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Lecture

Justice Brennan and the Law of Obscenity

Gerald M. Rosberg†

"There is no such thing as a moral or an immoral book," Oscar Wilde said. "Books are well written or badly written. That is all."¹ On the other hand, Wilde also said that he could resist everything except temptation,² and he wound up serving two years at hard labor on a charge of gross indecency. Not surprisingly, his views on the morality of books have turned out to be an imperfect guide to what real judges are likely to do when real cases come before them.

For decades the Supreme Court has struggled with what Justice Harlan called the intractable problem of obscenity.³ On

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1. O. WILDE, *THE PORTRAIT OF DORIAN GRAY*, preface (1891).

2. O. WILDE, *LADY WINDERMERE'S FAN* Act I (1891).

3. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (separate opinion of Harlan, J.).

the occasion of this tribute to Justice Brennan, I want to briefly comment on the Justice's extraordinary contributions to the law in this area.

I do not come as an advocate for his views; his opinions speak eloquently for themselves. Nor do I propose to offer some new way of looking at the problem of obscenity that will finally let us readily distinguish works protected by the first amendment from those the state and federal governments may suppress. There is an immense and often distinguished body of literature on the law of obscenity,⁴ and I happily leave to the first amendment scholars the burden of further doctrinal analysis and development.

My interest in the area is traceable to the Supreme Court's 1972 Term, when I had the great privilege of clerking for Justice Brennan. For the law of obscenity, and particularly for Justice Brennan, the 1972 Term was a significant turning-point.

With all the tributes that have been paid to Justice Brennan since his retirement from the Court last summer, relatively little has been said about his work in the obscenity area. The ABA Journal, for example, devoted 18 pages of its February 1991 issue to Justice Brennan and his legacy.⁵ Yet the Justice's obscenity opinions are barely mentioned in passing.

The explanation is certainly not that the Justice had little interest in the area. On the contrary, I believe he wrote more opinions on obscenity issues than any other subject that came before the Court, with the important exception of the death penalty.⁶ More remarkable is the frequency with which Justice Brennan wrote on this subject as compared to his fellow Justices. By my (admittedly rough) calculation, he wrote more than

4. Among numerous examples that might be chosen, see H. KALVEN, A WORTHY TRADITION 33-53 (1988); F. SCHAUER, THE LAW OF OBSCENITY (1976); Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

5. TRIBE, *Architect of the Bill of Rights*, 77 A.B.A. J. 46 (1991); FEIN, LEE, CHOPER, HOWARD AND NEUBORNE, *The Brennan Legacy: A Roundtable Discussion*, 77 A.B.A. J. 52 (1991); STEWART, *A Life on the Court*, 77 A.B.A. J. 62 (1991).

6. Cf. Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1125 (1991) (reporting on the finding of one of the Justice's law clerks that the Justice wrote 2,347 dissenting opinions over his career, 1,517 of them in death penalty cases). Many of the obscenity opinions, to be sure, were relatively brief dissents from denial of certiorari. But the persistence with which the Justice continued to express his views on this subject, despite his inability to win a majority of the Court, is itself an indication of the importance he placed upon it.

three times as many obscenity opinions as any other Justice.⁷

Merely counting the opinions, however, does not begin to show Justice Brennan's impact in this area. For the first half of his 34 years on the Supreme Court, Justice Brennan was the author of almost every major opinion for the Court on the subject of obscenity: *Roth v. United States*,⁸ *Mishkin v. New York*,⁹ *Freedman v. Maryland*,¹⁰ *Ginzburg v. United States*,¹¹ *Ginsberg v. New York*,¹² the plurality opinions in *Jacobellis v. Ohio*¹³ and *Memoirs of a Woman of Pleasure v. Massachusetts*,¹⁴ and many more. For years almost anyone could have told you that a book or movie was not obscene unless it was "utterly without redeeming social importance." (In a song entitled "Smut", Tom Lehrer explained the standard: "As the judge remarked the day that he acquitted my Aunt Hortense, To be smut it must be utterly without redeeming social importance." On the other hand, a cartoon once showed a judge telling a defendant who stood before him, "Just because the pages are numbered sequentially doesn't mean your book has redeeming social importance."¹⁵) That phrase and its companion, "utterly without redeeming social value," went from Justice Brennan's opinions in *Roth*, *Jacobellis* and *Memoirs* into our language and folklore.

