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OBSCENITY LAW AND THE JUSTICES: REVERSING POLICY ON THE SUPREME COURT

*Rodney A. Grunes**

The Supreme Court has been substantially involved with obscenity law since its first major pronouncement on the issue in 1957. From that time to the present, Supreme Court decision-making in this area has been marked by a great degree of internal disagreement. For the most part, neither the Warren nor the Burger Courts have been able to marshal majority support for a single definition of obscenity. Yet a shift in attitude has been evident. The permissive policy adopted by the Warren Court has been replaced by the more restrictive approach of the Burger Court. Maintaining that in no other policy area has such a significant reversal of policy taken place, Mr. Grunes in this article examines the process of this change. An important reason for this reversal, Mr. Grunes argues, was the failure of the justices during the Warren Court era to agree upon a single definition of obscenity. The author identifies no less than six positions that existed at that time on the obscenity issue and attempts to demonstrate that this internal disagreement within the Warren Court over a definition of obscenity created conditions conducive to change. Focusing then on the Burger Court, Mr. Grunes identifies three major states of policy reformulation: curtailment of Warren Court policy with respect to its permissive approach to obscenity, reversal of that policy, and the implementation of a new approach. Mr. Grunes concludes that, by supplementing a definitional approach to obscenity with a deference toward state policy interest, a majority of the Burger Court has maintained an anti-pornography, or freedom restricting, policy with a significant degree of consistency.

INTRODUCTION

Following the re-election of Richard M. Nixon to the presidency, some commentators predicted that there would be dramatic reversals

* B.A., Drew University, Phi Beta Kappa; M.A., Ph.D., Duke University. Co-author of the Monograph, Race and the Tobacco Industry; Assistant Professor of Political Science, Rutgers, The State University, Newark, specializing in constitutional politics.

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in the pro-civil liberty policies of the Supreme Court.[1] After all, the new President had pledged to seek changes in Supreme Court policy-making by using his power of appointment to replace liberal activist justices with what he called "judicial conservatives" who believed in a "strict constructionist" interpretation of the Constitution, and who would adhere to the principles of judicial restraint.[2] Nixon was able to use this power four times.[3] Although he was unable to select an absolute majority of justices who met his criteria, he is generally credited with altering the ideological balance and transforming what had been called the Warren Court[4] into the current Burger Court.[5] Yet, there have been relatively few reversals in policy. Indeed, if there has been any discernible pattern in Burger Court decision-making, it has been to make minor adjustments rather than to overturn past liberal policies.[6] One policy area where there seems to have been a significant reversal, however, is that of obscenity.

The change from what was widely regarded as a permissive approach to obscenity to a much more restrictive policy represented one of the first major changes by the Burger Court. It also was one of the first instances in which the high Court adopted a policy that was in harmony with the views of the Nixon Administration.[7] What is

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[1] *See, e.g.*, JAMES F. SIMON, IN HIS OWN IMAGE 157 (New York: David McKay Company, Inc., 1973); Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine in a Changing Court*, 86 HARV. L. REV. 1, 10 (1972).

[2] Nixon's requirements for selecting Supreme Court justices are summarized in S. WASBY, CONTINUITY AND CHANGE 12–18 (1976).

[3] Chief Justice Warren Burger joined the Court in June 1969, Justice Harry Blackmun in June, 1970, and Justices Lewis Powell and William Rehnquist in January, 1972. [Current Term] S. CT. BULL. (CCH) vi–ix.

[4] The "Warren Court" refers to the Supreme Court during the time period when Earl Warren was its Chief Justice (1953–1969). For the general examination and history of the Warren era, see R. SAYLER, THE WARREN COURT (New York: Chelsea House, 1968).

[5] It has been argued that the "Burger Court" did not begin until after the fourth Nixon appointment. *See* A. Winter, *The Changing Parameters of Substantive Equal Protection: From the Warren to the Burger Era*, 23 EMORY L. J. 657, 659–661 (1974). While this and other designations such as "Last Warren Court" and "Interim Court" have merits as analytic constructs, they also have a tendency to mask the early influence of Chief Justice Burger in policy areas such as obscenity. Thus, for our purposes, the designation "Burger Court" will apply to the entire period following the appointment of the new Chief Justice.

[6] Several scholars have reached this judgment. *See, e.g.*, J.W. Howard, Jr., *Discussant's Remarks: "Is the Burger Court a Nixon Court?,"* 23 EMORY L.J. 747 (1974); Wasby, *supra* note 2, at 2–8. Recent decisions involving the *Miranda* rules and capital punishment have led some commentators to question this thesis. *See* Lesley Oelsner, *Now, Clearly It is a Burger Court, Just Right of Center*, N.Y. Times, July 11, 1976, § 4, at 8, Col. 1. *Compare id. with* N. Lewin, *Is There a Burger Court?*, 175 THE NEW REPUBLIC, 20–23 (Sept. 11, 1976).

[7] President Nixon's view of obscenity is discussed in *The Obscenity Report: The Report to the Task Force on Pornography and Obscenity* 72 (1970). Nixon believed that while "Government could maintain the dikes against obscenity . . . only people can turn the tide." *Id.*

noteworthy, however, is that the change occurred after a prestigious presidential commission had recommended, by a substantial vote, the abolition of all legislation which prohibited consenting adults from having access to sexually oriented material, and at a time when a majority of the justices were liberal holdovers from the Warren Court era.[8] Despite these inhibiting factors, the Burger Court successfully curtailed the further development and application of Warren Court policy, achieved a reversal of past policy, and then adopted a new approach to obscenity.[9]

While the appointment of new and more conservative justices may be the most visible reason for the change in obscenity policy, the absence of reversals in other policy areas suggests the existence of another explanation. It will be argued here that other factors, especially the internal disagreement of the justices and the lack of clarity in Warren Court pronouncements, combined to create an environment which was especially conducive to policy change.

This view of legal change is based, in part, on the result of impact studies conducted by social scientists.[10] Specifically, it has been hypothesized that factors such as the absence of unanimity, the existence of numerous concurring and dissenting opinions, and the lack of an "opinion of the Court" all tend to reduce full compliance with Supreme Court decisions.[11] Apparently, these factors undermine the legitimacy of Supreme Court decisions; policies are perceived as being less than "authoritative" and more amenable to reinterpretation.

Although most impact studies have concentrated on examining the effects of judicial decisions on other institutions, the argument here is that the lack of "authoritativeness" in Supreme Court decision-making during an earlier period can significantly influence the substance of later Court policy. Policies adopted within a framework of internal disagreement may not be conducive to long range support. Justices may feel that they are not bound to follow such "weak" precedent. Moreover, if majority support is viewed as

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[8] Twelve of the seventeen commissioners supported this recommendation. *See The Report of the Commission on Obscenity and Pornography* 51–52 (1970).

[9] All of these policy changes were accomplished prior to the appointment of an absolute majority of new justices by the Nixon-Ford administration. The absolute majority was realized with President Ford's appointment of John Paul Stevens who took his seat on the high court on December 17, 1975. For a list of Nixon's previous appointees, see note 3 *supra*.

[10] S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 44 (1970).

[11] Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 J. PUB. L. 314 (1968).

the proper indicator for determining whether a policy is to be considered as "authoritative" or binding, then a strong argument can be made that no such policy existed at the end of the Warren Court period. If these assumptions are correct, then it would appear that the justices appointed during the Nixon-Ford years inherited a policy situation that was especially ripe for change.

