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# OBSCENITY AND THE FIRST AMENDMENT: ROUND THREE

by Harry M. Clor\*

## INTRODUCTION

The Supreme Court's decisions of June, 1973 can be regarded as the third phase in the continuing controversy over legal regulation of obscenity. The unabated intensity of the conflict seems to justify its description in pugilistic terms: round one: *Roth v. United States*<sup>1</sup> and ensuing cases;<sup>2</sup> round two: *A Book named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*<sup>3</sup> (the *Fanny Hill* case) and its aftermath;<sup>4</sup> round three: *Miller v. California*,<sup>5</sup> *Paris Adult Theatre I v. Slaton*<sup>6</sup> and associated cases.<sup>7</sup> It is not surprising that the conflict remains unresolved. Much is at stake; perhaps more than many of the contestants realize. The obscenity controversy raises the most difficult questions concerning the relation of law to morality in a liberal society. These questions involve our concepts of the functions of law, the definition of the first amendment in vital respects, the character of American values and purposes, and even the definition of a liberal society. Fundamentally at issue is whether or not a liberal society can use its law to protect itself against forms of expression which violate and threaten basic presuppositions of its traditional morality and concept of human dignity. At bottom, it is a decision we must make about what we mean and what we want to mean by "freedom."

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

2. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962); *Smith v. California*, 361 U.S. 147 (1959); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York*, 360 U.S. 684 (1959).

3. 383 U.S. 413 (1966). See also *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966).

4. See, e.g., *Rabe v. Washington*, 405 U.S. 313 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Redrup v. New York*, 386 U.S. 767 (1967).

5. 413 U.S. 15 (1973).

6. 413 U.S. 49 (1973).

7. *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973); *Kaplan v. California*, 413 U.S. 115 (1973).

The legal dilemmas can be traced to *Roth v. United States*<sup>8</sup>—the Supreme Court's first direct effort to grapple with the constitutionality of obscenity censorship. The *Roth* decision pointed in two directions at once. On the one hand, it declared that legal restriction of obscene literature and art is constitutionally legitimate.<sup>9</sup> On the other hand, it reaffirmed a broad conception of freedom of speech and press and sought to confine censorship of obscenity within the narrowest possible limits.<sup>10</sup> Subsequent to *Roth*, the Court attempted to resolve the dilemmas of this two-pronged approach by emphasizing its libertarian side. From a relatively balanced (though problematic) position in *Roth*, the Court moved steadily in the libertarian direction, placing more and more limitations on the operation of obscenity laws.<sup>11</sup> This movement was ratified in the *Memoirs* decision with its three-part legal test: to be "obscene" a work must be predominantly "prurient" in its appeal, patently (grossly) offensive to community standards and "utterly without redeeming social value."<sup>12</sup> This was, in effect, if not in intention, to dismantle the system of legal control. The obscenity laws remained constitutionally valid but almost impossible to operate. The result was no enforcement of the laws in some jurisdictions and erratic enforcement in others. This legal confusion was accompanied by a striking escalation in the volume and salacity of pornographic writings, pictorials, and public performances in the United States. The situation could not be tolerated forever, but very little could be done about it as long as the Court was unable to address systematically the difficulties inherent in the three-part test—particularly its "redeeming social value" formula.

The decisions of June, 1973, are of crucial importance for several reasons. First, in *Miller v. California*<sup>13</sup> a majority of the Court has finally managed to reexamine and reformulate the legal definition of obscenity.<sup>14</sup> Second, that majority has attempted a highly controversial resolution of the problem of "community standards"<sup>15</sup> in obscenity cases. Third, the *Paris Adult Theatre I v. Slaton*<sup>16</sup> decision

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8. 354 U.S. 476 (1957).

9. *Id.* at 485.

10. *Id.* at 488. This interpretation of *Roth* is not shared by everyone, but I believe it is valid. See H. CLOR, *OBSCENITY AND PUBLIC MORALITY* chs. I & II (1969).

11. See cases cited in note 2 *supra*.

12. 383 U.S. at 419.

13. 413 U.S. 15 (1973).

14. *Id.* at 24.

15. *Id.* at 30-34.

