In Quest of a "Decent Society": Obscenity and the Burger Court

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COMMENTS

IN QUEST OF A "DECENT SOCIETY": OBSCENITY AND THE BURGER COURT

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex . . . in any way limited or affected expression of serious literary, artistic, political, or scientific ideas.

—Chief Justice Warren Burger

For sixteen years following its seminal decision in Roth v. United States, the United States Supreme Court was unable to produce another majority opinion on the issue of obscenity. In the final week of last Term, however, eight months after hearing arguments, the Chief Justice announced five to four majority opinions in a series of five decisions. These opinions have stimulated widespread comment in the press and aroused fears (and hopes) of a governmental drive against obscenity. Whatever their psychological effect on citizens and prosecutors, the legal effect of these decisions has been to modify the prior

3. Kaplan v. California, 93 S. Ct. 2680 (1973); United States v. Orito, 93 S. Ct. 2674 (1973); United States v. 12 200-Ft. Reels of Super 8 mm. Film, 93 S. Ct. 2665 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973); Miller v. California, 93 S. Ct. 2607 (1973). Miller, Orito and 12 Reels had been originally argued in January, 1972. They were docketed for reargument in June, and reargued in November, 1972. Paris Theatre was argued in October, 1972. The decisions were announced on June 21, 1973. The time taken to announce a decision, together with the narrow five to four vote, suggests that the ultimate decision was uncertain for a portion of the intervening period. This conjecture is reinforced by the curious language of Justice Brennan's dissent, which often seemed to be announcing his views as the majority holding. It seems quite possible that one of the five-man majority defected from his adherence to Justice Brennan's opinion after that opinion was actually written. See Lewin, Sex at High Noon in Times Square, The New Republic, July 7 & 14, 1973, at 19.
4. [The] Chairman of the [Seattle] Public Safety Committee indicated that there may be even tighter enforcement.

"The Supreme Court has taken a proper and long overdue step," he declared. "I feel sure my committee will begin to take a look at those places that have been the outlet for hard core pornography in Seattle.

"I believe the people of our city want reasonable standards that will keep us out of the gutter."

Roth-Memoirs test,5 retaining—and perhaps aggravating—the conceptual difficulties inherent in the two-level speech construct.6 In these opinions the Court examined for the first time the legitimate purposes which a state rationally might implement in controlling non-protected obscene speech. Furthermore, as dicta two years earlier had seemed to prophesy, the Court refused to recognize a right of privacy to receive or transport obscene material for personal use, effectively limiting Stanley v. Georgia7 to its facts. Despite these setbacks for supporters of free speech, however, the Court's language and identification of issues parallels the approach suggested by Dr. Meiklejohn's model of the first amendment.8

It is the thesis of this Comment that the Burger Court, in its search for constitutional certainty and structure, and for neutral principles of constitutional adjudication, has seized upon the Meiklejohn model and applied it to the area of obscenity. It has done so gropingly and in an effort to restrict, not to expand, openness of expression; nevertheless, as a repository of constructive constitutional theory, Miller and its companion cases may prove more beneficial to future first amendment adjudication than all the confusing obscenity decisions of the Warren years.

I. THE NEW DECISIONS: NAILING DOWN OBSCENITY

Of the five opinions, the two most important in their contribution to the theory of obscenity law are Miller v. California9 and Paris Adult Theatre I v. Slaton.10 Miller supplies the analytical contours of a redefined two-level theory of speech, offering an explanation of why obscene expression is not protected by the first amendment; Paris Theatre, in applying a due process rational basis test, describes the goals which state or federal government might assert to justify suppression of obscenity, overcoming barriers presented by the due

8. See text accompanying notes 163-184 infra.
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process clause of the fifth or fourteenth amendments. All five opinions lacked the usual attributes of judicial decisions. The facts were outlined sketchily in each case, with little description of the contested, allegedly obscene material. In *Miller* and *Paris Theatre* in particular the facts, once stated, received no further discussion or analysis; the cases served simply as vehicles by which the Court launched its treatises on obscenity. Having announced new doctrines, the Court declined to apply them to the facts of each case. It vacated the lower court decisions in all five cases, as well as in all obscenity cases pending on the docket, instructing the lower courts to reconsider their decisions in light of the Court's new guidelines. As a consequence, any analysis of obscenity law in the United States at this time is necessarily abstract in nature, and must rely on principles not yet tempered by application to concrete facts.

The Court used each case to spotlight a different facet of its restated approach to obscenity. Chief Justice Burger's opinion in *Miller* strongly emphasized that the Court's last previous majority opinion had been in *Roth*. It expressly repudiated portions of Justice Brennan's three-member plurality opinion in *Memoirs v. Massachusetts* and impliedly called into question the validity of every other obscenity opinion handed down since *Roth*. Although it is "categorically settled" that the first amendment does not protect obscene material, the Chief Justice took note of the "inherent dangers" involved in regulating expression, and acknowledged that state and federal governments must use care when controlling obscenity. Hence, he announced that the Court would permit only regulation which observed newly promulgated guidelines:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest..., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,

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14. *Id.*, at 2615.
and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court left to the states and to Congress the definition of the descriptions of sexual conduct to be proscribed, but the Chief Justice offered examples of the type of content he had in mind: 15

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The Court emphasized that its new standards were intended to permit prosecution only for the sale or exposure of depictions or descriptions of "patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed," 16 and asserted that this definition was sufficiently precise to overcome the vagueness objections raised by Justice Brennan in dissent.

The Miller Court also clarified to a degree the definition of "community standards." In judging the prurient appeal or offensiveness of sexually-oriented material, the judge or jury is not required to apply some hypothetical national standard, 17 but may draw on the standards of the local community. The first amendment does not require "the people of Maine or Mississippi [to] accept public depiction of conduct found tolerable in Las Vegas or New York City." 18 The Court did not specify how localized the community used as reference might be—a county? a village?—but Miller approved the lower court's use of the standards of the state of California. 19

The Paris Theatre decision rejected the contention that a state may not prevent consenting adults from receiving or viewing obscenity. The Court stressed that protection of juveniles and non-consenting adults were not the only interests which a state might legitimately assert to justify regulation of obscenity; of paramount importance, said

15. Id.
16. Id. at 2616.
18. 93 S. Ct. at 2619.
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the Court, quoting former Chief Justice Warren, was the "‘right of the Nation and of the States to maintain a decent society . . . .’"20 Since obscenity is not afforded first amendment protection, the state need have only a rational basis for concluding that regulation will contribute to a healthier society, and, the majority continued:21

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

Analogizing obscenity regulation to environmental and consumer protection legislation, the Court rejected deference to individual free will; the Constitution does not compel the states to accept a laissez faire policy in social or economic spheres when the state instead desires "to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."22

The *Paris Theatre* Court dismissed the argument that the individual's right to privacy required the state to demonstrate a compelling interest to justify prohibiting the reading or viewing of obscene material by consenting adults. It declared that the right enunciated in *Stanley v. Georgia*23 of a person to read anything in his own home was "hardly more than a reaffirmation that ‘a man's home is his castle,' "24 and does not imply derivative rights outside the home. The Court also decided that the state need not elicit expert testimony as to the obscene nature of material, at least when the material is directed to non-deviant groups,25 since obscene materials "obviously, are the best evidence of what they represent."26

*United States v. Orito*27 and *United States v. 12 200—Ft. Reels of Super 8 mm. Film*28 further emphasized the limited extent of the privacy right recognized by *Stanley*. In *Orito*, the Court held that Con-

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21. 93 S. Ct. at 2638.
22. *Id.* at 2638-39.
24. 93 S. Ct. at 2640.
25. *Id.* at 2634 n.6.
26. *Id.* at 2634.
gress had ample power under the commerce clause to prohibit inter-
state transportation of obscene matter. The defendant had challenged
the statute under which he was charged as overbroad since it failed
to distinguish public from private transportation. The Court, analog-
izing to laws which forbid interstate transportation, both public and
private, of lottery tickets and of women for immoral purposes, de-
clared that Congress could legislate to prevent use of interstate com-
merce in the spreading of moral evils; the Court also observed that
Congress may reasonably have determined that even privately trans-
ported obscene matter intended for private use was more apt to be
exposed to juveniles and unwilling audiences than would material
kept in the home. In 12 Reels, the Court reversed a lower court deter-
mination that a statute forbidding importation of "obscene or immo-
rall" material was unconstitutional on its face. The Chief Justice's
opinion declared that the power of Congress to regulate imports was
"plenary," and governed by rules different from those applying to
domestic transportation. Since Stanley's protection of private posses-
sion in the home afforded no correlative right to receive obscene ma-
terial, Congress's power to regulate was unlimited. Finally, in Kaplan v.
California, the Court rejected the argument that a book without pic-
tures could not be obscene:

Obscenity can, of course, manifest itself in conduct, in the pictoral
representation of conduct, or in the written and oral description of
conduct. The Court has applied similarly conceived First Amendment
standards to moving pictures, to photographs, and to words in books.

31. 93 S. Ct. at 2667.
32. The Court seemed to suggest that the first amendment imposes no limitation
on Congress's power to regulate imports. The statute in question provided that "the
Secretary of the Treasury may, in his discretion, admit the so-called classics or books
of recognized and established literary or scientific merit . . . only when imported for
observed that it had upheld the constitutionality of a statute prohibiting importation
of any films of prize fights usable for public exhibition. Weber v. Freed, 239 U.S.
325 (1915), cited 93 S. Ct. at 2667-68. But see United States v. Thirty-Seven
Photographs, 402 U.S. 363, 376-77 (1971): "[O]bscenity is not within the scope of
First Amendment protection. Hence Congress may declare it contraband and prohibit
its importation . . . ." The negative implication is that Congress may not prohibit
importation of protected speech materials, contrary to the Court's suggestion in Miller.
34. Id. at 2684.
Justice Douglas dissented in all cases, expressing his long-held belief that the first amendment contains no implied exception for regulation of obscenity. Obscenity, he stated, is simply a matter of taste and private morality, not of constitutional law. The only exception which Justice Douglas would recognize to his policy of judicial "abstention" involves the case in which obscene matter is forced upon captive audiences.

Justice Brennan, joined by Justices Stewart and Marshall, also dissented, rejecting not only the majority's new formulation of obscenity doctrine, but also his own test announced seven years earlier in Memoirs. Justice Brennan conceded that the concept of unprotected obscenity might exist "in the sky," so to speak, but denied that it could be defined in a way sufficiently precise to give fair notice to those charged under a criminal statute and to avoid "chilling" the expression of protected speech. Because an attempt to suppress obscenity necessarily works a chilling effect on protected erotic expression, Justice Brennan wrote, it could be justified only by the state's demonstration that it was required to accomplish a compelling interest. While a state traditionally has been granted an interest under the police power to protect public morality, this interest is too "unfocused and ill-defined" to justify any chilling of first amendment freedoms. Justice Brennan would have preferred to await a more appropriate case before determining whether protection of juveniles and unwilling audiences would serve as sufficiently compelling interests for this purpose.

