests of the United States were incompatible with the needs of the American people. See John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge: Harvard University Press, 2008), 187–97.

27. Although the ACLU's early approach was partly modeled on the Industrial Workers of the World (IWW)'s prewar free speech fights, its theory of civil liberties was quite different. Most of the IWW leadership regarded the First Amendment as a tool for protecting organizers while illustrating official hypocrisy. Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Chicago: Quadrangle Books, 1969), 174. Meanwhile, the Free Speech League, which defended the IWW speakers in court and was largely responsible for articulating the underlying constitutional commitments, emphasized personal autonomy and fulfillment. Rabban, *Free Speech*, 23; and Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, Conn.: Greenwood Pub. Co., 1972), 20 ("Schroeder and his cohorts were remnants of nineteenth-century liberal thought. Optimistic individualists themselves, they believed that man's basic problem was unwarranted restraint.").

as privacy, bodily integrity, and expressive freedom[28]—they borrowed conservatives' language and studied their tactics.[29] For the core leadership, however, the immediate lesson of the government's wartime policy was not about pluralism or personal responsibility. In the wake of the Bolshevik revolution, Roger Baldwin, Norman Thomas, Albert DeSilver, Walter Nelles, and the other members of the ACLU inner circle believed that the downfall of the American economic system was imminent, and desirable, in America. In their new understanding, which grew out of the radical labor movement, government threatened the public good. The role of the civil liberties movement was to ensure that in the coming struggle between labor and capital, the state would not interfere. To that end, civil liberties would need to encompass not only the right to advocate ideas, but also to engage in concerted *activity*, that is, the boycott, the picket, and eventually the general strike.

The strident radicalism of the ACLU's early rhetoric, like the revolutionary moment that produced it, was short lived. The early leadership considered the coal and steel strikes of 1919 to be "the greatest demonstrations of working-class power in the history of the country,"[30] and even after the Wilson administration broke them, the ACLU thought its place was on the front lines.[31] It was quickly evident, however, that social change through "agitation" was a distant specter. The Republicans who came to office in the 1920 election were eager to reverse labor's remaining wartime advances. Assistance was forthcoming from the Supreme Court, which, under its newly appointed Chief Justice William Howard Taft, rejected labor's arguments that boycotts and picketing were constitutionally protected speech even as it struck down state anti-injunction laws as unconstitutional infringements on employers' property rights.[32] The

28. See, for example, Testimony of Gilbert Roe, 10 May 1915, in Final Report of the Commission on Industrial Relations, vol. 11, 10473.

29. Cf. Robert Gordon, "The Legal Profession," in *Looking Back at Law's Century*, ed. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca: Cornell University Press, 2002), 288–336.

30. ACLU, *The Fight for Free Speech* (New York: American Civil Liberties Union, 1921), 6.

31. Ibid., 8–9.

32. Its 1921 decision in *Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921), declared secondary boycotts unlawful under the Clayton Act and authorized the use of injunctions to block them. In *Truax v. Corrigan*, 257 U.S. 312 (1921), it went further, striking down a state anti-injunction law as an unconstitutional violation of equal protection and due process. Other decisions effectively outlawed picketing and made unions subject to high damages for restraint of interstate commerce. *American Steel Foundries v. Tri-Cities Central Trade Council*, 257 U.S. 184 (1921); and *United Mine Workers v. Coronado Coal*, 259 U.S. 344 (1922).

postwar depression exerted downward pressure on wages and put unions further on the defensive. By 1921, union membership had declined by 1.5 million and the open shop was the rule. Within a few more years, as economic conditions improved, mass mobilization through direct action seemed a hopeless endeavor in the short term.

From the perspective of the ACLU, the changing labor landscape called for a revised set of civil liberties commitments. The organization had achieved no more success in protecting labor activity from state (including judicial) interference than it had, working with its progressive allies, in the domain of politically subversive advocacy. The ACLU's 1925 Annual Report laid out the organization's new understanding. Although popular and judicial tolerance of dissent appeared to be increasing, the relative quietude merely reflected a reduced need for repression. Government and industry could temper their efforts to crush worker militancy because "widespread prosperity" had already accomplished that task. "The efforts to impose majority dogma by law and intimidation have shifted from the industrial arena to the field of education," the report concluded.[33] Going forward, a crucial part of the ACLU's project was to safeguard radical education and to undermine countervailing attempts by the state to institutionalize conservative views. The organization continued to defend the few anarchists and Communists prosecuted under state criminal syndicalism laws. It contested ideologically grounded immigration laws, and it opposed alien registration and deportation bills. It also engaged with racial discrimination, especially lynchings. But during the labor lull of the 1920s, it made primary and secondary education its most visible focus. Notably, the leaders of the ACLU promoted a broad right to education because they hoped that the radical labor movement, if given the opportunity to educate the masses, would ultimately triumph. Their new rallying cry was Justice Holmes's dissenting proclamation in *Gitlow v. New York* (which, like *Whitney v. California*, was argued by Walter Nelles and Walter Pollak of the ACLU): "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[34]

The new commitment dovetailed both with traditional progressive goals and with the conservative commitment to individual rights. And the ACLU

33. American Civil Liberties Union, *Free Speech 1925–1926: The Work of the American Civil Liberties Union* (New York: American Civil Liberties Union, 1926), 3.

34. *Gitlow v. New York*, 268 U.S. 652, 673 (1925); and *Whitney v. California*, 274 U.S. 357 (1927). Quoted, for example, in Roger Baldwin, Draft Speech, ACLU Papers, reel 46, vol. 303.

emphasized the commonalities, gradually guiding both groups toward a civil libertarian stance. Its involvement in such cases as *Pierce v. Society of Sisters* (invalidating Oregon's compulsory education law on due process grounds) and the *Scopes* trial (contesting a Tennessee law prohibiting the teaching of evolution) revealed that academic freedom, unlike the rights of anarchist immigrants or radical workers, commanded mainstream support.[35] When the organization first addressed the issue of academic freedom as a potential area of activity in June 1924, it openly acknowledged its concern, namely, "propagandists' efforts to distort education in the interest of a particular conception of political and economic thinking," of which the Lusk Committee's effort to shut down the socialist Rand School of Social Science was the most prominent example.[36] Increasingly, however, cooperation with the American Association of University Professors and other reputable groups taught the ACLU leadership to moderate its language. The ACLU redefined its goal as eliminating "force[d] conformity," a cause palatable to many of the same progressives who championed public schooling and who initially supported Oregon's effort to eliminate parochial education in the state.[37] Unfettered academic debate would serve the public interest by encouraging critical thinking and advancing social thought. Civil liberties would encourage American ingenuity and facilitate progress by preventing the "complete standardization" of the "intellectual life of [the] nation"[38]—which is why the ACLU could advocate the right of Catholics to private education in Oregon and the right of Tennessee school teachers to explain evolution in the same breath.[39]

35. For a discussion of the ACLU's early efforts in this arena, including its defense of the Rand School of Social Science and the radical ideals underlying its positions in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Scopes v. Tennessee*, 152 Tenn. 424 (Tenn. 1925), see Weinrib, "Liberal Compromise," 181–204.

36. American Civil Liberties Union, *Freedom of Speech in Schools and Colleges* (New York: American Civil Liberties Union, June 1924), in ACLU Papers, reel 34, vol. 245.

37. See, for example, William S. U'Ren to Roger Baldwin, 27 December 1922, ACLU Papers, reel 34, vol. 245.

38. Forrest Bailey to Rev. Noah Cooper, June 15, 1925, ACLU Papers, reel 38, vol. 274.

39. Ibid. The organization's leaders ordinarily spoke in terms of pluralism and tolerance, but their true objectives were more ambitious, and occasionally they came out. In Roger Baldwin's understanding, "the Klan's attempt to compel all children to go to public schools" and the "Fundamentalist attack on scientific teaching" were instances of a more general phenomenon, namely, "the effort of all groups in power to hold on their privileges, and to write those privileges into law." ACLU News Release, April 1926, reel 46, vol. 303 (abstract of remarks by Baldwin). The consolidation of power of which they were reflective had coincided with the War, but its true cause was the Russian Revolution: "Bolshevism is the issue which has aroused the propertied classes to the defense of things as they are all over the world." Roger Baldwin, "What has become of the Pre-War Radicals," January 4, 1926, ACLU Papers, reel 46, vol. 303.

These early seminal cases were also instrumental in attracting an important new constituency: the conservative bar. With the battle over education, the source of repression had subtly shifted. Even more than before, the ACLU came to define itself in opposition to state authority.[40] Perhaps because the old progressive convictions were so deeply ingrained, or perhaps because progressive ideology was so pervasive and its language so dominant, the early ACLU had preserved a place for the state in regulating the "marketplace of ideas" and in tempering its effects. It continued to pursue free speech through legislatures and administrative agencies,[41] and it remained skeptical of the judicial forum, a distrust that stemmed not only from the Supreme Court's notorious exercises of judicial review, but also from the less mandarin but equally reviled labor injunctions issued by the trial courts.[42] Roger Baldwin was a pragmatist,[43] however, and he pushed the organization's lawyers to pursue judicially enforceable constitutional rights, notwithstanding objections from much of the ACLU's membership. In 1925, litigation appeared sufficiently promising to prompt ACLU attorney Arthur Garfield Hays to propose a study of "affirmative legal action" as a means of securing "labor's civil rights."[44] Over time, through its cooperation with conservative lawyers, the ACLU began to reimagine the courts as a check on government's reach rather than an arm of the state. Where progressives promoted free speech to ensure the

40. Roger Baldwin to William H. Jefferys, December 22, 1926, ACLU Papers, reel 46, vol. 303 ("It is with government agencies that we have to deal all the time, opposing the repressive and often lawless tactics of the executive and of government by an appeal to the judiciary. And the judiciary now has pretty nearly emasculated civil liberties as they have been conceived by the forefathers and maintained for a hundred years.").

41. See, generally, Laura Weinrib, "From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law," *Law & Social Inquiry* 34 (2009): 187–223; Emily Zackin, "Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts," *Law and Society Review* 42 (2008): 367–95. The ACLU reached out to government agencies and public officials in opposition to restrictive legislation and in pursuit of amnesty for political and industrial prisoners. When mobs and vigilantes shamelessly beat dissenters, it had called upon officials to intervene, notwithstanding its concerns about government abuses. More tellingly, when local officials aligned with courts to quash local labor struggles, even Roger Baldwin had been tempted to enlist state and federal assistance in leveling the playing field. See, for example, ACLU Executive Committee Minutes, September 26, 1921, in American Civil Liberties Union, *Minutes of the Meeting of the Executive Committee* (New York: American Civil Liberties Union, n.d.).

42. Walter Nelles, "Objections to Labor Injunctions," in *Civil Liberty*, ed. Edith M. Phelps (New York: H. W. Wilson Co., 1927), 156.

43. As Baldwin freely admitted, he was "not troubled . . . about any issue of theory or principles." Roger Baldwin to James P. Cannon (International Labor Defense), May 26, 1926, ACLU Papers, reel 46, vol. 303.

44. Executive Committee Minutes, October 26, 1925, ACLU, *Minutes*.

legitimacy of state coercion, the ACLU's leadership contested the government's regulation of ideas in order to undermine its monopoly on power. Eventually, it hoped, the working classes would rise to fill the void.

The question for the next half-decade was how far the new program would extend. In the minds of the ACLU's leaders, state inculcation of religious orthodoxy was clearly inimical to revolution. So was the effort to shut unconventional ideas out of the schools (including the prohibition on ACLU-sponsored meetings in the New York public schools, an ongoing battle that in 1927 the ACLU deemed the "most important free-speech fight of the year").[45] There was one field, however, into which the organization had not yet ventured. In spite of the longstanding association of radicalism with "free love,"[46] the ACLU, restrained by progressives on the National Committee and by the board members' own biases, had resolutely excluded the regulation of sexual relations from its purview.[47] Nonetheless, there was a marginal but mounting sentiment within the ACLU that social change was threatened not only by laws directly suppressive of radical ideas, but also (in the words of the ACLU's designated theoretician, Leon Whipple) by the "steady extension of the police power over health, morals, and personal habits"—the "slow encroachment" of the state into all aspects of personal liberty.[48] With the suppression of Mary Ware Dennett's foundational sex education pamphlet, the ACLU faced the new terrain head on.

45. ACLU Press Release, May 16, 1927, in ACLU Records and Publications, reel 1.

46. See Christine Stansell, *American Moderns: Bohemian New York and the Creation of a New Century* (New York: Henry Holt, 2000).

47. A more libertarian vision of free speech was not without precedent. A vibrant, although unsuccessful, prewar free speech movement had championed individual autonomy in the realms of free love and artistic expression as well as politics. Theodore Schroeder, founder of the Free Speech League, had formulated a countermajoritarian theory of civil liberties as expansive as the one espoused by the ACLU at mid-century. See generally Rabban, *Free Speech*; Stansell, *American Moderns*; and Wertheimer, "Free Speech Fights." Constitutional free speech claims also proliferated during the nineteenth century, see, for example, Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), but defenders of sexually explicit speech generally relied on property rights during that period. Donna Dennis, *Licentious Gotham: Erotic Publishing and Its Prosecution in Nineteenth-Century New York* (Cambridge: Harvard University Press, 2009). Most of the prewar libertarians had, however, abandoned the cause by the beginning of World War I, and the early agenda of the free speech movement did not reflect their broader concerns.

48. Leon Whipple, *Our Ancient Liberties: The Story of the Origin and Meaning of Civil and Religious Liberty in the United States* (1927; reprint, New York: De Capo Press, 1972), 146.

The Sex Side of Life

Mary Ware Dennett had challenged social norms throughout her life, politically and personally. Born in 1872 to a middle-class family in Worcester, Massachusetts, she attended Boston-area schools (public and private) and studied at the School of Art and Design at the Boston Museum of Fine Arts. From 1894 to 1897 she headed the Department of Design and Decoration at the Drexel Institute of Art in Philadelphia. In 1898, she and her sister opened a gilded leather shop, the kind of fancywork to which aspiring female artists could turn for an income, and the two women garnered national attention for rediscovering a lost process for making cordovan gilded leathers.[49]

Mary Ware married William Hartley Dennett in 1900. Together, they had three children, one of whom died in infancy. Dennett separated from her husband in 1909 when he declared himself a free-lover and sought to convince her to accept his relationship with their friend and neighbor, whose own husband sanctioned the relationship and invited him to live in their home. The custody proceedings and subsequent divorce generated sensationalist news coverage, which distressed Dennett deeply.[50] Despite her aversion to publicity, however, she remained active in public life. During the first decade of the twentieth century she served as field secretary of the Massachusetts Woman Suffrage Association, and in 1910, she was elected corresponding secretary of the National American Woman Suffrage Association. During the First World War, Dennett became a prominent pacifist. She was a founding member of the People's Council of America for Democracy and Peace and a member of the Woman's Peace Party in New York. Notably, she also served as field secretary for the American Union Against Militarism and, once it was organized as a separate entity, for the NCLB. In that capacity, she witnessed first-hand the unchecked use of postal censorship to curtail public exposure to unpopular views.

When the war drew to a close, Dennett's focus shifted to birth control, the cause that would dominate her life for the next two decades. In 1915, Dennett had helped organize the United States' first birth control

49. "Mrs. Dennett, 75, Suffrage Leader: A Founder of National Birth Control League Dies—Fought to Legalize Sex Education," *New York Times*, July 26, 1947.

50. William Hartley Dennett unabashedly professed his love for Chase, as well as his free love ideology in general, in the court proceedings. "Lover of Wife Honored by Complaisant Husband," *Atlanta Constitution*, September 24, 1909. The husband of his lover, H. Lincoln Chase, joined the couple at their small town farmhouse in 1913. Two years later, the press reported that the arrangement was a success. See, for example, "Chase to Join Wife and Her Soul Mate," *New York Times*, January 25, 1915.

organization, the National Birth Control League. Four years later, she founded the Voluntary Parenthood League—the institutional rival of Margaret Sanger's American Birth Control League—and became Sanger's chief contender for leadership of the birth control movement. Whereas Sanger tempered her demands for birth control reform in the interwar period by advocating medical regulation rather than open access, Dennett called for repeal of all restrictions on contraception. In particular, she was a fierce and vocal opponent of the 1873 Comstock Act. A federal statute, the Comstock Act gave the postal authorities immense discretion to censor obscene material, and Dennett considered it a formidable obstacle to birth control reform. Under its terms, the postal service was free to suppress not only "lewd" images and literature, but also publications considered morally suspect, such as arguments against the legal regulation of marriage and pamphlets providing information about contraception, as well as contraceptive devices themselves.[51]

In the early 1920s, Dennett believed the Comstock Act was on its way out. Under the leadership of Postmaster General William Hays, censorship of political materials had declined from its wartime heights, and Dennett thought Hays might even petition Congress for a change in the laws.[52] But the postal crusade against obscenity and birth control redoubled under Hubert Work, who took over the office in 1922 when Hays was named president of the Motion Picture Producers and Distributors of America (it was in this role, which he held for more than 20 years, that he would implement the influential 1930 "Hays Code" for movie self-censorship). Consequently, Dennett spearheaded a legislative effort to repeal the prohibition on the dissemination of information about birth control, which she unavailingly distinguished from the dissemination of contraception itself. In 1923, after a long effort, she managed to find sponsors in the Senate and the House. The Cummins–Vaile Bill, which Dennett drafted, would have prohibited postal censorship of birth control materials.[53] But despite her unflagging efforts, including her publication in 1926 of *Birth Control Laws*,[54] a book that criticized the Comstock laws and advocated legislative change, the bill reached a dead end.