16. 413 U.S. 49 (1973).

devotes considerable attention to the reasons why legal regulation of obscenity is justified.<sup>17</sup> Effort is made to identify the public interests which are served by legal regulation and to defend those interests.<sup>18</sup> No previous Supreme Court decision, including *Roth*, had undertaken this task. Finally, the majority opinion undertakes to identify and refute some of the major arguments against the constitutionality of obscenity censorship and some of the more prominent doctrines held by its opponents.<sup>19</sup> Taken together, the majority and dissenting opinions constitute the most far-reaching Supreme Court debate of the constitutional and extra-constitutional issues—at least since *Roth*. These are surely landmark cases.<sup>20</sup>

It is the purpose of this article to explore several of the more controversial themes in these cases with a view to determining what has been accomplished, what remains to be done, and where the difficulties lie. The first part of the analysis is concerned with the legal standards established for determining obscenity and with related legal questions. The second part deals with the Court's rationale for censorship of obscenity and with the larger moral and philosophic dimensions of the subject, including those treated in the dissenting opinions.<sup>21</sup>

## I

Speaking for the majority in *Miller*, Chief Justice Burger summarizes the reformulated legal tests as follows:

[W]e now confine the permissible scope of such regulation [of obscene materials] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.<sup>22</sup>

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17. *Id.* at 57-64.

18. *Id.*

19. *Id.* at 65-69.

20. The fact that these are 5-4 decisions does not detract from their importance. It is appropriate to observe that some of the crucial decisions of the "Warren Court" were also 5-4 decisions. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

21. Ideally, perhaps, one should begin with the second part since one's position on these issues inevitably influences one's approach to the more specifically constitutional questions. I have decided, however, to follow the sequence adopted by the Court in these cases.

22. 413 U.S. at 24 (footnote omitted).

The *Miller* decision abandons the requirement that a censorable work must be "utterly without redeeming social value" and substitutes the rule of "serious value"—literary, artistic, political, or scientific. This is the most important innovation in the law of obscenity introduced by these decisions. Before exploring this, however, it is necessary to observe that the Court *does* retain a three-part test for obscenity. The Court has not yielded to arguments urging the abandonment of a separate "value" test altogether. Thus, the prosecution must still overcome three obstacles to a finding of obscenity, and the defense can still raise three independent arguments: that the work is not predominantly prurient, that it is not patently offensive in light of prevailing community standards, or that it has serious value even though it is prurient and offensive to the average person. Failure of the prosecution on any of these points will presumably save the work.

The "serious value" principle was adopted essentially for two reasons—one related to the effectiveness of obscenity regulation and one related to the interpretation of the first amendment. It had become almost impossible to decide what is "utterly without redeeming social value," especially since the *Memoirs* decision seemed to say that *any* kind or degree of "value" would do to save a work no matter how prurient and offensive it may be as a whole. It could follow from this that a graphically detailed sado-masochistic film would be redeemed by one scene with some good photography in it, and a novelette wholly devoted to scenes of necrophilia would be saved by a few paragraphs of rumination about death. The Court plurality supporting the *Memoirs* formula had never gone so far as to explicitly embrace such consequences, but its members were unwilling or unable to agree on any way to preclude them.<sup>23</sup>

The *Miller* majority interprets the first amendment as designed to protect serious literature and the communication of ideas. Such literature and ideas are to be distinguished from "the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain."<sup>24</sup> The word "ideas" is emphasized several times in the majority's argument and in its quotations from the *Roth* decision. The Court seems to be making a distinction between

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23. Indeed, the plurality opinion indicated that "[t]he Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.'" 383 U.S. at 419, quoting *Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 206 N.E.2d 403, 406 (1965).

24. 413 U.S. at 35.

works which have intellectual content and which are designed to address the mind and those calculated simply to arouse elemental passions and sensations. Two questions can be raised about this distinction: Is it a valid principle for construing the first amendment? Is it safe and workable in practice at the present time in the United States? The first question is easier to answer than the second. There is much to be said for the majority's suggestion that the first amendment is demeaned when it is read as making no discrimination between political discourse or genuine aesthetic works and a sex orgy, portrayed or performed. Is "freedom of speech and press" intended to serve some purpose, and does that purpose have to do, generally speaking, with the promotion of political enlightenment and cultural development? If so, then, the first amendment cannot be wholly indifferent to the character of the "expression" which claims its protection. The terms "serious value" and "ideas" do seem to reflect, as effectively as general words can do so, a principle which is consistent with the dignity of the first amendment and the goals of a liberal culture.<sup>25</sup>

Greater problems are confronted when one considers the practical application of this principle. The major difficulties will arise in its application to imaginative literature in today's literary world. The Chief Justice does not provide any definition of "serious value," and he provides only one example of it in his reference to "medical books for the education of physicians and related personnel [which] necessarily use graphic illustrations and descriptions of human anatomy."<sup>26</sup> But this example states a case very obviously involving the use of sexual materials for a definite educational purpose. Works of imaginative literature are not usually designed to "educate" in the same way that a medical textbook educates, and they do not usually communicate "ideas" in the same way that a philosophical essay or political tract does. They address the emotions as well as the intellect. Surely the Supreme Court does not intend its new formulation to protect only the most didactic literature. It was perhaps unnecessary for the Court to spell out a definition of "serious" in these cases, and it would be both impossible and inappropriate to do this in elaborate detail, but some further guidance will have to be provided in the near future. One can easily predict a series of cases involving literature or motion pictures dealing with sex, in-

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25. This will be discussed more fully in section II *infra*.

