

## **LAWYERS, LIBERTINES, AND THE REINVENTION OF FREE SPEECH, 1920–1933**

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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.”<sup>1</sup> So stated a 1928 ACLU bulletin, reiterating a position to which the organization had adhered since its formation in 1920. To the authors of the bulletin, “political views” encompassed the struggle for control of the government and the economy, but not of the body or the mind.

Just three years later, however, the ACLU was the undisputed leader of the anti-censorship campaign, an aggressive advocate of artistic freedom and birth control. With that shift, a new model of civil liberties began to take shape—one that celebrated individual expressive freedom over substantive political reform. Thus transformed, the civil liberties

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<sup>1</sup> ACLU Bulletin 63, November 1928, “Civil Liberty and the Courts: Obscenity and Political Opinions” (American Civil Liberties Union, *The Roger Baldwin Years: 1917–1950*, A Microfilm Edition, Mudd Library, Princeton University, Reel 2) [hereinafter “ACLU Papers”].

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 involving a sex education pamphlet, *The Sex Side of Life: an Explanation for Young People*, written by the former suffragist and outspoken birth control activist Mary Ware Dennett. 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, and she responded by challenging the postal censorship laws.

ACLU board members agreed to sponsor Dennett's case because it instructed the youth on an issue of social importance, thereby advancing the public interest in a direct and familiar way. Unexpectedly, however, the litigation unleashed a far more sweeping anti-censorship initiative. Dennett's heavily publicized conviction, overturned by the Second Circuit on appeal, generated popular hostility toward the censorship laws and convinced ACLU attorneys that speech should be protected regardless of its social worth. *United States v. Dennett*,<sup>2</sup> in the words of ACLU co-counsel and emerging free speech leader Morris Ernst, was a "test-case of vital importance."<sup>3</sup>

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<sup>2</sup> *United States v. Dennett*, 39 F.2d 564 (2nd Cir. 1930).

<sup>3</sup> Appellant's Brief, 59 (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, Reel 23, Folder 490) [hereinafter "Dennett Papers"].

### *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 cultural expression.<sup>4</sup> The new organization, which emerged in response to the repressive excesses of the First World War, was devoted to the protection of political speech. Most of its members were unconcerned with other, more personal, modes of expression, and many in fact welcomed state regulation in the realm of morality. Theirs was a circumscribed commitment to political pluralism as an instrument of social welfare. By the early 1930s, however, the ACLU was unqualifiedly committed to the fight against censorship—indeed, 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.<sup>5</sup> Meanwhile, obscenity scholars have related changing public

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<sup>4</sup> 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).

<sup>5</sup> Because contemporary academic discussion has continued to focus primarily on the political, public-interest implications of free speech (see generally Graber), it is unsurprising that many

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.<sup>6</sup> In this paper, 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, or because it was not decided on First Amendment grounds, or because its implications for the broader civil liberties movement were not immediately apparent.<sup>7</sup> And yet, *Dennett*

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historical accounts have neglected the expansion of civil liberties advocacy to include issues like obscenity, which more directly implicate individual rights.

<sup>6</sup> 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, like 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 anti-obscenity movement and women's political power, identity, and sexuality. *Against Obscenity: Reform and the Politics of Womanhood in America, 1873–1935* (Baltimore: Johns Hopkins University Press, 2004).

<sup>7</sup> See, e.g., 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); Paul L.

fundamentally redefined the way that lawyers, judges, and activists understood the category of civil liberties.<sup>8</sup> It introduced the possibility of a free speech agenda premised on personal autonomy, a cause that resonated strongly with mainstream Americans, rather than political

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Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, Connecticut: Greenwood Publishing Co., 1972); 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) (none of which list Dennett in the index). 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.

<sup>8</sup> 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(3) (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 anti-obscenity 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. "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 (Autumn 2000): 173–96; see also Wheeler, *Against Obscenity*.

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 they 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.<sup>9</sup>

This chronology turns on its head the conventional wisdom that acceptance of free speech in America began with political speech and steadily expanded toward more personal liberties. 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, non-political causes like 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. Historians have rightly

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<sup>9</sup> Franklin D. Roosevelt Annual Message to Congress, January 6, 1941; Records of the United States Senate; SEN 77A-H1; Record Group 46; National Archives. 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. Letter from Morris Ernst to Franklin D. Roosevelt, 21 September 1943 (Morris Leopold Ernst, 1888–1976, Harry Ransom Humanities Research Center, The University of Texas at Austin, Box 97, Folder 3 [hereinafter "Ernst Papers"]).

regarded the First World War as the central impetus for the modern civil liberties movement.<sup>10</sup> The figures at the forefront of the interwar civil liberties movement were a varied bunch, 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<sup>11</sup> and to constitutional rights-based claims.<sup>12</sup> These they identified with corporate and judicial opposition to protective labor legislation, epitomized by the Supreme Court’s notorious decision in *Lochner v. New*

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<sup>10</sup> Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York, Norton, 1979), 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; Graber; Rabban; Richard W. Steele, *Free Speech in the Good War* (New York: St. Martin’s Press, 1999); Stone; John Witt, “Crystal Eastman and the Internationalist Beginnings of American Civil Liberties,” *Duke Law Journal* 54: 705–63 (2004).

<sup>11</sup> 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).

<sup>12</sup> On the latter point, Gilbert Roe is a noteworthy exception. Like his Progressive colleagues, Roe distrusted the federal courts. Nonetheless, he was a committed civil libertarian and was active in the leadership of the Free Speech League. Roe (who represented the editors in the *Masses* case, see *infra* note 18), strongly influenced the ACLU’s early agenda.

*York*,<sup>13</sup> which invalidated a New York maximum-hours law because it interfered with an implicit constitutional “right to free contract.” Cases like *Lochner* prompted reformers to seek social progress through state action rather than individual liberties. Their broad commitment to social welfare, and their corresponding support for President Wilson, led many notable thinkers on the left of the political spectrum to condemn wartime dissent—or at least to support the right of a majoritarian government to quash it.<sup>14</sup>

In short order, however, the Progressive faith in enforced uniformity began to wane. 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.<sup>15</sup> Moreover, many dissenters were denied the opportunity to defend themselves. The Espionage Act of 1917 authorized the Post Office Department to act unilaterally in deny mailing privileges

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<sup>13</sup> 198 U.S. 45 (1905). Notwithstanding revisionist claims about popular reaction to *Lochner* in the immediate aftermath of the case, *see, e.g.*, David E. Bernstein, *Rehabilitating Lochner* (forthcoming, University of Chicago Press), it is clear that by the 1910s Progressive antipathy toward the case had crystallized.

<sup>14</sup> 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.

<sup>15</sup> Rabban, *Forgotten Years*, 300.

to suspect newspapers, journals, and other outlets of dissent.<sup>16</sup> Postmaster General Albert Burleson proved a willing and enthusiastic censor,<sup>17</sup> 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, co-founded 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.<sup>18</sup>

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<sup>16</sup> 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, 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.

<sup>17</sup> See Murphy, *World War I*, 98–99.

<sup>18</sup> 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 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917). Nonetheless, Hand’s reasoning was later incorporated into the

Episodes like these were highly publicized and prompted a growing contingent of journalists and politicians to resent the suppression of speech in general and bureaucratic censorship in particular.<sup>19</sup>

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.<sup>20</sup> 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 Berkman. Although

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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 (Feb. 1975): 719–73; Gerald 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).

<sup>19</sup> 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.

<sup>20</sup> The Palmer Raids outraged Felix Frankfurter, who joined with eleven other prominent attorneys to author a "Report on the Illegal Practices of the United States Department of Justice."

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.<sup>21</sup>

Many former Progressives sympathized with the radicals imprisoned under the Espionage Act. Some, like Crystal Eastman and Roger Baldwin, even came to share the views of the dissenters.<sup>22</sup> Others, like the civil liberties theoreticians Felix Frankfurter and Zechariah Chafee, endorsed free speech despite serious reservations about the speakers’ underlying beliefs. They emphasized the instrumental value of civil liberties in flushing out political truth.

Though crucial, political disillusionment was not the only ingredient of the interwar civil liberties movement. The notion of a libertarian democracy provided a valuable foil to bolshevism (and later, fascism), and an important counterbalance to bureaucratic centralization. Civil liberties were shaped in part by self-interested conservatives who continued to associate individual rights with economic rights and regarded a rights-based regime as preferable to socialism. And while few conservatives articulated civil libertarian arguments explicitly during this period, moderates, liberals, and even radicals were borrowing their language and learning

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<sup>21</sup> “The Red Assassins,” *Washington Post*, 4 January 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, *World War I*, 53.

<sup>22</sup> To Eastman and 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.

their tactics.<sup>23</sup> Many of the early civil liberties lawyers defended labor agitators and political dissenters by reference to individual rights because rights-based litigation had proved effective, not because they believed in individual liberty. In making these arguments and adopting these legal practices, they discovered the reformist potential of the Bill of Rights and the Courts. And as they did so, they gradually unlearned or moderated their older Progressive critique of rights.

Predictably, the civil liberties advocates and organizations of the early interwar period sought to curb the sorts of speech-restrictive government activity that had so alarmed them during the war. The best known of these, the ACLU, was chartered in 1920 in response to the wartime prosecutions, and it advocated a narrow swath of constitutionally protected speech based on the democratic value of political expression. Although its founders had always opposed military conscription and the suppression of dissent, they had believed for much of the war that the Wilson administration would come around to their point of view. As government officials treated them with increasing hostility, they began to reevaluate their optimism. They maintained their emphasis on social betterment, but the war undermined their confidence in majoritarian consensus as a path to truth. Instead of uniformity, they encouraged a proliferation of public voices. They rallied to Justice Holmes's formulation of a "marketplace of ideas,"<sup>24</sup>

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<sup>23</sup> Robert Gordon, "The Legal Profession," in Austin Sarat, Bryant Garth & Robert A. Kagan, eds., *Looking Back at Law's Century* (Ithaca: Cornell University Press, 2002): 288–336.