7. Borrowing a technique used by one of the Justice's law clerks (*see supra* note 6), I used Lexis to tabulate the opinions written by the Justices that have included the words "obscene" or "obscenity." The figures are no doubt over-inclusive, because I did not weed out the cases where a dissenting justice may have described the majority's handling of some fourth amendment or other problem as "obscene." But I used the same technique for all the justices, and the pertinent point is how the respective numbers compare. The analysis showed that Justice Brennan had 191 opinions. Justices Douglas and White were tied for second place with 62 each.

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

9. 383 U.S. 502 (1966) (upholding conviction under New York obscenity statute).

10. 380 U.S. 51 (1965) (Maryland motion picture censorship statute procedurally defective because it failed to provide adequate safeguards against inhibition of protected expression).

11. 383 U.S. 463 (1966) (upholding conviction under federal obscenity statute).

12. 390 U.S. 629 (1968) (upholding conviction under New York statute that prohibited sale to minors of sexually oriented materials that are not obscene for adults).

13. 378 U.S. 184 (1964) (setting aside conviction under Ohio law for possessing and exhibiting an allegedly obscene film).

14. 383 U.S. 413 (1966) (setting aside finding that the book commonly known as *Fanny Hill* was obscene).

15. The Supreme Court itself made this last point with somewhat more refinement: "a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

How, then, to account for the apparent reluctance to focus on the Justice's obscenity opinions? One explanation, I suspect, is that the politics of obscenity have become more complicated than they used to be. For many civil libertarians, the choice was once fairly simple: you were for freedom of expression or for censorship; for James Joyce, Henry Miller and D. H. Lawrence, or for the Legion of Decency, the Hayes Office and Charles Keating's Citizens for Decent Literature.¹⁶ But the feminist attack on pornography has made it harder than it used to be to tell the heroes from the villains.¹⁷ The confusion is nicely captured in the controversy surrounding the performance artist Karen Finley, "whose angry scatological feminism is intended to be anti-pornographic,"¹⁸ but who has herself been attacked for indecency and lewdness.¹⁹

A second reason why some may be reluctant to dwell on Justice Brennan's obscenity opinions is lingering discomfort over his opinion for the Court in *Roth v. United States*.²⁰ For the past 17 years the Justice has been the Court's champion of free expression in the obscenity area. But his role was more ambiguous during the first half of his tenure on the Court. The *Roth* opinion, which he wrote in 1957 at the end of his first Term, was the first decision of the Supreme Court to hold that "obscenity is not within the area of constitutionally protected speech or press."²¹ Along with its early progeny (most of which he also authored), *Roth* was subject to heavy criticism, particularly from those otherwise most attracted to Justice Brennan's views. On

16. Once one of the nation's leading anti-pornography organizations, and an *amicus curiae* in some of the Warren Court's leading obscenity cases, Citizens for Decent Literature was founded in 1957 by Charles H. Keating, Jr., who went on to greater fame as the head of Lincoln Savings and Loan and a major figure in the savings-and-loan debacle of the 1980's. See generally Corn, *Dirty Bookkeeping: Charles Keating's Porno Library*, THE NEW REPUBLIC, April 2, 1990, at 14.

17. See generally Wolfe, *Dirt and Democracy*, THE NEW REPUBLIC, Feb. 19, 1990, at 27; Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

18. Rosen, "Miller" Time: America's Obscenity Test Lacks Serious Value, THE NEW REPUBLIC, Oct. 1, 1990, at 18.

19. For a variety of views on Ms. Finley's work, see Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1367 (1990); Larson, *Censor Deprivation*, NEW YORK MAGAZINE, Aug. 6, 1990, at 48; Crittenden, . . . But Is It Art — or Trash, WALL ST. J., Aug. 1, 1990, at 1, col. 1.

20. 354 U.S. 476 (1957).