35. Paris Theatre, 93 S. Ct. at 2664.
37. See note 83 infra and accompanying text.
39. United States v. O'Brien, 391 U.S. 367, 376-77 (1968) required a compelling state interest to support regulation of conduct (draft card burning) when that regulation inhibited the expression of political ideas.
40. Paris Theatre, 93 S. Ct. at 2660 (Brennan, J., dissenting).
41. The practical difference between the recommendations of Justices Brennan and Douglas, disregarding the difference in analytical approaches, would be in the interests which a state could assert to justify obscenity regulation. Justice Brennan would probably allow protection of juveniles and nonconsenting audiences as sufficient interests to justify regulation. Justice Douglas would permit protection only of "captive audiences," following the much more stringent standards established for regulation of offensive but protected speech. See note 155 infra.
II. OBSCENITY REGULATION: ORIGINS AND RATIONALES

Obscenity has been around since our ancestors learned to mark up the walls of their cave with a charred stick.\(^{42}\) It was pleasing to the gods in Ancient Greece\(^^{43}\) and to mortals in Ancient Rome;\(^^{44}\) both civilizations have since expired. It was displeasing to His Majesty's courts in England, however; punishment for obscenity in Anglo-American jurisprudence is said to have originated in 1663 when Sir Charles Sedley harangued an Oxford mob while standing naked on his balcony.\(^{45}\) In the United States, the first recorded obscenity conviction was in 1821 for the sale of Fanny Hill.\(^{46}\) Later American decisions followed the authoritative test delivered in 1868 by the Queen's Bench in Regina v. Hicklin:\(^{47}\)

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

The Hicklin "tendency . . . to deprave . . . those . . . open to such immoral influences . . ." test, often said to be the predecessor of the Roth test, was simply a criminal definition, however. The Queen's Bench did not purport to establish a constitutional touchstone for the United States; it merely observed that "the law of England does not allow of any obscene publication . . . ."\(^{48}\) Nevertheless American courts looked to Hicklin in interpreting obscenity statutes\(^{49}\) and only gradually modified the test to avoid some of its more unacceptable results.\(^{50}\) These decisions did not attempt to explain any inconsistency

\(^{42}\) See H. KATCHADOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY 283 fig. 11.2 (1972) (cave petroglyph portraying an act of zoophilia).
\(^{43}\) Dramatic comedy had its origins in obscene phallic celebrations held in honor of Dionysos. See generally G. NORWOOD, GREEK COMEDY 1-13 (1963).
\(^{44}\) Pompeii is famed for its obscene murals.
\(^{45}\) Le Roy v. Sir Charles Sedley, 1 Sid. 168, pl. 29 (K.B. 1663); see generally Alpert, Judicial Censorship of Obscene Literature, 52 HARV. L. REV. 40 (1938).
\(^{46}\) Commonwealth v. Holmes, 17 Mass. 335 (1821).
\(^{48}\) Hicklin, L.R. 3 Q.B. at 371.
\(^{49}\) See, e.g., United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (C.C.S.D. N.Y. 1879).
\(^{50}\) See, e.g., United States v. One Book Entitled "Ulysses," 72 F.2d 705. 707 (2d Cir. 1934) ("the effect of the book as a whole is the test")
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between obscenity regulation and the first amendment; at most, courts tried to balance the community interests involved, seeking, in the words of Judge Learned Hand, "a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable." 51

Following these early cases, decisions in obscenity cases remained primarily a matter of determining the legislative intent in proscribing "obscenity" 52 only because the courts were so slow to recognize the implications of the first amendment. 53 Justice Brennan's majority opinion in Roth was the first to attempt a conciliation between obscenity regulation and freedom of speech. However, rather than fashion obscenity doctrine within a first amendment framework, perhaps by adopting a balancing test such as that advanced by Judge Hand, the Court resolved the problem by negating it. It did so by resort to what Professor Kalven has described as a two-level theory of speech, a theory positing the existence of some extra-first amendment categories of speech the "punishment of which have never been thought to raise any Constitutional problem." 54 One such category is speech which inflicts injury or incites immediate breach of the peace. 55 Another category—or perhaps a subcategory of the first—is libel. The Court had observed in Beauharnais v. Illinois 56 that libel was punishable at common law, and that no suggestion was made at or after the time of the adoption of the Constitution that libel was to be protected by the first amendment. In Roth, Justice Brennan added obscenity to the category of non-protected speech. 57 Roth has been voluminously, and

51. United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936). Judge Hand continued:

There can never be constitutive principles for such judgments . . . . "[O]bscenity" is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss [sic], but really a small bit of legislation ad hoc, like the standard of care.

Id.


53. The constitutional history of the first amendment did not really begin until America experienced a mass influx of "foreign" ideas during World War I; see Schenck v. United States, 249 U.S. 47 (1919).


55. Id.


57. Chaplinsky had referred only to obscenity which results in injury or breach of peace. 315 U.S. at 572.
often ably, discussed, but the Court’s decisions last Term so emphasized Roth's stature that a brief reexamination of its analytical approach is justified.

The Roth Court assumed the existence of a definable species of speech called “obscenity”: “The dispositive question is whether obscenity is utterance within the area of protected speech and press.” By interweaving historical and utilitarian arguments, the Court answered this question in the negative. After a cursory discussion of colonial law, Justice Brennan concluded that the framers of the first amendment intended that obscenity, like libel, was to be outside the realm of protected speech. The framers intended to promote self-government, as well as to advance truth, science, morality and the arts, but “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”

The term “redeeming social value” entered our legal jargon, then, not as part of a definition of obscenity but as an explanation of history’s refusal to accord it protection. The Court buttressed this historical argument with some utilitarian reasoning: All ideas, however hateful, are protected by the first amendment, but it is the consensus of contemporary civilization that obscene utterances “are no essential part of any exposition of ideas.”

Having justified exclusion of obscenity from first amendment protection, Justice Brennan proceeded to define “obscenity.” Following the lead of Judge Hand, he might have deferred to the good sense and representative nature of the jury, permitting it to weigh the conflicting interests in each case and to define obscenity by “legislation ad hoc.” Instead, apparently interpreting the intent of those who wrote the first amendment, he declared that “[o] bscene material is material which deals with sex in a manner appealing to prurient interest.” But ap-

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59. Roth, 354 U.S. at 481 (footnote omitted).
60. Roth, 354 U.S. at 484.
62. See note 51 supra.
63. 354 U.S. at 487 (footnotes omitted). The Court gave two definitions of "prurient" and said it perceived no significant difference between them. Id. at 487 n.20. The Court's own definition was "a tendency to excite lustful thoughts." The Model Penal Code's definition was considerably more restrictive: "a shameful or morbid interest in nudity, sex, or excretion . . . ." MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).
pealing to the prurient interest of whom? The *Hicklin* test had led courts to ascertain the effect of material on the most susceptible person likely to come into contact with it. But—and here the first amendment finally had a substantial impact on the Court's reasoning, making *Roth* a constitutional rather than simply a criminal case—continued use of this standard would result in an intolerable burden on protected expression of sexual ideas. Therefore, the Court held, to avoid restriction of protected speech, material containing obscene (i.e., prurient) portions could be proscribed only if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."\(^6^4\)

*Roth* evoked considerable critical commentary,\(^6^5\) most notably from Professor Kalven, whose brilliant criticism of the *Roth* reasoning may well have directly resulted in Justice Brennan's reformulation of his definition of obscenity in *Memoirs.*\(^6^6\) Kalven focused on *Roth's* use of a utilitarian justification for obscenity regulation, criticizing those portions of the opinion which relied on an historical approach. The appeal to history, if it became fully accepted, could lead to further exemptions from first amendment protection which seemed unpalatable in today's world—blasphemy, for example, and seditious libel, both of which were criminal offenses at the time the Bill of Rights was adopted. Instead, he insisted, the crux of *Roth's* reasoning was that "'[a]ll ideas having even the slightest redeeming social importance' ... are protected against governmental restraint."\(^6^7\) *Roth* thus allowed government to proscribe obscenity because obscenity has no redeeming social value.

But, Kalven asked, what is obscenity? "A legal term gets its meaning from the construction put on it by the courts,"\(^6^8\) and distin-

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65. Dean Lockhart and Professor McClure viewed *Roth* from a different perspective. They proposed that the Court had only one target in *Roth*: the *Hicklin* test. *Roth* established but two constitutional requirements: that material be judged as a whole and that it be judged by its impact on the average, not the most susceptible, person. The rest of the *Roth* formula embraced all the contemporary definitions of obscenity, they suggested, and all might well be acceptable constitutionally. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 49-58 (1960). Dean Lockhart served as Chairman of the President's Commission on Obscenity and Pornography, 1968-70.


67. *Id.* at 9.

68. *Id.* at 13.
guished courts had classified books like *Lady Chatterley's Lover* as obscene. Thus, under the *Roth* presumption, these books would be in the category of speech which has no redeeming social value. To avoid arriving at this absurd conclusion, the Court in subsequent cases would find it necessary, he predicted, to predicate a determination of obscenity on a finding that the matter contained no redeeming social value; it could not, if *Roth* were to make sense, presume a lack of value from a finding of obscenity. This rather dazzling syllogism may have precipitated Justice Brennan's *Memoirs* reformulation of the *Roth* test.

Professor Kalven's syllogism was based on one possible reading of *Roth*: by incorporating the "no redeeming social value" requirement into his *Memoirs* definition, Justice Brennan implicitly approved Kalven's interpretation. Justice Brennan is of course, the most authoritative arbiter of his own writing; still, an alternative construction of his ambiguous *Roth* opinion would have preserved it from the logical infirmities which Kalven perceived and, by eliminating Kalven's perceived *reductio ad absurdum*, would have obviated the necessity of the later *Memoirs* clarification.

*Roth*'s ambiguity has its source in the heart of the opinion's analysis: its use of the word "obscentity." Justice Brennan's analysis began with a definition: obscenity is "material which deals with sex in a manner appealing to prurient interest." It concluded with a second definition: obscenity may be suppressed if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Kalven's analysis equates the two definitions, viewing the second as a refined version of the first. This equation results in a basic flaw in his argument: The first definition describes material arguably possessing no social importance, but the second encompasses minor themes which almost always will contain some value.