<sup>24</sup> The concept of the "marketplace of ideas" is generally attributed to Justice Holmes's dissent in *Abrams v. United States*, though he did not explicitly use the phrase. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that

where theories and thinkers would battle it out and the best one would be the last to remain standing.<sup>25</sup> For the time being, in typical Progressive fashion, they preserved a role for the state

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the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

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. Indeed, Morris Ernst put it 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*, 7 August 1931 (Ernst Papers, Box 2, Folder 3).

<sup>25</sup> 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. Vincent Blasi notes that Holmes was a pluralist, skeptical of absolute truth and yet committed to the articulation of steadfast political beliefs. In this pragmatist model, he suggests, dissenting speech represents a crucial challenge to established

in regulating that market and tempering its effects. They remained skeptical of the judicial forum and preferred to pursue free speech through legislatures, grass-roots organizing, and administrative agencies.<sup>26</sup>

Their focus, like that of the wartime government, was resolutely political. The stated object of the ACLU was “to meet the post-war attacks on the civil rights of labor, the farmers and the radicals”<sup>27</sup>—the very groups that the federal government had sought to repress. ACLU press releases from the 1920s indicate that the organization was principally interested in defending left-wing political speakers against prosecution, protecting the rights of unions to organize, and opposing alien registration and deportation bills. The ACLU and its affiliates also engaged with racial discrimination (especially lynchings), restraints on blasphemy, academic freedom (including, famously, evolution), and the right of assembly (including its own right to hold 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”).<sup>28</sup> Although the new organization professed to “make[] no distinction as to whose liberties it defend[ed]” and to put “no limit on

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power structures and the means through which false conceptions are periodically replaced. Ibid. 14, 29–30, 45–46.

<sup>26</sup> 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.

<sup>27</sup> American Civil Liberties Union, *Pamphlets on Civil Rights* (Princeton University Library), 6.

<sup>28</sup> Press Release, 16 May 1927 (ACLU Papers, Reel 1).

the principle of free speech,”<sup>29</sup> its sweeping language was misleading. Baldwin and his peers were adamantly opposed to the silencing of ideas, but they were relatively untroubled by “moral” censorship and its implications for personal autonomy.<sup>30</sup> Even the militant conformism of wartime had been insufficient to generate a language and politics of individual rights overnight; the legacy of pro-state, anti-court Progressivism was too tenacious.

A more libertarian vision of free speech was not without precedent. A vibrant, though unsuccessful, prewar free speech movement had championed individual autonomy in the realms of free love and artistic expression as well as politics. Indeed, 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.<sup>31</sup> 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. The monthly ACLU bulletins

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<sup>29</sup> Ibid., 7–8.

<sup>30</sup> Rabban, *Forgotten Years*, 311–312.

<sup>31</sup> See generally Rabban, *Forgotten Years*; Christine Stansell, *American Moderns: Bohemian New York and the Creation of a New Century* (New York: Henry Holt, 2000); John Wertheimer, “Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States” (Ph.D. diss., Princeton University, 1992). Constitutional free speech claims also proliferated during the nineteenth century, see, e.g., Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History* (Durham: Duke University Press, 2000), but defenders of sexually explicit speech generally relied on property rights during that period. Donna I. Dennis, “Obscenity Regulation, New York City, and the Creation of American Erotica, 1820–1880” (PhD diss., Princeton University, 2005).

reporting on the “civil liberty situation” occasionally included blurbs on obscenity cases, but the organization rarely took an aggressive stand on such prosecutions.<sup>32</sup> 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 organization did become involved almost invariably pertained to political speech<sup>33</sup> or to the prior restraint of expression, an issue with a very established pedigree.<sup>34</sup> The limits of this enterprise were conspicuous to prewar free speech activists. In correspondence between 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

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<sup>32</sup> See, e.g., Report on the Civil Liberty Situation for Month of April, 1926 (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) (ACLU Papers, Reel 1).

<sup>33</sup> See, e.g., Letter from John S. Codman to Roger Baldwin, 4 November 1924 (ACLU Papers, Reel 37, Volume 260); ACLU Press Release, 28 April 1927 (ACLU Papers, Reel 1). Less commonly during this period, the ACLU participated in religion cases. E.g., ACLU Bulletin No. 185, 9 February 1926 (ACLU Papers, R1).

<sup>34</sup> The 1929 pamphlet *The Censorship in Boston* (written by Baldwin but attributed to Chafee, Walker, 83) argued that prior restraint was untenable because it afforded too much discretion to individual government agents. Zechariah Chafee (The Civil Liberties Committee of Massachusetts), “The Censorship in Boston” (ACLU Papers, Reel 86, Volume 503).

more personal liberties which are being very much invaded.”<sup>35</sup> Baldwin, unpersuaded, dismissed these issues as peripheral to “the wider political question which we are discussing.”<sup>36</sup>

In the mid-1920s, however, a new minority within the ACLU began to argue that obscenity prosecutions were of considerable public importance and 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.<sup>37</sup> As contemporaries of their ACLU colleagues (almost all of whom were born in the

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<sup>35</sup> Letter from Theodore Schroeder to Roger Baldwin, 27 November 1917 (ACLU Microfilm, 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, anti-liquor and anti-tobacco laws, and laws regulating women’s propriety and behavior. Letter from Theodore Schroeder to Roger N. Baldwin, 4 December 1917 (ACLU Microfilm Reel 1, Vol. 3).

<sup>36</sup> Letter from Roger Baldwin to Theodore Schroeder, 7 December 1917 (ACLU Microfilm, Reel 1, Vol. 3).

<sup>37</sup> ACLU Bulletin 325, 18 October 1928 (ACLU Papers, Reel 1); ACLU Bulletin 391, 14 February 1930 (ACLU Papers, 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, 13 March 1926 (Ernst Papers, Box 399, Folder 3).

1880s and came of age during the Progressive era<sup>38</sup>), Hays and Ernst endorsed Progressive 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 finding political truth, but because they recognized how rapidly public morality (as well as political ideology) shifted and were skeptical that any overarching truth was ascertainable by anyone, let alone by government. Moreover, though they were stark legal realists and skeptical about the integrity of the courts, they were lawyers, and as such they tended to favor the judiciary as a venue for protecting civil liberties.<sup>39</sup> Perhaps most importantly, they maintained successful private law practices. They regularly defended periodicals and publishing houses against obscenity charges. In these private censorship matters, they based their legal strategies on the long-term interests of their clients.<sup>40</sup> 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

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<sup>38</sup> 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.

<sup>39</sup> Only three of twenty executive committee members were lawyers in 1920. Walker, 69.

<sup>40</sup> As was customary during this period, see, e.g., Gordon, 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 fulltime attorneys. See generally Kutulas.

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<sup>41</sup> in a circle of reformers and radical activists.<sup>42</sup> 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,<sup>43</sup> and he was celebrated as a hero in the Boston anti-

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<sup>41</sup> In October 1928, Arthur Garfield Hays debated the question "Is Liberalism a Menace" at the Ford Hall Forum. Hays argued that liberalism was the way forward and that radicalism was an ill-advised theory; he sought to demonstrate that "the solution of our economic problems must be accomplished by education and law not by revolution" (Dennett Papers, Reel 22, Folder 477).

<sup>42</sup> Ernst and Hays also stood out as Jews in an overwhelmingly Protestant movement. Walker explains Ernst and Hays's aggressive libertarian stand on censorship of the arts on this basis. Walker, 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, e.g., Letter from John Haynes Holmes to Morris Ernst, 16 January 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).

<sup>43</sup> 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

ensorship campaign.<sup>44</sup> Meanwhile, Ernst was fighting censorship through multiple channels. In 1926, he testified before the Senate Committee of Interstate Commerce against the Dill Bill to 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.”<sup>45</sup> And while he was certainly concerned about the suppression of political speech,<sup>46</sup> 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.<sup>47</sup> 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*, co-authored with William Seagle, was a scathing critique of the obscenity laws.<sup>48</sup>

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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.

<sup>44</sup> It was Hays’s representation of Mencken in the postal matter that prompted Dennett to seek his assistance in 1926. Letter from Arthur Garfield Hays to Mary Ware Dennett, 25 May 1926 (Dennett Papers, Reel 21, Folder 441).

<sup>45</sup> ACLU News Release, 26 February 1926 (ACLU Papers, Reel 1).

<sup>46</sup> His proposed amendments to the bill involved political and economic provisions.

<sup>47</sup> Lewis Gannett attributed Ernst’s commitment to the anti-censorship cause to his loss in that case. Lewis Gannett, “Books and Things,” *Herald Tribune*, 9 December 1933.

<sup>48</sup> *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.

Notwithstanding their opposition to the vice societies, Ernst and Hays tended to separate their service to the ACLU from their private (and usually remunerative) anti-censorship work. By the late 1920s, however—just as Ernst and Hays were gaining influence within ACLU—the organization’s agenda was in flux. 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.<sup>49</sup> As late as 1929, the organization stated that while it opposed advance censorship of any kind, prosecution of a published work was not a civil liberties concern.<sup>50</sup> Despite their public position, however, many ACLU members had begun to reassess their views on this issue.