This study will be concerned with describing and explaining the change in the obscenity policy of the United States Supreme Court. For the purposes of analysis, obscenity will be treated as a public policy problem involving a clash between fundamental constitutional guarantees and other societal goals. In searching for a constitutionally acceptable definition and test for obscenity, for example, the justices have been asked to balance the national commitment to freedom of expression, as embodied in the first amendment, against competing societal goals such as the safeguarding of public morals and the protection of juveniles. However, neither a general policy analysis [12] nor a detailed historical survey of changes in constitutional doctrine are the primary objective of this article.[13] Rather, the emphasis will be placed on charting the changing and divergent views of the individual justices with the purpose of suggesting a theory of legal change respecting the law of obscenity. Both what the justices have written and how they have voted with respect to the problem of obscenity will be examined. While consideration will be given to all obscenity cases except those involving procedural questions, the primary interest will be with those decisions rendered since 1966—a period that encompasses the "final" Warren Court position on obscenity as well as the new approach of the Burger Court.

I

THE LEGACY OF THE WARREN COURT

Although obscenity had long been a social and political concern in America, it was not until the Warren Court period that the nation's

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[12] A general policy analysis of Supreme Court decision-making through the early Burger Court period has been made by Martin Shapiro. *See* Shapiro, *Obscenity Law: A Public Policy Analysis*, 20 J. PUB. L. 503–21 (1972).

[13] Systematic studies of doctrinal changes appear in: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Rogge, *The High Court of Obscenity–I*, 41 U. COLO. L. REV. 1–50 (1969); Rogge, *The High Court of Obscenity—II*, 44 U. COLO. L. REV. 201–59 (1969); Slough & McAnny, *Obscenity and Constitutional Freedom—Part II*, 8 ST. LOUIS U. J. 449–532 (1964).

In addition, the discussion of several Court decisions may be found in Krislov, *From* Ginzburg *to* Ginsberg: *The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153–97, and Magrath, *The Obscenity Cases: Grapes of* Roth, 1966 SUP. CT. REV. 7–77.

highest judicial authority began directing full attention to the constitutional issues raised by governmental regulation and suppression of obscenity.[14] Once the door of involvement was opened, however, the Supreme Court seemed to become preoccupied with the problem of obscenity. During a thirteen year period, the Court rendered decisions in no fewer than fifty-seven obscenity cases, deciding at least one case in every term except two. While some of these cases raised procedural questions, the great majority (78.9%) involved issues of free expression, generally requiring the Court to articulate or apply some constitutional standard for determining whether material was or was not legally obscene. Given this involvement, it is not suprising that the Court often resorted to the per curiam method of disposition. Formal opinions were delivered in approximately one-third of the obscenity cases and in only 26.6% of the cases involving basic first amendment questions. Table 1 gives a summary of the Warren Court's output in this policy area and the method used to dispose of these cases.

Table 1[15]

Summary of Decisions on the Merits Made by the Warren Court in Obscenity Cases by Method of Disposition

Obscenity Case Classification	Method of Disposition		
	Formal	Per Curiam	Totals
Constitutional Standard	12	33	45
Procedural Safeguards	8	4	12
Totals	20	37	57

The most salient characteristic of the Warren Court in the area of obscenity was its lack of internal consistency. Although the justices were occasionally unanimous in outlook, the predominant pattern was

[14] Obscenity had been given passing attention prior to the Warren Court period. In *Ex parte* Jackson, 96 U.S. 727 (1878), for example, dicta comments were used to support the position that the regulation of obscenity was not prohibited by the first amendment. *Id.* at 736. Fundamental constitutional issues were raised in Doubleday & Co., Inc. v. New York, 297 N.Y. 687, 77 N.E.2d 6 (Ct. App. 1947), *aff'd*, 335 U.S. 848 (1948), but the Court divided equally (Justice Frankfurter not participating) and did not render any opinion. 335 U.S. at 848.

[15] Constitutional Standard—Formal Disposition: Stanley v. Georgia, 394 U.S. 557 (1969); United Artists Corp. v. City of Dallas, 390 U.S. 676 (1968); Interstate Circuit, Inc. v. City of

one of disagreement and factionalism. While the Court seldom divided five-to-four,[16] more than four-fifths of the cases involving nonprocedural issues were resolved in split decisions. As can be seen in Table 2, split decisions were commonplace in cases decided by both the formal and per curiam methods.[17]

Table 2[18]

Unanimity in Obscenity Cases Decided by the Warren Court by Method of Disposition

	Method of Disposition	
Decision	Formal	Per Curiam
Split	83.3% (10)	84.8% (27)
Unanimous	16.7% (2)	15.2% (6)
Totals	100.0% (12)	100.0% (33)

Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Alberts v. California, 354 U.S. 476 (1957); Roth v. United States, 354 U.S. 476 (1957); Butler v. Michigan, 352 U.S. 380 (1957). Constitutional Standard—Per Curiam Disposition: Henry v. Louisiana, 391 U.S. 655 (1968); Rabeck v. New York, 391 U.S. 462 (1968); Interstate Circuit, Inc. v. City of Dallas, 391 U.S. 53 (1968); City of Dallas v. Interstate Circuit, Inc., 391 U.S. 53 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968); I. M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Landau v. Fording, 388 U.S. 456 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967); Gent v. Arkansas, 386 U.S. 767 (1967); Austin v. Kentucky, 386 U.S. 767 (1967); Redrup v. New York, 386 U.S. 767 (1967); Redmond v. United States, 384 U.S. 264 (1966); Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964); Tralins v. Gerstein, 378 U.S. 576 (1964); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1957). Procedural Safeguards—Formal Disposition: Freedman v. Maryland, 380 U.S. 51 (1965); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Marcus v. Search Warrant, 367 U.S. 717 (1961); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Smith v. California, 361 U.S. 147 (1959); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). Procedural Safeguards—Per Curiam Disposition: Lee Art

An examination of the ten non-unanimous cases decided with full written opinions demonstrates the extent of the internal disagreement. In these ten cases, forty-one separate opinions were submitted: seven majority opinions, three judgments of the Court, fourteen concurring opinions, and seventeen dissenting opinions. Thus, the justices submitted more than four times as many opinions as were necessary to resolve these cases. Moreover, not one of these cases was resolved without the filing of at least one concurring or dissenting opinion.

Of course, some Warren Court justices were more active than others in these ten non-unanimous decisions. As Table 3 helps to illustrate, Justice William Brennan, Jr. wrote most of the majority

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Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Tietel Film Corp. v. Cusack, 390 U.S. 139 (1968); Trans-Lux Distributing Corp. v. Board of Regents, 380 U.S. 259 (1965); Adams Newark Theatre Co. v. City of Newark, 354 U.S. 931 (1957).

[16] There was a one vote majority in Ginzburg v. United States, 383 U.S. 463 (1966), and Landau v. Fording, 388 U.S. 456 (1967).

[17] This is somewhat contrary to the expected breakdown of unanimous and split decisions during the Warren Court period. In doing a psychological analysis of the 1961–1962 term of the Supreme Court, for example, Glendon Schubert discovered that cases resolved by the use of per curiam opinions were more likely to be unanimous than split. *See Predictions from a Psychometric Model*, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 552–58 (G. Schubert ed. 1964).