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70. Justice Harlan raised very similar objections in his dissent. 354 U.S. at 497-98.
71. To suggest that a Supreme Court justice is moved more by logical imperatives than by policy objectives may be tantamount to a confession of gross naivete. Certainly, however, judges prefer to hang their policy decisions on pegs of logic; Kalven's syllogism presented Justice Brennan a well-crafted peg.
73. 354 U.S. at 489.
The suggested alternative construction would argue that *Roth* in fact defined two concepts: The first definition could be called "obscenity-in-fact," the second, "constitutional obscenity." Obscenity-in-fact, being material whose effect is the arousing of prurient interest, might rationally have been rejected as without social importance. Few books or films, however, consist of an unrelieved sequence of prurient representations, thus qualifying as pure obscenity-in-fact. Indeed, many pre-*Roth* obscenity decisions reflected an awareness that some literary or artistic value was being sacrificed for the sake of eliminating pornographic passages.\(^7^4\) *Roth's* definition of constitutional obscenity preserved this balancing approach; it recognized that suppression of constitutional obscenity may entail some suppression of socially important material, but in a balancing of societal interests a state could conclude\(^7^5\) that protection of these minor themes is outweighed in importance by the state's interest in suppressing the obscenity-in-fact dominant theme.\(^7^6\)

Important literary works like *Lady Chatterley's Lover*, found obscene in pre-*Roth* cases, would be protected after *Roth* since their dominant theme was not obscene-in-fact; under this interpretation, Professor Kalven's parade of horribles thus would have been halted before it got under way. But *Roth* would not have required that constitutional obscenity be utterly without redeeming value, and insofar as Justice Brennan's eventual interpretation of *Roth* and addition of an explicit requirement that material be found to be without redeeming social value was influenced by Kalven's writings, the professor contributed to a tightening of the obscenity test.\(^7^7\)

In *Roth*, Justice Brennan had observed in a footnote that the Court

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75. Or, as an alternate interpretation, the *Roth* Court itself drew the conclusion.

76. The viability of *Roth's* application of a balancing test under this interpretation is questionable today. United States v. O'Brien, 391 U.S. 367 (1968), required demonstration of a compelling state interest to justify incidental abridgment of protected expression. *Roth*, on the other hand, required only a rational basis for the decision of the state or federal government to choose suppression of a dominant obscene theme over protection of non-obscene minor themes. See Teamsters Union v. Hanke, 339 U.S. 470, 475 (1950), cited in *Roth*, 354 U.S. at 484 n.14.

77. Justice Brennan may have had more compelling constitutional reasons for his addition of a redeeming social value requirement. See text accompanying note 179 infra.
perceived no significant difference between obscenity as defined at
common law and in the *Model Penal Code*: "A thing is obscene if,
considered as a whole, its predominant appeal is to prurient interest . . .
and if it goes substantially beyond customary limits of candor in de-
scription or representation of such matters . . . ."78 An opinion by Jus-
tice Harlan in *Manual Enterprises v. Day*79 explicitly stated that to be
found obscene material must meet the common law definition: It must
be found both pruriently appealing and violative of customary stan-
dards.80

In *Jacobellis v. Ohio*,81 decided in 1964, Justice Brennan loosely
brought together the various threads of obscenity law which had been
spun out since *Roth*, threads later to be tied neatly together in *Mem-
oirs*. He reiterated *Roth's* prurient appeal requirement; he added Jus-
tice Harlan's patent appeal requirement from *Manual Enterprises*,
stating that it had been inherent in the *Roth* decision; he declared that
material advocating ideas or otherwise having value could not be
branded as obscenity, his reasoning paralleling that of Professor
Kalven. He stated that the community standards referred to in the
*Roth* test contemplated use of a national "community;" otherwise,
"the constitutional limits of free expression in the Nation would vary
with state lines."82

*Jacobellis* revealed the deep split within the Court on the obscenity
issue. Justice White concurred only in the judgment. Justices Black
and Douglas would not have permitted exclusion of obscenity from
the general standards of first amendment protection. Justice Stewart
decided that *Roth* and subsequent cases allowed prohibition only of
hard-core pornography which he declined to define but would know

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80. At common law, material was obscene if "offensive according to current stan-
Enterprises*, supra, 370 U.S. at 485. Cf. *MODEL PENAL CODE § 251.4(1)* (Prop. Offi-
cial Draft, 1962)), but only obscenity which tended to deprave the beholder was crim-
inally punishable. Both the obscenity statute and the Constitution incorporated the
common law definition, Justice Harlan wrote, and so each required a finding of both
prurient appeal and patent offensiveness. He equated Hicklin's "tendency to deprave"
with *Roth's* "appeal to prurient interest." Each measured an effect on the recipient,
the one moral, the other physical or psychological.
82. 378 U.S. at 194-95, quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).
when he saw. In dissent, Chief Justice Warren joined by Justice Clark was willing to live with the Roth test. However, he believed that "community standards" meant local, not national, standards, and that despite the normal doctrine of constitutional facts, trial courts were the proper forums in which to ascertain those facts relating to obscenity. Justice Harlan agreed with Justice Brennan that the Court must make an independent judgment on constitutional facts, but believed that the fourteenth amendment held the states to a lesser standard than the first amendment held the federal government.

Two years after Jacobellis, Justice Brennan collected the thoughts he had expressed in that decision and welded them into a single tripartite test in Memoirs. Joined by Chief Justice Warren and Justice Fortas, he described the new test as simply an elaboration of the basic Roth definition of obscenity, implying that the three requirements had all been inherent in Roth:83

We defined obscenity in Roth in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." . . . Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The lower court in Memoirs had found Fanny Hill to be obscene, declaring that because a book "has some literary value does not mean it is of any social importance. [It need not] be unqualifiedly worthless before it can be deemed obscene."84 Justice Brennan categorically disagreed: "A book cannot be proscribed unless it is found to be utterly without redeeming social value."85 This requirement must be satisfied independently of the other two, he added. Although, as Chief Justice Burger emphasized in Miller, the Memoirs requirements were endorsed by only three members of the Court, since Justices Douglas

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84. 383 U.S. at 419 quoting 349 Mass. at 73, 206 N.E.2d at 406.
85. 383 U.S. at 419 (emphasis added).
and Black would have reversed all obscenity convictions. Memoirs was generally treated as the authoritative test by lower courts.

Until last Term's holdings, Memoirs was the last decision to discuss obscenity from a definitional perspective. Against this major tide defining the contours of a body of unprotected expression, which found expression in cases from Roth to Memoirs, a counter-current flowed suggesting that less attention be devoted to the characteristics of the printed material and more to the nature of its dissemination—seeking in a sense a functional rather than a metaphysical definition. Chief Justice Warren, concurring in Roth had observed: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." A number of cases gave expression to the spirit of this approach, although preserving the outward forms of the metaphysical definition, by "adjusting" the Memoirs test to bring within the reach of obscenity laws certain forms of reprehensible conduct by the seller and by assessing realistically the effect of erotic materials on the special susceptibilities of certain groups of buyers. Although these decisions had extended Memoirs to enlarge the permissible scope of obscenity prosecutions when certain state interests were perceived to be threatened, mention of these interests in Redrup v. New York persuaded some commentators that the

86. Justice Douglas observed in Miller that he would have permitted only convictions which complied with his fundamental first amendment rule that the government can punish speech when brigaded with illegal conduct, see note 176 infra, or when it is imposed on captive audiences. Public Utilities Comm'n v. Pollak, 343 U.S. 451. 467 (1952) (Douglas, J., dissenting).


89. Roth, 354 U.S. at 495 (Warren, C.J., concurring).


92. 386 U.S. 767 (1967) (per curiam).
Court had swung away from the metaphysical obscenity approach of *Roth* and *Memoirs* toward a functional obscenity concept emphasizing protection of certain traditional state interests. This approach seemed to reach its zenith in *Stanley v. Georgia*, which was decided in the midst of a period of confusion following *Redrup*.

After *Redrup*, little more was clear than that a species of expression called "obscenity" did exist which, when identified, was not entitled to first amendment protection. In *Stanley*, however, the Court indicated that even when the government established that material was metaphysically obscene, it might still be unable constitutionally to punish its possession. The *Stanley* Court reversed the conviction of a defendant charged with possessing obscene matter in his own house, holding that the government could assert no justification for "telling a man, sitting alone in his own house, what books he may read or what films he may watch." Justice Marshall denied that his decision undermined *Roth*, but some courts and commentators thought otherwise, deducing that *Stanley*'s asserted right of "privacy" extended to all private possession and enjoyment of obscene material and, derivatively, to the right to receive such material for private use. After *Stanley*, many concluded, regulation of obscenity would be permitted only when the state could demonstrate a compelling interest in infringing on the individual's privacy interest; protection of juveniles or of unwilling audiences were the interests approved in *Stanley*. *Stanley* seemed to presage a new trend in obscenity law, an approach which would balance the real competing interests involved. The embryo mis-

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95. The *Redrup* Court had enumerated the respective approaches which members of the Court would apply to alleged obscenity and had concluded: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the [conviction] cannot stand." 386 U.S. at 771. The Court subsequently reversed 31 convictions by per curiam decisions, citing *Redrup* to indicate that at least "five members of the Court, applying their separate tests" had found the material protected by the first amendment. *Miller*, 93 S. Ct. at 2614 n.3. (For a listing of the 31 cases, see *Paris Theatre*, 93 S. Ct. at 2647 n.8 (Brennan, J., dissenting).) While this approach did justice to those parties fortunate enough to obtain Supreme Court review, it hardly provided guidance to lower courts.
carried, however. Two Nixon appointees ended the “permissive” era, and dicta in the next obscenity cases appeared to limit Stanley strictly to protecting the privacy of the home.98 Last Term’s decisions converted that dicta into holdings.

III. NEW STANDARDS: PLUS ÇA CHANGE, PLUS C’EST LA MÊME CHOSE?

Hicklin had stated the common law test for obscenity to be whether the material would deprave and corrupt the most susceptible of those persons into whose hands it would be apt to fall. Roth reflected the growing judicial disillusionment with the “most susceptible” formula; it required that the material’s effect on the “average reader” be ascertained, and the nature of its effect be an appeal to prurience, not a more speculative tendency to deprave.99 Roth also indicated an awareness of the first amendment interests at stake, requiring the material’s effect as a whole to be judged, not merely the effect of isolated passages. Memoirs “codified” Roth and subsequent cases into a tripartite test of obscenity. Commentators who examined the fact patterns in those cases reversed per curiam after Redrup concluded that the state could reach only the hardest of the hard core material.100 This conclusion seemed to moot discussion of the subtler aspects of the Memoirs test, since hard core obscenity was presumed to be self-identifying. Stanley, considered in conjunction with Redrup, sug-

98. United States v. Reidel, 402 U.S. 351 (1971); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971). Four members of the majority in Thirty-Seven Photographs expressed the belief that “obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use.” Id. at 376 (White, J., joined by Burger, C.J., and Brennan and Blackmun, JJ.).