51. Those found guilty of violating the Act were subject to 6 months' to 5 years' imprisonment at hard labor or a fine of between $100 and $2000 dollars. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, 17 Stat. 598 (1873).

52. Mary Ware Dennett to Senator Woodbridge Ferris, April 21, 1925, Dennett Papers, reel 22, file 470.

53. The bill would have deleted the phrase "for the prevention of contraception" from the Comstock Act.

54. Mary Ware Dennett, *Birth Control Laws: Shall We Keep Them, Change Them, or Abolish Them* (New York: F. H. Hitchcock, 1926).

According to Dennett, few members of Congress actually opposed the bill, but it was kept off the floor to avoid the liability of a vote.

Ultimately, it would be the courts rather than the legislatures that would rein in the postal censors. The impetus for change was Dennett's own sex education pamphlet, *The Sex Side of Life: An Explanation for Young People*. The pamphlet was heralded by secular and religious reformers as an indispensable educational tool,[55] and its censorship, coupled with Dennett's conviction for mailing an obscene publication, touched off a firestorm of public outrage and offended judicial sensibilities.

For all the controversy it would engender, *The Sex Side of Life* was penned, ostensibly, with very modest intentions. Dennett claimed that when she wrote the pamphlet in 1915, she had particular young people in mind: her sons Carl (then 14 years old) and Devon (10 years of age). According to Dennett, Carl asked her a series of questions about sex in his letters home from summer camp. She prepared the pamphlet by way of response and sent it to him while he was away.[56]

Dennett sampled more than sixty books and pamphlets on sex before writing her own. She rejected their tone of disapproval and insisted that sex, in the appropriate context, "is the very greatest physical and emotional pleasure there is in the world." She criticized one attempt at sex education for its "old-fashioned stupid idea about women," which made her indignant because it implied that "women were made to be *taken care of* " rather than being "*partners* in life with men."[57] Moreover, she worried that the literature assumed prior knowledge and traded in euphemisms instead of frankly explaining the terminology and physiology of sex.

Dennett's introduction to *The Sex Side of Life* attributed the deficiency in sex education literature to the fact that "those who have undertaken to instruct the children are not really clear in their own minds as to the proper status of the sex relation." Educational literature was confused with respect to physiology and sentimental in its description of natural science, but it was most troubling in its moral treatment of sex; it presented children

55. Among the pamphlet's thousands of supporters and subscribers were the Bridgeport, Connecticut public library; the First Methodist Episcopal Church in Pueblo, Colorado; the Juvenile Court of Cook County, Illinois; the Boy Scouts of Louisville, Kentucky; the Massachusetts Department of Public Health; the Bethel Evangelical Church in Detroit, Michigan (whose pastor, from 1915 to 1928, was Reinhold Niebuhr); the Minnesota Department of Education; and numerous YMCA chapters. List of Larger Contributors, Dennett Papers, reel 21, file 445.

56. At just that time, the Metropolitan Life Insurance Company was sponsoring a competition for the best pamphlet on sex education for adolescents between the ages of 12 and 16. Chen, *Story of Mary Ware Dennett*, 176.

57. Quoted in ibid., 172 (emphasis in original).

with a "jumble of conflicting ideas," from fear of venereal disease and the duty of suppressing one's "animal passion" to the sacredness of marriage.[58] Emotionally, Dennett noted, the subject was simply ignored.[59]

Endeavoring to correct these omissions, Dennett outlined the physiological process of sex, including an explicit description of the mechanics of intercourse. She addressed tabooed topics from venereal disease (which, she assured her readers, was treatable by modern medicine) to masturbation, which she discouraged unless the urge was "overwhelming."[60] Finally, she made the "frank, unashamed declaration that the climax of sex emotion is an unsurpassed joy, something which rightly belongs to every normal human being."[61] By the time Dennett was haled into court, sentiments such as these would be par for the course (Sanger, for one, also utilized them). Indeed, social scientists would make mutual sexual gratification a prerequisite of the new companionate marriage.[62] But in 1915, Dennett's celebration of sexual pleasure was unconventional, even radical.[63]

The Sex Side of Life combined advanced views about women's sexuality circulating among sophisticated feminists with the social hygiene impulse that was burgeoning at that time.[64] A Progressive Era reform initiative, the

58. Mary Ware Dennett, *The Sex Side of Life* (New York: n.p., 1919), 2, in ACLU Papers, reel 68, vol. 374. The pamphlet was reprinted in Mary Ware Dennett, *Who's Obscene?* (New York: Vanguard Press, 1930).

59. Dennett, *Sex Side of Life*, 3.

60. Ibid., 22.

61. Ibid., 4.

62. See Nancy F. Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987), 149. Cott, citing Alfred Kinsey's 1950s studies, notes that women's sexual practices changed drastically during the 1920s.

63. For prewar feminists, equality in the bedroom was merely one facet of a larger struggle for women's equality. Stansell, *American Moderns*, 227. These broader implications of *The Sex Side of Life* fell away in the intervening years. Cott, *Grounding of Modern Feminism*, 157 ("What was thrown overboard in the transformation of Feminist critiques into social scientists' proposition of companionate marriage was the ballast anchoring harmony between the sexes to sexual parity in the public world as well as the bedroom."). One acquaintance from Dennett's suffrage days advised her in 1930 that she had sought to reframe birth control and sex education as "necessary for the performance of marital and parental obligations" in order to accommodate the conservative tendencies of the League of Women Voters. S. P. Breckenridge to Mary Ware Dennett, January 15, 1930, Dennett Papers, reel 23, file 483.

64. See, generally, Kristin Luker, "Sex, Social Hygiene and the Double-Edged Sword of Social Reform," *Theory and Society* 27 (1998): 601–34. Although *The Sex Side of Life* was more celebratory of sex and more tolerant of "deviant" sexual practices than its social hygiene counterparts, the difference between them was relatively modest, as Dennett's defenders were eager to point out. See, for example, Remarks of Dr. Louis I. Harris, former New York City commissioner of health, Public Hearing on Sex Education—Freedom of Censorship, Town Hall, New York City, May 21, 1929, Dennett Papers, reel 23, file 484.

social hygiene movement sought to hold men and women to a "single standard" of sexual fidelity in order to combat prostitution, venereal disease, and associated social pathologies. Social hygienists—particularly the women among them—also imagined sexual responsibility as a mechanism for achieving sex equality, although their ambitions were predictably undermined in practice.[65]

Where Dennett broke from the social reformers was in her permissive approach to sexuality. Dennett, too, advocated a single standard for men and women, but hers was a standard of relative leniency. Whereas her reformist counterparts sought to mobilize state regulatory authority on behalf of sexual purity, Dennett consistently counseled her young correspondents that sexual experimentation was natural and desirable. This bolder message, however, was understated in *The Sex Side of Life*, and Dennett generally minimized it when she promoted the pamphlet. As late as the early 1930s, organized vice crusaders assumed that Dennett was an ally in the struggle against sexual promiscuity.[66]

Consistent with her family-friendly narrative, Dennett kept the focus on Carl and his wholesome boyhood curiosity. According to Dennett, Carl did not mention his mother's essay until he returned home from camp, when he called out from the shower, in the hearty manner young boys used in sex education literature long afterward, "Hi, mother, that paper you sent me was all right." "Did it fit the bill?" Dennett asked. "It sure did," he replied.[67] Carl's enthusiastic endorsement was only the beginning. His friends began borrowing the text, and Dennett's own friends and colleagues requested copies. Soon thereafter, the medical community took an interest in Dennett's explanation. *The Sex Side of Life* was printed in *The Medical Review of Reviews*, next to a glowing editorial review, in February 1918. Dennett began producing the text in pamphlet form. Copies were distributed by the YMCA, a chief purveyor of social hygiene literature, and used for instruction in the Union Theological Seminary and the Bronxville, New York public schools.

Despite the warm response to Dennett's pamphlet in educational and social science circles,[68] circulation of the pamphlet was beset by legal

65. The male physicians allied with female social hygienists were more interested in medical prophylaxis than in gender equality, and the new policies disproportionately targeted prostitutes and promiscuous young women. Luker, "Sex, Social Hygiene . . .," 619–20.

66. See below note 183 and corresponding text.

67. Lewis Gannett, "Books and Other Things," *New York Herald-Tribune*, March 20, 1930.

68. At her sentencing hearing, Dennett told Judge Burrows that the "total number of adverse criticisms which [she had] received by letter [had] been less than a dozen in eleven years, and all of those criticisms were purely of an academic character." Sentencing hearing,

difficulties. In 1922, Postmaster General Work declared *The Sex Side of Life* obscene and unmailable. Three years later, a second postmaster agreed and upheld the ban. Notwithstanding Dennett's repeated requests, the postal service refused to identify the offending characteristics or passages of the pamphlet.[69] Dennett solicited letters from senators and other prominent individuals in an effort to convince the postal service to reconsider the ban, but the campaign was unsuccessful.[70] Dennett believed her pamphlet was targeted in retaliation for her outspoken criticism of postal censorship practices, and she was outraged.[71]

After trying to reason with the postal authorities, Dennett began to consider her other options. Newspaper accounts, in order to make her a more sympathetic defendant, would later portray Dennett as a matronly grandmother who had been dragged into a humiliating judicial entanglement against her will. Many journalists quite consciously constructed Dennett as an unassuming figure, over Dennett's own objections.[72] According to most reports, Dennett's only ambitions were to educate her children and to help other mothers do the same; they painted the outspoken feminist as an appropriately modest woman, the unwitting victim of a ruthless legal assault. Dennett, however, resented this characterization. It was true that she was shy of publicity, and while her case was pending, she turned down all but one of the many speaking invitations she received.[73] But

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trial transcript 97, Second Circuit Case File 10712, United States Court of Appeals for the Second Circuit, in National Archives and Records Administration Northeast Region, New York, New York (hereafter NARA Northeast Region), Record Group 276.

69. In June 1925, Edgar Blessing, solicitor of the Post Office Department, confirmed that Dennett's pamphlet contained matter forbidden admission to the mails by Section 211 of the United States Penal Code but refused to indicate in writing which passages he considered objectionable. Edgar M. Blessing to Mary Ware Dennett, June 13, 1925, Dennett Papers, reel 22, file 463.

70. See, for example, Mary Ware Dennett to Senator William E. Borah, April 9, 1925, Dennett Papers, reel 20, file 415; and Mary Ware Dennett to Senator George Norris, April 7, 1925, Dennett Papers, reel 22, file 463.

71. Mary Ware Dennett to Florence Garvin, August 17, 1929, Dennett Papers, reel 21, file 436.

72. In the *New York Times*, Dennett urged the press to "mention the public work [she had] done during the last thirty years rather than to stress the individual facts of private life." Mary Ware Dennett, "Mrs. Dennett Excepts" (letter to the editor), *New York Times*, May 3, 1929. Although Dennett preferred to emphasize her accomplishments and public work, the newspapers refused to budge, because the fact that Dennett was a grandmother "carried great weight with the newspaper reading public." W. P. Beazell (editor for *The World*) to Mary Ware Dennett, May 1, 1929, Dennett Papers, reel 21, file 456.

73. Many organizations asked Dennett to speak at their functions, panels, and symposia during 1929 and 1930, but Dennett refused virtually all invitations. Mary Ware Dennett to Vine McCasland and Myra Gallert, March 1, 1929, Dennett Papers, reel 21, file 438.

Dennett, at 53 years of age and in robust health, had always taken a much more calculated and proactive approach to the law, and her own case was no exception.[74]

Dennett was intimately familiar with her potential allies in the effort to end postal censorship. As secretary of the NCLB, she had met or corresponded with most of the leaders of the interwar civil liberties movement, and she counted as friends and acquaintances many of the early board members of the ACLU.[75] The challenge, as she well knew, was to convince her former colleagues that sex education was part of the broader struggle for civil liberties.

The ACLU and Obscenity

Although the ACLU professed to make "no distinction as to whose liberties it defend[ed]" and to put "no limit on the principle of free speech,"[76] this sweeping language was misleading. The organization's leaders were, as a general matter, untroubled by "moral" censorship. The monthly ACLU bulletins reporting on the "civil liberty situation" occasionally included blurbs on obscenity cases, but the organization rarely took an aggressive stand on such prosecutions.[77] Even as rampant artistic censorship in Boston rendered the city a laughing stock in much of America, the ACLU remained largely aloof from the debate.

The censorship cases in which the ACLU did become involved almost invariably pertained to political speech[78] or to the prior restraint of expression, an issue with a very established pedigree.[79] The limits of

74. Dennett wrote in a letter that despite her "very real dread of the publicity" she was ready—indeed, "heartily glad"—to have the case proceed. Mary Ware Dennett to Morris Ernst, October 20, 1928, Dennett Papers, reel 23, file 485.

75. For example, John Haynes Holmes served as a vice president of the Voluntary Parenthood League.

76. Press Release, May 16, 1927, ACLU Records and Publications, reel 1.

77. See, for example, Report on the Civil Liberty Situation for Month of April 1926, ACLU Records and Publications, reel 1 (listing under the heading "freedom of the press" the acquittal in Boston of H. L. Mencken, the editor of the *American Mercury*, for "obscene and indecent" content).

78. See, for example, John S. Codman to Roger Baldwin, November 4, 1924, ACLU Papers, reel 37, vol. 260; and ACLU Press Release, April 28, 1927, ACLU Records and Publications, reel 1. Less commonly during this period, the ACLU participated in religion cases. See, for example, ACLU Bulletin No. 185, February 9, 1926, ACLU Records and Publications, reel 1.

79. Chafee, *The Censorship in Boston*, argued that prior restraint was untenable because it afforded too much discretion to individual government agents. The pamphlet was written by Baldwin but attributed to Chafee. Walker, *In Defense of American Liberties*, 83.

this enterprise were conspicuous to prewar free speech activists. In correspondence between Theodore Schroeder and Baldwin in 1918, the former complained that the ACLU was narrowing the scope of civil liberties to the political, to the exclusion of "the more personal liberties which are being very much invaded."[80] Baldwin, unpersuaded, dismissed these issues as peripheral to "the wider political question which we are discussing."[81]

In the mid-1920s, however, a new minority within the ACLU began to argue that obscenity prosecutions ought to receive more attention from the organization. The two most prominent voices for expansion were Arthur Garfield Hays and Morris Ernst, who were appointed general counsels during this transitional period.[82] As contemporaries of their ACLU colleagues (almost all of whom were born in the 1880s and came of age during the Progressive Era[83]), Hays and Ernst endorsed protective labor laws and distrusted judicial oversight in the economic realm. And yet, they were uneasy about state interference with personal conduct and beliefs. They defended free speech not because they thought it the surest way of securing radical economic change, or even of finding political truth, but because they recognized how rapidly public morality (as well as political ideology) shifted. They were skeptical that any overarching truth was ascertainable by anyone, let alone the government.

Although they were cynical about the process of judicial decision making, Ernst and Hays were lawyers. As such, they tended to favor the courts as a venue for protecting civil liberties.[84] Moreover, both maintained successful private law practices and regularly defended periodicals and

80. Theodore Schroeder to Roger Baldwin, November 27, 1917, ACLU Papers, reel 1, vol. 3. Schroeder mentioned such issues as Sunday regulations, the appropriation of public funds to religious institutions, the suppression of secularists and free thought lecturers, biblical instruction in public schools, the exemption of church property from taxation, compulsory medical licensing, optometry regulation, antiliquor and antitobacco laws, and laws regulating women's propriety and behavior. Theodore Schroeder to Roger Baldwin, December 4, 1917, ACLU Papers, reel 1, vol. 3.