In February 1929, Roger Baldwin, on behalf of the executive committee, urged a clarification and extension of the organization’s objectives. Baldwin reminded members of the 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

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Lawrence, among others. Letter from D. H. Lawrence (recipient not specified), 10 November 1928 (Ernst Papers, Box 5, Folder 3).

<sup>49</sup> National Committee, 12 November 1928 (ACLU Papers, R1).

<sup>50</sup> In fact, Baldwin insisted that “the best way to control . . . downright obscenity is by criminal prosecution” after the fact. Letter from Roger Baldwin to Mary E. McDowell, 25 February 1929 (ACLU Papers, Reel 63, Volume 360).

seizures.”<sup>51</sup> 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, though 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. Baldwin received a flood of letters opposing the ACLU’s expansion into fields not directly associated with freedom of speech and press.<sup>52</sup> In response to this 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”<sup>53</sup>). 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

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<sup>51</sup> Letter from Roger Baldwin, for the Executive Committee, to the National Committee, 14 February 1929 (ACLU Papers, Reel 63, Volume 360).

<sup>52</sup> The fact that the National Committee responded at all highlights the perceived importance of Baldwin’s inquiry, as most National Committee members were involved only nominally or financially.

<sup>53</sup> Letter from Roger Baldwin, on behalf of the Executive Committee, to the National Committee, 5 April 1929 (ACLU Papers, Reel 63, Volume 360).

work.<sup>54</sup> 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.<sup>55</sup>

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., *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* (italics in original).

Frankfurter wanted the ACLU to be interested in issues like civil rights, pacifism, internationalism, and birth control only to the extent that they implicated free speech proper. 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."<sup>56</sup> Like an increasing contingent of civil libertarians, Frankfurter was ready to defend speech regardless

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<sup>54</sup> In response to McDowell's letter, Baldwin sought to frame the censorship provision as a clarification rather than expansion of the ACLU's position on censorship. Letter from Roger Baldwin to Mary E. McDowell, 25 February 1929 (ACLU Papers, Reel 63, Volume 360).

<sup>55</sup> Letter from Felix Frankfurter to Roger Baldwin, 16 February 1929 (ACLU Papers, Reel 63, Volume 360).

<sup>56</sup> Letter from Felix Frankfurter to Roger Baldwin, 1 March 1929 (ACLU Papers, Reel 63, Volume 360).

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 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*.

### ***The Sex Side of Life***

When the American Civil Liberties Union announced its successful appeal in *United States v. Dennett* in March 1930, many Americans welcomed the news as a victory for justice. And indeed, it was justice of an uncommonly poetic sort. The *Dennett* case was the ACLU’s first important attack on postal obscenity censorship, and the Second Circuit’s seminal decision was an important achievement for the organization and its client. Newspaper accounts heralded Mary Ware Dennett as the protagonist<sup>57</sup>—but not in the capacity that civil liberties sympathists might have expected a few years prior.

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 Design and Decoration at the Boston Museum of Fine Arts. From 1894 to 1897 she headed the department of decoration and design at the

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<sup>57</sup> 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 *infra* note 131. For a discussion of Dennett’s opponents, see Wheeler, “Rescuing Sex” (describing opposition by Reverend William Sheafe Chase).

Drexel Institute 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.<sup>58</sup>

Mary Ware married William H. 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 William to live in their home. The custody proceedings and subsequent divorce generated sensationalist news coverage, which distressed Dennett deeply.<sup>59</sup> 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 for Peace and Democracy and a member of the Woman's Peace Party in New York. Notably, she

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<sup>58</sup> "Mrs. Dennett, 75, Suffrage Leader: A Founder of National Birth Control League Dies—Fought to Legalize Sex Education," *New York Times*, 26 July 1947, 13.

<sup>59</sup> William 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*, 24 September 1909, 3. 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. *E.g.*, "Chase to Join Wife and Her Soul Mate," *New York Times*, 25 January 1915, 3.

also served as field secretary for the American Union Against Militarism and, once it was organized as a separate entity, to the Civil Liberties Bureau—the institutional precursors to the ACLU. 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 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. While 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.<sup>60</sup>

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

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<sup>60</sup> Those found guilty of violating the Act were subject to six months to five years imprisonment at hard labor or a fine of between one hundred and two thousand dollars. 17 Stat. 598.

the laws.<sup>61</sup> 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 twenty 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.<sup>62</sup> But despite her unflagging efforts, including her publication in 1926 of *Birth Control Laws*,<sup>63</sup> a book that criticized the Comstock laws and advocated legislative change, the bill reached a dead end. 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 a sex education pamphlet, *The Sex Side of Life: an Explanation for Young People*, which was heralded by secular and religious reformers as an

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<sup>61</sup> Letter from Mary Ware Dennett to Senator Ferris, 21 April 1925 (Dennett Papers, Reel 22, Folder 470).

<sup>62</sup> The bill would have deleted the phrase “for the prevention of contraception” from the Comstock Act.

<sup>63</sup> Mary Ware Dennett, *Birth Control Laws: Shall We Keep Them, Change Them, or Abolish Them* (New York: F. H. Hitchcock, 1926).

indispensable educational tool.<sup>64</sup> The censorship of *The Sex Side of Life* and the subsequent conviction of its author for mailing an obscene publication touched off a firestorm of public outrage and offended judicial sensibilities. The author of the beloved pamphlet, of course, was Mary Ware Dennett.

For all the controversy it would engender, *The Sex Side of Life: an Explanation for Young People* was ostensibly penned with very modest intentions. Dennett claimed that when she wrote the pamphlet in 1915, she had two particular young people in mind: her sons Carl (then fourteen years old) and Devon (age ten). 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. Coincidentally, at just that time, the Metropolitan Life Insurance Company was sponsoring a competition for the best pamphlet on sex education for adolescents between the age of twelve and sixteen.<sup>65</sup>

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

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<sup>64</sup> 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 Y.M.C.A. chapters. “List of Larger Contributors” (Dennett Papers, Reel 21, Folder 445).

<sup>65</sup> Chen, 176.

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.”<sup>66</sup> 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* attributes 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 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.<sup>67</sup> Emotionally, Dennett noted, the subject was simply ignored.<sup>68</sup>

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.”<sup>69</sup> Finally, she made the “frank, unashamed declaration that the climax of sex emotion is an unsurpassed joy,

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<sup>66</sup> Quoted in *ibid.*, 172.

<sup>67</sup> Mary Ware Dennett, “The Sex Side of Life,” 2 (ACLU Papers, Reel 68, Volume 374). The pamphlet was reprinted in Mary Ware Dennett, *Who’s Obscene?* (New York: Vanguard Press, 1930).

<sup>68</sup> *Ibid.*, 3.

<sup>69</sup> Dennett, 22.

something which rightly belongs to every normal human being.”<sup>70</sup> By the time Dennett was haled into court, sentiments like 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.<sup>71</sup> But in 1915, Dennett’s celebration of sexual pleasure was unconventional, even radical.<sup>72</sup>

*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

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<sup>70</sup> Ibid., 4.

<sup>71</sup> See Nancy F. Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987), 149. Cott, citing Kinsey’s 1950s studies, notes that women’s sexual practices changed drastically during the 1920s.

<sup>72</sup> For prewar feminists, equality in the bedroom was merely one facet of a larger struggle for women’s equality. Christine Stansell, *American Moderns: Bohemian New York and the Creation of a New Century* (New York: Henry Holt, 2000), 227. These broader implications of *The Sex Side of Life* fell away in the intervening years. Cott, 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. Letter from S. P. Breckenridge to Mary Ware Dennett, 15 January 1930 (Dennett Papers, Reel 23, Folder 483).

time.<sup>73</sup> A Progressive-era reform initiative, the 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, though their ambitions were predictably undermined in practice.<sup>74</sup>

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

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<sup>73</sup> See generally Kristin Luker, “Sex, Social Hygiene and the Double-Edged Sword of Social Reform,” *Theory and Society* 27 (1998): 601–34. Though *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, e.g., 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, 21 May 1929 (Dennett Papers, Reel 23, Folder 484).

<sup>74</sup> 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, 619–20.

pamphlet. As late as the early 1930s, organized vice crusaders assumed that Dennett was an ally in the struggle against sexual promiscuity.<sup>75</sup>

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.<sup>76</sup> Carl's enthusiastic endorsement was only the beginning. His friends began borrowing the text, and her 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*, alongside 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,<sup>77</sup> circulation of the pamphlet was beset by legal difficulties. In 1922, Postmaster General

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<sup>75</sup> See *infra* note 164 and corresponding text.

<sup>76</sup> Lewis Gannett, "Books and Other Things," *Tribune*, 20 March 1930.

<sup>77</sup> 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, Trial Transcript, Second Circuit Case File 10712, United States Court of Appeals for the Second Circuit, Record Group 276 (National Archives and Records Administration Northeast Region, New York), 97.

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.<sup>78</sup> 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.<sup>79</sup> Dennett believed her pamphlet was targeted in retaliation for her outspoken criticism of postal censorship practices, and she was outraged.<sup>80</sup>

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. In fact, many journalists quite consciously constructed Dennett as

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<sup>78</sup> 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. Letter from Edgar M. Blessing to Mary Ware Dennett, 13 June 1925 (Dennett Papers, Reel 22, Folder 463).

<sup>79</sup> See, e.g., Letter from Mary Ware Dennett to Senator William E. Borah, 9 April 1925 (Dennett Papers, Reel 20, Folder 415); letter from Mary Ware Dennett to Senator George Norris, 7 April 1925 (Dennett Papers, Reel 22, Folder 463).