[18] Split Decisions—Formal Disposition: United Artists Corp. v. City of Dallas, 390 U.S. 676 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Alberts v. California, 354 U.S. 476 (1957); Roth v. United States, 354 U.S. 476 (1957). Unanimous Decisions—Formal Disposition: Stanley v. Georgia, 394 U.S. 557 (1969); Butler v. Michigan, 352 U.S. 380 (1957). Split Decisions—Per Curiam Disposition: Henry v. Louisiana, 393 U.S. 655 (1968); Rabeck v. New York, 391 U.S. 462 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Landau v. Fording, 388 U.S. 456 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967); Gent v. Arkansas, 386 U.S. 767 (1967); Austin v. Kentucky, 386 U.S. 767 (1967); Redrup v. New York, 386 U.S. 767 (1967); Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964); Tralins v. Gerstein, 378 U.S. 576 (1964). Unanimous Decisions—Per Curiam Disposition: Interstate Circuit, Inc. v. City of Dallas, 391 U.S. 53 (1968); City of Dallas v. Interstate Circuit, Inc., 391 U.S. 53 (1968); Redmond v. United States, 384 U.S. 264 (1967); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olsen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1957).

opinions in cases decided by the formal method. Justices Black and Stewart wrote the greatest number of concurring opinions while Justice John Marshall Harlan wrote the most dissents. With respect to the total number of written opinions, Justices Black, Brennan, and Harlan were the most prolific.

Table 3[19]

Summary of Written Opinions Submitted in Obscenity Cases Decided by Formal Method of Disposition by Individual Justice

Opinions Written By	Black	Brennan	Clark	Douglas	Fortas	Frankfurter	Harlan	Marshall	Stewart	Warren	White	Total
Majority	0	4	0	0	0	1	0	2	0	0	0	7
Judgment of Court	0	2	0	0	0	0	1	0	0	0	0	3
Concurring	4	1	0	2	0	0	2	0	4	1	0	14
Dissenting	3	0	2	3	1	0	4	0	2	1	1	17
Total	7	7	2	5	1	1	7	2	6	2	1	41°

Persistent internal disagreement was also manifested by the increasing use of the per curiam method for resolving obscenity cases. Beginning with the October 1966 term, this was to become the pre-

[19] Stanley v. Georgia, 394 U.S. 557 (1969); United Artists Corp. v. City of Dallas, 390 U.S. 676 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Alberts v. California, 354 U.S. 476 (1957); Roth v. United States, 354 U.S. 476 (1957); Butler v. Michigan, 352 U.S. 380 (1957).

Although twelve cases were decided via formal method, a single majority opinion was used to resolve *Roth* and *Alberts* together and *Interstate Circuit* and *United Artists* together.

dominant method used by the Court as the justices openly conceded their inability to agree on any one approach to the problem of obscenity.[20] Since agreement seemed impossible, the justices chose to substitute their own individual viewpoints, often expressed seriatim, in place of a broadly based and unified approach, which often resulted in ambiguous policy or no clear-cut policy at all.

A. *What the Justices Said—I: The Basic Policy*

With one notable exception, the justices on the Warren Court were unsuccessful in mobilizing majority support behind a single approach to the problem of obscenity.[21] That exception was the landmark decision of *Roth v. United States* and *Alberts v. California*.[22] The *Roth-Alberts* opinion of 1957 marked the first major obscenity pronouncement of the Warren Court[23] and the last time that a majority of the justices would subscribe to a common standard for determining obscenity.[24] Yet, the approach set forth in this case proved to be so vague, imprecise, and confusing as to undermine any chance for long term support.[25]

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[20] *See* note 68 *infra* and text accompanying notes 21–68 *infra*.

[21] *See* Magrath, *supra* note 13, at 10.

[22] 354 U.S. 476 (1957). Both *Roth v. United States* and *Alberts v. California* were heard and decided together. Roth, who published, sold and advertised books, photographs and magazines, was convicted under the federal obscenity statute, 18 U.S.C. § 1461 (1976), for sending obscene materials through the mails. 354 U.S. at 480. Alberts, the operator of a mail-order business, was convicted under California law, CAL. PENAL CODE § 311 (West 1955), for keeping for sale obscene books and for publishing an obscene advertisement of his stock. 354 U.S. at 481.

[23] The Court's first significant intervention in the area of obscenity occurred in Butler v. Michigan, 352 U.S. 380 (1957), where it found that an obscenity statute banning material which was unsuitable with regard to minors but which was not objectionable with regard to adults was unconstitutional. *Id.* at 383–84. However, the question of obscenity vis-á-vis the constitutional guarantees of speech and press were squarely faced for the first time in *Roth*. *See* Froessel, *Law and Obscenity*, 27 ALBANY L. REV. 1 (1963); Magrath, *supra* note 13, at 9.

[24] Despite the single majority opinion, however, the justices divided differently in each case: six-to-three in *Roth* and seven-to-two in *Alberts*. Only five of the Justices, Brennan, Frankfurter, Burton, Clark, and Whittaker, agreed on a common standard for determining obscenity. For an overview of the obscenity decisions of the Warren Court, see Magrath, *supra* note 13; 6 SANTA CLARA LAW. 206 (1966); 19 STAN. L. REV. 167 (1966); 8 WM. & MARY L. REV. 121 (1966).

[25] No test, however, was ever expected to achieve mathematical precision. As the Court observed all that the Constitution mandates is "that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" 354 U.S. at 491 (quoting United States v. Petrillo, 332 U.S. 1, 7–8 (1946)). *Compare* Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 835 (1964) (maintaining that Court should establish definite test for obscenity) *with* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 121 (1960) (opposing an absolute standard).

In entering the area of obscenity, seven of the nine justices opted to embrace and legitimize what other decision-makers had always assumed,[26] namely, that the seemingly absolute language of the first amendment did not prohibit Congress or the states by way of the fourteenth amendment, from making laws which regulated the dissemination of obscenity.[27] Only Justices Black and Douglas, the two "literalists" on the Court, refused to support the view that government possessed the authority to impose restraints upon the exercise of first amendment freedoms when other more important individual and societal interests were at stake.[28]

The majority opinion, written by Justice Brennan, was confusing, however, in that it seemed to say one thing while doing another. What the Court did was to affirm the convictions and uphold the validity of both federal and state obscenity laws.[29] Yet, it accomplished this within the framework of permissive rhetoric. None of the justices disagreed with Justice Brennan, for example, when he explained that "sex and obscenity are not synonymous," and that "the 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."[30]

Despite this liberal language, the majority was not about to afford constitutional protection to obscene material.[31] Seven of the

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[26] *See, e.g.*, 354 U.S. at 484–85 (Court noted legislative response to issue of obscenity).

[27] 354 U.S. at 481–83. It had long been recognized since the ratification of the Constitution that libel, blasphemy, and profanity were outside the protection guaranteed by the first amendment and were subject to statutory proscription. *Id.* at 482; *see, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libelous utterances not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (state's restriction upon speech leading to breach of peace does not violate right of free speech); Gitlow v. New York, 268 U.S. 652 (1923) (punishment of speech advocating overthrow of government by force is constitutionally permissible).

[28] 354 U.S. at 514. For a discussion of Justice Douglas' and Justice Black's dissent, see notes 47–48 *infra* and accompanying text.

[29] The *Roth-Alberts* Court was concerned with the question of whether two particular obscenity statutes were constitutional, not with the question of whether the material involved was in fact obscene, and hence the issue of obscenity was treated in a rather abstract manner. *See* 354 U.S. at 481 n.8.

For instances in which the *Roth* test was applied to determine the obscenity of specific material, see A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966); Attorney General v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

[30] 354 U.S. at 478 (footnotes omitted); *cf.* Lockhart & McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 59 (1960) (justices in *Roth-Alberts* were concerned with "hard-core" pornography).