26. 413 U.S. at 26.

tending to arouse intense emotional response and claiming, with some justification, to be serious art. When this occurs, the Court will have to be involved, however minimally, in the making of literary and aesthetic judgments.

This raises the issue of "vagueness," "lack of fair notice" and the "chill on protected expression," with which the dissenting opinions are so much concerned.<sup>27</sup> Is it possible to distinguish serious imaginative literature from obscenity by means of standards which are not unconstitutionally vague? This is a major problem, but its magnitude is susceptible of exaggeration. There are a great many obscenity cases in which the literary and aesthetic judgments required are rather easy to make. It does not require the deployment of very sophisticated aesthetic criteria to determine that pornographic "action" films, live sex shows, sado-masochistic novelettes, and the pictorial magazines featured in "adult book shops" are lacking in the qualities that characterize genuine literature and art. It does not require a literary critic to distinguish the crude scenario of the standard pornographic novellette from the carefully constructed plot and subtle characterization of *Lady Chatterley's Lover*.<sup>28</sup> Between these two reasonably clear extremes, however, there inevitably arise more troublesome cases in which highly prurient and offensive elements are found mixed together with some elements of intellectual or literary purpose. These may be called "borderline cases," but one must be aware that in today's literary world that borderline is bound to constitute a rather large area. This is the area in which the judicial dilemmas will arise.

One way to render these dilemmas manageable, or at least tolerable, is to articulate the criteria implicitly relied upon in the more extreme and obvious cases. What criteria are we tacitly employing when we say, with reasonable confidence, that *Lady Chatterley's Lover* is a serious literary work and *Lust for Sale* is not? The former presents human personalities struggling with a vital human and moral problem. Its intention is to confront the reader—emotionally and intellectually—with that problem and not to arouse sexual desires as such. The latter presents no human personalities at all; its "characters" are reduced to mere objects of sensual gratification. The intention is simply to arouse depersonalized sexual pas-

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27. See *Miller v. California*, 413 U.S. 15, 41-44 (1973) (Douglas, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83-89 (1973) (Brennan, J., dissenting).

28. D.H. LAWRENCE, *LADY CHATTERLEY'S LOVER* (1972).

sion (which is the proper definition of the word "lust"), and the "plot" is stereotyped to that end. Much more could be said along these lines. The point is that it is not impossible to articulate, with a measure of clarity, the standards by which we distinguish the aesthetic experience promoted by works of art from the mere stimulation of elemental sensuality which is the work of pornography. Such standards can then be employed to assist judgment in the more problematic cases. If the Supreme Court declines to pursue this or some similar method, it is difficult to see how the "serious value" principle can be rendered workable and preserved against the kinds of challenges that it is bound to encounter. If the Court does pursue such a method, it will still have some delicate line drawing problems in that sizeable borderline area. These will be easier to deal with if the Court adopts a set of relatively moderate requirements for the demonstration of "serious value" rather than some very elevated and demanding ones.<sup>29</sup>

The *Miller* decision attempts to deal with the problem of vagueness through its stipulations that regulation must be confined to depictions of *sexual conduct* and that the conduct must be "specifically defined." Thus, representations of nonsexual violence or brutality (which might be regarded as obscene) are free of regulation. Also free of regulation are treatments of sexual matters which do not depict conduct. (One may speculate that this includes conversations described or enacted, the use of four-letter words, etc.) The requirement that the conduct be specifically defined does not mean that state legislatures and courts must spell out in detail just what constitutes prurient or patently offensive portrayals. Rather, what must be specifically defined are the forms of sexual conduct which may not be described in a patently offensive way. A statute would specify a variety of sexual activities (coitus, masturbation, lewd exhibition of the sex organ, etc.), representations of which would fall within the statute *if* the triers of fact determine that the representation is patently offensive and appeals to prurient interest. The judgments of prurience and patent offensiveness would still be determined, in part, by reference to perceived community standards and attitudes, but the Court majority evidently thinks that the element of subjectivity will be reduced if such judgments must be made about specified conduct and that only. This makes some

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29. By the standards I have in mind, the works of Henry Miller, for example, would be declared serious literature, whatever one might think of them in light of the highest aesthetic and moral standards.