99. The “tendency to deprave” formula has remained the test for obscenity in England. In an interesting parallel to American experience with the no redeeming social value formula, courts simply made a finding of obscenity, and the tendency to deprave was presumed. In 1959, however, the Obscene Publications Act incorporated the “tendency to deprave and corrupt” phrase into the definition of obscenity and “[i]nstead of a presumed consequence of obscenity, a tendency to deprave and corrupt became the test of obscenity and became what had to be proved.” Director of Public Prosecutions v. Whyte, [1972] 3 All E.R. 12, 18 (H.L.) (Opinion of Lord Wilberforce). The case contained an amusing discussion of whether those who buy obscenity are not already depraved and corrupt to the point where the material can have no tendency to further deprave and corrupt them. The Lords did not buy the argument.

gested that laws should be drawn narrowly to protect the interests of juveniles and unwilling audiences, with the emphasis placed on accomplishment of permissible state objectives rather than on a blanket proscription of certain kinds of expression.

The Miller Court sharply criticized the Memoirs test, which contained the following elements:101

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
(c) the material is utterly without redeeming social value.

After criticizing this test, the Court announced a very similar tripartite test of its own:102

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The first requirement in both Miller and Memoirs essentially restates the Roth holding. Miller dropped the "dominant theme" terminology found in both Memoirs and Roth, requiring simply that the material, taken as a whole, appeals to prurient interest. Omitting "dominant theme of the material" seems, on its face, to tighten the pruriency requirement; the dominant theme might appeal to prurience while the material as a whole, because of the presence of many non-prurient minor themes, might not. The omission is probably a matter of semantics rather than substance, however; the Court cited a 1972 decision which had relied on the original Roth formula.103

Memoir's second requirement was modified significantly in two respects. The patent offensiveness now must inhere in depictions or descriptions of sexual conduct, not merely in sexual content. This

101. 383 U.S. at 418.
102. 93 S. Ct. at 2615.
change reinforces the Court’s efforts to insure that suppressible pornography contains no ideas. Furthermore, the conduct must be specifically defined by state law, an effort to escape the vices of vagueness. 104

Of the changes instituted in Miller, the Court’s substitution of a no serious “literary, artistic, political or scientific value” test for the third Memoirs requirement has provoked the most attention in the popular media. Although this transformation may well have symbolic importance as representing the Court’s determination to “get tough with smut,” it seems wise not to attach too much importance to variations in the wording of these formulas. 105 Some commentators had suggested that a release of tension in sexually repressed viewers of pornography might in itself have social value, aside from any value in the content of the material; the Court does appear to have plugged that loophole. Furthermore, the jury now must determine whether the value is “serious,” which gives about as free a scope to the prejudices of the jurors as can be imagined. On the other hand, a decision whether the social value of the material was sufficient to be “redeeming” called for a similar weighing under the old test. 106

Why the Court bothered to formulate this new “serious value” test remains a puzzling question. 107 If the Chief Justice intended to sweep aside the Memoirs heresy and reason directly from the authoritative Roth opinion, why did he not accept Roth’s fundamental and conclusionary presumption that material found to be obscene inherently lacks redeeming social value? Such a return to the pure approach of Roth would have enabled the Court to limit itself to review of a jury’s factual finding that material taken as a whole is prurient (together perhaps with a finding of patent offensiveness). Instead, after carefully demonstrating that the no redeeming social value test was an

104. See note 120 and accompanying text infra.
105. Those interested in decisions on pornography include many not normally attentive to Supreme Court niceties, who burn bonfires of celebration or despair where candles or even matches would be more appropriate. Krislov, supra, 1968 Sup. Ct. Rev. at 162.
106. Commentators often overlooked the fact that the “utterly without redeeming social value” test also suggested a certain weighing of the seriousness of the value. One judge suggested that too much emphasis had been placed on “utterly” and not enough on “redeeming.” “An orange floating in an open sewer does not change it into a fruit salad.” Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475, 493 (1971) (Hansen, J., concurring).
107. For this Comment’s answer, see text accompanying note 179.
invention of *Memoirs* and not required by *Roth*, the Court paradoxically modified it with a reworded serious value test.

One possible explanation for inclusion of a serious value requirement may lie in the difficulty of the Chief Justice garnering a majority of the justices to endorse his opinion. Just as the original *Roth-Memoirs* test was undoubtedly a product of intra-Court negotiations, so the Chief Justice may have been forced to retain a modified social value test to preserve his majority. A natural conservatism may have caused the Court’s reluctance to drop the requirement completely; furthermore, the subtleties of a legal logic which *presumes* all matter found obscene to be valueless would be lost on an alarmed public suddenly told that material need not be found valueless before it can be found obscene.

Whatever practical motives may have impelled the Court to adopt the serious value requirement, the effect of its adoption will be to tighten the requirements of *Roth*. *Roth* had held that material appealing to prurient interest was utterly without redeeming social value when the *dominant theme* of a book appealed to such interests the book could be suppressed despite the importance of lesser themes. *Roth* was, of course, an improvement over *Hicklin*, which had allowed isolated passages of obscenity to permit suppression of the entire book. Even so, *Roth* still permitted, as a matter of constitutional law, minor themes to be sacrificed when the dominant theme was prurient. *Roth* never explained the first amendment justification for allowing the presence of a dominant prurient theme to enable suppression of non-obscene minor themes in a work. Under *Miller*, on the other hand, even if the dominant theme appeals to prurient interests, if the work taken as a whole has serious value, it may not be suppressed.

The immediate reaction to these new guidelines is perhaps a combination of disappointment and relief—disappointment, because the doctrinal confusion among members of the Warren Court had fostered a growing belief that the concept of obscenity as a peculiar

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108. See note 2 *supra*.
110. One of that majority, Justice White, strongly opposed inclusion of the “redeeming social value” requirement in the *Memoirs* test. 383 U.S. at 460-62 (White, J., dissenting).
breed of speech outside the protection of the first amendment was on its way out; relief, because the change in the Memoirs test seems so slight and its probable effects so much less restrictive than had been feared from the Burger Court.

IV. AVOIDING THE MORE PROGRESSIVE ALTERNATIVES

A. The "Brennan Uncertainty Principle"

In its emphasis on a metaphysical definition, its rejection of Stanley, and its cavalier dismissal of vagueness objections which have been sounded since Roth, the new Miller test almost seems to turn the clock back to 1966 and Memoirs—a retrenchment to an approach found unworkable by its originator, amounting to a confession by the majority that it had learned nothing from the experiences of the intervening seven years. In contrast, the opinions of Justice Brennan have displayed a continued evolution in his thought as the Court's experience has offered him new insights into the difficulties implicit in attempts to regulate obscenity. It may prove especially significant in the panorama of obscenity litigation that the author of both the original Roth formulation and the Memoirs synthesis has now reevaluated his own prior efforts at developing a metaphysical definition of obscenity, as

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111. The Court tells us that it had reversed 31 convictions in per curiam opinions, citing Redrup v. New York, 386 U.S. 767 (1967), without comment. These reversals occurred whenever "five members of the Court, applying their separate tests" determined the material to be protected by the first amendment. Miller, 93 S. Ct. at 2614 n.3. For citations of these cases, see Paris Theatre, 93 S. Ct. at 2647 n.8 (Brennan, J., dissenting). Language in Stanley v. Georgia, 394 U.S. 557, 567 (1969), had lead to speculation that the Court would no longer judge the nature of the material but the circumstances of its sale; thus, it was thought, the Court would permit obscenity to be regulated only in pursuit of such limited state interests as the protection of children (see Ginsberg v. New York, 390 U.S. 629 (1968)), or of unwilling viewers (see Redrup v. New York, supra; State v. Rabe, 79 Wn. 2d 254, 484 P.2d 917 (1971), revd per curiam, 405 U.S. 313 (1972)).

112. [T]he Court's restatement substantially tracks the three-part test announced in Memoirs v. Massachusetts . . . [and] whether it will be easier to prove that material lacks "serious" value than to prove that it lacks any value at all remains, of course, to be seen.

Paris Theatre, 93 S. Ct. at 2654-55 (Brennan, J., dissenting).

113. But see Paris Theatre, 93 S. Ct. at 2654 (Brennan, J., dissenting): [T]oday's restatement will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation.
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well as those of the *Miller* Court, and has found them wanting. Justice Brennan has formulated what might be called the "Brennan Uncertainty Principle": 114 Because a fine line separates protected speech from unprotected obscenity, a line which can be determined only by measuring the value of the expression in question in a given case, any statutory attempt to avoid due process void-for-vagueness objections by drawing a clear and easily understood boundary between prohibited and permitted erotic expression runs afoul of the first amendment by permitting suppression of some protected sexually-oriented material; 115 conversely, any attempt to sensitively define by statute that fine line which does protect first amendment interests and at the same time permits all unprotected obscenity to be punished requires use of terms so vague 116 that a buyer or seller of sexually-oriented material is unable to know in advance whether he is committing a criminal act, thus depriving him of due process rights and, moreover, chilling freedom of speech for those whose erotic expression would be protected by the first amendment but who fear possible prosecution. 117 The dilemma confronting the legislator is that certainty in the statute creates uncertainty in the constitutionality of its application, requiring its invalidation for overbreadth; certainty in constitutionality of the statute's application creates uncertainty as to prohibited conduct, requiring its invalidation for vagueness.

114. *Cf.* the Heisenberg Uncertainty Principle, a basic postulate of quantum physics, which states that while either the momentum or the position of a subatomic particle can be determined with precision at a point in time, both quantities cannot be so fixed at once. Thus, precise determination of momentum will leave an uncertainty in position, and vice versa. *See* A. GLASSNER, *INTRODUCTION TO NUCLEAR SCIENCE* 73 (1961).

115. For example, a state might flatly forbid representations of certain well-defined forms of sexual conduct. *See, e.g., OR. REV. STAT. §§ 167.060 - .100 (1971 Supp.) (see note 120 infra); N.Y. PENAL LAW §§ 245.10 and 245.11 (McKinney Supp. 1972-73.). This approach, if incorporated in a general obscenity statute, rather than in a statute designed to protect a limited state interest in minors or privacy, would be constitutionally overbroad; *Miller* itself admitted by negative implication that even prurient, patently offensive representations may have serious literary, artistic, political or scientific value. 93 S. Ct. at 2616.

116. The meaning of "prurient," 'patent offensiveness," [and] 'serious artistic or literary value'... varies with the experience, outlook, and even idiosyncrasies of the person defining them." *Paris Theatre*, 93 S. Ct. at 2647 (Brennan, J., dissenting).

117. This difficulty was foreseen in Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 882-910 (1970), cited in *Paris Theatre*, 93 S. Ct. at 2650 n.12. The student authors concluded that a rule such as that defining obscenity "must usually be somewhat overprotective of first amendment interests in order to avoid underprotecting them." 83 HARV. L. REV. at 890.
Justice Brennan was unwilling to accept the long-espoused assertion of Justice Douglas that to define obscenity is constitutionally meaningless because obscenity does not exist as a separate category of unprotected speech. Obscenity exists all right, he maintained; the question is whether it can be isolated. Deciding that it cannot be isolated and that attempts to do so will chill protected speech, he concluded that the state cannot attack obscenity without demonstrating a compelling interest which outweighs the first amendment interests imperiled by the chill.