21. *Id.* at 485.

the Warren Court, Justice Brennan's position on obscenity put him to the right of Justices Black and Douglas, who condemned any restriction on sexually oriented speech,²² Justice Stewart,²³ and even, in cases involving the federal government's authority to suppress obscenity, Justice Harlan.²⁴

In 1966 Justice Brennan provided the fifth vote to uphold the criminal conviction of Ralph Ginzburg, who was sentenced to five years in prison for sending sexually oriented material through the mail.²⁵ The decision was particularly galling to many liberals because it held that in close cases evidence of "pandering" could be taken into account in deciding whether the *Roth* standard was satisfied.²⁶

In 1969 Justice Brennan was unwilling to join the opinion of the Court in *Stanley v. Georgia*.²⁷ There, in an opinion by Justice Marshall, the Court ruled that the first amendment barred a state from imposing criminal penalties on the mere private possession of sexually oriented materials, even if those materials could be considered obscene.²⁸ Justice Brennan joined Justice Stewart's opinion concurring in the result on fourth amendment search-and-seizure grounds rather than in reliance on the first amendment.²⁹

As late as 1971, in *United States v. 37 Photographs*,³⁰ Justice Brennan joined Chief Justice Burger and Justices White and Blackmun in a narrow reading of *Stanley* that would limit its reach to the privacy of the home. At issue was the constitutionality of a federal statute barring the importation of obscene materials. The plurality, which included Justice Brennan, maintained that the government could seize obscene material from

22. See, e.g., *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting); *id.* at 482 (Douglas, J., dissenting).

23. See, e.g., *Id.* at 497 (Stewart, J., dissenting) (government may suppress only "hard-core" pornography).

24. See, e.g., *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 708 (separate opinion of Harlan, J.) (federal government may suppress only "hard-core" pornography; states have much wider authority and discretion).

25. *Ginsberg*, 383 U.S. at 463.

26. As the Court put it, the "leer of the sensualist" permeated the advertising materials that Ginzburg had sent through the mails. *Id.* at 468.

27. 394 U.S. 557 (1969).

28. *Id.* at 559.

29. *Id.* at 569 (Stewart, J., concurring).

30. 402 U.S. 363 (1971).

travelers at a port of entry, even if the material was intended solely for private use.³¹ In the companion case of *United States v. Reidel*,³² Justice Brennan voted with the majority to reverse a decision that had relied on *Stanley* as the basis for striking down the federal statute prohibiting the knowing use of the mails for the distribution of obscene materials.³³ Considering where Justice Brennan wound up just two years later, it is startling to recall how uncomfortable he originally was with the *Stanley* decision and its implications.

Of course, the picture of Justice Brennan as a heavy on the subject of obscenity was always overdone. *Roth* is important at least as much for what it protected as for what it permitted the state and federal governments to suppress. *Roth* said that "sex and obscenity are not synonymous" and that "[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."³⁴ Those propositions may not seem remarkable now, but the Supreme Court had never before said as much. The Court also rejected the obscenity standard set out in *Regina v. Hicklin*,³⁵ followed by some American courts, which judged works by the effect of isolated excerpts on particularly sensitive persons.³⁶ That test, the Court explained in *Roth*, "might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the

31. *Id.* at 396. Justices Black, Douglas and Marshall viewed *Stanley* as controlling at the port of entry as well as in the home. Justices Harlan and Stewart found it unnecessary to decide the question, but Justice Stewart noted that if *Stanley* did not apply to the bringing of a book into the United States for private reading, then he did not know what the decision meant. *Id.* at 379 (Stewart, J., concurring). Two years later, a majority of the Court held that importation for private use was not covered by *Stanley*. See *United States v. 12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123 (1973). By that time, Justice Brennan was in dissent.

32. 402 U.S. 351 (1971).

33. *Id.* The court below had held the statute unconstitutional as applied to the distribution of obscene material to willing adult recipients on the grounds that "if a person has the right [under *Stanley*] to receive and possess the material, then someone must have the right to deliver it to him." Justices Black and Douglas dissented.

34. *Roth v. United States*, 354 U.S. 476, 487 (1957).

35. 1868 L.R. 3 Q.B. 360.

36. On the origins of American obscenity law and the adoption of the *Hicklin* standard, see F. SCHAUER, *supra* note 4, at 1-40.

freedoms of speech and press.”³⁷ The proper test, Justice Brennan explained, was “whether to the *average* person, applying contemporary community standards, the dominant theme of the material *taken as a whole* appeals to prurient interest.”³⁸

During this same period Justice Brennan authored opinions for the Court that established important procedural safeguards in obscenity cases, including *Marcus v. Search Warrant*³⁹ and *Freedman v. Maryland*.⁴⁰ And writing for a plurality in *Memoirs of a Woman of Pleasure*,⁴¹ he refined the *Roth* standard to make clear that a state cannot proscribe a book, even if it appeals to a prurient interest in sex and is patently offensive, unless it is also shown to be utterly without redeeming social value.⁴²