<sup>80</sup> Letter from Mary Ware Dennett to Florence Garvin, 17 August 1929 (Dennett Papers, Reel 21, Folder 436).

an unassuming figure, over Dennett's own objections.<sup>81</sup> 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 declined all but one of the many speaking invitations she received.<sup>82</sup> But Dennett, at fifty-three and in robust health, had always taken a much more calculated and proactive approach to the law, and her own case was no exception.<sup>83</sup>

In 1926, Dennett proposed a legal challenge of the Comstock laws to ACLU counsel 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

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<sup>81</sup> 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*, 3 May 1929, 24.

Though Dennett preferred to emphasize her accomplishments and public work, the newspapers refused to budge, since the fact that Dennett was a grandmother “carried great weight with the newspaper reading public.” Letter from W. P. Beazell (editor for *The World*) to Mary Ware Dennett, 1 May 1929 (Dennett Papers, Reel 21, Folder 456).

<sup>82</sup> Many organizations asked Dennett to speak at their functions, panels, and symposia during 1929 and 1930, but Dennett refused virtually all invitations. Letter from Mary Ware Dennett to Vine McCasland and Myra Gallert, 1 March 1929 (Dennett Papers, Reel 21, Folder 438).

<sup>83</sup> After meeting with Ernst, Dennett immediately wrote to him that despite her “very real dread of the publicity” she was ready—indeed, “heartily glad”—to have the case proceed. Letter from Mary Ware Dennett to Morris Ernst, 20 October 1928 (Dennett Papers, Reel 23, Folder 485).

chances slim and counseled Dennett to wait for a more opportune moment.<sup>84</sup> 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.<sup>85</sup> 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 was likely to consider the censorship inappropriate, let alone declare it contrary to legislative intent or, even more radically, unconstitutional.

Two years later, however, 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.”<sup>86</sup> Dennett was forthright about Hays’s discouraging advice.<sup>87</sup> Nonetheless, after some initial hesitation, Ernst enthusiastically devoted

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<sup>84</sup> Letter from Arthur Garfield Hays to Mary Ware Dennett, 21 May 1926 (Dennett Papers, Reel 21, Folder 441).

<sup>85</sup> 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. Letter from Arthur Garfield Hays to Mary Ware Dennett, 4 October 1927 (Dennett Papers, Reel 21, Folder 441).

<sup>86</sup> Letter from Morris Ernst to Mary Ware Dennett, 30 August 1928 (Dennett Papers, Reel 23, Folder 485).

<sup>87</sup> Letter from Mary Ware Dennett to Morris Ernst, 1 September 1928 (Dennett Papers, Reel 23, Folder 485).

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.<sup>88</sup> 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.<sup>89</sup> Dennett obligingly mailed out a copy of the pamphlet. And thus began *United States v. Dennett*.<sup>90</sup>

Dennett was indicted in December 1928 in the Federal District Court sitting in Brooklyn, the jurisdiction in which her Astoria, Queens home was located. She faced a maximum sentence of five years in prison or a five thousand dollar fine or both.<sup>91</sup> Ernst immediately agreed to

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<sup>88</sup> 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; Federal Appeals Court Frees Mrs. Mary Dennett of Obscenity Charge,” *Los Angeles Times*, 4 March 1930, p. 3.

<sup>89</sup> ACLU, “The Prosecution of Mary Ware Dennett for ‘Obscenity’: Who Determines Obscenity” (Dennett Papers, Reel 23, Folder 481).

<sup>90</sup> 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.

Letter from Mary Ware Dennett to Vine McCasland and Myra Gallert, 1 March 1929 (Dennett Papers, Reel 21, Folder 438).

<sup>91</sup> ACLU Bulletin 352, 26 April 1929 (ACLU Papers, Reel 2).

represent her (he donated his time at both the trial and appellate levels<sup>92</sup>), and he convinced the ACLU to sign on as well. At trial, the judge excluded outside assessments of Dennett's work, and in short order a jury convicted her of mailing an obscene publication. Dennett was fined three thousand dollars, but she refused to pay and declared that she would serve out her prison term instead.<sup>93</sup> The ACLU appealed the conviction as the American public cheered Ernst and Dennett on. In January 1930, the Second Circuit reversed the District Court's opinion. *The Sex Side of Life*, it held, was not obscene.

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<sup>92</sup> Minutes of the Executive Committee Meeting, 29 April 1929 (ACLU Papers, 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.” Letter from Mary Ware Dennett to Vine McCasland, 1 March 1929 (Dennett Papers, Reel 21, Folder 438). Meanwhile, an “unknown Cambridge woman,” Frances W. Emerson, sent Dennett one thousand dollars, essentially bankrolling her for the duration of the defense. Letter from Mary Ware Dennett to Family, 8 May 1929 (Dennett Papers, Reel 21, Folder 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.” Letter from Frances W. Emerson to Mary Ware Dennett, 20 May 1929 (Dennett Papers, Reel 20, Folder 431).

<sup>93</sup> Dennett was willing to serve time in prison to help the anti-censorship cause. Letter from Mary Ware Dennett to family, 8 May 1929 (Dennett Papers, Reel 21, Folder 433). Because the appeal was successful, however, she was never imprisoned.

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 monkey trial," they saw Dennett's prosecution as another opportunity to defend modern science against old-fashioned moralists—this time, they hoped, without triggering public resentment.<sup>94</sup> 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. No one suggested that Dennett should be permitted to publish her pamphlet if it were shoddily written, much less actually lewd. No one anticipated in 1929 that *United States v. Dennett* would usher in a new era for the ACLU.

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<sup>94</sup> Ernst repeatedly compared Dennett's case to the Scopes trial. Letter from Mary Ware Dennett to Rae Morris, 9 May 1929 (Dennett Papers, Reel 21, Folder 449). The ACLU regarded the Scopes trial as a case about academic freedom, 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, and it reaffirmed the organization's commitment to pluralism in education. It is noteworthy that the ACLU leadership, with the exception of Hays, was distressed by Clarence Darrow's flagrantly anti-religious approach during the Scopes trial and would have preferred a more moderate and publicly palatable strategy. *Ibid.*, 206–07. They believed that Darrow's confrontational tone was costly both ideologically, as the trial might otherwise have helped the ACLU promote an agenda of tolerance, and financially, since potential contributors were put off by Darrow's aggressive and disrespectful style. *Ibid.*, 207.

### *United States v. Dennett*

Ernst's 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. His strategy in the District Court was 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, and most direct treatment of the subject”<sup>95</sup> ever produced. Adolescents, Ernst suggested, are not satisfied with cryptic allusions, 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 children.”<sup>96</sup> By contrast, the truth, unadorned and respectful, was not obscene.

Ernst also urged the court to consider the motives and circumstances of publication.<sup>97</sup> 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,”<sup>98</sup> rather than to make money, confirmed that her motives were pure.<sup>99</sup>

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<sup>95</sup> Memorandum, 8.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid., 4.

<sup>98</sup> Ibid.

<sup>99</sup> 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.

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.”<sup>100</sup> His memorandum to quash the indictment 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.<sup>101</sup>

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.”<sup>102</sup> 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.”<sup>103</sup> “If I can stand between this woman and the children of the land,” he proclaimed in court, “I will have accomplished something.”<sup>104</sup>

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<sup>100</sup> Ibid., 8.

<sup>101</sup> Appellant’s Brief, 34 (Dennett Papers, Reel 23, Folder 490).

<sup>102</sup> ACLU, “Who Determines Obscenity,” 5.

<sup>103</sup> Ibid., 6.

<sup>104</sup> 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,” *The Nation*, Vol. 128, No. 3331 (May 8, 1929), p. 552.

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.<sup>105</sup> 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<sup>106</sup>; 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.<sup>107</sup> Ernst thereupon withdrew his motion to quash the indictment and filed a

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<sup>105</sup> 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.” Letter from Mary Ware Dennett to Vine McCasland and Myra Gallert, 13 March 1929 (Dennett Papers, Reel 21, Folder 438).

<sup>106</sup> Moscowitz canceled the hearing at the last minute on the grounds that the witnesses would unduly influence the jury. ACLU, “Who Determines Obscenity,” 6. 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, Second Circuit Case File 10712, United States Court of Appeals for the Second Circuit, Record Group 276 (National Archives and Records Administration Northeast Region, New York), 93.

<sup>107</sup> Dennett confided to her close friends that Moskowitz feared a favorable decision in her case would be used against him by his “enemies” and “practically beg[ged]” Ernst to have the case

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 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.<sup>108</sup> The all-male jury returned a guilty verdict in under an hour.<sup>109</sup>

Ernst promptly filed an appeal.

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transferred to another judge. Letter from Mary Ware Dennett to Vine McCasland and Myra Gallert, 7 March 1929 (Dennett Papers, Reel 21, Folder 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. Letter from Mary Ware Dennett to Vine McCasland and Myra Gallert, 13 March 1929 (Dennett Papers, Reel 21, Folder 438).

<sup>108</sup> ACLU, "Who Determines Obscenity," 4.

<sup>109</sup> Several explanations were offered for the jury's behavior, which seemed so inconsistent with public opinion. First, and most importantly, outside assessments of the pamphlet were 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." "Sex and the Law," *The Nation*, Vol. 128, No. 3331 (May 8, 1929), p. 554. No doubt the sex composition of the jury also affected the verdict. As women were ineligible to serve on juries in New York until 1937, Linda K. Kerber, *No Constitutional*

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.<sup>110</sup>

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."<sup>111</sup> A publication like 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

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*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.