81. Roger Baldwin to Theodore Schroeder, December 7, 1917, ACLU Papers, reel 1, vol. 3.

82. ACLU Bulletin 325, October 18, 1928, ACLU Records and Publications, reel 1; and ACLU Bulletin 391, February 14, 1930, ACLU Records and Publications, reel 2. In 1926, Baldwin invited Ernst to act as the organization's chief counsel, but Ernst preferred to serve in an informal capacity until his appointment as associate general counsel in 1930. Roger Baldwin to Morris Ernst, March 13, 1926, Ernst Papers, box 399, folder 3.

83. John Haynes Holmes was born in 1879; Hays in 1881; Frankfurter in 1882; Scott Nearing in 1883; Baldwin, John Nevin Sayre, and Norman Thomas in 1884; Albert DeSilver and Ernst in 1888; Elizabeth Gurley Flynn in 1890. A few members of the early leadership, including L. Hollingsworth Wood (born 1873) and Henry R. Linville (born 1866) were born earlier.

84. Only three of twenty executive committee members were lawyers in 1920. Walker, *In Defense of American Liberties*, 69.

publishing houses against obscenity charges. In these private censorship matters, they based their legal strategies on the long-term interests of their clients.[85] And their clients, though fully conversant in the language of "public good" and community enrichment, were unenthusiastic about submitting their investments to government review. They knew that respectability conferred certain advantages, but the costs of confiscation and prosecution far outweighed the benefits of official approval. Keeping the state out was best for the bottom line.

Relatively speaking, then, Ernst and Hays stood out as liberal individualists[86] in a circle of reformers and radical activists. Moreover, as Jews in an overwhelmingly Protestant movement, they came to the ACLU from different backgrounds and with different values.[87] By 1928, both were vocal opponents of censorship. In 1926, Hays had represented H. L. Mencken, editor of the *American Mercury*, in his notorious battle with Boston's Watch and Ward Society,[88] and he was celebrated as a hero in the Boston anticensorship campaign.[89] Meanwhile, Ernst was fighting censorship through multiple channels. In 1926, he testified before the Senate Committee of Interstate Commerce against the Dill Bill to

85. As was customary during this period, see, for example, Gordon, "Legal Profession," 319–20, both Hays and Ernst maintained lucrative private law practices in addition to their civil liberties work. Over the next decade, as the ACLU professionalized and increasingly focused on legal work, the national office (but not the local affiliates) began to employ full-time attorneys. See, generally, Kutulas, *American Civil Liberties Union*.

86. In October 1928, Arthur Garfield Hays debated the question "Is Liberalism a Menace" at the Ford Hall Forum. He argued that liberalism was the way forward and that radicalism was an ill-advised theory. Circular, Dennett Papers, reel 22, file 477.

87. Walker explains Ernst and Hays's aggressive libertarian stand on censorship of the arts on this basis. Walker, *In Defense of American Liberties*, 83 ("Thoroughly secularized Jews, they shared none of the puritanism of the ACLU Protestants."). The New England Protestants within the ACLU apparently shared this view. See, for example, John Haynes Holmes to Morris Ernst, January 16, 1940, Ernst Papers, box 5, folder 1 (attributing Holmes's "squeamishness in the field of censorship" to his "rigorous New England" upbringing and his "puritanical instinct"). As Jews, Ernst and Hays may also have been more invested in displacing religious moralism and promoting a secular worldview. See, generally, David A. Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth Century American Intellectual History* (Princeton: Princeton University Press, 1996).

88. Hays advised Mencken to provoke his own arrest by selling an issue of the journal containing an allegedly true story by Herbert Asbury, entitled "Hatrack," about a small-town prostitute. He then succeeded in getting the charges dismissed. When the postal service nonetheless refused to mail the April issue of *American Mercury*, Hays sought and won an injunction.

89. It was Hays's representation of Mencken in the postal matter that prompted Dennett to seek his assistance in 1926. Arthur Garfield Hays to Mary Ware Dennett, May 25, 1926, Dennett Papers, reel 21, file 441.

restrict broadcasting. He advocated the free use of radio for the expression of public opinion, cautioning that "[o]nce the country has become accustomed to censorship of broadcasting, it is but an easy step to the censorship of newspapers."[90] And while he was certainly concerned about the suppression of political speech,[91] he was eager to protect artistic expression as well. In 1927, Ernst unsuccessfully defended John Herrmann's *What Happens*, an unremarkable book containing an apparently objectionable profanity, before a New York jury.[92] In the wake of the defeat, he undertook a systemic study of obscenity censorship in America. His 1928 book, *To the Pure: A Study of Obscenity and the Censor*, coauthored with William Seagle, was a scathing critique of the obscenity laws.[93]

Notwithstanding their opposition to the vice societies, Ernst and Hays tended to separate their service to the ACLU from their private (and usually remunerative) anticensorship work. By the late 1920s, however—just as Ernst and Hays were gaining influence within the ACLU—the organization's agenda was in flux. After several years of largely haphazard expansion in its activities, the ACLU leadership lacked the clarity of its early vision, and a revised statement of principles and commitments was in order. Meanwhile, the mounting success of civil liberties claims in the courts commended litigation as a strategy for reform, and afforded a new measure of power to the organization's lawyers. In November 1928, Ernst proposed to the National Committee the expansion of the ACLU's activity to include censorship of the movies and talkies, and the committee approved the addition.[94] And yet, as late as 1929, the organization stated that whereas it opposed advance censorship of any kind, prosecution of a published work on obscenity grounds was not a civil liberties concern.[95] Despite their public position, however, many ACLU members had begun to reassess their views on this issue.

90. ACLU News Release, February 26, 1926, ACLU Records and Publications, reel 1.

91. His proposed amendments to the bill involved political and economic provisions.

92. Lewis Gannett attributed Ernst's commitment to the anti-censorship cause to his loss in that case. Lewis Gannett, "Books and Things," *New York Herald-Tribune*, December 9, 1933.

93. Morris L. Ernst and William Seagle, *To the Pure: A Study of Obscenity and the Censor* (New York: The Viking Press, 1928). *To the Pure* stressed the deleterious effect of censorship on public knowledge (as well as the arbitrariness of the criminal censorship laws), an argument that was convincing to D. H. Lawrence, among others. Letter from D. H. Lawrence, November 10, 1928, Ernst Papers, box 5, folder 3.

94. National Committee Minutes, November 12, 1928, ACLU Records and Publications, reel 1.

95. In fact, Baldwin insisted that "the best way to control . . . downright obscenity is by criminal prosecution" after the fact. Roger Baldwin to Mary E. McDowell, February 25, 1929, ACLU Papers, reel 63, vol. 360.

In February 1929, Roger Baldwin, on behalf of the Executive Committee, urged a formal clarification and extension of the organization's objectives. Baldwin told members of the large and respectable National Committee that "the policy of the American Civil Liberties Union since its foundation has been to protect the civil liberties described as 'freedom of speech, press, and assemblage'" and occasionally, if incidentally, the "right to be free from unreasonable searches and seizures."[96] But these rights, he emphasized, were not the only ones protected by the state and federal constitutions. The letter laid out several avenues for expansion, ranging from civil rights and criminal defense to opposition to the draft and American imperialism. Among its various proposals was opposition to the censorship of books, plays, radio, and movies, although the committee likely intended to curb political censorship rather than foster artistic freedom.

The members of the National Committee were open to some changes and hostile to others. In response to criticism, the Executive Committee promised not to take on such issues as the rights of criminal defendants, civil liberties in areas under American military control, or the validity of the draft ("as a violation of liberty of conscience, instead of as now, opposition only to interference with agitation against it"[97]). A few members of the National Committee, including labor activist and University of Chicago Settlement House Director Mary McDowell, opposed any new involvement in censorship work.[98] Most, however, supported or at least accepted the ACLU's recommendations with respect to censorship.

A letter to Baldwin from Harvard Law professor and future Supreme Court justice Felix Frankfurter cogently expressed concerns shared by much of the National Committee.[99] Frankfurter argued against diluting the ACLU's message and spreading its resources too thin. He explained:

> I am emphatically for a restriction of *the* Union to the protection of freedom of speech, press and assembly, and equally emphatically against assuming responsibility for the protection of negroes, the promotion of pacific ideals, the resistance of economic penetration in Latin-America, etc., etc., etc.,

96. Roger Baldwin to the National Committee, February 14, 1929, ACLU Papers, reel 63, vol. 360.

97. Roger Baldwin to the National Committee, April 5, 1929, ACLU Papers, reel 63, vol. 360. Ironically, the NCLB had been founded precisely to oppose the draft as a violation of individual conscience. See Weinrib, "Liberal Compromise," 68–80.

98. In response to McDowell's letter, Baldwin sought to frame the censorship proposal as a clarification rather than expansion of the ACLU's position on censorship. Roger Baldwin to Mary E. McDowell, February 25, 1929, ACLU Papers, reel 63, vol. 360.

99. Felix Frankfurter to Roger Baldwin, February 16, 1929, ACLU Papers, reel 63, vol. 360.

except in so far as activities or opinions in regard to the foregoing or any other item, like birth control, raise questions of freedom of speech, press, and assembly."[100]

Frankfurter wanted the ACLU to be interested in such issues as civil rights, pacifism, internationalism, and birth control only to the extent that they implicated the freedom to espouse those causes. He reasoned: "[I]t is one thing to 'back up' local groups that seek to gain a hearing for birth control; it is a totally different thing to 'back up' that local group in securing birth control legislation. The former is the Union's essential concern; the latter is none of the Union's business."[101]

Frankfurter, along with an increasing contingent of civil libertarians, was ready to defend speech regardless of its viewpoint. But he had a particular kind of speech in mind: namely, speech advocating political or economic change, or access to the democratic process. As a progressive veteran of the post-World War I civil liberties movement, that is what "free speech" meant to him and to the majority of his colleagues. A more libertarian position on artistic censorship would require a major change in public values as well as the law. That change found an unexpected form in *United States v. Dennett.*

United States v. Dennett

In 1926, Mary Ware Dennett proposed a legal challenge of the Comstock laws to Arthur Garfield Hays. She hoped a court might be persuaded to enjoin the postal service from censoring *The Sex Side of Life*. Hays was sympathetic to the project, but he thought their chances slim and counseled Dennett to wait for a more opportune moment.[102] The problem, he explained, was the standard of review. A court would declare the postal ruling invalid only if it was "arbitrary and wholly without foundation," a decidedly difficult hurdle. Dennett's pamphlet was explicit in its description of sex, and if a court considered its propriety subject to debate, it would uphold the ban.[103] In other words, in the mid-1920s, postal suppression of Dennett's pamphlet was so clearly lawful that a renowned civil liberties attorney considered it imprudent to bring a test case. No court

100. Ibid. (emphasis in original).

101. Felix Frankfurter to Roger Baldwin, March 1, 1929, ACLU Papers, reel 63, vol. 360.

102. Arthur Garfield Hays to Mary Ware Dennett, May 21, 1926, Dennett Papers, reel 21, file 441.

103. Dennett continued to write to Hays periodically for over a year. In October 1927, Hays finally, frankly advised her that "there would be very little chance of obtaining an injunction," and she let the matter drop. Arthur Garfield Hays to Mary Ware Dennett, October 4, 1927, Dennett Papers, reel 21, file 441.

was likely to consider the censorship inappropriate, much less declare it contrary to legislative intent or, even more radically, unconstitutional.

Two years later, Dennett had better luck. When Morris Ernst published an article attacking censorship, she wrote to him about her plight. Responding to her overture, Ernst told her that he had followed her work for years and asked whether she had "ever considered testing out the legality of the pamphlet in the courts."[104] Dennett was forthright about Hays's discouraging advice.[105] Nonetheless, after some initial hesitance, Ernst enthusiastically devoted himself to Dennett's case, and he promptly began exploring possibilities for getting *The Sex Side of Life* into court.

Postal authorities beat Ernst and Dennett to the punch. Despite the postal ban, a resolute Dennett had continued to send her pamphlet through the mail in sealed envelopes throughout the 1920s.[106] The postal service quietly tolerated her defiance until 1928. In that year, however, in purported response to a complaint by members of the Daughters of the American Revolution, the Post Office Department ordered *The Sex Side of Life* from Dennett under a fictitious identity.[107] Dennett obligingly mailed out a copy of the pamphlet.[108] Soon thereafter, in December 1928, she was indicted under the Comstock Act in the Federal District Court sitting in Brooklyn, the jurisdiction in which her Astoria, Queens home was located. Dennett faced a maximum sentence of 5 years in prison and a $5000 fine.[109] Ernst immediately agreed to represent her (he donated his time at both the trial and appellate levels[110]), and he convinced the ACLU to sign on as well.

104. Morris Ernst to Mary Ware Dennett, August 30, 1928, Dennett Papers, reel 23, file 485.

105. Mary Ware Dennett to Morris Ernst, September 1, 1928, Dennett Papers, reel 23, file 485.

106. The postal service was legally prohibited from opening sealed envelopes. Even during the litigation, Dennett never stopped circulating the pamphlet, though she did so by express. "Author of Sex Guide Wins Plea," *Los Angeles Times*, March 4, 1930.

107. American Civil Liberties Union, *The Prosecution of Mary Ware Dennett for "Obscenity"* (New York: American Civil Liberties Union, 1929), 3–4, in Dennett Papers, reel 23, file 481.

108. The fact that *Dennett* was litigated as a criminal matter helped her case immensely. Ernst, however, was disappointed that he would not be able to seek an injunction as he had hoped. Mary Ware Dennett to Vine McCasland and Myra Gallert, March 1, 1929, Dennett Papers, reel 21, file 438.

109. ACLU Bulletin 352, April 26, 1929, ACLU Records and Publications, reel 2.

110. Executive Committee Minutes, April 29, 1929, ACLU Records and Publications, reel 2. Ernst insisted on representing Dennett without compensation, despite her reluctance to accept charity. In January 1929, Dennett accepted ACLU sponsorship of the appeal "[o]n the basis that this sort of a fight does involve more than the victim's welfare." Mary Ware Dennett to Vine McCasland, March 1, 1929, Dennett Papers, reel 21, file 438. Meanwhile, an "unknown

When the ACLU agreed to sponsor Dennett's case, no one on the Executive Committee was advocating a full-scale assault on the obscenity laws. Rather, still reeling from their divisive role in the *Scopes* trial—in which National Committee member Clarence Darrow, despite the board's repeated entreaties, had ridiculed religious fundamentalism rather than emphasizing pluralism and academic freedom as instructed—they saw Dennett's prosecution as another opportunity to defend a contentious contribution to modern science from the censorial reach of the state. This time, they hoped, they could do so without triggering public resentment.[111] According to ACLU literature, *The Sex Side of Life* contributed to an important public discussion about sexual hygiene and sexual relations within marriage. No one, they insisted, actually thought the pamphlet was "obscene" in any legitimate sense of the word; squeamish, if not vindictive, authorities were using the obscenity laws to quell discussion on an important but uncomfortable social issue.

Ernst's strategy in the District Court was consistent with the ACLU's expectations. His first act as Dennett's attorney, in January 1929, was to file a motion to quash her indictment. That is, he asked Grover M. Moscowitz, the presiding judge, to rule that *The Sex Side of Life* was not obscene as a matter of law. To do so, he sought to portray the pamphlet as an irreproachable example of good, clean sex education—in the words of one of its medical endorsers, as "[t]he simplest, sweetest, most direct treatment of the subject" ever produced.[112] Adolescents are not satisfied with cryptic allusions, Ernst suggested, and when no appropriate literature exists, they rely on the "filthy misinformation of the streets, the dirty words chalked upon signboards and the obscene gossip of other

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Cambridge woman," Frances W. Emerson, sent Dennett $1000, essentially bankrolling her for the duration of the defense. Mary Ware Dennett to family, May 8, 1929, Dennett Papers, reel 21, file 433. Emerson—who was married to William Emerson, the Dean of Architecture at M.I.T. (where Dennett's ex-husband, also an architect, had once studied)—was an active philanthropist and was eager to assist in Dennett's case. When she became aware of Dennett's financial difficulties, she asked her to "keep [her] check for [her] own personal expenses." Frances W. Emerson to Mary Ware Dennett, May 20, 1929, Dennett Papers, reel 20, file 431.

111. See Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (Cambridge: Harvard University Press, 1997), 73–83. The principal exception was Darrow's law partner, Arthur Garfield Hays, who vehemently defended his approach. Unsigned letter to Felix Frankfurter, 10 November 1926, ACLU Papers, reel 44, vol. 299 (describing the positions of various members of the ACLU leadership). Ernst repeatedly compared Dennett's case to the *Scopes* trial. Mary Ware Dennett to Rae Morris, May 9, 1929, Dennett Papers, reel 21, file 449.

112. Memorandum in support of motion to quash indictments, 8, Dennett Papers, reel 23, file 490.

children."[113] By contrast, the truth, unadorned and respectful, was not obscene.