For most of the first half of his tenure on the Court, Justice Brennan’s position on obscenity put him at or near the Court’s center. *Jacobellis v. Ohio*,⁴³ decided in 1964, illustrates the point (though it is admittedly better known as the case where Justice Stewart declared that even though he could not define obscenity, he knew it when he saw it⁴⁴). Justice Brennan voted with a majority of six to reverse a state court finding that a French film, “*Les Amants*” (“*The Lovers*”), was obscene. He wrote only for himself and Justice Goldberg, however, because he was unwilling to join the more permissive analysis of Justices Black, Douglas and Stewart.⁴⁵ Justice Brennan’s conclusion that the film was not obscene seems unremarkable by today’s standards,⁴⁶ but to reach that result he had to take the (for him) very unusual step of disagreeing with Chief Justice Warren. The

37. *Roth*, 354 U.S. at 488-89.

38. *Id.* at 489 (emphasis added).

39. 367 U.S. 717 (1961) (procedures for seizing allegedly obscene materials not constitutionally adequate because of danger of infringing on protected speech).

40. 380 U.S. 51 (1965), described by Professor Schauer as the Court’s “landmark ruling in the licensing and prior-restraint areas.” F. SCHAUER, *supra* note 4, at 231.

41. 383 U.S. 413 (1966).

42. *Id.*

43. 378 U.S. 184 (1964).

44. *Id.* at 197 (Stewart, J., concurring).

45. *Id.* at 187.

46. As Justice Brennan described it, the film involved “a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she suddenly falls in love.” *Id.* at 195-96. It included “an explicit love scene in the last reel of the film.” *Id.* at 196. The film was “rated by at least two critics of national stature among the best films of the year.” *Id.*

Chief Justice and two other Justices, Clark and Harlan, would have upheld the state court's finding of obscenity.

Jacobellis illustrates another important point: the fractionation of the Warren Court on the definition of obscenity. In Justice Harlan's words, the subject had generated "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication," leaving anyone who read the Court's decisions in a condition of "utter bewilderment."⁴⁷ For 16 years after *Roth* the Court was not once able to reach a majority in any case dealing with the definition of obscenity. Beginning in 1967, it adopted the practice of summarily reversing judgments whenever at least five justices, applying differing standards, agreed that the work was not obscene.⁴⁸ The Court disposed of at least 31 cases in this manner,⁴⁹ but its inability to offer a rationale for the decisions left the state and lower federal courts in total confusion about the standards they were supposed to apply.

By the 1972 Term, with the law of obscenity in chaos, Justice Brennan was prepared to abandon his own decision in *Roth*. Commenting on 16 years of effort on the obscenity problem, the Justice told an interviewer:

I tried and I tried, and I waffled back and forth, and I finally gave up. If you can't define it, you can't prosecute people for it. And that's why, in the Paris Adult Theater decision, I finally abandoned the whole effort. I reached the conclusion that every criminal-obscenity statute . . . was necessarily unconstitutional, because it was impossible, from the statute, to define obscenity.⁵⁰

The approach Justice Brennan urged unsuccessfully on the Court, as set out in the dissenting opinion he wrote in *Paris Adult Theater I v. Slaton*,⁵¹ was as follows:

First, the Court should continue to reject the absolutist position of Justices Black and Douglas. He would not agree, in other words, that the state and federal governments are wholly

47. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704-05, 707 (separate opinion of Harlan, J.).

48. See *Redrup v. New York*, 386 U.S. 767 (1967).

49. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 82-83 & n.8 (1973) (Brennan, J., dissenting).

50. Hentoff, *The Constitutionalist*, THE NEW YORKER, March 12, 1990, at 56.

51. 413 U.S. 49, 70 (1973) (Brennan, J., dissenting).

without power to suppress sexually oriented expression.

Second, the Court should also reject *Roth* and acknowledge that it had proved impossible to define obscenity with sufficient precision to pass constitutional standards.⁵² The vagueness of the definition, he argued, deprived citizens of fair notice of what the law proscribed, threatened to chill constitutionally protected expression, and imposed significant institutional harms on the Supreme Court and the rest of the judiciary. These harms included the crowding of the Supreme Court's docket with obscenity cases, which subjected the justices to the "absurd business of perusing and viewing the miserable stuff that pours into the Court."⁵³ The impossibility of defining obscenity with precision also created tensions between state and federal courts because it left the impression that the justices were merely second-guessing state court judges.