sense. Judges, juries, and prosecutors will not be at liberty to declare "obscene" anything that they find offensive. They will have to find that the work under consideration does in fact depict the conduct defined in the statute, and they will have to focus their inquiry on the manner in which that conduct is depicted. Furthermore, in its effort to define that conduct, the legislature will be induced to consider (more exactly than has usually been done) just what it wants to proscribe and why. Finally, under this procedure booksellers and publishers should be in a better position to determine what kinds of materials are likely to get them in trouble with the law. At least, they will have a clearer picture of where the danger zone is. Whether or not the additional clarity and precision provided by this procedure will amount to "fair notice" remains to be seen.

The *Miller* decision makes frequent references to portrayals of "hard core" sexual conduct<sup>30</sup> as the proper object of regulation. The decision also refers two or three times to "hard core" pornography.<sup>31</sup> The term "hard core pornography" has a more-or-less technical meaning in the literature on this subject. It designates a sub-class of pornographic materials whose representations of sex are *extremely* detailed, distorted, perverted, and stereotyped. The majority opinion does not make clear whether it is using the term "hard core pornography" in this technical sense and whether it means to confine legal regulation to this very extreme form of pornography. If so, a degree of legal precision would be purchased at the price of leaving unregulated a large mass of highly prurient and offensive materials. One may reasonably doubt that this is what Chief Justice Burger and his colleagues have in mind. A more likely interpretation is that the Court is using the term "hard-core sexual conduct" to designate "ultimate sexual acts"<sup>32</sup> (such as coitus) and activities closely related thereto, as distinguished from activities more remote from the "ultimate" (such as embraces, conversations about sex, etc.). At any rate, the matter will have to be clarified in the near future; otherwise we will have cases in which it is claimed that a pictorial sex magazine, admittedly prurient, patently offensive, and without serious value is saved because it does not achieve the utmost extremity of hard core pornography.<sup>33</sup>

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30. 413 U.S. at 27, 35.

31. *Id.* at 28-29, 36.

32. *Id.* at 25.

33. This is perhaps an appropriate place to remark that motion pictures and live

Equally as controversial as any of the foregoing issues is the Court's ruling that "in determining the factual issues of prurient appeal and patent offensiveness, a jury may apply the standard that prevails in the forum community rather than a national standard."<sup>34</sup> The court rejects a national standard as both unworkable and undesirable. It is unworkable because "our nation is simply too big and too diverse" to allow for the articulation of its sexual moral standards in any uniform general formulation.<sup>35</sup> And it would be undesirable to require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City,"<sup>36</sup> or that Las Vegas or New York City be bound by restraints found appropriate in Maine or Mississippi. Thus, the Court adopts a "pluralistic" solution to the problem of community standards. The extent of this pluralism is a point that remains to be adjudicated, since it is not quite clear what is to be understood by "the forum community." Miller does not declare that the forum community is the locality (city, county, etc.); indeed, the text of the opinion refers most frequently to *the states* and the variations of attitudes among different states. "People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."<sup>37</sup> It will be argued, however, that there is as much variation between the standards of New York City and upstate New York as between those of any two states. Should rural communities in upstate New York be required to accept public depiction of conduct found tolerable in New York City? Or should New York City have to put up with restrictions desired in those communities? These and similar questions follow from the Court's own argument. The issue will have to be resolved one way or another. Perhaps the Court majority intends to leave it up to

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public performances pose a peculiar problem for the law of obscenity which has not yet been resolved. Although the *Miller* decision does not directly confront the problem, it contains a hint as to how it might be approached. A footnote stresses the point that, "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." 413 U.S. at 26 n.8. Live public performances might be treated as *conduct* embodying speech and nonspeech elements. The Court has previously taken this position by way of dictum in *California v. La Rue*, 409 U.S. 109, 117-18 (1972); *cf. Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 42 U.S.L.W. 3463 (U.S. Feb. 19, 1974).

34. 413 U.S. at 30-34.

35. *Id.* at 30.

36. *Id.* at 32.

37. *Id.* at 33.

the state legislature to decide between state-wide and local standards. This, however, could result in a crazy quilt of variations from place to place across the country.

A pluralistic solution has its virtues but it also has its weaknesses. From the publisher's point of view, the resulting variations in the law will make the marketing of books a somewhat difficult and risky enterprise (particularly if local standards are employed). From the moralist's point of view, the pluralist solution means that some communities will be inundated with much pornography in print and film. Perhaps it would be best for both liberty and morality if we could pull ourselves together and make a national decision about national principles on this subject. It is not comfortable to admit that the American community is irreconcilably divided on matters as fundamental as those concerning sexual morality and decency (which seems to say that we are *not* a community on these important matters).