His suggested approach has the advantage of impeccable constitutional orthodoxy. He accepted the fundamental postulate of the two-level speech theory, that obscenity is not constitutionally protected speech, and used it to trigger the O'Brien balancing test.118 O'Brien requires a compelling governmental interest; Stanley v. Georgia and Redrup v. New York had already suggested that the state had a special interest in protection of children and unwilling audiences, and Justice Brennan said that he would be willing to examine the strength of those interests when they were presented in a proper case. Certainly, he noted, after Stanley no one could claim that the state had a legitimate, rational interest—not to mention a compelling interest—in controlling the moral tone of a person's thoughts.

The Chief Justice shrugged off this final objection; since obscenity conveys no ideas,119 controlling obscenity to protect legitimate state interests is not forbidden even if some "thoughts" are incidentally affected, he asserted, thereby rather spectacularly missing the crucial point. Justice Brennan had criticized ends, not means. What were these "legitimate state interests" if not a direct control on a person's thoughts? Stanley also had discussed obscenity; it had asserted that controlling obscenity for the sole purpose of preserving the decency of people's thoughts was impermissible even though obscenity is unprotected by the first amendment. The Chief Justice also posed the specious analogy of drug control; the state can prohibit drugs, he ob-

118. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct,” the state may regulate the nonspeech elements even at the expense of limiting first amendment freedoms if it acts in pursuit of a compelling state interest, if this interest is unrelated to suppression of free expression, and if the regulation is strictly limited to the extent that it is essential for furtherance of the interest. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

119. But see text accompanying notes 161-205 infra.
served, even though it thereby deprives the addict of his fantasies. Again he confused ends and means: Did the government prohibit drugs for the sole purpose of halting fantasies? Presumably it could assert more tangible interests to justify controls on heroin.

As for the primary thrust of Justice Brennan's argument, the majority opinion attempted to avoid arriving at a point where an *O'Brien* analysis became necessary, asserting that obscenity was isolatable from protected speech and that Brennan's Uncertainty Principle was fallacious. For example, *Miller* limited the government to regulation of representations of "sexual conduct specifically defined by applicable state law."

The nature of the *Miller* requirements, however, which demand a weighing by a jury of competing values, itself seems to vitiate this attempted escape from vagueness. The Chief Justice suggested recent enactments by legislatures in Oregon and Hawaii as examples of state laws "directed at depiction of defined physical conduct, as opposed to expression." requiring a finding of serious artistic, literary, scientific or political value unquestionably reintroduces a great element of uncertainty into the test. The Chief Justice seemed to feel that this uncertainty is acceptable; he stated that a dealer distributing hard core material defined by state law will be put on "fair notice" that he may be prosecuted. Of course, this notice itself provides exactly the chill on marginal materials which have serious value that Justice Brennan feared. The Chief Justice observed that marginal cases will arise under any standard, cases "in which it is difficult to determine the side of the line on which a particular fact situation falls . . . ." This argument is valid as applied to a determination that a depiction of conduct meets the legally required definition of "nudity" or "sexual

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120. *Miller*, 93 S. Ct. at 2615 n.6. The Oregon statute, *ORE. REV. STAT. §§ 167,060-100* (1971 Supp.), does achieve a great deal of precision, banning depictions and descriptions of nudity, sado-masochistic abuse, sexual conduct or sexual excitement, each term defined in careful and graphic detail. The statute forbids distribution and display of the described material in absolute terms and does not require the jury to make determinations of patent offensiveness or prurient appeal. The statute could be found constitutional, however, only because limited to distribution to minors and public display for advertising purposes. Since commercial speech, Valentine v. Chrestensen, 316 U.S. 52 (1942), and speech directed to juveniles, *Ginsberg v. New York*, 390 U.S. 629 (1968), are excluded from the usual standards of first amendment protection, Oregon need not require a finding that material under the statute possesses no serious value, but clearly, under the rules which *Miller* set forth, such a finding would be required in order to permit suppression of sales to adults.

conduct;" but can a writer predict whether his story will be found to have "serious" literary value, at least until he sees the expression on the jurors' faces?  

The Court introduced even greater potential uncertainty into this requirement by adding that it did not hold "that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate." The Chief Justice added that, while state courts might do as they would, we are prepared to construe [the terms "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral"] as limiting regulated material to patently offensive representations or descriptions of [ultimate sexual acts, masturbation, excretory functions, and lewd exhibitions of genitals].

Surely this was judicial construction with a vengeance!

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122. The Washington Court answered this argument by an appeal to authority: [7] he import of Roth is not a thing of the past.... In Roth the United States Supreme Court considered carefully whether the word "obscene" is unconstitutionally vague and found that it was not. Accord, Mishkin v. New York....

J-R Distributors, 82 Wn. 2d at 600, 512 P.2d at 1060.

Roth, however, relied essentially on the common law definition of obscenity. The Court in Winters v. New York 333 U.S. 507 (1948), in holding a state statute to be void for vagueness, had distinguished the "permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting....." Id. at 518. Roth narrowed the "well understood" definition of obscenity only by requiring that the effect of the material be determined on the average reader and that the material be taken as a whole. These were minor readjustments in definition which a dealer could readily understand. It is submitted that the Miller test, protecting material however prurient which possesses "serious literary, artistic, political or scientific value," is not a test well known to the criminal law. Its application requires a sophistication far beyond that of the average buyer or seller of books. Like an oath to show respect to the flag, it may be read broadly or narrowly depending on the whims of a prosecutor or the cultural sensitivity of a jury; it thus presents no ascertainable standard of conduct. See Baggett v. Bullitt, 377 U.S. 360 (1964). The effect of the kind of statute sanctioned by Miller will be avoidance by buyer and seller of all depictions of hard core conduct, regardless of "serious value." The vagueness of the Miller standard will thus result in a chilling of constitutionally protected expression:

We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others.


123. Miller, 93 S. Ct. at 2615 n.6.

124. 12 Reels, 93 S. Ct. at 2670 n.7.

125. The states will pick up the cue."Obscene" has been construed in Washington since the Miller decision: Photographs, pictures and drawings which portray in a patently offensive way

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B. The Demise of Stanley: The Court Avoids Substantive Due Process

The Court evaded Justice Brennan's vagueness objections by applying a gloss of superficial precision to its new obscenity definition and ignoring the difficulties which Justice Brennan had shown to be inherent in such a definition. On the other hand, it met squarely the suggestion that after Stanley the state could not interfere with the right of a consenting adult to read or view what he wishes; outside the home, the Court held, this right is non-existent. In so holding, it confronted the increased willingness both of the lower courts and of itself in prior cases to apply a substantive due process scrutiny to governmental attempts to interfere with "autonomous control over the development and expression of one's intellect, interests, tastes, and personality."126

The Chief Justice strongly opposed in Paris Theatre any return to a concept of substantive due process in which legislative ends as well as means would be judicially examined to insure that they were "appropriate and legitimate."127 By insisting that the Court not use the fourteenth amendment to restrain state legislatures in ways not compelled by express prohibitions of the Constitution,128 the Chief Justice advanced a position apparently inconsistent with the Court's abortion law decision earlier in the same Term—a decision in which he had concurred. That decision, Roe v. Wade,129 was but one example of recent opinions shielding the individual from governmental intrusions upon his "right to privacy."

sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated, or which depict acts of masturbation, fellatio, cunnilingus, lewd exhibition of the genitals and sexual relations between humans and animals are "obscene" if, taken as a whole, the subject matter does not have a serious literary, artistic, political or scientific value.

J-R Distributors, 82 Wn.2d at 601-02, 512 P.2d at 1061. But see Papp v. State, 281 So.2d 600 (Fla. App. 1973) (adopting the Miller construction of "obscene material," but applying it only prospectively); Stroud v. State, 300 N.E.2d 100 (Ind. App. 1973) (Indiana obscenity statute held unconstitutional under Miller as not specifying the descriptions of conduct prohibited); cf. United States v. Lang, 361 F. Supp. 380 (C.D. Cal. 1973) (retroactive application of Miller requirements of obscenity to pre-Miller indictments would be tantamount to use of ex post facto law).

129. Roe v. Wade, 410 U.S. 113 (1973) (opinion of the Court); id. at 167 (Stewart, J., concurring).
"Right to privacy" is perhaps a misleading rubric. Privacy is best conceptualized not as a right to be balanced against other legitimate governmental interests; rather, it represents a zone of autonomy into which the government has been granted no power to intrude.\footnote{130} No one, of course, has the absolute right to manage his life as he sees fit; every act of government limits a person's autonomy to some degree.\footnote{131} Clearly, however, the Court has shown special solicitude in preserving individual autonomy in certain limited spheres of life.\footnote{132}

To deny government the power to act because its acting would invade individual privacy is equivalent to asserting that the government is seeking an impermissible goal, an unreasonable objective; in so doing the Court applies substantive due process.\footnote{133} The Court's traditional formulation of substantive due process provides protection to an individual's autonomy in certain unusually sensitive areas, nurturing those liberties "so rooted in the traditions and conscience of our people as to be ranked fundamental."\footnote{134} To intrude on these special areas, the government must demonstrate a compelling interest, and its regulations must be narrowly drawn to achieve only that compelling interest.\footnote{135} A less mechanical approach might assert that when governmental regulations begin to encroach upon spheres of life intimately related to a person's individuality,\footnote{136} the courts will examine with increasing sharpness the ends the government is pursuing and the means it is using.

\footnote{130} Hufstedler, Directions and Misdirections of a Constitutional Right of Privacy, 26 RECORD 546, 549-50 (1971).
\footnote{133} Because the Roe Court was so diffident in explaining precisely what interest of the expectant woman was being accorded constitutional protection ("The right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," Roe, 410 U.S. at 153), Professor Ely has criticized the decision as a return to the substantive due process of Lochner v. New York, 198 U.S. 45 (1905). (Indeed, this is Justice Stewart's candid basis for concurring in Roe, 410 U.S. at 167-71). [P]recisely the point of the Lochner philosophy [is to] grant unusual protection to those 'rights' that somehow seem most pressing, regardless of whether the Constitution suggests any special solicitude for them. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 939 (1973).
\footnote{134} Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See also Griswold, 381 U.S. at 486-99 (Goldberg, J., concurring).
\footnote{135} Roe v. Wade, 410 U.S. 113, 155 (1973). See also Griswold, 381 U.S. at 497 (Goldberg, J., concurring).
\footnote{136} Harold Laski . . . noted that the essence of liberty 'implies power to expand the choice of the individual of his own way of life without imposed prohibitions from without.' Men are free, he reasoned, when the rules under which they live
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The more intimate the effect on the individual, the more compelling the governmental interest required and the more narrowly drawn must be the regulation.\textsuperscript{137}

Proscription of certain forms of communication seems subject to the same objections as regulations on hair length, use of contraceptives, sexual acts within marriage and membership in nudist colonies: \textsuperscript{138} such regulation strikes too closely at an activity intimately related to an individual's personal life, his personal thoughts and fantasies, without articulating an overriding governmental interest to justify the intrusion. \textit{Stanley v. Georgia} seemed based precisely on this rationale. One perceptive commentator observed that even though obscenity is unprotected by the first amendment, "because of its close relationship with freedom of expression and thought, its regulation becomes increasingly suspect as the regulation begins to encroach on those values."\textsuperscript{139} Even the later Supreme Court holdings permitting the government to regulate the sale of obscene material by mail\textsuperscript{140} and its importation through customs for commercial purposes\textsuperscript{141} could be explained as

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leave them without a sense of frustration in realms they deem significant.