Ernst also urged the court to consider the motives and circumstances of publication.[114] Dennett's rationale for producing the pamphlet—her belief that existing sex education literature was inadequate because it did not grapple with the physical, moral, or emotional implications of sex—was, according to Ernst, "in complete accord with modern scientific thought." The fact that Dennett produced the pamphlet "as an unselfish social service,"[115] rather than to make money, confirmed that her motives were pure.[116]

In short, rather than challenge the existing definition of obscenity, Ernst argued that *The Sex Side of Life* was safely outside its realm. The pamphlet, he insisted, "is neither smut nor pornography. There is not a dirty word or a dirty thought in it."[117] His memorandum in support of his motion to quash the indictments quoted at length from a pamphlet produced by the New York State Department of Health describing a need for comprehensive sex education materials of precisely the kind Dennett had produced.[118]

In the face of Ernst's argument, Judge Moscowitz felt inadequate to the task of assessing the pamphlet's character. He therefore proposed an open hearing at which representatives from both sides would express their opinions of the pamphlet. And he called three members of the clergy—a Catholic priest, a Protestant minister, and a Jewish rabbi—to join him on the bench during arguments and to "aid the conscience of the court on the matter."[119] All of this may sound like the setup for a joke. And, indeed, the exaggerated rhetoric of the prosecuting attorney, United States District Attorney James E. Wilkinson, seems comical in retrospect. Wilkinson denounced "*The Sex Side of Life* [as] pure and simple smut."[120] "If I can stand between this woman and the children of the land," he proclaimed in court, "I will have accomplished something."[121]

113. Ibid.

114. Ibid., 4.

115. Ibid., 5.

116. In reality, Dennett always had her precarious financial situation in mind. When the *Medical Review of Reviews*, a professional journal, offered to publish the essay, she expressed reluctance to publish without compensation.

117. Ibid., 8.

118. Ibid., 9–11.

119. ACLU, *Prosecution of Mary Ware Dennett*, 4.

120. Ibid., 6.

121. Ibid. An article in *The Nation* wrote of Wilkinson, "He learned his fundamentalism in Georgia where he was born." Dudley Nichols, "Sex and the Law," *Nation*, May 8, 1929, 552–54, at 553.

To Moscowitz, however, the issues were serious. Although he privately believed that Dennett's pamphlet was not obscene, he did not feel comfortable deciding the issue without submitting it to a jury.[122] To make matters worse, Moscowitz was facing legal difficulties of his own—charges of misconduct in an unrelated matter—and he feared the publicity that might attend a decision either way in the highly publicized *Dennett* case. As it turned out, Moscowitz never made use of his clerical guests;[123] instead, he permitted the parties to submit written statements. Ernst chose a representative sample from the scores of endorsements the pamphlet had received, and Wilkinson submitted a collection of letters solicited in opposition. Even then the decision was too much for Moscowitz, and he delayed the trial yet again. After a series of postponements, he simply punted. With apologies, he convinced Ernst to have the case transferred.[124] Ernst thereupon withdrew his motion to quash the indictment and filed a demurrer instead, which brought the matter before another judge, Marcus B. Campbell. Judge Campbell heard argument from Ernst and Wilkinson on the demurrer, which he denied. He then reassigned the case on the theory that Ernst would no longer want him to preside over the matter.

Dennett's case finally went to trial in April 1929, before Judge Warren B. Burrows. The only evidence submitted to the jury, despite Ernst's best efforts, was the pamphlet itself. Burrows excluded all evidence of Dennett's motives as well as the approval of the pamphlet by educators and physicians.[125] The all-male jury returned a guilty verdict in under an hour.[126] Dennett was fined $3000, but she refused to pay and declared

122. Moscowitz told Ernst that had he retained the case, he would have sent it to the jury, but "if he had been on the jury he would have voted for acquittal." Mary Ware Dennett to Vine McCasland and Myra Gallert, March 13, 1929, Dennett Papers, reel 21, file 438.

123. Moscowitz canceled the hearing at the last minute on the grounds that they were contributing to unseemly publicity. ACLU, *Prosecution of Mary Ware Dennett*, 4. After Dennett's conviction, Wilkinson claimed in argument before Judge Burrows that all three of the clergy members consulted by Judge Moscowitz had privately considered the pamphlet inappropriate. Motion to Set Aside the Verdict, Trial Transcript 93, NARA Northeast Region, Record Group 276.

124. Dennett confided to her close friends that Moscowitz feared a favorable decision in her case would be used against him by his "enemies" and "practically beg[ged]" Ernst to have the case transferred to another judge. Mary Ware Dennett to Vine McCasland and Myra Gallert, March 7, 1929, Dennett Papers, Reel 21, file 438. Eventually, Moscowitz convinced Ernst to accept a transfer on the condition that the letters submitted in support of the pamphlet would become a part of the court record—a provision that Judge Campbell later declared invalid. Mary Ware Dennett to Vine McCasland and Myra Gallert, March 13, 1929, Dennett Papers, reel 21, file 438.

125. ACLU, *Prosecution of Mary Ware Dennett*, 4.

126. Several explanations were offered for the jury's behavior, which seemed so inconsistent with public opinion. First, and most important, outside assessments of the pamphlet were

that she would serve out her prison term instead.[127] Ernst promptly filed an appeal.

Although Ernst's strategy did not avail Dennett in the District Court, he was optimistic about persuading the appellate judges to reverse her conviction. He hoped that public outrage over the lower court's decision would carry weight on the appellate level. He devoted the bulk of the brief to arguing that the District Court improperly excluded evidence of Dennett's motivations and of the pamphlet's positive reception, and that the case should never have gone to trial.[128]

But he also made a series of powerful substantive claims about the Comstock Act that moved beyond his arguments at trial. First, he argued that *The Sex Side of Life* did not fall within the category of obscenity as it *ought* to be defined. In his brief, Ernst traced the history of obscenity in the law and argued that the "essence of the crime is sexual *impurity*, not sex itself." A publication such as Dennett's, which neither was impure nor "*pander*[ed] to the prurient taste," was not properly within the meaning of the statute.

In this regard, Ernst's rhetorical task was to portray *The Sex Side of Life* as an "honest presentation of sex facts," firmly planted in an educational mission. He was at pains to distinguish the pamphlet from those modes of speech deemed subject to regulation in the past: "lurid literature and advertisements distributed by quacks to beguile the public into buying worthless nostrums" (that is, the information on birth control that had once been grist for the Comstock Mill); "violent attack[s] on religion or

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kept from the jury. Secondly, potential jurors were excluded if they were familiar with sex education literature. Dudley Nichols, in his article for *The Nation*, offered a third possible explanation: "mankind's universal sex fears." Nichols, 554. The sex composition of the jury was also notable. As women were ineligible to serve on juries in New York until 1937, Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), 142, all twelve members of the jury in Dennett's case were men. Influenced perhaps by their verdict, Ernst became a strong advocate of gender inclusion in the jury system. In a 1931 article, he explained: "In the final analysis law is nothing more [or] less than the expression of the wishes, the customs and the modes of the people. With the jury composed only of men the jury system must fail because it represents only one-half of the population." "Take Your Choice—Should Women Serve on Juries?" *New York American*, 15 June 1931.

127. Dennett was willing to serve time in prison to help the anti-censorship cause. Mary Ware Dennett to family, May 8, 1929, Dennett Papers, reel 21, file 433. Because the appeal was successful, however, she was never imprisoned.

128. Ernst also presented a technical deficiency (insufficiency of indictment), but he urged the court to decide the case on the merits rather than relying on "legalistic grounds." The fact that the judges complied suggests that they wanted to reach the merits of the case. Appellant's Second Circuit Brief 40–42.

religious customs"; "newspaper reports of crime, immorality or fornication"; "defense[s] of illegitimacy or moral laxity"; and "forthright pornography." And Dennett's book was indeed a departure from these earlier forms of sexualized literature, some informative, some prurient.[129]

Ernst also made a bolder argument on appeal: he claimed that the Comstock law was unconstitutional. He argued first that the federal government had exceeded its authority in propagating the statute—that control over people's morality had never been relinquished to it. He cautioned that if the obscenity law were deemed constitutional, the government would be empowered to enforce a federal moral standard that might directly conflict with the local standards of the various states, to which such decisions were entrusted.[130] But Ernst, unlike the historical predecessors he cited, did not merely suggest that the statute fell outside the federal power to control the post roads under Article I, Section 8 of the Constitution. He also argued that it flatly contravened the First Amendment to the Constitution of the United States.[131]

Ernst was not naïve about his chances. The Supreme Court had ruled in *Ex parte Jackson* that the freedom of the press did not prevent Congress from excluding pamphlets from the mail, and it had given no indication that it was about to change its mind.[132] Indeed, Ernst conceded that obscenity statutes repeatedly had been deemed constitutional by the federal courts.[133] He nonetheless contended that changing public mores warranted reconsideration of the issue. Most important, he sought to extend the powerful rhetoric of Justices Holmes's and Brandeis's dissents in the Supreme Court's recent First Amendment cases, which dealt with political speech, to the obscenity context. For example, he quoted from Justice Holmes's dissenting opinion in *United States v. Schwimmer*: "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[134]

In 1930, the vast majority of what today falls within the scope of the First Amendment was beyond its purview. Even in the realm of political speech, few interwar free speech advocates believed that the Founders had anticipated and enshrined in the Constitution a robust vision of freedom of expression. Rather, ACLU attorneys sought consciously to write free speech into the First Amendment. Law, to these critics of

129. Ibid., 12, 13, 15, 16 (emphasis in original).
130. Ibid., 52–53.
131. Ibid., 9, 52.
132. *Ex parte Jackson*, 96 U.S. 727, 735 (1877).
133. Memorandum in support of motion to quash indictments, 53.
134. Ibid., 57; *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929).

Lochner-era legalism, was not a vehicle for protecting natural rights. It was a political tool.[135] And whereas Ernst's First Amendment argument was predictably unavailing, the fact that he made it at all reflects a sense of new possibility. He argued that the Comstock law was unconstitutional because he believed there was a fighting chance that the Second Circuit would agree.

Judge Augustus N. Hand, writing on behalf of a three-judge panel,[136] accepted the spirit of Ernst's argument if not its implications. Hand. although less prominent and less eloquent than his famous first cousin, Learned, would go on to author some of the most influential obscenity decisions of the 1930s. In *Dennett*, he insisted that there could be no doubt about the constitutionality of the statute, but he nonetheless reversed the conviction on the basis that *The Sex Side of Life* was not obscene. The decision implicitly modified the "*Hicklin* test," imported by a federal circuit court 50 years earlier in *United States v. Bennett*,[137] according to which a work could be judged obscene on the basis of a single passage that would corrupt the youth, the most susceptible of audiences.[138] Judge Hand's opinion in *Dennett* was more permissive. A sex education pamphlet such as Dennett's might have an "incidental tendency to arouse sex impulses," he explained, but that effect was "apart from and subordinate to its main effect." Any sex instruction might titillate some of its readers, but in Dennett's case, this tendency "would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear." A work must be judged in its entirety; an explicit passage in a truthful and socially

135. Morris Ernst conveyed this idea in a letter: "Before any person is appointed to the bench in the future, there should be a very stringent cross examination by the proper committees of Congress as to the man's economic faith. It is about time that we got away from the idea that there is such a thing as a good lawyer or a bad lawyer. He is either a man of our prejudices or of other prejudices." Morris Ernst to Heywood Broun, May 21, 1935, Ernst Papers, box 8, folder 2.

136. The other judges were Judges Thomas W. Swan and Harrie B. Chase.

137. *United States v. Bennett*, 16 Blatchf. 338 (Circuit Court, Southern District of New York, 1879). In *Bennett*, the defendant had been convicted of mailing a pamphlet advocating the legalization of prostitution. Judge Samuel Blatchford affirmed the District Court's application of the "*Hicklin* test," named for the 1868 British case, *Regina v. Hicklin*, from which it was derived. In that case, Lord Chief Justice Cockburn had inquired "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." *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868).

138. The *Hicklin* decision was motivated by concerns about the corruption of youth, and it defined as obscene any material that would elicit in "the young of either sex . . . thoughts of a most impure and libidinous character." Ibid. It is ironic that the Second Circuit chose to abandon this emphasis in the *Dennett* case, which involved a pamphlet explicitly addressed to "young people."

constructive sex education pamphlet would not render the whole work obscene. In sum, the court held, "an accurate exposition of the relevant facts of the sex side of life in decent language and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene."[139]

Dennett was decided as a matter of statutory interpretation. Modest in its reasoning, it left the Comstock Act more or less intact. And yet, it signaled the end of judicial deference to postal censorship. Judge Hand's opinion meant that judges would henceforth subject administrative determinations of obscenity to genuine examination. Moreover, it acknowledged for the first time that sexual matters were not always or necessarily destructive of social values. Indeed, its basic recognition of a public interest in sex laid the groundwork for the Supreme Court's mid-century extension of First Amendment protection to sexually explicit speech.[140]

Despite her relief, Dennett refrained from celebrating for several days while the government decided whether to appeal the case to the Supreme Court. The United States attorney filed a request to do so,[141] but the solicitor general, Thomas T. Thacher, decided to let the Second Circuit's decision stand. According to Thacher, *Dennett* was a mere factual dispute unworthy of consideration by the Supreme Court.[142] In reality, the Second Circuit's decision effected a very real change in the law of obscenity. But public opposition to the case, along with the possibility of an adverse judgment in the Supreme Court, no doubt dissuaded Thacher from pursuing the issue.

139. *United States v. Dennett*, 39 F.2d 564, 569 (Second Circuit, 1930). The ACLU announced the reversal of Dennett's conviction in ACLU Bulletin 394, March 6, 1930, ACLU Records and Publications, reel 2.

140. In *Roth v. United States*, 354 U.S. 476, 487 (1957), Justice Brennan wrote on behalf of a six-justice majority of the Supreme Court that "[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Sex, he explained, "is one of the vital problems of human interest and public concern." He then went on to reject the *Hicklin* test as an abridgement of First Amendment freedoms and to adopt the modified common law test —"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"—as the new constitutional standard. Ibid., 489. Gerald Gunther described a similarly delayed constitutionalization of statutory interpretation in the context of Learned Hand's "direct incitement" test in the *Masses* case.

141. Howard W. Ameli, the United States Attorney for the Eastern District of New York, initially announced that he would seek appeal. "Plan New Appeal in Dennett Case," *World*, March 5, 1930.

142. Department of Justice Press Release, June 5, 1930, quoted in Felix Frankfurter, "The Business of the Supreme Court at October Term, 1929," *Harvard Law Review* 44 (1930): 1–40, 19, n. 22.

A few years after *Dennett*, Morris Ernst would declare: "The decisions of the courts have nothing to do with justice. . . . [T]he point of view of the judge derives from the pressure of public opinion."[143] Ernst's claim is an oversimplification, but it rang true in the *Dennett* case. Many prominent men and women, along with myriad organizations and members of the clergy, had rallied to Dennett's defense.[144] In her letters to her family, Dennett described an outpouring of assistance and encouragement from all reaches of society. "The support for the case is rolling up till it looks like a mountain range," she reported. Aid was forthcoming from organizations as well as private citizens. The *New Republic* donated its back cover to the Defense Committee. Associations and universities issued official statements on Dennett's behalf. Old friends and colleagues from Dennett's suffrage and Voluntary Parenthood League days, including muckraker Ida Tarbell, re-established correspondence and offered to help, and hundreds of strangers sent letters, donations, and orders for *The Sex Side of Life*.[145] Dennett was most touched by the support she received from ordinary people, including an Italian worker, whose letter Dennett had translated by a neighbor,[146] and a "colored" man who offered to serve Dennett's sentence in her stead.[147]

When the decision was announced, newspapers throughout the country ridiculed the prosecution and congratulated Dennett on her

143. Draft of Interview between Thomas Stix and Morris Ernst, January 23, 1935, Ernst Papers, box 11, folder 3. In the *Married Love* case, which was patterned on *Dennett* and litigated the following year, Ernst's office circulated requests for letters of support on the theory that obscenity "is measured not by the application of a statute, but by public opinion," and that "public opinion could best be crystallized in getting the opinions of representative persons in the community." Alexander Lindey to Messrs. G. P. Putnam's Sons, September 24, 1930, Ernst Papers, box 359, folder 1. Ernst adopted the same practice in the *Ulysses* case, discussed below at note 228 and corresponding text. In his brief to the Second Circuit, he argued that the law "is a living organism subject to growth and change in precisely the same manner as society itself" and that "[p]ublic approval should mean . . . legal vindication." Brief for Claimant-Appellee, Second Circuit Case File 13326, United States Court of Appeals for the Second Circuit, NARA Northeast Region, Record Group 276.