<sup>110</sup> Ernst also presented a technical deficiency (insufficiency of indictment) on pages 40–42 of his brief, 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.

<sup>111</sup> Appellant's Brief, 12 (Dennett Papers, Reel 23, Folder 490) (*italics in original*).

worthless nostrums” (i.e., the information on birth control that had once been grist for the Comstock mill), “violent attack[s] on religion or religious customs,” “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.

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 the federal government. He cautioned that if the obscenity law were deemed constitutional, the federal government would be empowered to enforce a federal moral standard that might directly conflict with the local standard of the various states, to which such decisions were entrusted.<sup>112</sup> 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 argued that it flatly contravened the First Amendment to the Constitution of the United States.<sup>113</sup>

Though it is standard practice today, invoking the First Amendment in an obscenity case was almost laughable in 1930.<sup>114</sup> The ACLU itself had written off constitutional argument in a 1928 bulletin describing its position on obscenity. “There is no longer any doubt that so-called obscene publications are not protected by the federal constitution,” it reported with apparent

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<sup>112</sup> *Ibid.*, 51–52.

<sup>113</sup> *Ibid.*, 9, 52.

<sup>114</sup> Nonetheless, Theodore Schroeder and the Free Speech League regularly made such claims during the early twentieth century. See *supra* note 31.

resignation.<sup>115</sup> Ernst was not naïve about his chances. The Supreme Court had ruled in *Ex parte Jackson* (1878) that the First Amendment did not apply to the mails, and it had given no indication that it was about to change its mind. “We are aware,” Ernst conceded, “that obscenity statutes have been repeatedly held to be constitutional by the Federal Courts.”<sup>116</sup> He nonetheless contended that changing public mores warranted reconsideration of the issue. Most importantly, he sought to extend the powerful rhetoric of Justice Holmes and Brandeis’s dissents in the Supreme Court’s recent First Amendment cases, which dealt with political speech, to the obscenity cases. 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.”<sup>117</sup>

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 legal realists, was not a vehicle for protecting natural rights. It was a political tool. And while 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.

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<sup>115</sup> ACLU Bulletin 63, November 1928 (ACLU Papers, Reel 2).

<sup>116</sup> Memorandum, 53.

<sup>117</sup> Ibid.

Judge Augustus N. Hand, writing on behalf of a three-judge panel,<sup>118</sup> accepted the spirit of Ernst’s argument if not its implications. Hand insisted that there could be no doubt about the constitutionality of the statute, but he nonetheless reversed Dennett’s conviction on the basis that *The Sex Side of Life* was not obscene. The decision implicitly modified the test adopted by the Supreme Court fifty years earlier in *United States v. Bennett*.<sup>119</sup> 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.”<sup>120</sup> Under the *Hicklin* test, a work could be judged obscene on the basis of a single passage that would corrupt youth, the most susceptible of audiences.<sup>121</sup>

Judge Hand’s opinion in *Dennett* was more permissive. A sex education pamphlet like 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

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<sup>118</sup> The other judges were Judges Thomas W. Swan and Harrie B. Chase.

<sup>119</sup> *United States v. Bennett*, 16 Blatch. 338 (1879).

<sup>120</sup> *Regina v. Hicklin*, L. R. 3 Q. B. 360, 371, 8 Eng. Rul. Cas. 60 (1868).

<sup>121</sup> 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.”

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 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.”<sup>122</sup>

*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.<sup>123</sup>

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<sup>122</sup> *United States v. Dennett*, 39 F.2d 564, 569 (2nd Cir. 1930). The ACLU announced the reversal of *Dennett's* conviction in ACLU Bulletin 394, 6 March 1930 (ACLU Papers, Reel 2).

<sup>123</sup> 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

Despite her relief, Dennett refrained from celebrating for a 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,<sup>124</sup> 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.<sup>125</sup> In reality, of course, the Second Circuit's decision effected a very real change in the law of obscenity. But the massive 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.

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."<sup>126</sup> While Ernst's claim is an oversimplification, it rang true in the *Dennett* case.

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Gunther described a similarly delayed constitutionalization of statutory interpretation in the context of Learned Hand's "direct incitement" test in the *Masses* case.

<sup>124</sup> 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*, 5 March 1930.

<sup>125</sup> Department of Justice Press Release, 5 June 1930, quoted in Felix Frankfurter, "The Business of the Supreme Court at October Term, 1929," *Harvard Law Review* 44 (November 1930): 1-40, 19, note 22.

<sup>126</sup> Draft of Interview between Thomas Stix and Morris Ernst, 23 January 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, explaining: "In the numerous obscenity cases which we have handled, we have found the opinions of representative

Many prominent men and women, along with myriad organizations and members of the clergy, had rallied to Dennett's defense.<sup>127</sup> Indeed, 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—reestablished correspondence and offered to help, and

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citizens in the community most helpful in influencing the courts to arrive at common sense decisions. We have always maintained that obscenity, in the last analysis, 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, 24 September 1930 (Ernst Papers, Box 359, Folder 1).

<sup>127</sup> "Mrs. Dennett Freed in Sex Booklet Case," *New York Times*, 4 March 1930. Private congratulations poured in. See, e.g., Letter from B. W. Huebsch (publisher) to Mary Ware Dennett, 3 March 1930 (Dennett Papers, Reel 20, Folder 423); telegram from Rupert Hughes (historian and screenwriter) to Mary Ware Dennett, 3 March 1930 (Dennett Papers, Reel 20, Folder 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." Letter from John Dewey to Mary Ware Dennett, 3 March 1930 (Dennett Papers, Reel 20, Folder 423).

hundreds of strangers sent letters, donations, and orders for *The Sex Side of Life*.<sup>128</sup> Dennett was most touched by the support she received from ordinary people, including an Italian worker, whose letter Dennett had translated by a neighbor,<sup>129</sup> and a “colored” man who offered to serve Dennett’s sentence in her stead.<sup>130</sup>

When the decision was announced, newspapers throughout the country ridiculed the prosecution and congratulated Dennett on her victory.<sup>131</sup> Journalistic support may have been particularly enthusiastic given the financial and editorial interests at stake. One might suppose, for example, that 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.<sup>132</sup> But whatever the underlying motivation, coverage of the Second Circuit decision

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<sup>128</sup> “Some enemies” came out of the woodwork as well. Letter from Dennett to Family, 8 May 1929 (Dennett Papers, Reel 21, Folder 433).

<sup>129</sup> Letter from F. Mazsella to Mary Ware Dennett, 26 April 1929 (Dennett Papers, Reel 21, 433).

<sup>130</sup> Letter from Mary Ware Dennett to Family, 2 May 1929 (Dennett Papers, Reel 21, Folder 433); letter from James Layne to Mary Ware Dennett, 26 April 1929 (Dennett Papers, Reel 21, Folder 444).

<sup>131</sup> 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 (Summer 1999): 64–74.

<sup>132</sup> Newspaper support, in turn, likely helped to sway public opinion in Dennett’s favor. Indeed, this phenomenon may help explain the public relations disaster that was the prosecution. While

was unqualifiedly exuberant. The *Kansas City Star* considered it “preposterous that [Dennett] should have been put to trial.”<sup>133</sup> *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.”<sup>134</sup> Lewis Gannett of the *Tribune* labeled *Dennett* “an historic case, a landmark in the history of America’s attitude toward sex,”<sup>135</sup> 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” that would dissuade the government from bringing future prosecutions.<sup>136</sup>

Dennett too was gratified by the outcome.<sup>137</sup> Ernst, however, was less sanguine. Certainly, he

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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.

<sup>133</sup> “Common Sense on a Sex Pamphlet,” *Kansas City Star*, 5 March 1930.

<sup>134</sup> “Mrs. Dennett Vindicated,” *World*, 6 March 1930.

<sup>135</sup> Lewis Gannett, “Books and Other Things,” *Tribune*, 20 March 1930.

<sup>136</sup> ACLU Bulletin 395, 13 March 1930 (ACLU Papers, Reel 2).

<sup>137</sup> “Mrs. Dennett Freed in Sex Booklet Case,” *New York Times*, 4 March 1930, C12.

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.<sup>138</sup>

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 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. Though formulated a full decade after World War I, Ernst's brief supplied the court with a Progressive vision of First Amendment Law: “[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.”<sup>139</sup> 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:

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<sup>138</sup> 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 censorship laws. Letter from Morris Ernst to Mary Ware Dennett, 31 December 1934 (Dennett Papers, Reel 20, Folder 414).

<sup>139</sup> Appellant's Brief, 15 (Dennett Papers, Reel 23, Folder 490).

[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. . . .<sup>140</sup>

Put simply, Ernst argued that regardless of social worth, all expression should be permissible unless its principal purpose was to pollute public morals. 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.<sup>141</sup> The early cases involved “wholesome” materials 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.<sup>142</sup> It is evident from Judge Hand’s

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<sup>140</sup> *Ibid.*, 61.

<sup>141</sup> 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.

<sup>142</sup> 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. In fact, they would often cite the condemnatory passages from dissents to cases which they had won as evidence of the relative promiscuity of the prior book. See, e.g., Memorandum of Law Submitted on Behalf of the Defendants, *People v. Brewer & Warren Inc.* (N.Y. City Mag. Ct., 4th Dist., 15 May 1930), 18 (Ernst Papers, Box 90).