\textsuperscript{137} Many lower courts have stricken down "unreasonable" restraints on activities intimately connected to a person's individual personality. For a ringing refusal to permit the state to regulate hair length, see Breen v. Kahl, 296 F. Supp. 702, 706 (W.D. Wis. 1969), aff'd. 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970):

For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being." It would violate a basic value "implicit in the concept of ordered liberty."... It would deprive a man or a woman of liberty without due process of law....

\textit{See also} Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), \textit{vacated on other grounds,} 401 U.S. 989 (1971) (State may not prohibit sodomy between married persons. "Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation."); Roberts v. Clement, 252 F. Supp. 835, 848-50 (E.D. Tenn. 1966) (striking down a statute making nudism a criminal offense; Darr, J., concurred on substantive due process grounds); Kent v. Dulles, 357 U.S. 116, 125-26 (1958) ("Travel... may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. [I]t is basic to our scheme of values." (Emphasis added)). "One index of the unacceptability of the state's intrusion into the private lives of its citizens may be the degree to which it reaches the minutiae of those lives." Note, 84 Harv. L. Rev. 1702, 1710 (1971). Would the Court uphold a law prohibiting as immoral the wearing of lipstick? Or forcing women to wear a veil? \textit{See} Emerson, \textit{Nine Justices in Search of a Doctrine}, 64 Mich. L. Rev. 219, 226 (1965).

\textsuperscript{138} \textit{See note} 137 supra.


\textsuperscript{140} United States v. Reidel, 402 U.S. 351 (1971).

\textsuperscript{141} United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).
permitting prohibition of activities fairly remote from personal use and possession. But the decisions of last Term emphatically concluded that Stanley protects a place—the home—not a zone of autonomy about the personal activity of reading;\(^{142}\) the Court's extensive treatment of this issue in Paris Theatre, Orito and 12 Reels appears to have nailed the lid solidly in place on the argument that the act of reading is in itself within a zone of autonomy.\(^{143}\)

V. LEGISLATIVE PURPOSES IN REGULATING OBSCENITY

Even if the first amendment does not protect obscene material, and even if regulation of obscenity invades no personal zone of privacy, the state still must demonstrate some permissible purpose which it hopes to achieve by its legislation—individual liberties may not be curtailed at whim or to advance forbidden goals. The classic due process test for judging the validity of an exercise of the police power was stated by the Court in Lawton v. Steele:\(^{144}\)

To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose . . . .

Although the Court had never explicated the permissible goals which it believed legislatures might further in enacting obscenity laws,\(^{145}\) commentators had suggested possible objectives and had attempted to evaluate their validity. Professor Emerson suggested five major cat-

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143. See text accompanying notes 23-32 supra.


145. Professor Kalven's half-serious suggestion that obscenity legislation is motivated primarily by fear of exciting masturbation may contain a kernal of psychological truth, but it is not a conscious legislative objective which the Solicitor General would care to argue to the Supreme Court. See Kalven, supra, 1960 Sup. Ct. Rev. at 4 n.21.
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categories into which most proposed justifications of obscenity regulation fall:146

(1) that the expression has an adverse moral impact, apart from any
effect upon overt behavior;
(2) that the expression may stimulate or induce subsequent conduct in
violation of law;147
(3) that the expression may produce adverse effects on personality and
attitudes which in the long run lead to illegal behavior;148
(4) that the expression has a shock effect, of an emotionally disturbing
nature [in more attenuated form, this effect is expressed as a blight on
community aesthetics, merging into the common law category of
nuisance];149; and
(5) that the expression has especially adverse effects, of the sort de-
scribed in the previous categories, upon children, who are intelle-
tually and emotionally immature.

Emerson dismissed the first three categories as “incompatible with the
basic theory of freedom of expression as incorporated in the first
amendment.”150 Dicta in Stanley v. Georgia in effect suggested that
only the fourth and fifth, protection of nonconsenting adults and juve-
niles, were permissible state goals in regulating obscenity.151 The
Chief Justice rejected this reading of Stanley. Even apart from a pos-
sible correlation between obscene material and criminal acts, the
Court held in Paris Theatre that the state has a right to maintain “a
decent society.”

The phrase sounds attractive and contemporary: a decent society,
“or to use terms that have perhaps greater currency, the style and
quality of life, now and in the future.”152 The Chief Justice wove sup-
pression of obscenity into a larger pattern of accepted societal goals:
prohibition of unfair business practices, protection of the environment

148. See id. at 233-56.
150. Emerson, note 133 supra, at 938.
151. 394 U.S. at 567.
from pollution, preservation of forests and streams. All legislative efforts at improving our surroundings, he observed, result in the limiting of some individual freedoms for the sake of the general welfare; all are based on "unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions . . . ."\textsuperscript{154}

The Chief Justice here created a little pollution himself, of the smokescreen variety. In terms of Professor Emerson's categories, a "decent society" is a number one or a number three justification posing as a number four. Assuming that obscenity is unprotected speech, it certainly may be regulated to avoid environmental offensiveness in the same way that advertising signs or public nuisances are regulated.\textsuperscript{155} But the Chief Justice clearly intended to stamp an imprimatur on laws which went far beyond controlling nuisances. The analogy to social and environmental legislation was a cosmetic cover for statutes whose real purpose was to control the influences acting on the minds of citizens. The "decent society" sanctioned by the Chief Justice entails more than cleaning up 42nd Street or Times Square; he envisions a society where men and women act cleanly because they think cleanly.

Debate on the issue of censorship causes hard feelings and misunderstandings between persons of equally good will. Much of their frustration derives from the fact that they are arguing from opposing sets of premises about the nature of man and his place in society. "Liberal" and "conservative" have acquired misleading connotations; "political optimist" and "political pessimist" better describe the real conflict. John Stuart Mill and Alexander Meiklejohn exemplify the optimistic faith that humans are fundamentally "decent" and capable of governing themselves decently, both individually and collectively in a democracy. Pessimists like Edmund Burke view life as shadowed by original sin and humans as naturally weak and corrupt, requiring limits on conduct imposed externally by authority and tradition, and

\textsuperscript{153} The environmental analogy is not new to the Chief Justice's thoughts. See Rabe v. Washington, 405 U.S. 313, 317 (Burger, C.J., concurring).

\textsuperscript{154} Paris Theatre, 93 S. Ct. at 2638.

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internally by a conscience trained in childhood. Optimists have strongly supported freedom of expression not only for its importance to self-government in a democracy, but for the self-fulfillment it affords the individual and the greater richness of experience it provides by encouraging development of a pluralistic society. Pessimists, on the other hand, look to government not for richness of experience or encouragement of individuality, but for development of virtue in man and in society. Both views are philosophically respectable, but the American Constitution was the product of an optimistic era which believed in man’s ability to govern himself. Political pessimists understandably have difficulty in meshing their vision of society with the structure and spirit of the Constitution.

Plato was a “pessimist” who in a time of decline sought after a decent society. Since poetry appealed to base emotions, clouding man’s rational faculties, he was quite content to ban poets from his utopia. Although the Chief Justice’s views have been tempered by American history and experience, still his approach to relations between man and state seem closer to Plato’s than to Mill’s. He shares with Plato a fear of man’s imperfections, the anarchy certain to emerge should the state loosen its reins on the erratic individual. Like Plato, he views the state as an educational institution; the unspoken corollary is that its citizens are immature and under governmental tutelage. Plato was

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[C]ivilized society cannot afford to be neutral toward a perception of life which undermines its efforts to make of man something more than a creature of elemental passions and sensations.

158. PLATO, THE REPUBLIC. See also G. MARCEL, MAN AGAINST MASS SOCIETY 20 (1962): “Man depends, to a very large degree, on the idea he has of himself, and . . . this idea cannot be degraded without at the same time degrading man.”

159. If we accept the unprovable assumption that a complete education requires certain books, . . . can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books [has] a tendency to exert a corrupting and debasing impact leading to antisocial behavior?

Paris Theatre, 93 S. Ct. at 2638.

160. Compare the post-election statement by President Nixon:

The average American is just like the child in the family. You give him some re-
an unabashed aristocrat who provided his imaginary citizenry with a class of philosopher-kings as guardians; the Chief Justice does not explain who in a self-governing republic will act in loco parentis for a citizenry so susceptible to corrupting and debasing literature.161

In this respect, therefore, the Chief Justice's opinion is inconsistent with the fundamental theorem of the Constitution: The citizen governs himself. After reasonable debate, the majority may decide to control pollution, require garbage disposal or regulate securities offers. Minorities may be hurt by these measures, but they lose only in the pocketbook or in their freedom to act—they retain the basic freedom to persist in their dissenting views and proselytize new support from the majority. But if the majority can enact measures which deprive the minority not only of their freedom to act, but also of their ability to reinforce their own beliefs and strive for converts, then they have de-
prived them of a liberty fundamental to a democracy without due process of law.

VI. BUILDING A FIRST AMENDMENT THEORY: THE MEIKLEJOHN MODEL

Last Term's opinions are regressive in their approach to obscenity. The Court's emphasis on a metaphysical definition of obscenity, its rejection of fresh approaches like those suggested by Justice Brennan and the *Stanley* opinion and its rather narrow understanding of "serious value" in a sexual context—these features of the opinion and others all display less concern with protecting individual liberties from very real potential infringements than with sanctioning some vague interest of the state in collective self-purification. On the other hand, by ensuring protection for any work possessing "serious literary, artistic, political, or scientific value" the *Miller* Court brings obscenity law more explicitly into conformity with the Meiklejohn model of the first amendment, which perhaps bodes well for the future.