144. "Mrs. Dennett Freed in Sex Booklet Case," *New York Times*, March 4, 1930. Private congratulations poured in. See, for example, B. W. Huebsch to Mary Ware Dennett, March 3, 1930, Dennett Papers, reel 20, file 423; telegram from Rupert Hughes (historian and screenwriter) to Mary Ware Dennett, March 3, 1930, Dennett Papers, reel 20, file 423. John Dewey, who chaired the Defense Committee for some time, wrote: "I don't know when I have had such a spontaneous outburst of elation. I feel as if I had been let out of jail myself." John Dewey to Mary Ware Dennett, March 3, 1930, Dennett Papers, reel 20, file 423.

145. "Some enemies" came out of the woodwork as well. Mary Ware Dennett to family, May 8, 1929, Dennett Papers, reel 21, file 433.

146. F. Mazsella to Mary Ware Dennett, April 26, 1929, Dennett Papers, reel 21, file 433.

147. Mary Ware Dennett to family, May 2, 1929, Dennett Papers, reel 21, file 433; and James Layne to Mary Ware Dennett, April 26, 1929, Dennett Papers, reel 21, file 444.

victory.[148] Journalistic support may have been particularly enthusiastic given the financial and editorial interests at stake. One might suppose, for example, that Scripps-Howard newspaper publisher Roy Howard agreed to chair the Dennett Defense Committee because the prospect of leniency in the obscenity laws appealed to his business sense as well as his aesthetic sensibilities.[149] But whatever the underlying motivation, coverage of the Second Circuit decision was unqualifiedly exuberant. The *Kansas City Star* considered it "preposterous that [Dennett] should have been put to trial."[150] *The World* called the reversal of Dennett's conviction "a denial of the archaic idea on which this prosecution rested and which threatened free thought so seriously," a decision "manifestly of the first importance."[151] Lewis Gannett of the *Tribune* labeled *Dennett* "an historic case, a landmark in the history of America's attitude toward sex,"[152] and he hailed the court's decision as a clarion call for broader reform.

The ACLU was effusive, calling the Second Circuit's decision "an outstanding victory for free speech," which would dissuade the government from bringing future prosecutions.[153] Dennett too was gratified by the outcome.[154] Ernst, however, was less sanguine. Certainly, he was pleased by Judge Hand's opinion and its vindication of *The Sex Side of Life.* He nonetheless regretted that the decision did not undermine postal censorship more broadly.[155]

In this context, a final point about Ernst's litigation strategy bears mentioning. It is a prerogative of the lawyer to argue in the alternative: to set out multiple and even inconsistent theories according to which a court

148. Dolores Flamiano has examined the press coverage of the Dennett case in depth, and it bears out Dennett's claim in *Who's Obscene* that the vast majority of newspaper stories were celebratory. Dolores Flamiano, "*The Sex Side of Life* in the News: Mary Ware Dennett's Obscenity Case, 1929–1930," *Journalism History* 25 (1999): 64–74.

149. Newspaper support, in turn, likely helped to sway public opinion in Dennett's favor. This phenomenon may help explain the public relations disaster that was the prosecution. Although many organizations and individuals had endorsed "The Sex Side of Life" before the *Dennett* trial was in the news, public support was far more forthcoming in the wake of the pro-Dennett coverage. But regardless whether Americans were predisposed to Dennett's side or rather were convinced by friendly journalistic portrayals, the crucial point is that they eventually came to support her and her cause.

150. "Common Sense on a Sex Pamphlet," *Kansas City Star*, March 5, 1930.

151. "Mrs. Dennett Vindicated," *World*, March 6, 1930.

152. Lewis Gannett, "Books and Other Things," *Tribune*, March 20, 1930.

153. ACLU Bulletin 395, March 13, 1930, ACLU Records and Publications, reel 2.

154. "Mrs. Dennett Freed in Sex Booklet Case," *New York Times*, March 4, 1930.

155. Ernst seems to have better appreciated the magnitude of the victory in retrospect, particularly when vice crusaders held it up as their principal obstacle to enforcement of censorship laws. Morris Ernst to Mary Ware Dennett, December 31, 1934, Dennett Papers, reel 20, file 414.

might reach a decision for the litigant. In the *Dennett* case, Ernst did precisely that. The Second Circuit reversed Dennett's conviction not because *The Sex Side of Life* expressed the author's imagination or because it evoked an intellectual response in the reader or even because it did no harm, but rather because it enhanced the public good. Although it was drafted a full decade after World War I, Ernst's brief supplied the court with a progressive vision of free speech: "[I]f enlightenment and breadth of vision are necessary to social welfare; if it is right to try and banish ignorance from a realm of human study where taboos and truth-dodging have been definitely established as the causes of incalculable harm in the past, then the judgment of conviction must be set aside, and the defendant discharged."[156] Ernst argued throughout the proceedings that Dennett's pamphlet deserved protection because it was of substantial social value. This was a position that the Second Circuit proved willing to accept.

And yet Ernst also gestured, in conclusion to his brief, toward a bolder principle. "[E]ven if the pamphlet were not educational, even if it were utterly worthless," he suggested, "the mere fact that it deals with sex would not bring it within the statute." He clarified:

> [T]o be obscene within the meaning of the law [the pamphlet] must be more than coarse, vulgar or indecent, more than scurrilous and vicious, more than indelicate and shocking to the sense of modesty of the community, more than offensive to the institutions, ideals and doctrinal conceptions of the people. *It must be found to have a lewd, lascivious and obscene tendency calculated definitely to corrupt and undermine the minds and morals of the community*. . . .[157]

Put simply, Ernst argued that regardless of social worth, all expression should be permissible unless its principal purpose was to pollute public morals.[158] In doing so, he urged the court to break from precedent and accept a radical new vision of free speech.

Ernst would litigate dozens of obscenity cases over the next decade, winning most of them.[159] The early cases involved "wholesome" materials

156. Appellant's Second Circuit Brief, 14.

157. Ibid., 61 (emphasis in original). Ernst's distinction anticipates but does not precisely track the distinction between high- and low-value speech in contemporary First Amendment law, articulated by the Supreme Court in *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942).

158. He would later caution that an exception for "clearly" obscene language would result in "the censor winning all cases." Morris Ernst to Roger Baldwin, February 4, 1938, ACLU Papers, reel 157, vol. 1081.

159. Books that Ernst successfully defended in the New York state courts include Radclyffe Hall's *Well of Loneliness*, Arthur Schnitzler's *Casanova's Homecoming*, *Hsi Men Ching*, Clement Wood's *Flesh*, Octave Mirbeau's *Celestine*, Louis Charles Royer's *Let's Go Naked*, and Erskine Caldwell's *God's Little Acre*, among others.

of the *Dennett* variety. Over time, however, Ernst became more ambitious. Still citing *Dennett* as a central precedent, he defended a body of literature and illustrations that verged increasingly on the pornographic.[160] It is evident from Judge Hand's decision that in 1930 the courts were not yet ready to accept this approach, which would have removed government from the business of deciding which ideas are good for society. Ernst, however, was ready to espouse it. And the *Dennett* case had made this new position possible, even before the Second Circuit's decision was handed down.

The ACLU's Campaign Against Censorship

In histories of free speech, *United States v. Dennett* is generally cast (often in footnotes) as a pivotal precursor to *United States v. Ulysses* and the final demise of the *Hicklin* test.[161] And indeed, as a doctrinal matter, *Dennett* did provide the basis for future decisions. But *Dennett* was more than a step along the way to the judicial protection of artistic expression. In the months after the Second Circuit's decision, the ACLU took advantage of the popularity of the *Dennett* case to re-evaluate and expand its position on censorship. The reformulation was not a matter of simple opportunism. Rather, the public conversation about censorship unleashed by Dennett's conviction and subsequent vindication changed the way that the ACLU related to the law and politics of obscenity. Although it began as an education case in the mid-1920s mold, *Dennett* sparked a debate about whether the state should ever inhibit freedom. The appeal and its aftermath strongly influenced the beliefs and tactics of influential civil libertarians, as well as their contributors and supporters. Within a few years of the Second Circuit's decision, civil libertarians were aggressively advocating not only open sex education but also artistic freedom and even, in some cases, birth control.

United States v. Dennett marked a turning point in the intellectual trajectory of the ACLU and, more broadly, in American understandings of and relationships to civil liberties. There is no doubt that extrinsic developments,

160. Ernst and his associates continuously pushed the boundary of acceptability by portraying whatever book they were presently defending as the paragon of purity while referring to earlier works—which they themselves had defended—as comparatively smutty. They would often cite the condemnatory passages from dissents to cases that they had won as evidence of the relative promiscuity of the prior book. See, for example, Memorandum of Law Submitted on Behalf of the Defendants, *People v. Brewer & Warren Inc.* (N.Y. City Mag. Ct. 1930), 18, Ernst Papers, box 90.

161. On the *Ulysses* case, see Paul Vanderham, *James Joyce and Censorship: The Trials of Ulysses* (Hampshire: Macmillan Press, 1998); and Carmelo Medina Casado, "Legal Prudery: The Case of Ulysses," *Journal of Modern Literature* 26 (2002): 90–98.

from the cultural experimentalism of the Roaring Twenties to the compelling rhetoric of Holmes's and Brandeis's First Amendment dissents, influenced the course of events. The ACLU appointed Ernst and Hays as general counsels in the late 1920s because (in part through its own maneuvering) free speech was becoming an increasingly liberal and lawyerly affair. Ernst, for his part, was moving toward a theory of expressive autonomy well before Mary Ware Dennett sought his services. He was resistant to morals regulations from the start, and the professional and financial pressures of his private law practice were nudging him ever more forcefully in that direction. The circumstances of Dennett's prosecution were, however, particularly well suited to Ernst's needs. Ernst was acutely aware that an unfavorable legal posture or an unsympathetic defendant could undermine the soundest of litigation strategies.[162] He knew that a public relations defeat for the ACLU would be costly for the organization; if it happened on his watch, it threatened to shift internal authority to the board's progressive holdouts. *Dennett* was Ernst's opportunity to bring together the tolerance of dissent and the freedom from sexual squeamishness under a single civil liberties banner.

In a period when government regulation of private life seemed increasingly trivial, ineffectual, and ill advised, the defense of sex education was a singularly persuasive cause. A constellation of factors made *Dennett* a landmark event in the history of civil liberties, ranging from popular support for the case and the financial contributions it generated to Ernst's newfound confidence in strategic litigation. The very fact of winning in *United States v. Dennett* made a broader agenda seem possible.

As an organizational and institutional matter, Dennett's ordeal was instrumental in expanding the ACLU's position on censorship. The Executive Committee officially offered Dennett the organization's support in January 1929.[163] In April of that year, the board constituted "The Mary Ware Dennett Defense Committee,"[164] which was to include educational, religious, and scientific leaders from across the country and drum up public support for Dennett's cause.[165] In early November, the Defense Committee

162. See below note 222 and accompanying text.

163. Executive Committee Minutes, January 21, 1929, ACLU Records and Publications, reel 2. The ACLU formally announced its offer of assistance to Dennett on January 24, 1929. ACLU Press Bulletin 339, January 24, 1929, ACLU Records and Publications, reel 2. Within a month, it authorized the formation of a special committee to raise funds for printing costs associated with a possible appeal and to appoint a subcommittee for that purpose. Executive Committee Minutes, February 18, 1929, ACLU Records and Publications, reel 2.

164. The formation of the committee was unanimously approved by the Executive Committee of the ACLU.

165. ACLU Bulletin 353, "National Committee Forms for Mrs. Dennett's Defense," May 3, 1929, ACLU Records and Publications, reel 2.

(headed by John Dewey,[166] after several months under the leadership of Roy Howard) launched a national campaign on Dennett's behalf, soliciting support throughout the United States.[167]

Early on, the ACLU was enthusiastically committed to Dennett's defense but cautious in its justification of the pamphlet. It explained its participation in the case in narrow terms, emphasizing the propriety and importance of *The Sex Side of Life* rather than asserting an abstract right against state interference in private matters:

> [W]e condemn the prosecution as an evidence of an intolerant and unenlightened attitude toward the serious discussion of the facts of sex. Obscenity should not be defined in law or in facts as governing the instruction of youth in matters of vital concern to wholesome living. Mrs. Dennett's high-minded motive, her wisdom in presenting a difficult subject and the practical value of her pamphlet have been attested over ten years by thousands of educators, clergymen, and social workers.[168]

Freedom of the press, argued the ACLU, "means the right to print and distribute freely facts or opinions on public issues."[169] *The Sex Side of Life* was not obscene, because it did just that: it provided children with sorely needed information on sex education, a public issue of the utmost importance. Even one year later, as the appellate decision neared, the ACLU clung to its early position.[170] A press bulletin issued in January 1930 quoted Forrest Bailey, secretary of the Mary Ware Dennett Defense Committee: "The real question the court is asked to decide," he said, "is whether a serious and accurate piece of writing on sex that has been found valuable for ten years in the work of leading educational and welfare agencies can be condemned as 'obscene' in the meaning of the law."[171]

At Ernst's urging, however, the Second Circuit's decision ventured significantly beyond the modest question that Bailey described. Indeed, it fundamentally changed the legal doctrine of obscenity. And the litigation, sensationalistic from the outset,[172] generated outpourings of public support

166. Prior to the Armistice of November 1918, Dewey had been skeptical of free speech claims. The failure of the Versailles Peace Conference to "make the world safe for democracy" prompted him to reevaluate his position. Rabban, *Free Speech*, 301.

167. ACLU Press Release, November 14, 1929, ACLU Records and Publications, reel 2.

168. Minutes of the Executive Committee Meeting, April 29, 1929, ACLU Records and Publications, reel 2.

169. ACLU Press Release, January 17, 1929, ACLU Records and Publications, reel 2.

170. ACLU Bulletin 385, January 10, 1930, ACLU Records and Publications, reel 2.

171. ACLU Bulletin 387, January 16, 1930, ACLU Records and Publications, reel 2.

172. Shortly after her conviction, Dennett contracted to write a book for Vanguard press on "the stupidities and arbitrary rulings of the Post Office Department." ACLU Bulletin 354,

that changed the ACLU's vision of civil liberties. The change did not quite happen overnight. As late as 1932, Ernst complained that "many people who belong to an organization such as the Civil Liberties Union are afraid of the right to spread sexual ideas."[173] Still, after *Dennett*, obscenity was undeniably a civil liberties issue. The Executive Board of the ACLU, guided by Ernst, seized on the *Dennett* case to explore and excoriate postal censorship more generally. "The importance of the case in court far exceeds the issue of [*The Sex Side of Life*] itself," an ACLU pamphlet explained. "It involves the whole method of determining obscenity, the rules of evidence in trials, and the constitutionality of the law under which the Post Office Department operates its censorship."[174]

Just as the *Dennett* case convinced civil libertarians that obscenity was a worthwhile civil liberties issue, it also persuaded many *anti*obscenity activists that censorship laws at least occasionally resulted in the suppression of desirable speech. Mainstream organizations, including the League of Women Voters and the Woman's Christian Temperance Union, advocated "rigid enforcement of anti-vice laws," but they also lobbied for better sex education.[175] Like their male counterparts in the anti-vice movement, they condemned "dirty" magazines, movies, and burlesque shows. At the same time, however, they regarded marital sex as natural and desirable.[176] Characteristically, Catheryne Cooke Gilman, a leading antiobscenity reformer, circulated *The Sex Side of Life* to teenagers (and planned to adapt the text for younger children) in order to discourage the sex delinquency that she attributed to inadequate sex education and induced ignorance, or "the conspiracy of silence."[177]

May 9, 1929, ACLU Records and Publications, reel 2. Dennett, *Who's Obscene*, was released by Vanguard Press in 1930.

173. Morris Ernst, "Sex Wins in America," *Nation*, August 10, 1932, 123.

174. ACLU, *Prosecution of Mary Ware Dennett*, 8.

175. "Social Morality Work of the W.C.T.U.," *Woman's Journal*, May 15, 1920, 1267.

176. Male social hygienists also tentatively supported *The Sex Side of Life*. Although the American Social Hygiene Association did not officially endorse the pamphlet, several of its members used it as a reference in preparing the organization's own materials. Bascom Johnson, director of the Division of Legal and Protective Measures, American Social Hygiene Association, to Morris Ernst, April 20, 1929, Ernst Papers, box 46, folder 1. The president of the American Social Hygiene Association disapproved of Dennett's lenient attitude toward masturbation but nonetheless asked Judge Moscowitz not to condemn the pamphlet, lest an adverse decision "occasion the suppression of similar documents published by the American Social Hygiene Association." E. L. Keyes, M.D., to Hon. Grover Moscowitz, February 4, 1929, Ernst Papers, box 46, folder 1.