Third, to resolve the problems of fair notice, chilling effect and institutional harms, the Court should hold that in the absence of distribution to juveniles or offensive exposure to consenting adults, the first amendment prohibits the state and federal governments from suppressing sexually oriented speech, even if that speech might in some sense be considered obscene.⁵⁴

52. The Justice's dissenting opinion in *Paris Adult Theater* did not expressly reject *Roth's* two-level analysis — i.e., its premise that obscene speech is different from ordinary speech and is wholly unprotected by the first amendment. Instead, it reasoned that the Court erred in *Roth* insofar as it found that the class of unprotected obscene expression (assuming it exists) could be defined with sufficient precision to permit its suppression. See, e.g., *Id.* at 103 (Brennan, J., dissenting). In a footnote, however, Justice Brennan cast significant doubt on the continued validity in his mind of *Roth's* premise that there exists a separate class of obscene expression that falls outside the protection of the first amendment. *Id.* at 85-86 n.9 (Brennan, J., dissenting).

53. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 707 (separate opinion of Harlan, J.).

54. Justice Brennan discounted — but not to zero — the governmental interest in "regulating the reading and viewing habits of consenting adults." *Paris Adult Theater*, 413 U.S. at 107 (Brennan, J., dissenting). Relying on *Stanley v. Georgia*, 394 U.S. 557, 566 (state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"); *Roe v. Wade*, 410 U.S. 113 (1973) (state abortion law unconstitutional), and *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("the State may do much . . . to improve the quality of its citizens, . . . but the individual has certain fundamental rights which must be respected"), he concluded that the governmental interest, though not "trivial or nonexistent," could not justify the harms resulting from attempts to bar the distribution of obscene materials to consenting adults. *Paris Adult Theater*, 413 U.S. at 112.

In other words, so long as distribution was limited to consenting adults, the courts would not have to decide whether the work was obscene because the work could not be suppressed even if it was.

Fourth, while acknowledging the seriousness of the governmental interest in protecting juveniles and unconsenting adults, the Court should reserve decision on whether and under what circumstances governments could regulate or even suppress sexually oriented speech to serve this interest.⁵⁵

Justice Brennan's approach won the support of Justice Marshall, whose opinion in *Stanley v. Georgia* anticipated the Justice's analysis, although it stopped well short of it.⁵⁶ He also had the support of Justice Stewart. While Justice Douglas would adhere to his own views, he would provide a fourth vote to overturn obscenity convictions in all cases involving consenting adults. But Justice Brennan could not obtain a fifth vote.⁵⁷

In an opinion by Chief Justice Burger, and by a vote of 5-4, the Court in *Miller v. California* reaffirmed *Roth* and the principle that obscene speech enjoys no protection under the first

55. Even where the allegedly obscene work was distributed to juveniles or unconsenting adults, the overbreadth doctrine would generally require invalidation of the obscenity statute on its face and without the need for an evaluation of the work itself, because most state and federal obscenity statutes were not narrowly focused on protecting juveniles and unconsenting adults. See *Miller v. California*, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting) ("[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overbroad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972))).

56. Acknowledging that he had not joined the opinion of the Court in *Stanley*, Justice Brennan said in *Paris Adult Theater* that he was now "inclined to agree" with *Stanley's* reasoning. *Paris Adult Theater*, 413 U.S. at 85 n.9 (Brennan, J., dissenting).

57. At several moments in the 1960's Justice Brennan's abandonment of *Roth* might well have produced a five-person majority for a considerably more permissive standard. Why the Justice resisted the move for as long as he did remains an open question. Chief Justice Warren, who was the Justice's closest ally on the Court, was a former prosecutor, and his position on obscenity issues was, as *Jacobellis* showed, somewhat more stringent than Justice Brennan's. It is tempting to suggest that the Justice was reluctant, for as long as Chief Justice Warren remained on the Court, to separate himself any further from the Chief Justice than he already had in *Jacobellis*. But that explanation does not account for the Justice's position in *United States v. 37 Photographs*, 402 U.S. 363 (1971), and *United States v. Reidel*, 402 U.S. 351 (1971), which were decided after Chief Justice Warren retired.