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.<sup>143</sup> 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 capitalized on the popularity of the *Dennett* case to reevaluate 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 a "public interest" case in the mid-1920s mold, *United States v. Dennett* sparked a debate about whether censors could ever be trusted to advance the public good. 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

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<sup>143</sup> See *supra* note 7. On the *United States v. Ulysses*, see Paul Vanderham, *James Joyce and Censorship: The Trials of Ulysses* (Hampshire: MacMillan Press, 1998); Carmelo Medina Casado, "Legal Prudery: The Case of Ulysses," *Journal of Modern Literature* 26 (Fall 2002): 90–98.

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.

Notwithstanding *Dennett's* considerable influence on Ernst, the ACLU, and the American public, I do not mean to suggest that the case was causally indispensable to the incorporation of nonpolitical speech into the civil liberties agenda or to the embrace of autonomy by civil liberties advocates. Even if Mary Ware Dennett had never sought his legal services, Morris Ernst would likely have steered the ACLU toward a theory of expressive autonomy. 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. Perhaps, however, a less sympathetic defendant or a less conducive legal posture would have delayed or altered the process. The ACLU might have suffered another costly public relations defeat, and Ernst might have lost ground to the organization's Progressive holdouts. Civil liberties in American might have remained a political and economic affair. There was, after all, no controlling reason to bring together the tolerance of dissent and the freedom from sexual squeamishness under a single civil liberties banner.

In any case, the circumstances of Dennett's prosecution were well suited to Ernst's needs. 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.<sup>144</sup> In April of that year, the board constituted "The Mary Ware Dennett Defense Committee,"<sup>145</sup> which was to include educational, religious, and scientific leaders from across the country and drum up public support for Dennett's cause.<sup>146</sup> In early November, the Defense Committee (headed by John Dewey,<sup>147</sup> after several months under the leadership of Scripps-Howard newspaper publisher Roy Howard) launched a national campaign on Dennett's behalf, soliciting support from throughout the United States.<sup>148</sup>

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<sup>144</sup> Minutes of Executive Committee Meeting, 21 January 1929 (ACLU Papers, Reel 2). The ACLU formally announced its offer of assistance to Dennett on January 24, 1929. ACLU Press Bulletin 339, 24 January 1929 (ACLU Papers, 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. Minutes of the Executive Committee Meeting, 18 February 1929 (ACLU Papers, Reel 2).

<sup>145</sup> The formation of the committee was unanimously approved by the Executive Committee of the ACLU.

<sup>146</sup> ACLU Bulletin 353, "National Committee Forms for Mrs. Dennett's Defense," 3 May 1929 (ACLU Papers, Reel 2).

<sup>147</sup> 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, 301.

<sup>148</sup> ACLU Press Release, 14 November 1929 (ACLU Papers, Reel 2).

Early on, the ACLU was enthusiastically committed to Dennett's defense but conservative 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.<sup>149</sup>

Freedom of the press, argued the ACLU, "means the right to print and distribute freely facts or opinions on public issues."<sup>150</sup> *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.<sup>151</sup> 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."<sup>152</sup>

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

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<sup>149</sup> Minutes of the Executive Committee Meeting, 29 April 1929 (ACLU Papers, Reel 2).

<sup>150</sup> ACLU Press Release, 17 January 1929 (ACLU Papers, Reel 2).

<sup>151</sup> ACLU Bulletin 385, 10 January 1930 (ACLU Papers, Reel 2).

<sup>152</sup> ACLU Bulletin 387, 16 January 1930 (ACLU Papers, Reel 2).

of obscenity. And the litigation, sensationalistic from the outset,<sup>153</sup> generated outpourings of support that changed the public's view of censorship and 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."<sup>154</sup> 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," an ACLU pamphlet explained, "far exceeds the issue of [*The Sex Side of Life*] itself. 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."<sup>155</sup>

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 like 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.<sup>156</sup> Like their male

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<sup>153</sup> 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, 9 May 1929 (ACLU Papers, Reel 2). The book, entitled *Who's Obscene*, was released by Vanguard Press in 1930.

<sup>154</sup> Morris Ernst, "Sex Wins in America," *The Nation*, Vol. 135, No. 3501 (August 10, 1932), p. 123.

<sup>155</sup> ACLU, "Who Determines Obscenity," 8.

<sup>156</sup> "Social Morality Work of the W.C.T.U.," *Woman's Journal* 4(43), 15 May 1920, 1267.

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.<sup>157</sup> Characteristically, Catheryne Cooke Gilman, a leading anti-obscenity 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.”<sup>158</sup>

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<sup>157</sup> Male social hygienists also tentatively supported *The Sex Side of Life*. While 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. Letter from Bascom Johnson, Director of the Division of Legal and Protective Measures, American Social Hygiene Association, to Morris Ernst, 20 April 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 Moscovitz not to condemn the pamphlet, lest an adverse decision “occasion the suppression of similar documents published by the American Social Hygiene Association.” Letter from E. L. Keyes, M.D., to Hon. Grover Moscovitz, 4 February 1929 (Ernst Papers, Box 46, Folder 1).

<sup>158</sup> Gilman observed that men were far more likely than women to oppose sex education. Wheeler, *Against Obscenity*, 126. Men—both critics and supporters of Dennett—generally agreed with this assessment. William Sheafe Chase, Gilman’s longtime anti-obscenity ally, submitted an *amicus* brief on behalf of the government in the *Dennett* case. He told Gilman that Dennett “was thinking as a woman and of women, rather than of her boys as their father would think of them.” *Ibid.*, 125.

Gilman's attitude was representative of an increasingly influential segment of the anti-obscenity movement that sought simultaneously to eliminate prurience and to promote healthy and fulfilling sexual practices within marriage.<sup>159</sup> "Old-fashioned" vice crusaders, like Boston's Watch and Ward Society and the New York Society for the Suppression of Vice, indiscriminately condemned all sexually explicit material.<sup>160</sup> Indeed, from their perspective, materials like Dennett's were even more dangerous than outright pornography, because they threatened to make sex respectable.<sup>161</sup> By contrast, reformers like Gilman saw sex education materials as an antidote to sexual prurience rather than its cause. They feared that prosecutors would target educational offerings rather than the more worrisome but better-financed commercial ones.<sup>162</sup> Many endorsed explicit medical materials about sex, and few frankly opposed contraception.<sup>163</sup> While Gilman and her allies continued to distinguish desirable

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<sup>159</sup> Ibid., 118.

<sup>160</sup> 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.

<sup>161</sup> 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. *E.g.*, Letter from Samuel Marcus to Morris Ernst, 16 January 1940 (Ernst Papers, Box 5, Folder 1) (asserting that various prominent vice crusaders "derived a vicarious sex satisfaction out of pornography").

<sup>162</sup> Wheeler, *Against Obscenity*, 124.

<sup>163</sup> Ibid., 5.

treatments of sex, like *The Sex Side of Life*, from the more vulgar sort,<sup>164</sup> 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, fifteen hundred 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 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."<sup>165</sup>

Out of this meeting, the National Committee for Freedom from Censorship ("NCFC") was born. 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 excess funds.<sup>166</sup> From the

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<sup>164</sup> 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.

<sup>165</sup> Letter from Forrest Bailey to the Editor, 23 May 1929 (ACLU Papers, Reel 2).

<sup>166</sup> 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

outset, the NCFC emphasized the need for direct action 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.<sup>167</sup> 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 anti-censorship campaign, and to that end it hired a full-time secretary for the NCFC.<sup>168</sup> In July, the council announced a "drive against censorship in all its forms" headed by Pulitzer Prize-winning playwright Hatcher Hughes.<sup>169</sup> 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.<sup>170</sup>

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

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ways to support it through other means. Minutes of the Meeting of the Board of Directors, 5 October 1931 (ACLU Papers, Reel 3).

<sup>167</sup> ACLU Bulletin 397, 27 March 1930 (ACLU Papers, Reel 2).

<sup>168</sup> Minutes of the Meeting of the Board of Directors, 20 April 1931 (ACLU Papers, Reel 3).

<sup>169</sup> NCFC Press Release, 2 July 1931 (ACLU Papers, Reel 3).

<sup>170</sup> *Ibid.*

dirt,” she quipped in a 1930 forum.<sup>171</sup> For Dennett, the crusade against obscenity censorship 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.”<sup>172</sup> 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.<sup>173</sup>

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.”<sup>174</sup> 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

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<sup>171</sup> “Censorship Analyzed by Noted Publicists; Merits and Faults of System Are Placed in Limelight,” *Paterson Call*, 22 May 1930.

<sup>172</sup> Letter from Mary Ware Dennett to F. L. Rowe, 29 December 1934 (Dennett Papers, Reel 20, Folder 414).

<sup>173</sup> Mary Ware Dennett, “‘Married Love’ and Censorship,” *Nation*, Vol. 132 (May 27, 1931), p. 580.

<sup>174</sup> *Ibid.*

accomplish the task.<sup>175</sup> “The cure for the situation,” she insisted, “lies not in more suppression, but in less and less.”<sup>176</sup>

Significantly, Dennett was proposing the same remedy for antisocial and corruptive speech in the moral realm—namely, deregulation—as the ACLU had been advocating in the political sphere for the past decade. Her reasoning, however, was subtly different. In the political context, the goal of free speech was to encourage community debate. Bad ideas 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 did not easily translate to the circulation of sexually explicit speech, where legalization seemed sure to increase production 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.

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. Given the slipperiness of social norms, it was foolhardy and dangerous to enforce community standards from the top down. Though Dennett 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

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<sup>175</sup> Ibid.