[31] For a discussion of the question of whether obscenity should be protected speech and the role the government should play in the censorship of obscene material, see Falk, *The* Roth *Decision in the Light of Sociological Knowledge*, 54 A.B.A.J. 288 (1968); Henkin, *Morals and*

justices accepted the view that obscenity could be distinguished from other categories of speech and that only the latter were entitled to protection under the first amendment.[32] According to the Court, "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are protected against governmental restraint.[33] Obscene ideas, on the other hand, are subject to regulation because they are, by definition, "utterly without redeeming social importance."[34]

Having adopted this "two-tier" approach[35] to freedom of expression, the core problem became the formulation of a satisfactory test for determining obscenity. The goal was to devise a standard which would enable others to clearly distinguish unprotected obscene expression from constitutionally protected non-obscene expression.[36] Toward this objective, five of the Justices,[37] Brennan, Frankfurter, Burton, Clark and Whittaker, proposed the following test: "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to pru-

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the Constitution: The Sin of Obscenity, 63 COLUM. L. REV. 391 (1963); *Censorship and Obscenity: A Panel Discussion*, 66 DICK. L. REV. 421 (1961); 39 N.Y.U. L. REV. 1063 (1964); 19 STAN. L. REV. 167, 187–89 (1966).

[32] 354 U.S. at 485. Justices Douglas and Black dissented. *Id.* at 508–14 (Douglas, J., joined by Black, J., dissenting).

[33] *Id.* at 484. For a discussion on the concept of "redeeming social importance," see Lockhart & McClure, *supra* note 25, at 95–99.

[34] 354 U.S. at 484. This position was consistent with the one set forth in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where Justice Murphy declared that there exist "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," such as "the lewd and obscene." *Id.* at 571–72. *But cf.* 354 U.S. at 511–12 (Douglas, J., dissenting) (where first amendment rights are involved, the collective conscience of community is not more proper standard with regard to obscenity than it would be with regard to religion, politics, or philosophy).

[35] An excellent discussion of this approach can be found in Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 315.

[36] In fact, the Warren Court was unable to reach a consensus with respect to defining obscenity. Instead, each judge utilized separate standards when facing this issue. *See, e.g.*, Manual Enterprises v. Day, 370 U.S. 478 (1962). This inability to agree on a common obscenity standard prompted Justice Brennan to comment:

> In the face of this divergence of opinion, the Court began the practice in 1967 in Redrup v. New York, 386 U.S. 767, . . . of per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.

Paris Adult Theatre I v. Slatin, 413 U.S. 49, 82–83 (1973) (Brennan, J., dissenting); *cf.* Roth v. United States, 354 U.S. at 507 (Harlan, J., concurring) (federal government can constitutionally restrict only "hard-core" pornography and further restrictions should be left to states); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (first and fourteenth amendments limit governmental restrictions on obscenity to hard-core pornography).

[37] *See* note 24 *supra*.

rient interest."[38] Reliance on such vague and generally undefined concepts as "average person," "contemporary community standards," and "appeal to prurient interest," however, hardly seemed designed to increase clarity in this area.[39] The Court's standard, moreover, seem to lack sufficient preciseness with respect to the protection of non-obscene or "borderline" sexual material.

Ironically, this test was intended to be more permissive and effective than other standards, including the popular formula, articulated in *Regina v. Hicklin*,[40] which judged obscenity by the effect of isolated passages from the material in question on the minds and morals of young people.[41] Actually, the new test neither altered the restrictive rationale of *Hicklin* nor provided a more satisfactory standard for distinguishing between obscene and non-obscene expression. While the substitution of "dominant" effect for isolated passages[42] and adult values for juvenile ones were positive developments, the Brennan led majority, nevertheless, remained wedded to the underlying premise of *Hicklin*, namely, that government possessed the authority to regulate the thoughts of its citizens. In the words of Justice Brennan, material which appealed to the prurient interest could be

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[38] 354 U.S. at 489.

[39] The difficulty inherent in a case-by-case application of the *Roth* test is perhaps best exemplified by the inconsistent decisions of various courts with respect to Henry Miller's *Tropic of Cancer*. Holding *Tropic of Cancer* not obscene and therefore protected by freedom of expression: Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800, *cert. denied*, 375 U.S. 957 (1963); Attorney General v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963). Holding *Tropic of Cancer* to be obscene: Besig v. United States, 208 F.2d 142 (9th Cir. 1953); People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).

[40] L.R. 3 Q.B. 360 (1868).

[41] The *Hicklin* test, widely used in American courts until the 1920's, was set forth in 1868 by Chief Justice Alexander Cockburn in the English case of Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). Based upon the examination of isolated passages, the test under *Hicklin* was "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." *Id.* at 371.

Although the *Hicklin* formula prevailed as the dominant test in American jurisprudence, it had been rejected by several American courts prior to *Roth*. *See, e.g.*, United States v. One Book Entitled Ulysses, 72 F.2d 705, 707 (1935) (holding Joyce's *Ulysses* was not obscene under federal statute barring importation of obscene books). When the Supreme Court rejected the *Hicklin* test as unconstitutional, it did so on the ground that the practice of merely examining isolated passages might result in declaring material which legitimately discusses sex obscene. 354 U.S. at 489.

[42] *See, e.g.*, Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Ackerman v. United States, 293 F.2d 449 (9th Cir. 1961); *In re* Louisiana News Co., 187 F. Supp. 241 (D.D.C. (1960). *But cf.* Kahm v. United States, 300 F.2d 78 (5th Cir. 1962), *cert. denied*, 369 U.S. 859 (1962) (isolated passages of book found obscene when used alone in an advertisement, even though book, taken as whole, was not obscene).

defined as "material having a tendency to excite lustful thoughts."[43] Thus, the Court impliedly accepted the view that, at least to some extent, the prevention of sexually impure thoughts was a legitimate policy objective.[44]

Despite the one-sidedness of the votes, a substantial amount of internal disagreement was evident in *Roth-Alberts*. Chief Justice Warren, for example, advocated a "variable" approach which, instead of viewing obscenity as an inherent characteristic, accepted it as a quality which depended upon such factors as the manner of its advertisement and distribution, the intended recipient group, the medium utilized, and geographical areas of distribution.[45] Conceding that different results would be produced in different settings, Warren maintained that government possessed the power to punish people like Roth and Alberts who were "plainly engaged in the commercial exploitation of the morbid and shameful . . . ."[46] Justices Douglas and Black, on the other hand, charted out the most permissive position, arguing that the first amendment places all speech in a preferred position and that only material which "is so closely brigaded with illegal action as to be an inseparable part of it"[47] was subject to regulation.[48] Needless to say, Justices Douglas and Black did not believe that the "arousal of sexual thoughts" fell into this category. Finally, there was the unique position of Justice Harlan who argued that state governments possessed far more authority than did the national government in the area of obscenity.[49] State governments, Justice Harlan stated, could enact any reasonable regulation of sexual moral-

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[43] 354 U.S. at 487 n.20.

[44] However, not all the justices accepted this viewpoint. Justice Harlan maintained that the federal government had no right to prevent the distribution of a book regardless of the type of thoughts it might arouse and further remarked that some of the world's greatest literature, which arouses lustful thought, would be labelled obscene under this test. 354 U.S. at 507 (Harlan, J., concurring in part, dissenting in part). Justice Douglas went even further, asserting that punishment can only be imposed for provoking overt acts rather than mere thoughts. *Id.* at 508–14 (Douglas, J., dissenting).