It was Dr. Meiklejohn's thesis, a thesis increasingly discussed and accepted by commentators, that the first amendment protects not private rights to speak, but the right of the citizenry to self-government. Because we as a people have chosen to govern ourselves, he argued, we have reserved the freedom of thought, association and communication necessary to govern successfully. But Meiklejohn did not be-

162. See text accompanying note 206 infra.
163. Notwithstanding this analysis, Chief Justice Burger did not, of course, indorse explicitly the views of Meiklejohn any more than did Justice Brennan in *New York Times*. The Chief Justice was, however, well aware of his theory. He demonstrated his familiarity with Meiklejohn's writings by quoting them with approval in another first amendment case decided the same day as the obscenity cases. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 93 S. Ct. 2553, 2565 n. (Burger, C.J., dissenting), quoting A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 45-46 (1948). The Chief Justice's opinions, in requiring protection of certain specified forms of "serious value" and application of due process standards to unprotected speech, and in seeking to insure that citizens are free to receive all ideas necessary to govern themselves, point to a parallel course between the majority of the Court and Meiklejohn.
164. The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility. Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255. See generally A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)
lieve that the first amendment was "the guardian of unregulated talkativeness." 165 The freedom of speech which it shelters is not the freedom of a citizen as an individual to speak his mind, but the freedom of a citizen as a voter to hear every idea relevant to issues on which he must pass judgment. Meiklejohn used the familiar metaphor of the nation as town meeting. The very purpose of the meeting is to hear all ideas on the issue being discussed. Yet this purpose cannot be achieved unless each person's freedom to choose the time, place and subject of his speech is to some degree abridged. An individual's right to speak in a given instance is a fifth amendment liberty, subject to abridgement by due process of law like other personal liberties, but the right of the people to hear every idea needed to make choices necessary for self-government is an absolute, non-abridgeable right under the first amendment. 166 Professor Kalven, an admirer of Meiklejohn's ideas, questioned whether his model of the first amendment was not too limited in scope, being restricted to protection of political ideas: 167

Not all communications are relevant to the political process. The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres . . . .

This criticism suggested a rather narrow conception of the sort of idea relevant to the political process. Meiklejohn responded to Kalven by observing that many forms of thought and expression provide the "knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." 168 These forms include education, the findings of philosophy

republished as Part I of A. MEIKLEJOHN, POLITICAL FREEDOM (1960) [hereinafter cited as POLITICAL FREEDOM].


166. Indeed, under the very rationale of the Constitution as a whole. See, e.g., U.S. CONST. art. I, § 6. POLITICAL FREEDOM, supra, 34-36.

[U]nder the Bill of Rights, there are two freedoms, or liberties, of speech, rather than only one. There is a "freedom of speech" which the First Amendment declares to be non-abridgeable. But there is also a "liberty of speech" which the Fifth Amendment declares to be abridgeable.

Id. at 36.


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and the sciences, literature and the arts and public political discussion.169 The fine arts, he observed, help shape the values by which voters make decisions.

Dr. Meiklejohn's ideas apparently enjoyed a major triumph in 1964. In reversing on first amendment grounds an award for libel of a public figure, Justice Brennan wrote in New York Times Co. v. Sullivan170 that the great accomplishment of the first amendment had been to eliminate the crime of seditious libel.171 The Court strongly affirmed the right and duty of a citizen to criticize elected officials as part of his constitutional duty of self-government:172

It is as much [the citizen-critic's] duty to criticize as it is the official's duty to administer . . . . As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people."

Justice Brennan reacted favorably to suggestions that New York Times incorporated Meiklejohn's thesis that the first amendment preserves the citizen's role as ruler,173 but warned in a law review article that "[r]adical shifts in judicial doctrine are rare. They usually occur over long periods, step-by-step in a series of decisions."174 While Justice Brennan's warning cannot be disregarded, it seems clear that since New York Times the stature of Meiklejohn's political theory of the first amendment has increased markedly; it is now the principal touchstone by which the contours of freedom of expression are described.175

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169. Id. at 257.
171. Id. at 273. Accord, Lewis v. Reader's Digest Ass'n, Inc., 512 P.2d 702, 706 (Mont. 1973): "Historically, the free press amendment is construed to mean freedom from three major types of restraint: censorship, licensing, and seditious libel, which is defamation of the government."
175. Most of the present justices of the Supreme Court have acknowledged their support of the fundamentals of Meiklejohn's theory at one time or another. See, e.g.,
By requiring an absence of "serious literary, artistic, political, and scientific value," the Court apparently attempted to justify suppression of obscenity in terms it believed consistent with Meiklejohn's assertion that the first amendment protects only that expression which contributes to the ability of citizens to govern themselves. In so doing, it has incorporated obscenity law into a general theory of the first amendment while retaining the two-level terminology used in Roth.

To congratulate the Court for this incorporation probably would be to praise necessity as though it were virtue. After the Court's discussion of libel in New York Times, continued reliance on a strict Roth analysis may have been an untenable position for the Court to assume, despite Miller's emphasizing that the "social redeeming value" test of Memoirs had been a drastic change of the Roth definition. The Roth Court had been able to avoid Justice Douglas's attempt to apply first amendment tests to obscenity by holding that for historical reasons obscenity was outside the purview of the first amendment. The Supreme Court undermined this approach in New York Times when it refused to accept a jury's finding that a political advertisement was libel as affording a "talismanic immunity from constitutional limitations." The Court insisted on looking behind the label of "libel" to ascertain whether dissemination of the material in question furthered the goals which the first amendment was designed to promote; after New York Times, it seemed clear that the Court would have to look behind the label in obscenity cases as well. No longer, presumably,


176. Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.... As a people, we cannot afford to relax that standard. 354 U.S. at 514 (Douglas, J., dissenting). See Brandenburg v. Ohio. 395 U.S. 444, 450, 456 (1969) (Douglas, J., concurring).

177. New York Times, 376 U.S. at 269. [W]e are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law.... It must be measured by standards that satisfy the First Amendment.


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could a jury's determination that material was pruriently arousing and patently offensive suffice to remove it from constitutional scrutiny.

Justice Brennan's opinion in *Memoirs* came two years after *New York Times*. His incorporation of the redeeming social value requirement saved the test from the "labelling" objection; under *Memoirs*, a court would be required to make a specific finding in each case that the material totally lacked any value entitled to first amendment protection. The *Miller* Court may have been willing to discard the *Memoirs* plurality holding, but still found itself confronted by the logic of *New York Times* which forced it to enunciate some test allowing supression of obscenity only within a first amendment context. The Meiklejohn theory, besides enjoying increased acceptance, was useful in that its interpretation of the first amendment as protecting the people's ability to govern themselves seemed to permit a less all-encompassing sheltering of speech than had the *Memoirs* "utterly without redeeming social value" requirement. The Court was able to exclude all material from first amendment protection which did not serve this purpose and did so by phrasing its "serious value" requirement in terms very reminiscent of those used by Meiklejohn himself.179

While most members of the Court now support the Meiklejohn "self-government" theory of the first amendment,180 the *Miller* majority used it in a spirit far removed from that in which it was conceived. Meiklejohn was an earnest advocate of free speech who launched a strong attack against use of Justice Holmes's "clear and present danger" test as a weapon to punish political dissent.181 *Miller*, on the other hand, may have used his theory to restrict rather than enlarge freedom of speech by deducing that since the first amendment protects all expression which contributes to citizen self-government, pornographic writings (which by judicial definition have no serious value) are excluded from its purview. Meiklejohn theorized that some forms of writing and speaking are beyond the scope of the first amendment,182 but his rationale of the first amendment distinguished

179. See text accompanying note 169 supra.
180. See note 175 supra.
181. *Political Freedom*, supra note 164, at 29-50. See *Dennis v. United States*, 341 U.S. 494 (1951), for such a use of the clear and present danger test. It was Meiklejohn's thought viewed in this context which enabled Justice Douglas, who favors an absolute construction of the first amendment, to declare: "My view is close to that of the late Alexander Meiklejohn..." *Caldwell*, 408 U.S. at 713.
182. See *Political Freedom*, supra note 164, at 21; but see Meiklejohn, supra, 1961
less between kinds of expression than between private and public interests in speech.  

The drawback to the Meiklejohn theory of the first amendment—to the Court, its attractiveness—is that while it provides a rational framework behind which citizens could rally, it needs to be given content by judicial decision. What speech, exactly, is useful to a voter? Meiklejohn himself did not include art and literature until Professor Kalven observed that his theory seemed to leave them unprotected. The Miller Court gladly afforded first amendment protection to art and literature, but held that the requirement of serious value excluded protection for hardcore pornography.

VII. HARDCORE PORNOGRAPHY—CONSTITUTIONALLY OBSCENE?

Miller's assertion that categories of speech not essential to a democratic peoples' self-government and devoid of ideational content should be unprotected by the first amendment is comprehensible as theory. However, the Court's application of this theory to hardcore pornography poses problems.

The first difficulty is Miller's ambiguity in describing the relationship between ideational content and serious value. Roth itself stated that "[a]ll ideas having even the slightest redeeming social importance" were protected, but that obscenity was not protected, being utterly lacking in such importance—and thus impliedly empty of


The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.

POLITICAL FREEDOM, supra note 164, at 79.

A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign.

Meiklejohn, supra, 1961 SUP. CT. REV. at 257.


185. The Chief Justice adopted Justice Stewart's former belief that obscenity regulation was limited to "hard core" pornography. Justice Stewart's ideas have since evolved, and he joined Justice Brennan in dissent.

186. 354 U.S. at 484.
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ideas. *Kingsley Pictures*, in rejecting "thematic obscenity," emphasized that the first amendment protected all ideas, whatever their merits. Justice Brennan's plurality opinion in *Jacobellis* synthesized *Roth* and *Kingsley Pictures*, stating in the disjunctive that "material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance" was protected. The tripartite *Miller* test demands only a showing that the material possesses no serious literary, artistic, political or scientific value. The Court's discussion of that requirement, however, repeatedly emphasized that regulation of obscenity entails no "censorship of ideas—good or bad, sound or unsound;" the Chief Justice insisted that only verbal or pictorial depictions of conduct can be punished as obscene. The Court thus seemed to hold that any idea, however unmeritorious or unsound, possesses ipso facto the required serious value. If material charged as obscene can be shown to have ideational content it may not be suppressed, however otherwise lacking in serious literary, artistic, political or scientific value.

Another difficulty is that the *Miller* Court, like other courts in the past, presumed that hardcore pornography conveys no ideas. But in each case, the prosecution must prove this fact, not rely on a presumption. The Court has admonished in the past that the line between ideas and non-ideational expression is fine and elusive: "What is one man's amusement, teaches another's doctrine." If it follows past precedent, the Court will resolve any doubt whether a form

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187. "[T]he First Amendment's basic guarantee is of freedom to advocate ideas. . . . It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." *Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of New York*, 360 U.S. 684, 688-89 (1959). If material expresses any idea, determining its merits is the province of history, not of a criminal jury.

188. 378 U.S. at 191 (emphasis added). *Compare* Attorney General v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328, 333 (1962): "We think . . . that the First Amendment protects material which has value because of ideas, news, or artistic, literary, or scientific attributes."