Attorneys defending erotic publications will now begin to argue that the local community has no common standards on the subject. Evidence of local pluralism will be gathered and advanced to show that the state, county, or city is irreconcilably divided on matters of prurient appeal and that there is no agreement on what is offensive. These arguments will not be met very effectively if judges, juries, and prosecutors accept an overly simplistic sociological view of what it means to have community standards. The simplistic view assumes that, for community standards to exist on some subject, all or the great majority of citizens must believe exactly the same things about that subject. Further, their agreement must be discoverable in public opinion polls or exactly reflected in their behavior. The standards of a community, however, are not necessarily those which each individual will articulate in an ephemeral public opinion poll; more fundamentally, they are the general principles upon which the community's institutions rest. As such, they need not be in the forefront of everyone's consciousness; by many they will be tacitly assumed. And they will often be contradicted by particular behaviors or specific opinions of individuals. On the simplistic assumption about what it means for a community to have standards, it could not be said that freedom of speech is a basic principle of the American community. It would have to be said that there are many different opinions about freedom of speech, diverse behaviors regarding it, and, therefore, no community standards about it. But we do regard freedom of speech as an authoritative public standard.

We so regard it not because we look to opinion polls or short-term trends in behavior but because we look to the institutions founded upon it, to the pronouncements of established public leaders, and to the teachings of the community's traditions. The same kinds of considerations should be taken into account in determining the moral values of the community that are relevant to judgments about obscenity.

In its attempt to reconcile its pluralist solution with the first amendment, *Miller* states what appears to be a paradox:

Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive."<sup>38</sup>

*Miller's* critics will seize upon this as a perfect example of the majority's muddled and self-contradictory thinking. But the passage need not be so regarded; it can be regarded as a statement of a legitimate problem which the courts and the country must now struggle to resolve. The struggle is not a hopeless one. Some first amendment limitations are already incorporated in the "prurient interest" and "patent offensiveness" tests as enunciated in previous decisions. "Prurient interest" must still be determined by reference to the average person, not the most susceptible few, and by reference to contemporary community standards, not the standards of a bygone age.<sup>39</sup> "Patent offensiveness" must still mean "obnox-

38. *Id.* at 30.

39. These are principles of *Roth v. United States*, 354 U.S. 476, 489-90 (1957), as exemplified by the Court's approval of the following jury instruction:

"The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved.

...  
 "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. . . . In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

*Id.* at 490.

iously debasing portrayals of sex."<sup>40</sup> But the primary protection for "fundamental First Amendment limitations" is in the "serious value" rule of the new test. Serious literature is to be protected regardless of majority opinions about prurience and offensiveness. *This* is the national principle which is not subject to variation from community to community. If it is to perform this function, the rule will have to be elaborated and the meaning of "serious value" articulated in some measure. This is the most important item on the legal agenda.

## II

The *Roth* decision had nothing to say about the public interests served by the regulation of obscenity. It left those interests undefined and, in effect, undefended. The *Paris* decision undertakes to define and defend them.

Chief Justice Burger's opinion emphatically denies that the only public interests involved are those concerning protection of juveniles and unconsenting adults from exposure to obscenity:

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.<sup>41</sup>

The Chief Justice acknowledges that there is a division of opinion among experts regarding the connection between obscenity and anti-social conduct. But the opinion goes on to quote Alexander Bickel's argument that the crucial consideration

concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future . . . . Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.<sup>42</sup>

Finally, the Court argues that:

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relation-

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40. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 483 (1962).

41. 413 U.S. at 57-58 (citation and footnote omitted).

42. *Id.* at 59.

ship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.<sup>43</sup>

These three quotations may be taken as a summary of the Court's rationale for the legal control of obscenity. This rationale asserts that there is an important communal interest in the moral and cultural environment or "quality of life" and that government may act to protect this interest. It also asserts that there is such a thing as the debasement of human sexuality which is harmful to the family and human development and that the state can act against the worst forms of such debasement. One might wish that the Court had provided more argument or illustration at key points in this rationale. Particularly, the assertions about the quality of life and debasement of sex could have been supported by some references to the nature of contemporary obscenity and pornography. There could have been at least some brief discussion of *how* this obscenity degrades sexuality and reduces human beings to mere objects, and some references could have been made to those increasingly prevalent forms of obscenity which heavily emphasize perversion, violence, and the degradation of women. The rationale remains incomplete in the absence of some showing that pornographic representations of sex dehumanize human beings.