[45] *See* 354 U.S. at 494–96. Under a concept of "variable obscenity," obscenity is not viewed as an inherent or constant quality. Rather it is determined by the circumstances of dissemination and the effect upon the audience which the material is designed to reach. Thus material that is characterized as obscene may not be so at all times and places and under all circumstances. The issue of obscenity will then depend on certain variables or factors. *See* Lockhart & McClure, *supra* note 25, at 68–70, 77–88. Semonche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation*, 13 U.C.L.A. L. REV. 1173, 1173–77 (1966).

[46] 354 U.S. at 496 (Warren, C.J., concurring).

[47] *Id.* at 514 (Douglas, J., joined by Black, J., dissenting).

[48] *Id.* at 508–14 (Douglas, J., dissenting).

[49] *Id.* at 496–508 (Harlan, J., concurring in part, dissenting in part).

ity if it related to a legitimate state interest such as the preservation of moral standards, the prevention of anti-social conduct, or the protection of personal privacy.[50] The national government, however, was prohibited by the first amendment from using its postal and commerce powers to regulate anything other than a limited and largely undefinable class of expression known as "hard-core" pornography.[51]

Despite considerable criticism and commentary from the scholarly community,[52] it was seven years before the Warren Court, in *Jacobellis v. Ohio*,[53] sought to re-examine the *Roth-Alberts* standard. By this time, however, significant changes had taken place in the composition and ideology of the Court. Justices Frankfurter, Burton and Whittaker—conservatives who had supported the Brennan formula of 1957—had been replaced by three more liberal men: Arthur Goldberg, Potter Stewart, and Byron White.[54] Of the new justices, only White was to indicate adherence to the original test.[55]

There was no "opinion of the Court"—no "authoritative" policy announced in *Jacobellis*. Although a plurality of the Justices (Warren, Goldberg, and Clark) reluctantly supported the Brennan formula in *Roth-Alberts* "until a more satisfactory definition [was] evolved,"[56] only Goldberg was prepared to accept Justice Brennan's view that the "community" referred to in the *Roth-Alberts* test was a national rather than a state or local one.[57] Chief Justice Warren, joined by Justice Clark, preferred the use of local instead of national standards.[58] But, it was not clear whether they accepted Justice Brennan's

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[50] *Id.* at 502 (Harlan, J., concurring in part, dissenting in part).

[51] *Id.* at 506–07 (Harlan, J., concurring in part, dissenting in part).

[52] *See* Lockhart & McClure, *supra* note 25. A summary of the reaction in the press and periodicals may be found in L. BARKER & T. BARKER, FREEDOMS, COURTS, POLITICS AND STUDIES IN CIVIL LIBERTIES (1965). The criticism and commentary was engendered mainly by the many questions the Court left unresolved. The resulting ambiguity presented problems for law enforcement officials as well as the courts. Some of these questions included: what was meant by the term "prurient interest" and "socially redeeming importance;" who was to determine and define "contemporary community standards," and what was the relevant community? *See* L. BARKER & T. BARKER, CIVIL LIBERTIES AND THE CONSTITUTION 119 (2d ed. 1975).

[53] 378 U.S. 184 (1964).

[54] Justice Stewart replaced Justice Burton in 1958. Justice White replaced Justice Whittaker in 1962, and Justice Goldberg replaced Justice Frankfurter in 1962.

[55] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 462 (1966) (White, J., dissenting). In *Memoirs*, Justice White specifically rejected the majority's criterion of "utterly devoid of socially redeeming value" which altered the original *Roth* test. *Id.*

[56] 378 U.S. at 200 (Warren, C.J., dissenting).

[57] *Id.* at 198 (Goldberg, J., concurring).

[58] *Id.* at 200 (Warren, C.J., dissenting). This preference for a local standard was based in part on the belief that a national standard was not provable. *Id.*

view that the test for obscenity should not be applied until *after* it had been determined that the material was "utterly without redeeming social importance" and went "substantially beyond customary limits of candor."[59] Justice Stewart, on the other hand, refused to get involved with the *Roth-Alberts* test. Instead, he indicated support for the "hard-core" pornography standard of Justice Harlan, though he would use it in both state and federal cases.[60] As for Justices Douglas and Black, they continued to favor the granting of first amendment protection to virtually all sexually oriented expression.[61]

The final attempt to win majority support for a single constitutional standard came in 1966 in the case of *Memoirs v. Massachusetts*.[62] In what amounted to a major reformulation of the *Roth-Alberts* standard, a three justice plurality, Justice Brennan joined by Justice Fortas and Chief Justice Warren, set forth a test in which each of the following had to "coalesce" for a finding of obscenity: "(a) the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex; (b) the material [must affront] contemporary community standards relating to the description or representation of sexual matters; and (c) the material [must be] utterly without redeeming social value."[63] The most significant part of this reformulation was that "redeeming social value" had not been officially elevated to a co-equal status with the other elements of *Roth-Alberts*. Since almost all expression can be construed as having at least some minimal "social value," it would appear that these three justices were advocating an approach that was far more protective of sexually oriented material than was the original *Roth-Alberts* formula.[64]

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[59] *Id.* at 191.

[60] *Id.* at 197 (Stewart, J., concurring). Justice Harlan's approach to the obscenity issue involved two distinct tests for the state and federal governments. On the federal level, Justice Harlan called for a "hard-core" pornography standard which would allow a national ban on hard-core pornography but would prohibit such a proscription on borderline material. On a state level, Justice Harlan contended for a test of rationality. Under this approach the state would have the authority to proscribe material which was reasonably found to treat sex in a fundamentally offensive manner. Thus the state would be able to ban borderline material. This bifurcated standard rested on the rationale that the Constitution required limited or restrictive bans on expression by the federal government, but allowed greater latitude to the states which bear the direct responsibility for preserving the moral fabric of their communities. *Id.* at 203–04.

[61] *Id.* at 196 (Black, J., concurring).

[62] 383 U.S. 413 (1966).

[63] *Id.* at 418.

[64] The requirement that all three criteria be met before a given work could be labeled obscene clearly imposed a greater burden on the censor than did the test of "prurient appeal" which automatically indicated the absence of any social value. Previously under the *Roth* standard material which had been designated as obscene was denied first amendment protection because it was considered to be without any "redeeming social importance." Jacobellis v. Ohio,

Like *Jacobellis*, the *Memoirs* decision produced no majority viewpoint.[65] With the exception of the Chief Justice, all of the justices maintained previously announced positions.[66] In Chief Justice Warren's case, the shift seemed more related to obtaining Justice Brennan's support for his view of "variable" obscenity than indicative of any change in personal policy preference.[67]

B. *What the Justices Said—II: Toward a More Permissive Policy*

Following the failure to secure majority support in *Memoirs*, the justices began to openly acknowledge that they were hopelessly divided as to the proper standard for determining obscenity.[68] There were to be no further efforts to reformulate *Roth-Alberts* in quest of a

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378 U.S. at 191. But under *Memoirs* the standard of "redeeming social value" became an independent factor which had to be satisfied as part of the initial determination of obscenity, rather than as a resultant fact necessarily present where prurient appeal and patent offensiveness were demonstrated.

The Court indicated, however, that evidence of a purveyor's attitude toward the material in question, as demonstrated by the manner in which he exploits it, might be determinative of whether the work actually possesses any social value. 383 U.S. at 420. Thus, treating material as though it possesses no redeeming social value may lead the Court to find it does not.

[65] Separate concurring opinions were written by Justices Douglas, 383 U.S. at 424; Black, *id.* at 421; and Stewart, *id.* Dissenting opinions were filed by Justices Clark, *id.* at 441; Harlan, *id.* at 455; and White, *id.* at 460.