189. "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of ideas . . . ." [citing Roth].

190. *Miller*, 93 S. Ct. at 2620 (emphasis added in *Miller*).


of expression conveys ideas in favor of protecting first amendment values.  The *Miller* Court, in applying a Meiklejohn-like analysis of the first amendment to obscenity, itself recognized that literary and artistic endeavors convey ideas; it referred to the “expression of serious literary, artistic, political, or scientific ideas.”

Learning of a form of communication which conveys no ideas is like discovering a Cheshire smile without the cat: the one generally accompanies the other. The Court perhaps considered pornography to be a uniquely non-ideational form of expressive conduct, tending to operate directly upon the sexual organs with minimal intervening circuitry through the brain. And yet, literature of other genres may arouse sensations of hunger, anger, fear or horror without losing its first amendment protection. Ideas are often triggered by the immediate emotional reaction one experiences upon reading a book or seeing a photograph; a vivid description of My Lai, or a photograph of a napalmed Vietnamese child running naked down a road, may produce an immediate sensation of horror, succeeded by a new understanding of the effects of war upon victor and victim alike, without any need of the writer’s having prompted these thoughts directly. Similarly, to read the sexually taboo may cause the reader to question the wisdom of the taboo.

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193. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures are "a significant medium for the communication of ideas," *id.* at 501); *In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), *cert. denied* 395 U.S. 910 (1969) (topless dancing is a form of expression protected by the first amendment).


195. 93 S. Ct. at 2621 (emphasis added).

196. In esthetic theory, art is distinguished by a certain detachment between observed and observer, enabling the observer to contemplate not merely the message of the art but the manner in which the message is conveyed. Pornography, like propaganda, deliberately endeavors to destroy that detachment. *See generally* Finnis, "Reason and Passion:” *The Constitutional Dialectic of Free Speech and Obscenity,* 116 U. Pa. L. Rev. 222 (1967).

197. "[T]o write pornography is to express an idea that pornography should be produced.” *Katz,* *Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials,* 79 Yale L.J. 209, 213 (1969). Likewise, of course, to kill may assert the idea that the act of killing can have value. *See A. Camus, The Stranger* (1946). In either case, elements of "conduct" are combined with the expression of ideas. *See Note,* 48 Wash. L. Rev. 667, 674-76 (1973). A compelling state interest in preventing the conduct is required to justify impeding the expression of ideas. United States v. *O'Brien*, 391 U.S. 367 (1968). Preventing death would certainly be a compelling interest, but preventing a "degradation" in public attitudes seems to strike too closely at the very interests which the first amendment was designed to protect. *See Note,* supra, 48 Wash. L. Rev. at 676; *cf. Paris Theatre,* 93 S. Ct. at 2662 (Brennan, J., dissenting).
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Indeed, the extensive discussion which the majority in *Paris Theatre* devoted to preservation of a decent society belies its assertion that obscenity conveys no ideas. The Chief Justice was not concerned merely with an environment polluted by tawdry books; he was alarmed by the prospect of a society peopled with morally insensitive degenerates. Magazines such as *Playboy* may have done much to increase the respectability of hedonism in the United States; it advanced this idea at least as much by its photography and its risque humor as by the "Playboy Philosophy;" certainly the Court would concede that the Sierra Club has advanced the idea of wilderness preservation by its photography, and it would be hard-pressed to distinguish the two analytically without judging the merits of hedonism vis-à-vis wilderness preservation. As one commentator observes:198

[T]he claim that pornography presents the debasement and dehumanization of man *and* that it involves no ideas is a contradiction. Surely the debasement of man is a serious moral idea . . . . To the extent that pornography makes a claim—by showing, not telling—that reducing human beings into objects for manipulation is good or fun, it is within the realm of ideas.

Under our form of government, advocacy of socially undesirable ideas should be combated by counter-advocacy, not by suppression.

In *Paris Theatre*, the Court discussed at some length the ways in which government restricts speech and association in a commercial context. The *Miller* Court's soundest constitutional argument for deeming obscenity to possess a non-ideational character might have been that commercial speech also affects one's thoughts and aspirations, indeed may affect one's life more than noncommercial speech, and yet it is not protected by the first amendment. Chief Justice Burger remarked:199

Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

A better solution to the inconsistency might be to extend first amendment protection to commercial speech, not strip it from pornography.

For thirty years, since Valentine v. Chrestensen, it has been clear that purely commercial advertising is not protected speech. Chrestensen merely stated that the state may decide "[w]hether and to what extent, one may promote or pursue a gainful occupation in the streets . . . ." It is clear that an advertisement which expresses an opinion on public issues is protected speech. The distinguishing factor between such an advertisement and one for a commercial product is the communication of ideas beyond the simple selling of one advertiser's product. Today's subtle advertising conveys many ideas with profound effect on public values, and the Chrestensen rule probably should be abandoned. This abandonment, suggested by the Chief Justice himself, would remove an important support for his position.

VIII. PROGNOSIS FOR THE FUTURE

The Court has established the constitutional contours of obscenity doctrine and tossed the ball back to the state and lower federal courts. How these courts apply the new guidelines will determine the content of obscenity law, at least in the immediate future. Although these courts may feel a psychological impetus to loosen the reins on state obscenity prosecutions, a careful analysis and application of the Miller test should produce little change in obscenity determinations. Indeed, in light of the Supreme Court's apparent willingness to follow Meiklejohn's political model of the first amendment with its emphasis on self-government and protection of all ideas, lower courts might eventually conclude that "obscenity" is an empty category because

200. 316 U.S. 52 (1942).
201. Id. at 54.
203. See, e.g., Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968) (cigarette ads strongly imply smoking is a desirable habit).
205. One's ability to remain sanguine regarding the common sense of state courts is lessened upon hearing of the recent decision of the Georgia Supreme Court. Immediately following last Term's obscenity decisions, the Georgia court upheld by a four to three decision a lower court's finding that Carnal Knowledge was obscene. The exhibitor of the film, which was a major studio production, was convicted on criminal charges. Jenkins v. State, 199 S.E.2d 183 (Ga. Sup. Ct. 1973), appeal docketed, 42 U.S.L.W. 3200 (U.S. Oct. 9, 1973).
all expression contains ideas and is valuable in developing the people's ability to govern themselves.

Acceptance of a political model could bode well for the future of political expression in the United States. Yet, a motif of uncontestably Puritan grimness runs through the five majority opinions. That the one example offered by the Chief Justice of sexual material possessing literary, artistic, political or scientific value should be an illustrated medical text has its ominous aspects. So does the rather vindictive manner in which, after equating sexual "permissiveness" with laissez-faire economics, he throws the liberals' traditional arguments back in their faces. But motifs do not set precedents, and not all five members of the majority would have written the same opinion. Regardless of the Chief Justice's approach to literature and art, it is quite likely that a healthy majority of the Court will continue to find serious value in works considerably more entertaining than Gray's *Anatomy*.

Lower courts must look at the test upon which the *Miller* majority agreed, not at the distaste for sexual low-life which the opinion conveys. Certainly, modification of the *Memoirs* test should cause no great upsurge in obscenity convictions. Whether material is described as lacking serious literary, artistic, political or scientific value or as utterly without redeeming social value probably will mean little to a jury; under either formula it is being asked essentially to decide that the nation does not need a book or film. This is an awesome determination for a jury to make and hardly one for which it is well suited. While "prurient interest" and "patent offensiveness" may be largely questions of fact on which the findings of the jury can be final, a finding that prurient material does not have sufficient serious value to warrant first amendment protection must ultimately be a determination for the Supreme Court. Like it or not, eventually the Court will be forced to give further guidance in the application of its test, once more acting as "Super Censor."

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206. See *Miller*, 93 S. Ct. at 2616.
IX. CONCLUSION

Yes, I know that the law today is what today the Court says it is. But you see I am hoping that tomorrow the members of the Court will read again from Madison and Hamilton and Harlan. Perhaps tomorrow they will change their minds.

—Alexander Meiklejohn

Bertrand Russell noted that the academic thinker easily becomes so infatuated with manipulating verbal symbols that he loses sight of their real world referents. In law, where abstract principles are always subordinate to social and political realities, such scholarly detachment can lead quickly to the assertion of absurd conclusions. In speaking loftily of the first amendment, it is easy to overlook some of the down to earth realities which opponents of obscenity confront. The hard-core obscenity with which the Court is concerned is not pretty stuff. Foes of censorship no longer have the privilege of fighting for the people’s right to read Ulysses or Lady Chatterley’s Lover or even Tropic of Cancer; they fight instead for a person’s right to read magazines or view films which they would themselves probably find offensive.

Nonetheless history demonstrates that “[t]he door barring federal and state intrusion into [the area of free speech] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.” The Court last term attempted to leave the door open only that slightest crack, but the danger in giving any encouragement to proponents of suppression is always that forces will be unleashed which even the most carefully constructed constitutional bulwarks will be unable to contain.

The new test which the Court announced in Miller is a variant of the Memoirs test, imposing standards only slightly easier for prosecu-

210. POLITICAL FREEDOM, supra note 164, at 106.
211. It is true that education tries to depersonalize language, and with a certain measure of success. ... [A]s your instruction proceeds, the world of words becomes more and more separated from the world of the senses; you acquire the art of using words correctly, as you might acquire the art of playing the fiddle: in the end you become such a virtuoso in the manipulation of phrases that you need hardly ever remember that words have meanings.
B. RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 4-5 (1948).
212. Roth, 354 U.S. at 488.
Obscenity

tors to fulfill. The threat represented by last Term's opinions lies less in their formal holdings than in their dominant mood. Clearly the Court had no intention of rethinking its constitutional approach to obscenity. It reaffirmed Roth's conclusion that obscenity was a special class of speech, lacking importance worthy of first amendment protection; it refused to treat seriously Justice Brennan's fears that the necessary vagueness of obscenity standards would chill protected expression; it halted abruptly the development of due process protection for the act of reading and receiving information. For the first time, the Court discussed the legislative goals which a legislature could pursue in enacting obscenity statutes, but the goal of a "decent society" which it posited is so vague and all-encompassing an end as to justify virtually any conceivable legislative program.

The Court appears to have made a strategic decision to permit obscenity prosecutions when possible to do so without violence to past precedent. In a series of maneuvers, obscenity law was retrenched to a less expansive but more easily defended position. One of these maneuvers was adherence to Meiklejohn's model, so interpreted as to provide a coherent justification for excluding obscenity from the protections normally accorded speech. The analytical structure furnished by this model is sound and will survive to a happier time when the Court is more inclined to protect the right of the individual to choose for himself what he will read and view. Judicial decisions will then reflect the fact that all communication transmits ideas, good or bad, and that a self-governing people has a right to weigh those ideas for itself. The spirit and logic of the Meiklejohn structure may then persuade the Court to close the door completely on censorship.

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