Nonetheless, the Court has made a considerable advance over previous adjudication in its attempt to identify the public purposes and values at stake in the regulation of obscenity. Expressions such as "the quality of life," "the total community environment," and "the tone of the society" reflect, in contemporary language, a traditional view that there is such a thing as "public morality"—a body of moral and aesthetic standards and restraints which have public status because they are regarded as essential elements of the community's preferred way of life. It is only on this basis that the community can declare, through its official organs, that it does not wish to have live sex shows and pornographic book shops in its midst, even if children and unconsenting adults were adequately protected from exposure. Does the United States (or do its various sub-communities) have a public morality and preferred way of life to which certain standards of decency and dignity are requisite? If so, to what extent does our concept of individual freedom forbid the use of law in support of this public morality? These are, and always have been, the fundamental issues underlying the

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43. *Id.* at 63.

debate over obscenity. They are fundamental (although not always incisively formulated) in the cases now under discussion.

The dissenting opinions in these cases present three major lines of attack (apart from the question of "vagueness"). One line of argument is calculated to cast much doubt upon the moral and aesthetic standards by which obscenity is judged. Another argument relies upon an enlarged concept of privacy and "privacy rights," particularly as elaborated in recent cases concerning contraceptives and abortion. The third ground of dissent is an interpretation of the first amendment based upon certain libertarian premises.

Justice Douglas declares that in the area of obscenity "we [the Court] deal with tastes and standards of literature. What shocks me may be sustenance to my neighbor,"<sup>44</sup> and "matters of taste, like matters of belief, turn on the idiosyncracies of individuals."<sup>45</sup> These and many similar pronouncements from Justice Douglas<sup>46</sup> inevitably lead to the conclusion that the values involved in judgments about obscenity are wholly subjective, relative, and personal. Let us see where this proposition leads. Literature and the values thereof are said to be only matters of personal "taste." Some people happen to prefer Shakespeare; some happen to prefer pornography. One individual may dislike films which portray human beings having sexual intercourse with animals; another individual may happen to like such films. It follows that, if the law places restrictions upon the production and display of such films, it is only reflecting the likes and dislikes of a present, and perhaps transient, majority. Why should the law support the subjective tastes and idiosyncracies of one group (however large) at the expense of another? There is no genuine public interest to be served, and personal liberty is restricted, by such laws. This line of argument abolishes the concept of a public morality altogether and replaces it with the concept of a variety of private moralities—all equal and all equally subjective. The values implicit in the Shakespearean treatment of man's sexual life can have no higher status than those implicit in the pornographic treatment of it. Carried to its logical conclusion, this concept entails the proposition that organized society has no legitimate interest in the distinction between loving and loveless sex.

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44. *Miller v. California*, 413 U.S. 15, 40-41 (1973) (Douglas, J., dissenting).

45. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 70 (Douglas, J., dissenting).

46. *See, e.g., Ginzburg v. United States*, 383 U.S. 463, 489-90 (1966) (Douglas, J., dissenting).

Justice Brennan is more moderate in the expression of moral skepticism than is Justice Douglas. Justice Brennan does not say that it is all a matter of "taste," but he does say this: "Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex and religion."<sup>47</sup> The majority opinion responds with a demonstration that government frequently acts, and acts properly, on premises which cannot be conclusively *proved*. This is responsive to the question of causal connection between obscenity and anti-social conduct.<sup>48</sup> But Justice Brennan's statement also reflects some skepticism about assumptions concerning morality and sex which are implicit in the effort to suppress obscenity. The reader is not told what moral assumptions the Justice finds doubtful. Is it the proposition that there is something degrading about the performance of sexual acts for a leering audience? Perhaps the Justice would acknowledge that live sex shows violate some defensible standards of decency. One may then inquire whether there is any significant moral difference between such live performances and the pornographic films and pictorial magazines which must necessarily require human beings to perform sexual acts for the same purposes. If this activity is not indecent, then it is difficult to see why prostitution is indecent. If the moral assumptions involved are too tenuous to sustain legal regulation of the former, then it is difficult to see why the latter should remain illegal.

Justice Brennan's position does not rest *primarily* upon moral skepticism; it rests primarily upon the consideration of "vagueness."<sup>49</sup> Supporting this consideration, however, is a commitment to recent conceptions of "privacy" which could have far-reaching implications. Justice Brennan cites *Griswold v. Connecticut*,<sup>50</sup> *Eisenstadt v. Baird*<sup>51</sup> (decisions invalidating state restrictions on the use and distribution of contraceptive devices) and *Stanley v. Georgia*<sup>52</sup> (uphold-

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47. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 109 (Brennan, J., dissenting) (footnote omitted).