[66] Justice Douglas steadfastly adhered to the position that the first amendment forbids censorship of expression of ideas not linked with illegal action. *Id.* at 426 (Douglas, J., concurring); Justice Black, like Justice Douglas, felt that the federal government was without power to put any type of burden on speech and expression (as distinguished from conduct). Ginzburg v. United States, 383 U.S. at 476 (Black, J., dissenting); Justice Clark, dissenting, expressed his disagreement with the majority's revision of the *Roth* test, which was altered by requiring that the materials be initially found without redeeming social value. Justice Clark remarked: "Such a condition rejects the basic holding of *Roth* and gives the smut artist free rein to carry on his dirty business." 383 U.S. at 441 (Clark, J., dissenting). He advocated the retention of the *Roth* test. *Id.* at 441–42 (Clark, J., dissenting). Justice White, like Justice Clark, objected to the addition of the "socially redeeming value" element as an individual criterion and believed that the *Roth* test should have been retained in its original form. *Id.* at 462 (White, J., dissenting). Justice Harlan retained his view that federal suppression of allegedly obscene material should be constitutionally limited to that which is often described as "hard-core pornography." *Id.* at 457 (Harlan, J., dissenting). Justice Stewart also advocated this "hard-core" standard but in both a state and federal context. *Id.* at 421; *see* Mishkin v. New York, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting).

[67] *See* Semonche, *supra* note 45, at 1196. For a discussion on "variable" obscenity, see note 45 *supra* and accompanying text. Chief Justice Warren had been a constant advocate of the variable approach to obscenity. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. at 201 (Warren, C.J., dissenting); Roth v. United States, 354 U.S. at 495 (Warren, C.J., concurring); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 446 (1957).

[68] Justice Harlan summed up this discord when he stated: "The central development that emerges from the aftermath of *Roth v. United States* . . . is that no stable approach to the obscenity problem has yet been devised by this Court." Memoirs v. Massachusetts, 383 U.S. at 455 (Harlan, J., dissenting).

new consensus. Instead, the Warren Court began the practice of disposing of obscenity cases through the use of summary per curiam judgments, most of which were delivered without written explanation and thus provided no guidance to those seeking to implement high court policy.[69] In addition, the justices sought to identify new policy objectives by adopting a "variable" or contextual approach toward obscenity.[70]

During the post-1966 period, the justices relied greatly on *Redrup v. New York*,[71] a per curiam decision in which a majority of the justices voted to overturn convictions for the selling of "girlie" type magazines and paperback books. In this case, the Court seemed to adopt the position that material would be judged on the basis of separate tests articulated by the different justices then sitting on the high bench.[72] Its conclusion was that the material in question was not obscene under any of the standards being advanced by the justices.[73] What is confusing, however, is a statement in the opinion that the three-element standard set forth by Justices Brennan, Fortas, and Chief Justice Warren in the *Memoirs* decision was "not dissimilar" to Justice Stewart's concept of "hard-core" pornography.[74] After all, it was Justice Stewart who had previously declared: "I shall not today attempt further to define the kinds of material I understand to be embraced within the shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligently doing so. But I know it when I see it . . . ."[75]

Although the justices may have been divided with respect to the proper standard for determining obscenity, the *Redrup* approach of

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[69] *See, e.g.*, Avansino v. United States, 388 U.S. 466 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967); Books Inc. v. United States, 388 U.S. 449 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Datner v. California, 388 U.S. 422 (1967); Friedman v. United States, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967); Blankenship v. Holding, 387 U.S. 95 (1967); Holding v. Blankenship, 387 U.S. 94 (1967).

[70] For an explanation of this approach, see note 45 *supra*.

[71] 386 U.S. 767 (1967). The Court's decision also applied to *Gent v. Arkansas* and *Austin v. Kentucky*, two cases which were decided together with *Redrup* and which also involved the distribution of obscene novels and magazines. *Id.*

[72] *Id.* at 771. These tests or positions included: (1) that the state had no authority to suppress the distribution of obscene material; (2) that the state power to ban obscene material is limited to a "distinct and clearly identifiable class of material;" (3) that the "social value" element is an independent factor in the obscenity test. *Id.* at 770–71.

[73] *Id.* at 771.

[74] *Id.* at 770–71.

[75] Jacobellis v. Ohio, 378 U.S. at 197 (Stewart, J., concurring).

judging material by a combination of judicial tests enabled the generally liberal justices to unite behind a largely undefined but clearly more permissive obscenity policy.[76] Relying on *Redrup*, the justices overturned nearly two dozen convictions involving the dissemination of books, magazines, and films containing detailed and graphic descriptions of masturbation, homosexuality, sexual intercourse, fellatio, and sadomasochism.[77] Pictures of naked men and women in sexually alluring poses were also found to be non-obscene.[78] Perhaps the justices had found wisdom in Justice Stewart's statement after all, for they seemed to agree on what material was not obscene while continuing to disagree on how to define and actually determine the concept of obscenity. In almost all of the instances mentioned above, the justices overturned the decisions of lower courts which had employed and applied *Roth-Alberts* or some variation of this test.[79] Thus, the use of the same standards produced different results in different state and federal courts. Moreover, the citing of *Redrup* in other summary per curiam judgments hardly seemed designed to eliminate these discrepancies or increase the guidance offered to the lower courts.

In addition to the use of summary per curiam judgments, the justices began utilizing a "variable" approach by which the obscenity of material was determined on the basis of the particular circumstances surrounding dissemination. Although there was little evidence of permissiveness when the justices first began taking this approach, it was later to become the vehicle for what appeared to be a

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[76] The *Redrup* approach can be viewed as encompassing at least two things:

> First, where content of publications charged to be obscene is in question, federal and state prosecutions will not be successful unless it can be shown that the material involved is what Justice Stewart calls hard-core pornography. Second, it seems that the Supreme Court has decided that the time has come to begin putting men, not books or motion pictures, on trial.

Teeter & Pember, *The Retreat from Obscenity:* Redrup v. New York, 21 HASTINGS L.J. 175, 176 (1969).

[77] *See, e.g.*, Henry v. Louisiana, 392 U.S. 655 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Felton v. Pensacola, 390 U.S. 340 (1968); Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Conner v. Hammond, 389 U.S. 48 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Corinth Publications v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967).

[78] *See, e.g.*, Central Magazine Sales Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967).

[79] *See* note 77 *supra*.

major new policy position—the view that the government could not legitimately control the moral content of a person's thoughts without violating the first amendment.

The "variable" approach to obscenity was adopted by a majority of the Court in two highly criticized 1966 cases.[80] In *Ginzburg v. United States*,[81] Justice Brennan was joined by Chief Justice Warren (the original supporter of "variable" obscenity), and Justices Fortas, Clark, and White in holding that the intent of the publisher, as revealed by advertising and marketing techniques, was a relevant factor in determining whether material was legally obscene.[82] According to these justices, material which was not obscene under any of the judicial tests could still be found to be obscene if "commercial exploitation," *i.e.*, "pandering," was evident in the advertising or distribution practices of the publisher.[83] This view was challenged by Justices Black, Douglas, Harlan, and Stewart. In separate dissenting opinions, the majority position was attacked for introducing still more confusion into the law of obscenity through a judicially created ex post facto regulation.[84]

In *Mishkin v. New York*,[85] on the other hand, the same five justice majority held that the "average person" part of the Court's obscenity test was not applicable when material was designed to appeal to the prurient interest of deviant groups.[86] According to Justice Brennan, who wrote the majority opinion, "the prurient appeal requirement . . . is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the mem-

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[80] *See* Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966).