177. Gilman observed that men were far more likely than women to oppose sex education. Wheeler, *Against Obscenity*, 115, 126. Men—both critics and supporters of Dennett—generally agreed with this assessment. William Sheafe Chase, Gilman's longtime antiobscenity ally, submitted an *amicus* brief on behalf of the government in the *Dennett* case. He told

Gilman's attitude was representative of an increasingly influential segment of the antiobscenity movement that sought simultaneously to eliminate prurience and to promote healthy and fulfilling sexual practices within marriage.[178] "Old-fashioned" vice crusaders, such as the New England Watch and Ward Society and the New York Society for the Suppression of Vice, indiscriminately condemned all sexually explicit material.[179] Indeed, from their perspective, materials like Dennett's were even more dangerous than outright pornography, because they threatened to make sex respectable.[180] By contrast, reformers like Gilman saw sex education materials as a remedy for sexual prurience rather than its cause. They feared that prosecutors would target educational offerings rather than the more worrisome but better-financed commercial ones.[181] Many endorsed explicit medical materials about sex, and few frankly opposed contraception.[182] While Gilman and her allies continued to distinguish desirable treatments of sex, such as *The Sex Side of Life*, from the more vulgar sort,[183] Dennett's prosecution demonstrated how easily censorship laws could target the former and prompted many social moderates to question censorship in general.

In short, ordinary citizens felt strongly that Dennett's prosecution crossed a line, and free speech enthusiasts pressed their advantage. In May 1929, 1500 people attended a Town Hall meeting to discuss the *Dennett* case and associated issues. Speakers cited a need for freedom of instruction on "sex subjects" by health authorities, religious bodies, and educators, among other groups. "Because this freedom [was] shown by the recent trial and conviction of Mary Ware Dennett to be seriously menaced," the attendees called for the formation of a permanent agency on censorship. Its principal purpose was to resist the censorship of sex

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Gilman that Dennett "was thinking as a woman and of women, rather than of her boys as their father would think of them." Ibid., 127.

178. See above note 64 and corresponding text.

179. John Sumner, head of the New York Society for the Suppression of Vice, vigorously supported the Dennett prosecution and submitted one of the few letters to the District Court that was critical of the pamphlet.

180. Critics often attributed the vice crusaders' excessive zeal to their hypersensitivity to sexual materials, which they believed stemmed from Victorian repression as well as an underlying perversity on the part of the censors. See, for example, Samuel Marcus to Morris Ernst, January 16, 1940, Ernst Papers, box 5, folder 1 (asserting that various prominent vice crusaders "derived a vicarious sex satisfaction out of pornography").

181. Wheeler, *Against Obscenity*, 124.

182. Ibid., 5.

183. Gilman had vocally supported Dennett's distribution of "The Sex Side of Life," but when she discovered that Dennett was on the letterhead of the ACLU's National Committee for Freedom from Censorship, she wrote Dennett to express her disapproval. Ibid., 131.

education, but its agenda would encompass the "systematic consideration of censorship and the problems of public policy underlying it," as well as "recommendation for alterations in existing laws, federal and state, wherever required to insure the necessary freedom."[184]

Out of this meeting, the National Committee for Freedom from Censorship ("NCFC") was born. Crucially, contributions to the Dennett Defense Fund had far exceeded what was necessary for the appeal, and the ACLU voted to finance the NCFC out of the surplus. The fundraising potential of the anticensorship work took on increasing significance in the wake of the stock market crash, and it encouraged the organization's new direction.[185] From the outset, the NCFC emphasized the need for public pressure as well as litigation. In March, a few days after Judge Hand issued his opinion in *Dennett*, an ACLU bulletin instructed members to urge their local broadcasting stations to protest exclusion of the subject of birth control from the air.[186] One year later, the ACLU's Monthly Bulletin for Action asked ACLU constituents to monitor for news of censorship initiatives or ordinances in their cities and towns.

By 1931, the ACLU was ready to enter the censorship fray in full force. The Board of Directors hoped to unify the anticensorship campaign, and to that end it hired a full-time secretary for the NCFC.[187] In July, the council announced a "drive against censorship in all its forms" headed by Pulitzer Prize-winning playwright Hatcher Hughes.[188] It pursued reform through a combination of legislative change and test case litigation. In particular, it focused on post office censorship, state movie censorship laws, the New York state theater padlock law, and the vice societies.[189]

Dennett herself became a powerful voice for civil liberties, and she was influential in expanding the ACLU's mission. Fresh from her court battle, she had a lot to say about the ACLU's new project. "Censorship is like wearing gray clothes because they don't show the dirt," she quipped in a 1930 forum.[190] For Dennett, the crusade against obscenity censorship

184. Forrest Bailey, letter to the editor, May 23, 1929, ACLU Records and Publications, reel 2.

185. After the stock market crash, ACLU funds steeply declined, and extension into new terrain was economically difficult. By the time the Dennett defense fund was exhausted, however, censorship work had become such an integral part of the ACLU's agenda that the board found ways to support it through other means. Board Minutes, October 5, 1931, ACLU Records and Publications, reel 3.

186. ACLU Bulletin 397, March 27, 1930, ACLU Records and Publications, reel 2.

187. Board Minutes, April 20, 1931, ACLU Records and Publications, reel 3.

188. NCFC Press Release, July 2, 1931, ACLU Records and Publications, reel 3.

189. Ibid.

190. "Censorship Analyzed by Noted Publicists; Merits and Faults of System Are Placed in Limelight," *Paterson (N.J.) Call*, May 22, 1930.

meant doing battle with the "miserable old concept that sex itself is dirty." On the one hand, she advocated the free distribution of birth control and sex education literature because she deemed it "clean."[191] But she went much further, at this point suggesting that sexually explicit expression might be worth protecting even if she—or progressive social and scientific circles more broadly—deemed it perverse instead of illuminating.[192]

The antidote to obscenity, according to Dennett, was more speech. "In the course of time it will become clear to all normal citizens," she insisted, "that the dirt-seeing faculty can be educated but not legislated out of people. As that discovery is made by larger and larger sections of the public, the demand will grow for dumping the obscenity laws into the legal scrap-basket as just so much useless clutter."[193] Her stated goal—to "gradually eliminate the obscene mind from the world"—was still publicly oriented, but no amount of legal finessing and fine-tuning would accomplish the task.[194] "The cure for the situation," she insisted, "lies not in more suppression, but in less and less."[195]

Significantly, Dennett was proposing the same remedy for antisocial and corruptive speech in the moral realm as civil libertarians had been advocating in the political sphere for the past half-decade. Her reasoning, however, was subtly different. In the political context, ACLU lawyers argued that bad ideas (for example, the Ku Klux Klan's) would be less powerful, and less damaging, if they were exposed to scrutiny; good ideas, even unpopular ones, would withstand a critical barrage. That rationale—which never fully persuaded the ACLU's National Committee, much less a national audience—did not easily translate to the circulation of sexually explicit speech.[196] On the contrary, legalization seemed sure to increase consumption of lascivious materials. Dennett claimed that education would operate more effectively when its target was out in the open, but the argument was clearly a stretch, as her former allies in the social hygiene movement were quick to point out.

191. Mary Ware Dennett to F. L. Rowe, December 29, 1934, Dennett Papers, reel 20, file 414.

192. Mary Ware Dennett, "'Married Love' and Censorship," *Nation*, May 27, 1931, 579–80.

193. Ibid.

194. Ibid.

195. Mary Ware Dennett to F. L. Rowe, December 29, 1934, Dennett Papers, reel 20, file 414.

196. For example, Arthur Garfield Hays adopted an absolutist line on the right of the American Nazi party to march, but a Special Committee of the ACLU assigned to consider legislation to curb fascist activities in the United States concluded that some regulation was warranted. Memorandum of the Special Committee to consider Legislation To Curb Fascist Activities in the United States, January 21, 1938, ACLU Papers, reel 156, vol. 1080.

In reality, Dennett was approaching a libertarian stance on speech issues that far outstripped her reformist roots. The problem, for Dennett, lay in specifying a legal definition of obscenity. In her view, obscenity was by its very nature culturally dependent. "It varies ridiculously from time to time and from place to place," she noted, in a formulation that presaged the language of the Supreme Court decades later. That inherent ambiguity created problems with line-drawing and chilling effects, but these were not Dennett's primary concerns. Rather, Dennett believed, given the slipperiness of social norms, that it was foolhardy and dangerous to enforce community standards from the top down. Although she still invoked the "public interest," that notion was becoming increasingly theoretical and abstract. When she said that the tolerance of divergent beliefs and behaviors served the public interest, she simply meant that the best society was one that valued cultural pluralism, if not individual freedom. The ACLU actively solicited Dennett's views on what sorts of projects the NCFC should pursue, and her evolving views pushed the organization in new directions.[197]

Of course, Dennett and *Dennett* were only one part of the new movement. The NCFC capitalized (literally and figuratively) on its victory in *Dennett*, but mounting public opposition to censorship had helped make the groundswell of public support for Dennett possible in the first place. As is so often the case, government efforts to ratchet up the suppression of speech gave rise to a broad-based resistance movement.[198] Already in 1929, as vice crusaders in Boston and New York intensified their efforts to suppress "immoral" speech, the ACLU counted the censorship of books, plays, and talking movies[199] among the three new issues facing civil libertarians.[200] The onset of the Depression made matters worse, as publishers and producers pushed the boundaries of acceptability in order to attract bigger audiences and stay afloat. In New York State, the

197. See, for example, Forrest Bailey to Members of the Executive Committee, Dennett Papers, reel 20, file 414. Dennett referred several cases to the ACLU. See, for example, Memorandum, July 3, 1930, Dennett Papers, reel 23, file 483.

198. During this period, civil libertarians were developing an incipient constitutional rights claim for free artistic expression. Cf. Robert Post and Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights-Civil Liberties Law Review* 42 (Summer 2007): 373–433.

199. In January 1929 the ACLU announced that it regarded "the censorship of the talking movies as a new angle of the fight for free speech." ACLU Bulletin 339, January 24, 1929, ACLU Records and Publications, reel 2. A few months later, an ACLU bulletin counseled that "hope of relief from censorship seems to lie rather with the legislature than with the court." ACLU Bulletin 67, "Civil Liberty and the Courts: Censorship of the Films," March 1929, ACLU Records and Publications, reel 2.

200. ACLU News Release, February 7, 1929, ACLU Records and Publications, reel 2.

ACLU mobilized against a 1931 censorship bill that would have created a bureaucratic mechanism for regulating plays, akin to the one already in place for motion pictures.[201] Civil liberties advocates made use of the heated public debate surrounding the proposal to attack censorship more generally. Participants at a meeting organized to discuss the bill roundly condemned it, but they also "pledge[d] unremitting effort to repeal existing censorship laws," including post office censorship, the restrictive regulation of the airwaves by the Federal Communications Commission, the censorship of moving pictures, mandatory curricula, and sectarian religious exercises in the public schools.[202]

The public attention generated by the effort to defeat theater censorship also spilled over into the NCFC's campaign against customs censorship. During the 1920s, the Customs Office unilaterally prevented the importation of thousands of medical, scientific, and artistic texts. In the fall of 1929, the NCFC worked with Senator Bronson Cutting to craft amendments to the Tariff Bill that sharply curtailed customs censorship authority by transferring the power to determine whether a work was obscene from the Customs Office to the federal courts.[203] The change in venue reflected a concerted effort on the part of civil libertarians to weaken administrative control over speech. The post office had long been an eager censor, from its quest for prurience after passage of the Comstock laws through its crusade to weed out national disloyalty under the Espionage Act. But the interwar expansion of the administrative state made the threat of bureaucratic authority increasingly pressing. As the *Dennett* case demonstrated, unchecked administrative discretion was apt to target not only unpopular speech, but even popularly valued speech, especially when its authors were critical of the state. Rather than extol agencies for their expertise and insulation from political influence, as they had done several years prior, groups such as the NCFC overcame their lingering *Lochner*-era inhibitions and hailed the courts as a fairer forum for resolving disputes.

201. The Mastic Bill would have made all plays subject to the approval of a bureau within the State Board of Education. ACLU News Release, March 24, 1931, ACLU Records and Publications, reel 3.

202. ACLU News Release, March 29, 1931, ACLU Records and Publications, reel 3.

203. Ibid. Cutting's bill would have removed all reference to the customs censorship of obscene books from the statutes, thereby leaving the battle against obscene books entirely to the state courts. The following March, the bill was amended to give that power to the federal courts (with their right of trial by jury in civil cases). ACLU Bulletin 396, March 19, 1930, ACLU Records and Publications, reel 2. On the ACLU's role in the tariff bill debate, see Christopher M. Finan, *From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America* (Boston: Beacon Press, 2007), 104.

Censorship in the Courts

Appropriately enough, the new tariff law became the vehicle for Morris Ernst's next major legal battles. Within a year of Judge Hand's opinion in *Dennett*, Judge John M. Woolsey produced two trailblazing obscenity decisions in the Southern District of New York. Both involved the exclusion by customs agents of books written by Dr. Marie C. Stopes, a leading British birth control advocate; both were argued by Ernst; and both were filed under the Tariff Act of 1930, which prohibited the importation of any material "which is obscene or immoral."[204] In both cases, as in the many others he would argue in the coming years, Ernst emphasized changing public mores. The public, he insisted, was ready to talk openly about sex.[205]

The first case, *United States v. One Obscene Book, entitled "Married Love,"*[206] centered on Stopes's sex manual for married couples. Stopes was a longtime friend of Dennett's, and Dennett urged Ernst to take up the case.[207] Although Judge Woolsey decided the matter on procedural grounds (the proceeding was barred, he held, by a prior decision in the Eastern District of Pennsylvania that deemed the work not obscene and therefore eligible for importation), he was moving toward a wholesale reformulation of the *Hicklin* test, at least in the customs context. In doing so, he relied heavily on the *Dennett* precedent. Ernst devoted three full pages of the brief to comparison with *Dennett*, and he submitted a copy of *The Sex Side of Life* as well as his appellate brief from the case to the court.[208] The strategy worked. The book was not obscene, in Woolsey's view, because it "treat[ed] quite as decently

204. Tariff Act of 1930, 46 Stat. 688 (1930), codified at 19 U.S.C. 1305.

205. Ernst made particular use of this strategy in the state courts. See, for example, Memorandum Submitted on Behalf of Defendants, *People v. Samuel Roth* (N.Y. City Mag. Ct. 1931), Ernst Papers, box 90 ("We have developed sturdier tastes. And we have grown wiser in the process. We have found that it is better to encourage freedom of expression than to risk the evils of suppression.").

206. *United States v. One Obscene Book, entitled "Married Love,"* 48 F.2d 821 (Southern District of New York 1931).

207. Mary Ware Dennett to Alexander Lindey, October 16, 1930, Dennett Papers, reel 23, file 487. Coincidentally, during the 1920 hearings over the Lusk Committee bill—the episode largely responsible for the ACLU's embrace of academic freedom—a proponent of the law sought to impugn the morality of the Rand School by reading passages of *Married Love* (which was available in the Rand School bookstore). "Defends Rand School and Criticized Book," *New York Times*, May 17, 1920. Algernon Lee called the book "a frank discussion of certain facts of sex from the viewpoint of personal hygiene" and told reporters that he "would welcome a thorough comparison of the private life and personal character of our staff and our student body" with that of the bill's advocates.

208. *Married Love* case materials, Ernst Papers, box 90. Dennett expressed to Lindey that she was "really surprised at the extent to which [her] case serve[d] as a precedent." Mary Ware Dennett to Alexander Lindey, March 18, 1931, Ernst Papers, box 359, folder 3.

and with as much restraint of the sex relations as did Mrs. Mary Ware Dennett in 'The Sex Side of Life, An Explanation for Young People.'"[209] *Married Love*, according to Woolsey, "may fairly be said to do for adults what Mrs. Dennett's book does for adolescents."[210]

In *The Nation*, Dennett, who by virtue of her published writing as well as her own travails had come to be regarded as something of an expert on obscenity law, celebrated Woolsey's decision in the *Married Love* case. She identified two factors that appeared promising for future cases. First, judges had begun to appraise publications based on their total effect and intent rather than isolated excerpts. Second, the recent decisions presupposed a reader of normal intelligence and demeanor, not an unusually susceptible one.[211] Both ideas had been latent in her own case, but Judge Woolsey's opinion in *Married Love* made them explicit. His decision, according to Dennett, "ha[d] established another precedent by which the absurd obscenity statutes of this country may be slowly but surely broken down."[212]

Three months later, in July 1931, Judge Woolsey built upon that precedent in *United States v. One Book, Entitled Contraception*.[213] Ernst and his colleague Alexander Lindey, acting together on behalf of the NCFC, represented the book in what Gordon Moss called "the first test case undertaken by this Council in an effort to liberalize the Customs censorship of foreign books."[214] The *Contraception* case, like *Married Love*, involved the importation of a practical guide by Dr. Stopes. This one, however, was bolder in its content. *Contraception* was an explicit account of the theory, history, and practice of birth control. Applying the test he had articulated in the *Married Love* case, Judge Woolsey reasoned that the reading of *Contraception* "would not stir the sex impulses of any person with a normal mind."[215] As a "scientific book written with obvious

209. District Court Opinion (Judge Woolsey), Section III, Admiralty Case File 106-165, NARA Northeast Region, Record Group 21.