<sup>176</sup> Letter from Mary Ware Dennett to F. L. Rowe, 29 December 1934 (Dennett Papers, Reel 20, Folder 414).

simply meant that the best society was one that valued individual freedom. The ACLU actively solicited Dennett's views on what sorts of projects the NCFC should pursue, and her evolving free speech absolutism pushed the organization in new directions.<sup>177</sup>

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.<sup>178</sup> 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<sup>179</sup> among the three new issues facing civil

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<sup>177</sup> See, e.g., Letter from Forrest Bailey to Members of the Executive Committee (Dennett Papers, Reel 20, Folder 414). Dennett referred several cases to the ACLU. See, e.g., Memorandum, 3 July 1930 (Dennett Papers, Reel 23, 483).

<sup>178</sup> During this period, civil libertarians were developing an incipient constitutional rights claim for free artistic expression. Cf. Robert Post & Reva Siegel, “Roe Rage: Democratic Constitutionalism and Backlash,” *Harvard Civil Rights-Civil Liberties Law Review* 42 (Summer 2007): 373–433.

<sup>179</sup> 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, 24 January 1929 (ACLU Papers, Reel 2). Just a few months later, however, 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 Papers, Reel 2).

libertarians.<sup>180</sup> 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 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.<sup>181</sup> Civil liberties advocates took advantage 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 FCC, the censorship of moving pictures, mandatory curricula, and sectarian religious exercises in the public schools.<sup>182</sup>

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 a 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.<sup>183</sup> The change in venue reflected a

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<sup>180</sup> ACLU News Release, 7 February 1929 (ACLU Papers, Reel 2).

<sup>181</sup> The Mastic Bill would have made all plays subject to the approval of a bureau within the State Board of Education. ACLU News Release, 24 March 1931 (ACLU Papers, Reel 3).

<sup>182</sup> ACLU News Release, 29 March 1931 (ACLU Papers, Reel 3).

<sup>183</sup> *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

concerted effort on the part of civil libertarians to weaken administrative control over speech—a marked shift from their earlier endorsement of regulatory power. The post office, of course, 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 like the NCFC overcame their lingering *Lochner*-era inhibitions and hailed the courts as a fairer forum for resolving disputes.

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 trail-blazing 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 controller; 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.”<sup>184</sup> 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.<sup>185</sup>

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their right of trial by jury in civil cases). ACLU Bulletin 396, 19 March 1930 (ACLU Papers, Reel 2).

<sup>184</sup> Tariff Act of 1930, 19 U.S.C. 1305.

<sup>185</sup> Ernst made particular use of this strategy in the state courts. See, e.g., Memorandum Submitted on Behalf of Defendants, *People v. Samuel Roth*, 7 May 1931 (Mag. Ct.) (Ernst

The first case, *United States v. One Obscene Book, entitled "Married Love,"*<sup>186</sup> 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.<sup>187</sup> 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 thus 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.<sup>188</sup> The strategy worked. The book was not obscene, in Woolsey's view, because it "treat[ed] quite as decently 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

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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.").

<sup>186</sup> 48 F.2d 821 (S.D.N.Y. 1931).

<sup>187</sup> Letter from Mary Ware Dennett to Alexander Lindey, 16 October 1930 (Dennett Papers, Reel 23, Folder 487).

<sup>188</sup> *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." Letter from Mary Ware Dennett to Alexander Lindey, 18 March 1931 (Ernst Papers, Box 359, Folder 3).

People.”<sup>189</sup> *Married Love*, according to Woolsey, “may fairly be said to do for adults what Mrs. Dennett’s book does for adolescents.”<sup>190</sup>

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 considering isolated excerpts. Secondly, the recent decisions presupposed a reader of normal intelligence and demeanor, not an unusually susceptible one.<sup>191</sup> 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, “has established another precedent by which the absurd obscenity statutes of this country may be slowly but surely broken down.”<sup>192</sup>

Three months later, in July 1931, Judge Woolsey built upon that precedent in *United States v. One Book, Entitled Contraception*.<sup>193</sup> Ernst and his colleague Alexander Lindey, acting together on behalf of the NCFRC, represented the book in what Gordon Moss called “the first test

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<sup>189</sup> District Court Opinion (Judge Woolsey), Section III, Admiralty Case File 106-165, United States District Court for the Southern District of New York, Record Group 21 (National Archives and Records Administration Northeast Region, New York).

<sup>190</sup> In *Married Love*, Stopes urged husbands to be more attentive to their wives’ sexual and emotional needs.

<sup>191</sup> Mary Ware Dennett, “‘Married Love’ and Censorship,” *Nation*, Vol. 132 (May 27, 1931), p. 580.

<sup>192</sup> *Ibid.*

<sup>193</sup> 51 F.2d 525 (S.D.N.Y. 1931).

case undertaken by this Council in an effort to liberalize the Customs censorship of foreign books.”<sup>194</sup> 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.”<sup>195</sup> As a “scientific book written with obvious 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.<sup>196</sup>

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.

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<sup>194</sup> Letter from Gordon W. Moss to the Editor, 29 July 1931 (ACLU Papers, Reel 3). Stopes herself played no role in the legal battle to admit the book into the United States. ACLU Press Release, 7 July 1931 (ACLU Papers, Reel 3).

<sup>195</sup> District Court Opinion (Judge Woolsey), Section VI, Admiralty Case File 107-197, United States District Court for the Southern District of New York, Record Group 21 (National Archives and Records Administration Northeast Region, New York).

<sup>196</sup> Letter from Gordon W. Moss to the Editor, 29 July 1931 (ACLU Papers, Reel 3). The favorable decision was unexpected, and Stopes cabled from London to congratulate the ACLU on its “surprising victory.” ACLU Bulletin 466, 24 July 1931 (ACLU Papers, Reel 3).

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.”<sup>197</sup> Freedom of the press, for Woolsey, meant freedom from prior restraints on publication.<sup>198</sup> 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.<sup>199</sup> Moss was skeptical that the decision (or any

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<sup>197</sup> District Court Opinion (Judge Woolsey), Section I, Admiralty Case File 106-165, United States District Court for the Southern District of New York, Record Group 21 (National Archives and Records Administration Northeast Region, New York).

<sup>198</sup> 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.

<sup>199</sup> Letter from Gordon W. Moss to the Editor, 29 July 1931 (ACLU Papers, Reel 3).

others) would have much weight in “whittl[ing down the meaning of the postal prohibition,” which “appear[ed] to be water-tight.”<sup>200</sup>

Finally, *Married Love* and *Contraception* applied only to medical and scientific tracts.<sup>201</sup> The judiciary had not yet signaled a similar 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.”<sup>202</sup> The constraints were even tighter in the realm of artistic expression,<sup>203</sup> where the ACLU was hesitant to defend any book written in the twentieth century.

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<sup>200</sup> Letter from Gordon W. Moss to W. W. Norton, 7 November 1932 (ACLU Papers, Reel 86, Volume 503).

<sup>201</sup> 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 obscenity ban.” “Recent Cases: Obscenity, Test of Obscene Literature,” *Harvard Law Review* 48 (Jan 1935): 519–20, 519.

<sup>202</sup> Letter from Gordon W. Moss to Arthur Garfield Hays, 18 August 1931 (ACLU Papers, Reel 86, Volume 503).

<sup>203</sup> 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.” Letter from Forrest

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.”<sup>204</sup>

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.<sup>205</sup>

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Bailey to Morris L. Ernst, 20 June 1931 (ACLU Papers, Reel 806, Volume 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. . . .” Letter from Forrest Bailey to Morris L. Ernst, 30 June 1931 (ACLU Papers, Reel 806, Volume 503). Ernst ultimately counseled Bailey to “pick a better volume.” Letter from Morris Ernst to Forrest Bailey, 2 July 1931 (ACLU Papers, Reel 806, Volume 503).

<sup>204</sup> Letter from Gordon Moss to Sidney J. Abelson, 7 April 1931 (ACLU Papers, Reel 86, Volume 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 leap frog one another, and Ernst routinely cited the most lenient examples from one court to the other.

<sup>205</sup> Ernst and Lindey wrote a series of letters to Customs officials and to the U.S. 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

Although the U.S. Attorney's office chose (reluctantly) to prosecute, Ernst was able to arrange for Judge Woolsey to preside over the case.<sup>206</sup> 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 Called "Ulysses,"*<sup>207</sup> 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." In November 1933, the Second Circuit agreed.<sup>208</sup>

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

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arrangement with Random House, which gave it royalties in the book but provided limited reimbursement for legal fees, Ernst sought to avoid protracted litigation if possible.

<sup>206</sup> Morris Ernst to Alexander Lindey, Office Memorandum, 12 August 1932 (Ernst Papers, Box 270, Folder 3). U.S. Attorney George Medalie was sympathetic to the book but felt obligated to prosecute.

<sup>207</sup> 5 F. Supp. 182 (S.D.N.Y. 1933).

<sup>208</sup> 72 F.2d 705.

dealings with sex.”<sup>209</sup> 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 manners and downsized its censorship effort substantially.<sup>210</sup> 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 and the civil liberties movement. A 1938 *Harvard Law Review* article, reflecting on the decision, called it a “new deal for literature.”<sup>211</sup>

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 battle 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. 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

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<sup>209</sup> Draft of Radio Debate between Roger Baldwin and Morris Ernst, 27 January 1934 (Ernst Papers, Box 198). Ernst foresaw a shift from sexual to political censorship.

<sup>210</sup> Walker, 86.

<sup>211</sup> Leo M. Alpert, “Judicial Censorship of Obscene Literature,” *Harvard Law Review* 52 (November 1938): 40–76, 41.