48. *Id.* at 60-61.

49. *Id.* at 103-05. Indeed, Justice Brennan "reluctantly" concluded that the approach he had authored in *Roth* was too vague to justify restricting the distribution of sexually oriented material to consenting adults. *Id.* at 84. He, however, left open the question as to whether or not the state could regulate the distribution of sexually oriented material to juveniles or to unconsenting adults. *Id.* at 78.

50. 381 U.S. 479 (1965).

51. 405 U.S. 438 (1972).

52. 394 U.S. 557 (1969).



ing the right to possess pornography in one's home). He also cites Justice Douglas' concurring opinion in *Doe v. Bolton*<sup>53</sup> (a decision limiting the states' power to prevent abortions) which proclaims the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality."<sup>54</sup> From this combination of decisions and opinions, Justice Brennan derives a concept of intertwining rights of privacy and personal liberty which calls into question the whole enterprise of obscenity control.<sup>55</sup> The Chief Justice responds to these contentions with the counterarguments that motion picture theaters and bookstores are not "private" places but places of "public accommodation," and that "[t]otally unlimited play for free will . . . is not allowed in our or any other society."<sup>56</sup> The Chief Justice also emphatically denies that "our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation . . . ."<sup>57</sup>

It is well that a majority of five Justices has been mustered in support of counterarguments against an exaggerated concept of "privacy rights" which could be expanded almost indefinitely unless counteracted. One need not object to the specific conclusions of *Griswold*, *Eisenstadt*, *Stanley*, or the abortion decisions. One might agree (as, for the most part, this author does) that the liberal state should not be able to proscribe the use of contraceptives, forbid abortion altogether, or punish an individual for possession of pornography in his home. But the arguments and doctrines employed on behalf of these conclusions tend to establish an increasingly large "zone of privacy" which undermines the very idea of public moral standards. A basis is then provided for further enlargement of the former at further expense to what remains of the latter. In this ideological process, one area after another of man's sexual life is declared to be "intimately personal" and relegated to the private sphere. This cannot be done without the implication that what occurs in these areas, and the morality thereof, is none of the public's business and no legitimate concern of organized society. When this ideological movement is extended (as, with the support of Justices Douglas, Brennan, and others, it often is) into other areas of the moral life, it leads to the ultimate conclusion that consenting adults

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53. 410 U.S. 179 (1973).

54. *Id.* at 211.

55. 413 U.S. at 86 n.9.

56. *Id.* at 64.

57. *Id.* at 68 (footnote omitted).

may do whatever they like as long as what they do does not cause physical harm or coercively interfere with the privacy of others. The doctrinal justification for this ultimate position is already provided by Justice Douglas' formulation of a right to exercise "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*"<sup>58</sup>

Let us call this doctrine "privatism" or "autonomism." It would follow from autonomism (if it means what it says) that the state may not interfere with pornography, prostitution, "sex clubs," polygamy, incest, marijuana and LSD, such entertainments as "bare-fist" prize fights, bull fights, cruelty to animals, and a variety of other activities which adults may consent to engage in. After all, these activities may well express the "interests, tastes and personalities" of individuals. The fact that they may express perverted or morally base interests and promote degraded tastes and personalities can be no concern of the organized community. In the overriding interests of personal autonomy, the organized community must be neutral toward the values at stake, or, at least, it cannot act to support them by any means involving the slightest degree of coercion. A society which has surrendered to the doctrine of autonomism will spawn a multitude of diverse private "life styles," but it will not be able to maintain any public, communal "life style." Can a liberal society use its law to help define and maintain a communally preferred way of life? This question summarizes a major conflict within contemporary liberal democracy. The debate over obscenity constitutes a central battleground in that conflict.

Justice Douglas declares that the recent obscenity decisions "make a sharp and radical break with the traditions of a free society"<sup>59</sup> and that they "[cut] the very vitals out of the First Amendment."<sup>60</sup> Surely the first statement is false if it means that there has been a radical break with the traditions of *our* society. Our society has never authoritatively adopted radical privatism and autonomism. We may yet decide to do so—if we decide to interpret the first amendment as Justice Douglas does.

Justice Douglas believes that the recent decisions cut the vitals out of the first amendment because they allow for the suppression of "offensive ideas." For Douglas, "'Obscenity' at most is the ex-

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58. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

59. *Miller v. California*, 413 U.S. at 44 (Douglas, J., dissenting).