210. In *Married Love*, Stopes urged husbands to be more attentive to their wives' sexual and emotional needs.

211. Dennett, "'Married Love' and Censorship," 580.

212. Ibid.

213. *United States v. One Book Entitled "Contraception,"* 51 F.2d 525 (Southern District of New York 1931).

214. Gordon W. Moss to the editor, July 29, 1931, ACLU Records and Publications, reel 3. Stopes herself played no role in the legal battle to admit the book into the United States. ACLU Press Release, July 7, 1931, ACLU Records and Publications, reel 3. Despite the ACLU's celebration of juries in the customs context, the parties to the *Contraception* case waived their right to a jury trial.

215. District Court Opinion (Judge Woolsey), Section VI, Admiralty Case File 107-197, United States District Court for the Southern District of New York, NARA Northeast Region, Record Group 21.

seriousness and with great decency," it was not obscene. Nor was it a drug, medicine, or article for the prevention of conception within the meaning of the statute. Woolsey therefore dismissed the action against the seized book and held that *Contraception* was eligible for importation into the United States. His opinion made it permissible to import birth control information for the first time since the practice was made illegal in 1890.[216]

However progressive Woolsey's views, his decisions in the two obscenity cases are as notable for what they did not hold as for the relief they granted. In both cases, the ACLU argued that the customs law violated the First Amendment's guarantee of freedom of the press. Woolsey rejected this argument in short shrift. "I think there is nothing in this contention," he wrote. "The section does not involve the suppression of a book before it is published, but the exclusion of an already published book which is sought to be brought into the United States. . . . Laws which are thus disciplinary of publications whether involving exclusion from the mails or from this country do not interfere with freedom of the press."[217] Freedom of the press, for Woolsey, meant freedom from prior restraints on publication.[218] He was not yet ready for an extension of the First Amendment on the order of what the ACLU was suggesting. The constitutional argument was a long shot in the customs case, just as it was in *United States v. Dennett.*

Nor did the Woolsey decisions represent a frontal assault on the Comstock laws. As NCFC Secretary Gordon Moss was careful to emphasize, the *Contraception* case involved the Customs Bureau law, a statute far narrower than the postal laws, which explicitly prohibited the transportation of birth control materials by mail.[219] Moss was skeptical that the decision (or any others) would have much weight in "whittl[ing] down the meaning of the postal prohibition," which "appear[ed] to be water-tight."[220]

Finally, the *Married Love* and *Contraception* decisions applied only to medical and scientific tracts.[221] The judiciary had not yet signaled a similar

216. Gordon W. Moss to the Editor, July 29, 1931, ACLU Records and Publications, reel 3. Stopes cabled from London to congratulate the ACLU on its "surprising" victory. ACLU Bulletin 466, July 24, 1931, ACLU Records and Publications, reel 3.

217. District Court Opinion (Judge Woolsey), Section I, Admiralty Case File 106-165, United States District Court for the Southern District of New York, NARA Northeast Region, Record Group 21.

218. Woolsey thus rejected the seemingly plausible argument that prohibiting the importation of a book to the United States constitutes a prior restraint because it wholly prevents its circulation within American borders.

219. Gordon W. Moss, letter to the editor, July 29, 1931, ACLU Records and Publications, reel 3.

220. Gordon W. Moss to W. W. Norton, November 7, 1932, ACLU Papers, reel 86, vol. 503.

221. By 1937, a *Harvard Law Review* article reported confidently, citing Dennett, that "[u]nder any 'test,' it seems clear that serious medico-scientific works are not within the

openness with respect to literary texts. The ACLU was ready to move on this issue, but it was waiting for an ideal test case. In a letter to Arthur Garfield Hays regarding a medical text containing "many illustrations of a decidedly risqué character," Gordon Moss relayed the position of at least one representative of Ernst's office when it came to strategic litigation: "[W]e should take only those cases where the cards [are] stacked in our favor, and where a favorable decision would establish precedent for an entire class of literature heretofore prohibited."[222] The constraints were even more rigid in the realm of artistic expression,[223] in which the ACLU was hesitant to defend any book written in the twentieth century. Strategic litigation had availed the ACLU well in the past decade, and it was a method with strict practical guidelines. Gordon Moss believed that censorship "in the field of literature" should first "be taken up on behalf of these old classics."[224]

Nonetheless, the book that would break down the censorship barriers turned out to be decidedly modern: James's Joyce's *Ulysses*, a book as celebrated by critics as it was castigated by vice crusaders. Ernst represented Random House, which had contracted with Joyce to publish an American trade edition of the book, and he actively sought to avoid litigation in the matter.[225] Although the United States Attorney's office chose

obscenity ban." "Recent Cases: Obscenity, Test of Obscene Literature," *Harvard Law Review* 48 (1935): 519–20.

222. Gordon W. Moss to Arthur Garfield Hays, August 18, 1931, ACLU Papers, reel 86, vol. 503.

223. For example, in June 1931, Forrest Bailey recommended a test case of Massachusetts's revised obscenity law based on Marshall McClintock's *We Take to Bed*, which had been censored in Boston because it contained "an adjective ending in ing—the present participle of the most dreadful of the four-letter words that make pure people tremble." Forrest Bailey to Morris Ernst, June 20, 1931, ACLU Papers, reel 806, vol. 503. He admitted to Ernst that Roger Baldwin was "a little squeamish about taking up this particular book-defense because he fears we may in some way involve ourselves in defending the use of that word." Forrest Bailey to Morris Ernst, June 30, 1931, ACLU Papers, reel 806, vol. 503. Ernst ultimately counseled Bailey to "pick a better volume." Morris Ernst to Forrest Bailey, July 2, 1931, ACLU Papers, reel 806, vol. 503.

224. Gordon Moss to Sidney J. Abelson, April 7, 1931, ACLU Papers, reel 86, vol. 503. Ernst was less discriminating when it came to private clients, like publishers and booksellers, whom he defended in the New York state context. The New York state courts relaxed their obscenity standards slightly earlier than the federal courts, though eventually the two forums began to leapfrog one another, and Ernst routinely cited the most lenient examples from one court to the other.

225. Ernst and Lindey wrote a series of letters to Customs officials and to the United States attorney's office seeking to persuade them that *Ulysses* ought to be admitted as an artistic masterpiece. Ernst Papers, box 93. Lindey apparently hoped for a test case, but given the firm's fee arrangement with Random House, which gave it royalties in the book

(reluctantly) to prosecute, Ernst was able to arrange for Judge Woolsey to preside over the case.[226] Chastened by Woolsey's dismissive tone in the Stopes cases, Ernst did not even raise a First Amendment claim. Instead, he played up *Ulysses*'s artistic innovativeness and its reliance on real and familiar patterns of colloquial speech. Joyce's profanity was not intended to incite lustfulness, he argued; it was designed to reveal the harsh reality of human expression and behavior. Judge Woolsey was convinced. In *United States v. One Book Entitled Ulysses*, Woolsey explicitly repudiated the *Hicklin* test. Once again deeming the customs laws inapplicable, he reasoned that even in the literary context a book must be judged by its aggregate effect, not by isolated passages, and that obscenity must "be tested by the court's opinion as to its effect on a person with average sex instincts."[227] In November 1933, the Second Circuit agreed.[228]

The public outcry over the censorship and prosecution of *Ulysses* became a political liability for the Hoover administration, a lesson that the newly elected Roosevelt took to heart. The devastating effects of the Depression had made the vice crusaders' efforts to curb the circulation of sexual materials seem increasingly trivial. As Ernst explained in 1934, "In this period while men's stomachs have been empty, there appears to have been less fear of writings dealings with sex."[229] The press coverage of *Ulysses* drove this point home, and in the wake of the Second Circuit's decision, the Customs Service hired a special advisor on obscenity matters and downsized its censorship effort substantially.[230] In short, *Ulysses* changed the practice as well as law of customs censorship, and, by extension, it precipitated a real shift in mainstream American attitudes about obscenity. After *Ulysses*, many foreign books long since barred as obscene were made available in reputable American bookstores for the first time. This ease of access, in turn, encouraged many American readers to rethink the acceptable parameters of sexual propriety in literature. Whatever its limitations, the *Ulysses* case was a major victory for Ernst

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but provided limited reimbursement for legal fees, Ernst sought to avoid protracted litigation if possible.

226. Morris Ernst to Alexander Lindey, Office Memorandum, August 12, 1932, Ernst Papers, box 270, folder 3. United States Attorney George Medalie was sympathetic to the book but felt obligated to prosecute.

227. *United States v. One Book Entitled Ulysses*, 5 F. Supp. 182 (Southern District of New York, 1933). As in the *Contraception* case, the parties waived the right to a jury trial.

228. Ibid., 184; *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (Second Circuit, 1934).

229. Roger Baldwin and Morris Ernst, "The New Deal and Civil Liberties" (radio debate over the Blue Network of NBC), January 27, 1934, ACLU Papers, reel 109, vol. 717. Ernst foresaw a shift from sexual to political censorship.

230. Walker, *In Defense of American Liberties*, 86.

and the civil liberties movement. A 1938 *Harvard Law Review* article, reflecting on the decision, called it a "new deal for literature."[231]

A new public appreciation for artistic freedom and the reformulation of obscenity law were the most visible legacies of *United States v. Dennett.* But birth control was Dennett's true and enduring passion, and it is appropriate that her own legal victory paved the way for a major liberalization on that issue as well. As with obscenity, the legal battle was only part of the story. To begin with, Americans were becoming increasingly suspicious of government regulation of private life. The failure of Prohibition provided a timely example of the folly of interfering with private morality. A few years later, in the aftermath of Judge Woolsey's decision in *Ulysses*, Morris Ernst tellingly declared: "The first week of December 1933 will go down in history for two repeals, that of Prohibition and that of squeamishness in literature. . . . Perhaps the intolerance which closed our breweries was the intolerance which decreed that basic human functions had to be treated in books in a furtive, leering, hypocritical manner."[232]

Ernst might easily have extended the comparison to contraception.[233] Opinion polls over the course of the late 1920s and early 1930s showed a steady upward trend in popular support for birth control, which was rapidly winning mainstream approval.[234] The Depression was instrumental in this change. Many Americans regarded family limitation as a necessary corollary to their increasingly strained household finances.[235] In 1931, the Federal Council of Churches of Christ in America, a coalition of mainline Protestant denominations (and the precursor to the National Council of the Churches of Christ in the United States of America), tentatively approved the use of birth control by married couples. A substantial majority of its

231. Leo M. Alpert, "Judicial Censorship of Obscene Literature," *Harvard Law Review* 52 (1938): 40–76.

232. Statement by Morris L. Ernst upon the Handing Down of Judge Woolsey's Opinion in the Ulysses Case, Ernst Papers, box 93. On the relationship between the rise of the administrative state and the construction of individual rights in the Prohibition cases, see Robert Post, "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era," *William & Mary Law Review* 48 (2006): 1–182.

233. Dennett did so. In 1929, she complained that "sexual knowledge [was] being conducted on a bootleg basis." "Mrs. Dennett Goes on Trial Today," *New York Times*, March 6, 1929.

234. Hazel C. Benjamin, "Lobbying for Birth Control," *Public Opinion Quarterly* 2 (1938): 48–60.

235. Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973* (Berkeley: University of California Press, 1997), 132–36. By the late 1930s, the federal government assisted in the provision of contraceptives under limited circumstances, and in 1937, the American Medical Association repudiated its longstanding opposition to birth control. Ibid.

Committee on Marriage and the Home believed that "the careful and restrained use of contraceptives by married people is valid and moral" and that "[s]ex union between husbands and wives as an expression of mutual affection, without relation to procreation, is right."[236]

Still, as in the case of obscenity regulation, the courts moved more closely in step with public opinion than the legislatures did. Despite growing approval for contraception, state and federal governments were reluctant to anger religious constituencies by tackling the issue directly, and they continued to censor materials advocating and explaining the use of contraceptives.[237] Disillusioned with the prospects of legislative change, Morris Ernst suggested "nullification" of prohibitions on birth control, a process which entailed executive nonenforcement as well as judicial erosion of the laws.[238] Significantly, and somewhat counterintuitively, this strategy was predicated on the assumption that judicial decisions would reflect changing social norms, not the modern, liberal notion that courts would serve as a check on repressive majoritarian impulses. In other words, Ernst believed, *Lochner* notwithstanding, that courts were more likely than legislatures to resist pressures by powerful donors or by small but influential voting blocs. Partly, the difference was a function of framing: whereas a legislative vote to legalize birth control (or to permit communist leafleting) would look like a substantive endorsement of promiscuous sex (or of communism), an equivalent judicial decision could more easily be cast as an abstract commitment to individual rights. Consequently, Ernst increasingly focused his energies on incremental judicial reform. His approach was fruitful, and *Dennett* was among its critical components. The doctrinal progression from *United States v. Dennett* to the pivotal 1936 birth control case *United States v. One Package* was indirect in comparison with the parallel path from *Dennett* to *Ulysses*, but the *Dennett* precedent was nonetheless crucial.

One step in the "nullification" process was the *Contraception* case. As Dennett had long argued, the practice of birth control would never be made legal as long as information about contraceptives was forbidden. The Comstock Act, however, had prohibited more than writing about contraception; it had also banned from the mails "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion." That provision, too, needed to be whittled down.

236. "Birth Control: Protestant View," *Current History* (April 1931): 97.

237. See, for example, Reagan, *When Abortion Was a Crime*, 139–140.

238. Ernst, "Sex Wins," 123. Ernst believed birth control legislation would never be directly repealed. Morris Ernst to Charles G. Norris, January 22, 1930, Ernst Papers, box 267, folder 28.

The first major breakthrough came in 1930, with the *Youngs Rubber* case.[239] In it, the United States Court of Appeals for the Second Circuit was asked to decide a trademark infringement lawsuit by the manufacturer of Trojan condoms. In his opinion, Judge Thomas Swan, who had been a member of the Second Circuit panel that reversed Dennett's conviction, declared (albeit in dicta[240]) that contraceptives were permissible when prescribed by physicians. Three years later, the Comstock laws were limited still further, with the Sixth Circuit's decision in *Davis v. United States*.[241] The defendants in that case, contraceptive wholesalers, were charged in Ohio with the circulation of contraceptive devices by common carrier.[242] The Sixth Circuit judges were not bound by Second Circuit precedent, but they nonetheless cited *Dennett* for the proposition that birth control laws "must be given a reasonable construction."[243]

The *Davis* decision, in turn, provided a persuasive doctrinal basis for the Second Circuit's 1936 decision in *United States v. One Package*, which invalidated importation restrictions on medically indicated contraceptives.[244] That case was sponsored by Margaret Sanger and the American Birth Control League. Like so many others, it was argued by Morris Ernst, who would serve for many years as general counsel of Planned Parenthood. As fate would have it, it was heard in the District Court by Judge Grover Moscowitz, who by then had ridden out the misconduct charges that stole him away from the *Dennett* case.[245] Moscowitz held that the diaphragms at issue had been seized improperly by customs because they were intended for medical purposes. Judge Augustus Hand, once again writing for the Second Circuit, affirmed Moscowitz's decision.[246] According to Hand, Congress would not have intended to "prevent the importation, sale, or carriage by mail of things which might

239. *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (Second Circuit, 1930).

240. The Second Circuit decided the case on the basis that the plaintiff could maintain a suit for trademark infringement in equity even if it was violating the statute.

241. *Davis v. United States*, 62 F.2d 473 (Sixth Circuit, 1933).

242. The indictments in *Davis* were brought under Sections 334 and 396 of Title 18 United States Code Annotated, a statute regulating the carriage of contraceptive devices and of explanations for their use by express companies and other common carriers operating in interstate commerce.

243. *Davis*, 62 F.2d at 475.

244. *United States v. One Package*, 86 F.2d 737 (Second Circuit, 1936).