amendment.⁵⁸ The Court also modified the definition of obscenity in the hope of making it easier for prosecutors to convict. Instead of having to prove that a work was utterly without redeeming social value, the prosecution would only have to show that it lacked "serious literary, artistic, political, or scientific value."⁵⁹ The Court also authorized juries to apply local rather than national standards in considering whether a work was patently offensive. As the Chief Justice explained, "the people of Maine or Mississippi [would no longer have to] accept public depiction of conduct found tolerable in Las Vegas, or New York City."⁶⁰ *Miller* did indicate, however, that a work could not be proscribed unless it depicted or described "hard-core" sexual conduct specifically defined by the regulating state or federal law.⁶¹ The Court offered several examples of the type of sexual conduct it had in mind.⁶²

In the companion case of *Paris Adult Theater I v. Slaton*,⁶³ where Chief Justice Burger again wrote for the majority, the Court "categorically disapprove[d]" Justice Brennan's "consenting adults" rationale.⁶⁴ If a movie was found to meet the definition of obscenity, the states could punish those who showed it, even if only to consenting adults.

In the years after *Miller v. California* and *Paris Adult Theater*, Justice Brennan steadfastly adhered to the views he expressed there, dissenting from the Court's denial of certiorari in dozens of cases involving obscenity convictions obtained under statutes that he considered constitutionally overbroad and invalid on their face.

Did Justice Brennan have the better of the argument? From a doctrinal standpoint, his position has enjoyed substantial scholarly support. Professor Kalven observed that "[f]or the moment, the hard-won clarity of Justice Brennan's view is confined to dissent."⁶⁵ And he expressed disappointment that "a bare ma-

58. 413 U.S. 15 (1973).

59. *Id.* at 24 (emphasis added).

60. *Id.* at 32.

61. *Miller*, 413 U.S. at 24-27.

62. *Id.* at 25.

63. 413 U.S. 49 (1973).

64. *Id.* at 57.

65. H. KALVEN, *supra* note 4, at 53.

jority of five justices continues to resist the conclusion that even the narrowest concession to censorship cannot be justified in the case of consenting adults, in view of the cost of regulation and the absence of any compelling state interest in policing the sexual fantasies of adults."⁶⁶ As Justice Stevens noted, even the 1986 Final Report of the Attorney General's Commission on Pornography, which was otherwise unsympathetic to Justice Brennan's position, acknowledged that "'the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues' involved in obscenity laws 'is incorrect,' in that it fails to adequately protect First Amendment values."⁶⁷

It may well be argued, however, that the critical question was empirical, not doctrinal.⁶⁸ To a very large extent Justice Brennan's argument turned on a prediction of what would happen, or not happen, if the Court persevered in the attempt to divide sexually oriented expression into two categories, one protected by the Constitution and the other subject to suppression by state or federal governments. As Justice Brennan saw it, the Court faced the following dilemma so long as it adhered to *Roth*: It could continue to bear the burden of reviewing the record in scores of obscenity cases to decide whether the work at issue was obscene, but that would perpetuate the problems of vagueness and institutional stress to which *Roth* had given rise. Alternatively, it could give up its oversight role and leave communities much greater latitude to find works obscene on the basis of local standards. That approach would purchase some relief for the Court, but at the price of a potentially drastic curtailment of protected speech. The only escape from this dilemma, he reasoned, was for the courts to let adults decide for themselves what movies to see and what books or magazines to read.

The early returns seemed to confirm that the dilemma would prove just as unmanageable as Justice Brennan had feared. In *Jenkins v. Georgia*,⁶⁹ decided just one year after

66. *Id.*

67. *Pope v. Illinois*, 481 U.S. 497, 513 n.7 (1987) (Stevens, J., dissenting) (quoting Attorney General's Commission on Pornography, Final Report 261 (July 1986)).

68. See Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 BRIGHAM YOUNG U.L. REV. 247, 251-22.

69. 418 U.S. 153 (1974).