[81] 383 U.S. 463 (1966).

[82] *Id.* at 470.

[83] *Id.* at 475–76. This view was also expressed in Memoirs v. Massachusetts, 383 U.S. 413 (1966). In an opinion joined by Chief Justice Warren and Justice Fortas, Justice Brennan maintained that "the circumstances of production, sale, and publicity are relevant" to the determination of obscenity. *Id.* at 420.

[84] Justice Black expressed this view most forcefully when he noted that Ginzburg had been "authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal." 383 U.S. at 476.

[85] 383 U.S. 502 (1966). Mishkin, a publisher of sadistic and masochistic novels was given a three year prison sentence and fined $12,000 for hiring authors to write obscene books, for publishing them, and for possessing them with intent to sell. This conviction was affirmed by the United States Supreme Court. *Id.* at 503–04.

[86] *Id.* at 508. Deviant groups were defined as classes of people who are stimulated and excited by reference to such interests as flagellation, fetishism, and lesbianism as compared with the average person who is disgusted and sickened by such material. *Id.* at 508–09.

bers of that group."[87] Four of the Justices (Harlan, Stewart, Black, and Douglas) refused to accept the majority's view with respect to judging material aimed at sexual deviants.[88] Instead, these justices continued to support previously announced positions on obscenity, ranging from the absolutism of Justices Black and Douglas,[89] to the "hard-core" pornography view of Justice Stewart,[90] and finally, to the federal-state position of Justice Harlan.[91] Nevertheless, by 1966, a majority of the Court had accepted the legitimacy of regulating the commercial exploitation of sex[92] as well as material appealing to the prurient interest of nonconforming sexual groups.[93]

During the last two years of the Warren Court, the "variable" approach was utilized to establish a significantly more permissive

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[87] *Id.* Some of the materials in this case were designed to appeal to those with more unusual sexual preferences than those of the average consumer. It was specifically directed at sadomasochists, various fetishists, and homosexuals. The defendant claimed that since the book concerned deviant sexual practices, it did not satisfy the prurient appeal requirement because it did not appeal to the prurient interests of the average person. *Id.* at 509. To apply the prurient interest test to nonconforming groups, the Court modified the "prurient appeal" requirement by allowing the allure of this genre of material to be judged in terms of the sexual preferences of the group for which it was intended. *Id. Compare* Mishkin v. New York, 383 U.S. at 509 (deviant group test) *with* Roth v. United States, 354 U.S. at 489 (average person test). For an analysis of prurient appeal and the *Roth* test, see Note, *Obscenity and the Supreme Court: Nine Years of Confusion*, 19 STAN. L. REV. 167, 171–72 (1966).

[88] 383 U.S. at 514–18. In a concurring opinion Justice Harlan maintained that the federal government could not impose upon the states a formula designed to regulate obscenity, with the exception of hard-core pornography which he defined as "prurient material that is patently offensive." *Id.* at 515 (quoting Memoirs v. Massachusetts, 383 U.S. 413, 455 (1966)). Dissenting, Justice Douglas adhered to the proposition that all forms of expression are protected by the first amendment, a position shared by Justice Black. 383 U.S. at 514 (Douglas, J., dissenting), 515 (Black, J., dissenting). Justice Stewart, also dissenting, espoused the doctrine that unless the material is hard-core pornography it is protected by the first amendment even against state statutes. *Id.* at 518 (Stewart, J., dissenting).

[89] 383 U.S. at 514, 515 (Douglas, J., dissenting); *see, e.g.*, Jacobellis v. Ohio, 378 U.S. at 196 (Black, J., concurring); Roth v. United States, 354 U.S. at 508 (Douglas, J., dissenting).

[90] 383 U.S. at 518 (Stewart, J., dissenting); *see, e.g.*, Ginzburg v. United States, 383 U.S. at 497 (Stewart, J., dissenting); Jacobellis v. Ohio, 378 U.S. at 197 (Stewart, J., concurring).

[91] 383 U.S. at 515 (Harlan, J., dissenting); *see, e.g.*, A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 215 (1964) (Harlan, J., dissenting); Roth v. United States, 354 U.S. at 496 (Harlan, J., concurring in part, dissenting in part).

[92] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966). Commercial exploitation of sex or "pandering" was deemed to have occurred when "the sexually provocative aspects of the work 'were deliberately emphasized' in order to earn a profit by exploiting the salaciously disposed." *Id.* at 472. Thus the circumstances of the promotion and sale of such material should be considered as an aid in determining its social value. While the pandering rule lead to a conviction in the *Ginzburg* case, it was not widely used as a deterrent to obscenity in following years. For an analysis of obscenity convictions founded upon the pandering rule, see C. REMBAR, THE END OF OBSCENITY 483–89 (1968).

[93] *See, e.g.*, 383 U.S. 502. For a discussion of the pruriency test as applied to deviant groups, see note 87 *supra* and text accompanying notes 86–92 *supra*.

obscenity policy.[94] The change was accomplished in two separate steps and was aided by the replacement of Justice Clark with the more liberal Justice Marshall.[95] The objective of the new policy seemed to be the removal of governmental interference with the reading and viewing habits of consenting adults.[96]

The first step in the movement toward a more permissive obscenity policy[97] involved the Court's recognition of the special governmental interest in protecting the "well-being of its children."[98] In *Ginsberg v. New York*,[99] for example, six of the justices found it constitutionally permissible for a state to allow young people "a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[100] Speaking for the majority, Justice Brennan[101] explained that it was entirely "rational" for a state to conclude that obscenity has a detrimental effect on the moral development of juveniles even without any

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[94] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 559, 564–66 (1969) (private possession of obscene material is constitutionally protected); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 687–90 (1968) (statute that did not define "sexual promiscuity" or adequately restrict discretion of National Picture Classification Board to declare film obscene held unconstitutionally vague). *See also* Comment, *Obscenity—A Change in Approach*, 18 LOY. L. REV. 319, 321–25 (1972).

[95] Thurgood Marshall was nominated by President Johnson on June 13, 1967 and was sworn in during October 1967. [Current Term] S. CT. BULL. (CCH) vi-ix.

[96] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 568 (1969) (mere possession of obscene material in one's home cannot be regulated by government).

[97] This "more permissive obscenity policy" had its roots in *Memoirs* which advanced the "utterly without social redeeming value test." 383 U.S. at 418; *see* notes 62–64 *supra* and accompanying text.

[98] Ginsberg v. New York, 390 U.S. 629, 639 (1968).

[99] 390 U.S. 629 (1968). Ginsberg was convicted of selling two "girlie" magazines to a 16 year old boy in violation of a state statute. The Supreme Court upheld the conviction by holding: (1) the state has the power to create special provisions for children that reach beyond the scope of state power over adults; (2) parents and teachers, whose primary responsibility is rearing children, are entitled to the protection of state laws enacted to aid in the performance of that responsibility; and (3) the state has an independent interest in safeguarding the welfare of children against abuses. *Id.* at 638–43.

[100] *Id.* at 637. For a statement of the three grounds upon which the adoption of restrictive policy was justified, see note 99 *supra*. Control of distribution of objectionable material to minors rather than total prohibition to the general public was strongly urged by Justice Brennan in Jacobellis v. Ohio, 378 U.S. at 195. *Ginsberg* takes this view a step further by allowing the obscenity test to be adjusted by statute when the audience to be protected consists of minors. 390 U.S. at 638. Thus, the purchase of material which is judged not to be obscene for adults can still be statutorily prohibited to minors. *Id.* at 636–37; *cf.* Butler v. Michigan, 352 U.S. 380, 382–83 (1957) (objectionable, but not obscene, material must be made available to adults even if it has potentially detrimental effect upon children).