245. Although the House declined to impeach Moscowitz, it issued a Public Condemnation of his business dealings. "Judiciary: Condemnation," *Time*, April 12, 1930, 1.

246. The solicitor general chose not to file a petition for a writ of *certiorari*. Lamar Hardy, United States attorney, to Greenbaum, Wolff & Ernst, January 25, 1937, Ernst Papers, box 69, folder 15.

intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients."[247]

As with *Dennett* itself, the case was decided as a matter of statutory interpretation only. It did not create a liberty interest in contraception, despite Ernst's efforts,[248] nor did it use the term "right." It applied only to the importation of contraceptives; as a matter of precedent, it had virtually no relevance to a subsequent interpretation of a state statute by a state court. And many such statutes still existed. A summary of birth control laws in the United States prepared by the NCFC in July 1931 provides a useful snapshot of the regulations and restrictions on the books at that time. According to the report, twenty-one states specifically prohibited the dissemination of information about contraception (though only Connecticut forbade actual use).[249] Despite all this, Sanger celebrated the decision as "the end of birth control laws," "an emancipation proclamation to the motherhood of America."[250]

Dennett, no doubt, was more reserved about the decision. Beginning with her effort to repeal the Comstock Act—which, of course, began her long civil liberties saga—she had criticized Sanger for advocating a narrow medical exception to the birth control laws. Dennett believed strongly that only universal access would guarantee "birth control knowledge for all citizens instead of class privilege."[251] The dispute came to a head in the early 1930s, when Dennett argued against Sanger's proposed amendment to the birth control laws because it exempted medical professionals from penalty without removing birth control from the auspices of the obscenity laws. In the same month that the ACLU endorsed Sanger's bill, Dennett urged a "clean repeal amendment,"[252] prompting an editor of *Time* to advise

247. *United States v. One Package*, 86 F.2d at 739.

248. Ernst argued that due process required that medical professionals be free to prescribe contraception. Trial transcript, *United States v. One Package*, Ernst Papers, box 69, folder 9, 71; Brief for Claimant-Appellee, Ernst Papers, box 69, folder 11, 36.

249. National Committee for Freedom from Censorship, "Summary of Birth Control Laws in the United States," July 28, 1931, ACLU Records and Publications, reel 3.

250. David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan, 1994), 42 (quoting Sanger). She also called it a "complete victory." "Mrs. Sanger Sees Court Ruling as Victory for Birth Control," *New York World-Telegram*, December 6, 1936. Morris Ernst and Harriet Pilpel proclaimed, "[the decision] marks the successful termination of a 60 year struggle to make clear that the federal obscenity laws do not apply to the legitimate activities of physicians." Morris Ernst and Harriet Pilpel, "A Medical Bill of Rights," *Journal of Contraception* (1937): 35–37.

251. Mary Ware Dennett to Margaret Sanger, February 15, 1930, Dennett Papers, reel 86, file 502.

252. ACLU Press Release, February 5, 1931, ACLU Records and Publications, reel 3. Gordon Moss, secretary of the NCFC, evidently sided with Dennett. Gordon W. Moss to Mary Ware Dennett, April 17, 1932, ACLU Papers, reel 86, vol. 502.

Dennett to "get together for unified action in behalf of birth control, voluntary parenthood or what you agree to call your movement" lest people come to regard their "several causes as the mere fields of action for ambitious ladies."[253] Still, even for Dennett, *United States v. One Package* must have seemed an important victory. In it, Ernst did not argue that advocacy of birth control was permissible, or even that instructions on the use of birth control was permissible. He argued that birth control itself was an inappropriate subject for government regulation.

Almost a decade after her indictment, Dennett retired from public life. In her letters to colleagues and friends, she often reflected on how future historians would regard her, and one wonders whether she later was satisfied with her legacy. Dennett dedicated her life to "public work," and she was vehement that she had "done a thing or two beside achieve 'silver hair'" during her years of service.[254] In addition to her many accomplishments as a suffragist and birth control advocate, she helped limit the scope of obscenity laws and, indeed, helped redefine civil liberties. Still, she believed that future generations would enjoy a robust individual autonomy that her contemporaries could barely imagine. In a celebration of Judge Woolsey's decision in *Married Love*, she wrote, "If we who are living now could come back to this earth a hundred years hence we should probably view with amused incredulity the records of the preposterous doings of our century in the field of censorship."[255] As for her disagreement with Sanger, Dennett felt strongly that half-measures were destructive and that history would vindicate her approach.

For his part, Ernst assisted and in turn was influenced by Sanger as well as Dennett.[256] An article in *The Nation* written while Dennett's appeal was pending reflected on the irony that the "[t]wo well-known women" had come together in the New York penal system. "For on successive days Mrs. Dennett, the conservative, was convicted of sexological heresy by a federal jury over in Brooklyn, while Mrs. Sanger, the militant, sat in a Manhattan police court and heard eminent volunteers from the medical profession so smash charges against her birth-control clinic that it appears

253. Myron Weiss (Associate Editor, *Time*) to Mary Ware Dennett, March 12, 1931, Dennett Papers, reel 20, file 412.

254. Mary Ware Dennett to Heywood Broun, May 1, 1929, Dennett Papers, reel 20, file 416; and Mary Ware Dennett to family, May 8, 1929, Dennett Papers, reel 21, file 433.

255. Dennett, "'Married Love' and Censorship," 580.

256. See, for example, Morris Ernst to Margaret Sanger, May 20, 1933, Ernst Papers, box 267, folder 28 ("[O]n all general principles, I am in favor of birth control. Incidentally, I am also very much in favor of you."); Morris Ernst to Mary Ware Dennett, January 15, 1930, Dennett Papers, reel 23, file 487 (declaring that the time for formalities had long passed, and addressing Dennett by her first name).

improbable that the magistrate will hold the case for trial."[257] Ernst, of course, was defense counsel in both matters.

In retrospect, there was much to recommend both strategies. Dennett's disillusionment with legislative change made the social reformist ever more radical; Sanger's success at ingratiating herself with professionals endeared the erstwhile socialist to incremental reform. The differences were ideological as well as strategic. In time, Dennett adopted a theory of civil liberties much like the rights-based individualism that Sanger had espoused decades earlier and gradually repudiated.[258] For the mature Dennett, birth control was a matter best left to private discretion, despite its public implications. Government interference in individual decision making was impossible to modulate and undesirable as a matter of principle. Sanger's compromises may have yielded more in the way of concrete results, but the ACLU was deeply indebted to Dennett for the civil liberties revolution it wrought. The question whether to sacrifice principle in favor of stop-gap gains would plague the ACLU for decades. In his many years of service to the ACLU, Ernst himself would often face precisely this dilemma.[259] He foresaw with astounding acuity the path that birth control litigation would follow over the coming decades, with its halting expansion of the health exception to include, eventually, threats to a woman's psychological well-being, irrespective of her marital status.[260] He was uneasy

257. Nichols, "Sex and the Law," 552. Ernst regularly corresponded with and provided legal advice to Sanger, but she was not actually a named defendant in the clinic case, which involved a 1929 raid on the Birth Control Clinical Research Bureau, an office that "was not operated or controlled by the Birth Control League, but [in which] Mrs. Sanger was vitally interested." Samuel J. Schur to Covington, Burling & Rublee, April 17, 1930, Ernst Papers, box 358, folder 1.

258. In 1916, when Sanger (along with her sister, Ethyl Byrne) was arrested for operating the country's first public birth control clinic, she had argued (as the judge summarized it) for "[a] right of copulation . . . that cannot be invaded by the Legislature forbidding the sale of articles necessary to the free enjoyment of such right." In her attorney's words, the statute was "an infringement upon [a woman's] free exercise of conscience and pursuit of happiness" because it denied "her absolute right of enjoyment of intercourse. . . ." *Law Journal*, December 5, 1916, Supreme Court, Part I. Mr. Justice Kelby, Kings County, Ernst Papers, box 358, folder 3. This language reflected an earlier, radical moment in the free speech fight. After World War I, bold rights claims of this sort more or less disappeared. Even at the time, it was unavailing as a legal strategy. The judge dismissed Sanger's suggestion of a "personal right" to "copulat[e] without conception" as preposterous. Ibid., 13. Sanger herself later abandoned this approach for a more conservative and politically palatable strategy that played up physicians' professional duties rather than women's choices.

259. Most famously, during World War II, Ernst discouraged criticism of the administration because he felt it undermined ACLU credibility and influence. Walker, *In Defense of American Liberties*, 156.

260. Essay draft, Ernst Papers, box 198.

about this medical "compromise," and yet he regarded it as a potentially fruitful strategy.[261] In their court briefs, however, ACLU lawyers were free to make their boldest arguments. And although practical exigencies influenced what cases they chose to pursue, their theory of civil liberties became ever more capacious.

Conclusion

United States v. Dennett ushered in a new era of civil liberties advocacy in America. In the years immediately after World War I, the reformers-turned-radicals who led the civil liberties movement had envisioned free speech as a vehicle for working-class power, a backdoor approach to a just society. As the enforced conformity of the 1910s gave way to the pluralistic ambivalences of the 1920s, their rhetoric subtly shifted. Increasingly, they called for an open public conversation about how best to govern America. Throughout, they defended free speech in political and economic terms.

After *Dennett*, a new theory of civil liberties steadily gained ground. Lawyerly and individual-centered, that vision prioritized autonomy over equality. Whereas earlier free speech advocates (including Dennett herself for much of her career) had hoped that a rich and varied public discourse would ensure the best political and social outcome, a growing crop of civil libertarians felt that government intervention in the realm of private beliefs was inherently against the public interest. For some, even this abstract interest in maximizing the public good receded into the background. By 1942, the Colorado Supreme Court framed the central tension of one First Amendment case as the "liberty of the individual v. the general welfare."[262]

Many within the ACLU resisted the new approach. Some still clung to a radical vision of the right of agitation. Others, such as Alexander Meiklejohn, thought that art was worth protecting only to the extent that it enabled the "voting of wise decisions."[263] An important minority, however, were articulating the alternative justification for civil liberties, at least

261. Ibid. ("Possibly those who are in favor of compromising on this issue feel sure that if birth control material and information can be made legal for the offices of doctors and prescription rooms of druggists, there will be no practical way of preventing such literature reaching the eyes of the general public.").

262. *Hamilton v. City of Montrose*, 124 P.2d 757, 759 (Colo. 1942).

263. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Governance* (New York: Harper Brother Publishers, 1948), 25. Meiklejohn believed "that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'" Quoted in

in the nonpolitical context. These influential few defended free speech not as an avenue to peaceful revolution, or as a prerequisite of self-governance, or even because they thought it the surest way of discerning the truth, but rather because they believed that people's convictions and dispositions were their own concerns. Put simply, they were committed to what a 1934 NCFC statement labeled "personal choice." The committee explained: "A certain amount of unworthy material is bound to come into existence in one form or another, as time goes on. It is for the individual to approve or condemn whatever he encounters—to accept what he deems desirable for himself and to reject the rest. However, it is he, the individual who must exercise this choice."[264]

Crucially, *Dennett* taught Ernst and the ACLU that "civil liberties" was a pliable category. If it could hold nonpolitical speech, perhaps it could also stave off state interference with private conduct. Sex education was only the beginning. Lawyers such as Ernst called for the protection of artistic expression and later of self-expression of any sort—political, artistic, or "personal"—as long as it did not cause actual harm to others. They would ultimately conclude that birth control advocacy and birth control use are flip sides of the same civil liberties coin.[265]

It is, of course, impossible to determine the causal significance of *United States v. Dennett*, or, indeed, of any given case. The best a historian can hope to do is to compare the legal landscape (broadly construed) that preceded the event with the one that came after, paying attention to the perceived significance of the case—understood, expansively, as a contest among competing ideas and interests within and outside the court—among contemporary actors (who may have been mistaken). After *Dennett*, key figures within and outside the ACLU understood the category "free speech" and the scope of civil liberties advocacy differently than they had at the outset of litigation. The new rhetoric emerged in the course of the organization's involvement with Dennett, much of it in materials

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Owen Fiss, "A Freedom Both Personal and Political," in John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb (New Haven: Yale University Press, 2002), 192.

264. Statement by the National Council on Freedom from Censorship, July 16, 1934, ACLU Papers, reel 105, vol. 678.

265. Ernst's 1940 article for the *Britannica Book of the Year* listed as one of the year's crucial civil liberties developments the refusal of the United States Supreme Court to review a Massachusetts decision closing birth control clinics in that state. He noted that new cases would seek to persuade the courts "that medically regulated contraception should not be interfered with." In the same paragraph, he lauded a new Post Office Department ruling that permitted the free circulation of birth control information and supplies to doctors and pharmacists. Morris Ernst, "Civil Liberties," in *Britannica Book of the Year, 1940* (Chicago: Encyclopaedia Britannica, 1940).

expressly related to her case. Perhaps the transformation was a product of broader forces and would have occurred even absent Ernst and Dennett's intervention, although a close reading of the historical record points to contingency rather than inevitability. But whatever its immediate effects, *United States v. Dennett* demonstrates that popular and judicial acceptance of a negative vision of civil liberties in America—one that incorporated nonpolitical speech and embraced individual autonomy—was a new development. Today, the protection of speech such as Dennett's seems fundamental to civil liberties advocacy; it is hard to imagine a world in which administrative censorship on the basis of morality was thought to *facilitate* free speech, by enhancing the quality of public discourse.[266] Nonetheless, that is precisely the sort of world in which Ernst and Dennett lived.[267]

The freedoms grouped together under the new civil liberties tent were framed against a common enemy: the state. In the early interwar period, the ACLU's progressive allies had maintained their commitment to regulatory governance even as they distanced themselves from majoritarian politics. They imagined the legislative and executive branches as potential protectors of minority interests, a counterbalance to powerful private forces (primarily, industry) as well as mass ignorance and prejudice. Administrative censorship cases, including *Dennett*, brought home the dangers of central government authority much more convincingly than did earlier appeals to direct action in the labor context. They also demonstrated that free speech, properly framed, could attract popular support. And they rehabilitated the judiciary—a longtime bastion of antidemocratic values and a reviled instrument of corporate power—as a potential forum for social advocacy.

Whatever the costs and benefits of the new approach, and there were many of each, the new model of free speech was wildly successful. Its institutionalization during the next half-century gradually erased the stigma

266. Analogous arguments with respect to pornography and hate speech during the 1980s and 1990s were rejected by the ACLU and by most First Amendment scholars. See, e.g., Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" *Duke Law Journal* (1990): 484–573; Nadine Strossen, "In Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future," *Harvard Civil Rights-Civil Liberties Law Review* 29 (1994): 143–58.

267. To borrow from Robert Gordon, *Dennett* has the potential to "[tell] us that the difficulties we have in imagining forms of social life different from and better than those we are accustomed to may be due to the limits on our conceptions of reality rather than to limits inherent in reality itself." Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125, 100. That is true whether *Dennett* itself changed everything or, rather, was merely one "episode," albeit an important one, "in an ongoing story of bargaining and conflict between contending normative orders." Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985): 899–935, 935.

of a more radical free-speech past. By promoting artistic freedom and sexual autonomy, the ACLU made civil liberties into something more than a stepping stone to economic redistribution. Critics alleged that the organization's defense of personal freedom was disingenuous—that it ventured into the new realm precisely to bolster its credibility.[268] For some members, no doubt, the allegations were true. Nonetheless, over the course of the 1930s, much of the ACLU leadership internalized a more generalized commitment to civil liberties. In turn, the vision of civil liberties that *United States v. Dennett* helped to validate gave rise to an individualist language that anticipated, and perhaps even supplied, the state-skeptical rhetoric of postwar American liberalism.[269] The transformation in liberal political ideology was gradual but profound. In time, the ACLU convinced activists, judges and ordinary Americans that the individual rights toward which Dennett and Ernst had gestured are the building blocks of American democracy.

268. For example, Harold Lord Varney alleged in the *American Mercury* that Alexander Woolcott, "a genuine Liberal," joined the ACLU because of his mistaken belief that "the Union was primarily a defender of artistic freedom against the throttling hand of censorship"—and that an additional 300 members signed on as a result. Harold Lord Varney, "The Civil Liberties Union," *American Mercury* 39 (1936): 385–99.

269. More obliquely, it paved the way for what mid-century aesthetes and intellectuals would celebrate as the fulfillment of individual identity, and cultural critic Phillip Rieff would denigrate as "post-communal culture." Philip Rieff, *The Triumph of the Therapeutic: Uses of Faith After Freud* (New York: Harper and Row, 1966), 11. Rieff explained: "Much of modern literature constitutes a symbolic act of going over to the side of the latest, and most original individualist. This represents the complete democratization of our culture." Ibid., 9.