Miller, the Court overturned a Georgia decision holding that the movie *Carnal Knowledge*, starring Ann Margret and Jack Nicholson, was obscene.⁷⁰ Justice Brennan concurred in the result. The lesson seemed obvious: the state courts could not apply the new *Miller* standards in a way that safeguarded constitutionally protected expression, and, as Justice Brennan had predicted, no one could say with certainty that a work was obscene "until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so."⁷¹

In fact, *Jenkins* proved the exception rather than the rule. The Court has had no shortage of subsequent obscenity cases deciding an average of considerably more than one every year since *Miller*. The great majority of these cases, however, have concerned either the power of states to regulate the distribution of sexually oriented materials — for example, through zoning ordinances directed at the location of adult movie theaters,⁷² — or a host of thorny questions raised by the creation, distribution and possession of child pornography.⁷³ The Court has largely avoided the unsavory task of deciding which movies, videotapes or glossy pictures are obscene and which are not.

Of course, the Court may simply have dumped the problem on the state and lower federal courts by refusing to grant certiorari in cases where the obscenity of particular works was put in issue. There is obviously some evidence for that view, including Justice Brennan's numerous dissents from denial of certiorari. There is also evidence suggesting that the *Miller* reformulation has failed to cure the vagueness that Justice Brennan considered inherent in any attempt to articulate a definition of obscenity.⁷⁴

70. *Id.*

71. *Id.* at 164-65 (Brennan, J., dissenting).

72. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters*, 427 U.S. 50 (1976).

73. *See, e.g., Osborne v. Ohio*, 110 S. Ct. 1691 (1990); *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

74. Justice Brennan, in his dissent from denial of certiorari in *Liles v. Oregon*, 425 U.S. 963 (1976), quoted from the obscenity standard as applied by the trial judge:

Well, what is patently offensive?

And frankly, I had to kind of apply my own standard, which, I believe, corresponds with the standards of the community. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.

Nevertheless, it is hard to avoid the impression that Justice Brennan's fears may have been excessive. To all appearances, the courts have not had to bear an intolerable burden policing the distinction between protected and unprotected sexually oriented speech,⁷⁵ and yet there has been no wave of repression of such speech.⁷⁶ In fact, what is now readily available on MTV, late-night cable television and at the local video store makes many of the controversial works of an earlier day seem tame by comparison. There has, of course, been much recent controversy about 2 Live Crew, the Mapplethorpe photographs and funding for the National Endowment for the Arts.⁷⁷ But the apparent resolution of these matters seems to belie any suggestion that the roof is about to fall in on sexually oriented expression.⁷⁸

What does that say about Chief Justice Burger's approach, as adopted by the Court in *Miller*? The stated goal was not to suppress sexually oriented expression but to give communities greater discretion to evaluate such works under their own local standards. If those communities have turned out to be more tolerant than Chief Justice Burger anticipated, that may only prove that his approach is working.

I find it hard to believe, however, that the former Chief Justice sees much cause for celebration. It was not for want of trying that *Miller* failed to halt the proliferation of pornography. Its reformulation of the obscenity standard was simply over-

Applying that standard I would think that I wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mothers sitting next to them while they looked at either one of those movies. They are patently offensive.

Id. at 965-66.

75. See Justice Brennan's dissenting opinion in *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), where he said "the [*Miller*] reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment." *Id.* at 100-01.

76. See Justice Brennan's dissenting opinion in *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), where he said the *Miller* test "will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost certainly be held protected under our current formulation." *Id.* at 96.

77. See, e.g., Note, "As Nasty As They Wanna Be": Popular Music on Trial, 65 N.Y.U.L. Rev. 1481, 1501-04 (1990); ROSEN, *supra* note 18.

78. See *Congress Approves Arts Funding Compromise*, WASH. POST, Oct. 28, 1990, at A.17; *Rap Group Found Not Guilty in Obscenity Case*, N.Y. TIMES, Oct. 21, 1990, at 25, col. 1; *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at 1, col. 1.

taken by events over which the Supreme Court had no control, including the development of new technology (notably the VCR) that could turn every living room in the land into a blue movie house. *Miller* gave prosecutors and juries more discretion, but they have shown relatively little interest in exploiting it. Even though a majority of the Supreme Court was not willing to adopt Justice Brennan's "consenting adults" rationale, that, implicitly at least, is what much of the country has evidently done.

Moreover, it is not even clear that the Supreme Court has really solved the institutional problems about which Justice Brennan warned. In several recent opinions Justice Scalia has called for reconsideration of *Miller*.⁷⁹ He has said that the courts should stop trying to distinguish between sex and obscenity, or otherwise adjudicate questions of taste, and should focus instead on the commercial activities involved in distributing sexually oriented materials. Under his view, the states could not suppress a work of art or even of pornography, but they could regulate or even suppress the *business* of pornography.⁸⁰ Justice Scalia comes at the problem of obscenity from a perspective very different from Justice Brennan's, but he is apparently concerned about a very similar problem.