60. *Id.* at 45.

pression of offensive ideas."<sup>61</sup> This is the position he has taken in every obscenity case.<sup>62</sup> Douglas, however, has never made any effort to show what "ideas" are involved in pornographic writings, pictures, and films. Nor is there any effort here to show what "ideas" are expressed by the kind of obscene *depictions of sexual conduct* which the Court now finds censorable. It will be remembered that the Court has also determined, as an additional precondition for censorship, that such depictions must be lacking in serious literary or educational value. If Justice Douglas finds this to be a blow at the very vitals of the first amendment, this must be because of his peculiar version of what is vital in the first amendment. According to this version, the first amendment makes no discrimination between a discussion of ideas and an arousal of elemental sensations nor between a genuine work of literature and a device for the stimulation of depersonalized sensuality. One may wonder, then, what the first amendment is for, what it is supposed to accomplish, what purposes or values it is designed to serve. The conclusion is inescapable that Justice Douglas' first amendment is not particularly concerned with ideas or with literature; it is concerned with protection of "expression"—that is, anything that can be "uttered," written, or photographed. Why should there be a solemn constitutional provision with such an end in view? There are only two intelligible answers: to prevent government and law from making any discriminations among "life styles," and to ensure the utmost autonomy of "life styles" regardless of their worth. To this end the first amendment (indeed, the whole Constitution) must treat as equal the human values implicit in *Romeo and Juliet* and a work of sado-masochistic pornography. If this is what the American people want the first amendment to mean, if we want the first amendment to legislate the perfect equality of all life styles, then it is ultimately within our power to bring this about. But is this what we want "freedom" to mean in American life?

Justice Brennan makes a point similar to Justice Douglas' argument about the suppression of offensive ideas. The legal regulation of obscene literature is based on the premise (among others) that such literature is morally degrading. Is this not an effort of

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61. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 71 (Douglas, J., dissenting).

62. *But see* Justice Douglas' dissenting opinion in *Dennis v. United States*, 341 U.S. 494 (1951), a sedition case, wherein Justice Douglas proclaimed: "The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality." *Id.* at 581.

government to "control the moral content of a person's thoughts"?<sup>63</sup> On the premises established in *Miller* and *Paris*, Justice Brennan finds it

hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films.<sup>64</sup>

Chief Justice Burger answers with two points which, if not conclusive, at least serve to cut this argument about "thought control" down to size. First, the Chief Justice replies that restriction of obscene materials which lack serious value as communication "is distinct from a control of reason and the intellect."<sup>65</sup> In other words, there will be no regimentation of thought because materials which the law can reach under the "serious value" test do not communicate or promote "thought" in the usual sense of that term; they do not address the rational faculties. If that test is properly applied, there will be no control whatever of the communication of ideas, concepts, doctrines, or teachings—literary, artistic, political, or scientific. Secondly,

[w]here communication of ideas, protected by the First Amendment, is not involved, . . . the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests.<sup>66</sup>

As an example, the Court points out that government may legitimately regulate the sale of drugs, even though this affects the opportunity of people to experience the fantasies ("thoughts") which drugs promote.<sup>67</sup> The drug analogy is at least partly appropriate. Neither the drug laws nor the obscenity laws reach into the mind of the individual. In both cases the legal restraints fall upon commercial distribution of the materials thought to be harmful. If restrictions on commerce in obscenity are unconstitutional because they result in the inhibition of some people's sexual fantasies, then the drug laws are unconstitutional on the same grounds.

Of course, there is nothing in the kind of censorship counte-

63. In *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), the Court held that a state had no legitimate concern in controlling "the moral content of a person's thoughts."

64. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 110 (Brennan, J., dissenting).

65. *Id.* at 67.

66. *Id.*

67. *Id.* at 67-68.

nanced by the Court which would prevent anyone from thinking his own thoughts about sex or any other matter. No *argument* on behalf of any kind of sexual morality or immorality is forbidden, and no seriously artistic treatment of any subject is forbidden. Nor do the obscenity laws attempt to *impose* a moral tone on the citizens. What they attempt to do is *preserve* a moral tone from erosion by certain powerful tendencies and growing influences in the mass media. These increasingly gross and sensationalized appeals to prurient interest do not constitute arguments or debate about sex; rather they undermine moral sensibilities and concepts of human dignity without inviting any argument or debate about them. If anything, well constituted obscenity laws can be a protection of the public against "regimentation of the mind" by commercially inspired elements in the mass media.

For the moment, a Supreme Court majority has declared, in effect, that first amendment freedoms are not incompatible with the maintenance of a public morality in some areas of our social life. The Court has affirmed that the first amendment is not entirely "value free" and that, in some measure, American freedom still means "ordered liberty." But the issue is by no means settled and the battle is by no means over.