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”<sup>212</sup> Ernst might easily have extended the comparison to contraception. 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.<sup>213</sup> The Depression was instrumental in this change. Many Americans regarded family limitation as a necessary corollary to their increasingly strained household finances.<sup>214</sup> 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 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

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<sup>212</sup> 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 Post (2006).

<sup>213</sup> Hazel C. Benjamin, “Lobbying for Birth Control,” *The Public Opinion Quarterly* 2 (January 1938): 48–60, 49.

<sup>214</sup> Reagan, 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.*

union between husbands and wives as an expression of mutual affection, without relation to procreation, is right.”<sup>215</sup>

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 their use.<sup>216</sup>

Disillusioned with the prospects of legislative change, Morris Ernst suggested “nullification” of prohibitions on birth control, a process which entailed executive non-enforcement as well as judicial erosion of the laws.<sup>217</sup> Significantly, and somewhat counter-intuitively, this strategy was predicated on the realist 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

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<sup>215</sup> *The Arbitrator*, Vol XIII, No. 4 (April 1931).

<sup>216</sup> See, e.g., Reagan, 139–140.

<sup>217</sup> Morris Ernst, “Sex Wins in America,” *The Nation*, Vol. 135, No. 3501 (August 10, 1932), p. 123. Ernst believed birth control legislation would never be directly repealed. Letter from Morris Ernst to Charles G. Norris, 22 January 1930 (Ernst Papers, Box 267, Folder 28).

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.

The first major breakthrough came in 1930, with the *Youngs Rubber* case.<sup>218</sup> 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<sup>219</sup>) 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*.<sup>220</sup> The defendants in that case, contraceptive wholesalers, were

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<sup>218</sup> *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (1930).

<sup>219</sup> The Second Circuit decided the case on the basis that a plaintiff could maintain a suit for trademark infringement in equity even if he was violating the statute.

<sup>220</sup> 62 F.2d 473 (6th Cir. 1933).

charged in Ohio with the circulation of contraceptive devices by common carrier.<sup>221</sup> 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.”<sup>222</sup>

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.<sup>223</sup> 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 Moscovitz, who by then had ridden out the misconduct charges that stole him away from the *Dennett* case.<sup>224</sup> Moscovitz held that the diaphragms at issue had been improperly seized by customs because they were intended for medical purposes. Judge Augustus Hand, once again writing for the Second Circuit, affirmed Moscovitz’s decision.<sup>225</sup> According to Hand, Congress would not have intended to “prevent the

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<sup>221</sup> The indictments in *Davis* were brought under Sections 334 and 396 of Title 18 U.S.C.A., 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.

<sup>222</sup> *Ibid.*

<sup>223</sup> 86 F.2d 737 (2d. Cir. 1936).

<sup>224</sup> Although the House declined to impeach Moscovitz, it issued a Public Condemnation of his business dealings. *Time*, 12 April 1930, 1.

<sup>225</sup> The Solicitor General chose not to file a petition for a writ of certiorari. Letter from Lamar Hardy, United States Attorney, to Greenbaum, Wolff & Ernst, 25 January 1937 (Ernst Papers, Box 69, Folder 15).

importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients.”<sup>226</sup>

Like *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,<sup>227</sup> 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).<sup>228</sup> Despite all this, Sanger celebrated the decision as “the end of birth control laws,” “an emancipation proclamation to the motherhood of America.”<sup>229</sup>

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<sup>226</sup> 86 F.2d at 739.

<sup>227</sup> Ernst argued that due process required that medical professionals be free to prescribe contraception. Trial transcript (*United States v. One Package*), 71 (Ernst Papers, Box 69, Folder 9); Brief for Claimant-Appellee, 36 (Ernst Papers, Box 69, Folder 11).

<sup>228</sup> National Committee for Freedom from Censorship, “Summary of Birth Control Laws in the United States,” 28 July 1931 (ACLU Papers, Reel 3).

<sup>229</sup> Garrow, 42. She also called it a “complete victory.” “Mrs. Sanger Sees Court Ruling as Victory for Birth Control,” *World-Telegram*, 6 December 1936 (Ernst Papers, Box 69, Folder 20). 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

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.”<sup>230</sup> 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”<sup>231</sup>—prompting an editor of *Time* to advise 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.”<sup>232</sup> 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

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legitimate activities of physicians.” Morris Ernst and Harriet Pilpel, “A Medical Bill of Rights,” *Journal of Contraception* (February 1937): 35–37, 35 (Ernst Papers, Box 69, Folder 18).

<sup>230</sup> Letter from Mary Ware Dennett to Margaret Sanger, 15 February 1930 (Dennett Papers, Reel 86, File 502).

<sup>231</sup> ACLU Press Release, 5 February 1931 (ACLU Papers, Reel 3). Gordon Moss, secretary of the NCFRC, evidently sided with Dennett. Letter from Gordon W. Moss to Mary Ware Dennett, 17 April 1932 (ACLU Papers, Reel 86, Volume 502).

<sup>232</sup> Letter from Myron Weiss (Associate Editor, *Time*) to Mary Ware Dennett, 12 March 1931 (Dennett Papers, Reel 20, Folder 412)

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.<sup>233</sup> 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.”<sup>234</sup> As for her disagreement with Sanger, Dennett felt strongly that half-measures were destructive and that history would vindicate her approach.

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<sup>233</sup> Letter from Mary Ware Dennett to Heywood Broun, 1 May 1929 (Dennett Papers, Reel 20, Folder 416); Letter from Mary Ware Dennett to Family, 8 May 1929 (Dennett Papers, Reel 21, Folder 433).

<sup>234</sup> Mary Ware Dennett, “‘Married Love’ and Censorship,” *Nation*, Vol. 132 (May 27, 1931), p. 580.

For his part, Ernst assisted and in turn was influenced by Sanger as well as Dennett.<sup>235</sup> 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 improbable that the magistrate will hold the case for trial."<sup>236</sup> 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 the rights-based

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<sup>235</sup> See, e.g., Letter from Morris Ernst to Margaret Sanger, 20 May 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."); Letter from Morris Ernst to Mary Ware Dennett, 15 January 1930 (Dennett Papers, Reel 23, Folder 487) (declaring that the time for formalities had long passed, and addressing Dennett by her first name).

<sup>236</sup> Dudley Nichols, "Sex and the Law," *The Nation*, Vol. 128 (3331), 8 May 1929, 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, 17 April 1930 (Ernst Papers, Box 358, Folder 1).

individualism that Sanger had espoused decades earlier and gradually repudiated.<sup>237</sup> For the mature Dennett, birth control was a matter best left to private discretion, despite its public implications. Government interference in individual decisionmaking 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.<sup>238</sup> Indeed, he foresaw with astounding acuity

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<sup>237</sup> 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*, 5 December 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. Cf. Stansell, *American Moderns*. 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.

<sup>238</sup> Most famously, during World War II, Ernst discouraged criticism of the administration because he felt it undermined ACLU credibility and influence. Walker, 156.

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 wellbeing, irrespective of her marital status.<sup>239</sup> He was uneasy about this medical "compromise," and yet he regarded it as a potentially fruitful strategy.<sup>240</sup> In their court briefs, however, ACLU lawyers were free to make their boldest arguments. And while 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 ran the civil liberties movement had envisioned free speech as a backdoor approach to a just society. As the enforced conformity of the 1910s gave way to the pluralistic ambivalences of the 1920s, they called for an open public conversation about how best to govern America—but they retained their Progressive emphasis on advancing the public good, and they defended free speech in political and economic terms. After *Dennett*, by contrast, a new theory of civil liberties steadily gained ground. Lawyerly and individual-centered, this vision prioritized autonomy over equality. Where earlier civil libertarians, including Dennett herself for much of her career, had discouraged government

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<sup>239</sup> Untitled and undated essay (Ernst Papers, Box 198).

<sup>240</sup> *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.").

intervention lest the government silence something important, the new civil libertarians felt that the government regulation of morality and private beliefs was inherently against the public interest. Increasingly, liberal lawyers defended free speech not 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.

Crucially, *United States v. Dennett* taught Ernst and the ACLU that "civil liberties" was a pliable category. If it could hold non-political speech, perhaps it could also stave off state interference with private life, even with personal conduct. Sex education was only the beginning. Lawyers like 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.<sup>241</sup>

The freedoms grouped together under the new civil liberties tent were framed against a common enemy: the state. In the early interwar period, civil liberties groups 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

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<sup>241</sup> 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 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. "Civil Liberties," *Britannica Book of the Year* (1940) (Ernst Papers, Box 7, Folder 2).

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. They also demonstrated that free speech, properly framed, could attract popular support. And they rehabilitated the judiciary—a longtime bastion of anti-democratic 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 libertarian model of free speech was wildly successful. Its institutionalization during the next half-century gradually erased the stigma of a more radical free-speech past. The new civil libertarians did not regard free speech as a stepping stone to economic redistribution or political equality; rather, they promoted civil liberties because they considered personal autonomy to be a public good in and of itself. Eventually, 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.”<sup>242</sup>

In short, the vision of civil liberties that *United States v. Dennett* helped to validate and promote gave rise to an individualist language that anticipated, and perhaps even supplied, the

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<sup>242</sup> *Hamilton v. City of Montrose*, 124 P.2d 757, 759 (Colo. 1942). Robert Post has described the judicial tendency to favor individual autonomy over alternative, publicly oriented free speech theories as “one of the hallmarks of our distinctively American free-speech jurisprudence.” Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” *California Law Review* 88 (December 2000): 2353–2374, 2370.

state-skeptical rhetoric of postwar liberalism.<sup>243</sup> 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.

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<sup>243</sup> 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.” Phillip 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” (9).