In the final analysis, whether one agrees or disagrees with Justice Brennan's conclusions on obscenity, it must be conceded that his obscenity opinions abundantly demonstrate the remarkable qualities he brought to the task of serving as a Justice of the Supreme Court.

When he thought he was wrong, he was prepared to admit it. Although he had set the course for the Court in this area for 16 years, he did not hesitate to change direction when he became convinced the course was unsound.

He was not an absolutist or an ideologue. Some of his admirers and detractors have suggested that he brought to constitutional analysis a kind of unified field theory in which every piece was made to fit a larger framework. The evidence of his obscenity opinions is, at least to my mind, to the contrary. They make clear that he decided cases one at a time and was more

79. See *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring); *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 617 (1990) (separate opinion of Scalia, J.).

80. *FW/PBS, Inc.*, 110 S. Ct. at 623-24.

concerned about making sense out of the particular issues presented than of building an overarching analytic superstructure. He would not accept the absolutist position of Justices Black and Douglas because he believed it left the states too little room to pursue substantial and legitimate interests in regulating the distribution of sexually oriented materials to juveniles and unconsenting adults. He accepted the legitimacy and importance of state concerns about child pornography. In one opinion he called the coercive enlistment of children in the making of obscenity "a grave and widespread evil which the states are amply justified in seeking to eradicate."⁸¹ He also concurred in the judgment of the Court in *New York v. Ferber*,⁸² which upheld a state statute designed to curb child pornography.

He was not afraid of unpopular causes. He concluded his last obscenity opinion — a dissent, naturally, in *Osborne v. Ohio*⁸³ — with this observation:

When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborn's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law.⁸⁴

He was deeply concerned about process. From the beginning he worried as much about the procedures for determining whether a work was obscene as he did about the substantive standards to be applied. At the core of his concern in *Paris Adult Theater* was his conviction that the Court had failed to discharge one of its most fundamental obligations — to articulate intelligible grounds for its decisions that could guide the

81. *Massachusetts v. Oakes*, 491 U.S. 576, 592 (1989) (Brennan, J., dissenting).

82. 458 U.S. 747 (1982). The statute prohibited the knowing promotion of a sexual performance by a child under the age of 16 through the distribution of material depicting such a performance. Citing his own opinion for the court in *Ginsberg v. New York*, 390 U.S. 629 (1968), Justice Brennan said the state's interest in protecting its youth, and the vulnerability of children, give it leeway to regulate pornographic material, the promotion of which is harmful to children, even though it does not have the same leeway when it seeks only to protect consenting adults from exposure to such material. *Ferber*, 458 U.S. at 776.

83. 110 S. Ct. 1691 (1990).

84. *Id.* at 1695.

process of adjudication in the state and federal courts.

Finally, and contrary to what many of his critics have said, he was determined to subordinate his own value preferences to the principles he discerned in the Constitution. From the standpoint of personal values, it is hard to imagine a more improbable defender of sexually oriented expression. I have no doubt that the exhibits in these cases would have been totally repellent to him, had he even been willing to look at them. He simply did not believe that his own taste had anything to do with the constitutional questions presented.

Although in recent years Justice Brennan was usually in dissent in cases involving sexually oriented expression, his departure from the Court has already made a difference in this area. In *Barnes v. Glen Theatre, Inc.*, the Court held that Indiana could constitutionally prohibit nude, non-obscene dancing under a public decency statute.⁸⁵ Had Justice Brennan still been on the Court, he would almost certainly have joined with Justices White, Marshall, Blackmun and Stevens, who dissented from the decision in *Barnes*, and provided a fifth vote to hold that nude dancing is constitutionally protected under the first amendment.

Which way the Court will eventually turn on the problem of obscenity is obviously impossible to predict. It may yet adopt the consenting adults rationale that Justice Brennan championed for so many years. But it need not do so to validate what he accomplished in this area. Over the course of 34 years, from *Roth* to *Osborne v. Ohio*, more than any other single justice, he defined and pressed the issues and dominated the debate. Of course, what makes this achievement all the more remarkable is that this was but one of so many different areas in which he made as indelible a mark.

85. 59 U.S.L.W. 4745 (1991).