[101] Justice Brennan was joined by Justices Warren, White, Marshall. *See* 390 U.S. at 631. Separate concurring opinions were written by Justices Harlan, *id.* at 645, and Stewart. *Id.* at 648. Justice Douglas, joined by Justice Black, wrote a dissenting opinion, *id.* at 650, as did Justice Fortas. *Id.* at 671.

evidence of causation.[102] Thus, the justices voted to extend the *Mishkin* logic, that prurient appeal may be determined with respect to special groups, to juveniles by allowing the regulation of sexual material which appealed to the prurient interest of the average minor even when it did not appeal to the prurient interest of the average adult.[103] Yet, as the justices made clear in *Interstate Circuit, Inc. v. City of Dallas*,[104] the standard used for determining the acceptability of material for minors could not be so vague as to endanger the free flow of material which was entitled to the protection of the Constitution.[105]

The crucial second step in the development of a more liberal obscenity policy was taken in *Stanley v. Georgia*,[106] the last major obscenity decision of the Warren Court. In establishing "privacy" as another consideration,[107] the Court, speaking through Justice

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[102] *Id.* at 641–43. Although the Court recognized that the state's conclusion (*i.e.*, obscenity has a detrimental effect on juveniles) is not supported by any accepted scientific fact, *see, e.g.*, Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1035 (1962), this holding was still affirmed. 390 U.S. at 641. The Court reasoned that obscenity lies outside the protection of the first amendment, and that the state must therefore only demonstrate that its actions to protect minors from objectionable material are "not irrational." *Id.*

[103] 390 U.S. at 634–36; *cf.* Comment, *supra* note 94, at 323–24 (state may prohibit any materials believed to be offensive or detrimental to children). *Compare* Ginsberg v. New York, 390 U.S. at 636 (regulation of material appealing to prurient interest of average minor though not to average adult) *with* Redrup v. New York, 386 U.S. 767, 769–70 (1967) (statute aimed at minors must assert "a specific and limited state concern for juveniles").

[104] 390 U.S. 676 (1968). This decision was also applied to the companion case of *United Artists Corp. v. City of Dallas. Id.*

[105] 390 U.S. 682–84. Vagueness violative of due process occurs when a statute either prohibits or requires the performance of an act in language so indefinite that a person of average intelligence must guess at its meaning and disagree as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *See generally* Note, *Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67–75 (1960). There are basically two dangers of a vague obscenity statute: (1) a violation of due process by punishing someone for acts that were not clearly prohibited; and (2) a chilling effect on distribution of material that is in fact constitutionally protected. F. SCHAUER, THE LAW OF OBSCENITY 158 (1976). An example of the second pitfall occurs where distributors of material deemed obscene for children but not for adults might decide not to sell such publications in order to avoid possible prosecution involving accidental sales to minors. Due to these damages, the Supreme Court has strictly analyzed any obscenity statute brought before them. *See, e.g.*, 390 U.S. at 682; Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 694–95 (1959) (Frankfurter, J., concurring) (statutory language cannot be so vague and loose as to leave too large a power of discretion to those who apply it).

[106] 394 U.S. 557 (1969). During a search of Stanley's home for evidence of bookmaking, the police found films in his bedroom. The films were viewed and deemed obscene; Stanley was then arrested and convicted of violating a state obscenity statute. The Supreme Court reversed this conviction and held that mere possession of obscene material cannot constitute a crime. *Id.* at 558–59.

[107] *Id.* at 564. The *Stanley* Court noted that protection from unwanted intrusions by the government is a fundamental freedom which takes on added dimensions when it concerns the

Marshall, held that "the mere private possession of obscene matter cannot constitutionally be made a crime."[108] Justice Marshall argued that there was a difference between laws regulating the commercial dissemination of obscene material and legislation making punishable the mere private possession of such material.[109] The five man majority maintained that the consenting adult's right to read *and* receive all kinds of information, including material lacking in social worth, was essential for the maintenance of a free society.[110]

Although this decision was ostensibly limited to the right of a consenting adult to enjoy explicit sexual material in the privacy of the home, Justice Marshall provided the foundation for changing the basic rationale of judicial policy by including even obscenity, under certain circumstances, within the parameters of the first amendment.[111] Moreover, the majority seemed to undermine the underlying assumption of the "prurient interest" element of *Roth-Alberts* when it de-

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privacy of one's home. Thus this right, together with the guarantees of the first amendment, creates an insurmountable barrier to the enforcement of obscenity laws within the privacy of the home. Recognition of state power to control what one thinks or reads in his home, the Court reasoned, would amount to condonation of governmental thought control in its most blatant form. *See id.* at 564–65; *cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (every individual has right to be free from unwarranted state interference in fundamental private matters such as decision whether to bear children).

At first, some courts interpreted *Stanley* as a far-reaching principle which provided an unqualified right of distribution to willing and competent recipients. *See, e.g.*, United States v. Thirty-Seven (37) Photographs, 309 F. Supp. 36, 37–38 (C.D. Cal. 1970), *rev'd and remanded*, 402 U.S. 363, 377 (1971) (federal court invalidated federal obscenity statute and allowed importation of obscene material). However, the ruling in *Stanley* was significantly curtailed by Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), where the Burger Court upheld a state prohibition against obscene movies in public theatres, noting that the right to possess and view obscene material is confined to the privacy of the home. *Id.* at 66–67, 69; *see* text accompanying notes 222–29 *infra*.

The *Paris* and *Stanley* rules lead to a dilemma when the individual right to possess obscene material conflicted with the state's right to proscribe its purchase or distribution. In such a case, dictum in *Stanley* indicates that the right to private use outweighs the state's regulatory interests. 394 U.S. at 564. For a discussion of this dilemma, see Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203 (1969).

[108] 394 U.S. at 559. Private possession of obscene material, which is subsumed under the right to read what one pleases, is recognized as a fundamental element in the constitutional scheme of individual liberty and as such is protected from state subjugation by the first amendment which is made applicable to the states by the fourteenth. *Id.* at 568.

[109] *Id.* at 567–68.

[110] *Id.* at 565–66. The Marshall opinion, joined by Chief Justice Warren, and Justices Douglas, Harlan and Fortas, may have marked the outer limits of a liberal obscenity policy from which the Burger Court eventually retreated.

[111] *Id.* The prior rationale of the Court had been that obscenity was not included in constitutionally protected speech or press. *Roth*, 354 U.S. at 485. In *Stanley*, the Court suddenly provided an exception to this long-standing rule by allowing obscenity the protection of the first amendment. The main thrust of this case, however, was not that obscenity is afforded first

clared that the first amendment prohibited government from either "protect[ing] the individual's mind from the effects of obscenity" or "control[ling] the moral content of a person's thoughts."[112] According to Justice Marshall, the state could not formulate obscenity policy based on some notion of preventing the corruption of individual morals or harm to the public morality.[113] The only legitimate governmental concerns, explained the Court, were the protection of non-consenting adults who had a right to be free from forced exposure to obscenity and the protection of juveniles.[114]

The adoption of a "variable" approach to obscenity, however, continued to be marked by the same kind of internal disagreement that had characterized the Warren Court attempts to formulate a satisfactory test for judging obscenity. The *Stanley* decision was no exception. Although the justices had unanimously voted to reverse the conviction in this case, Justices Black, Stewart, Brennan, and White all offered reasons that differed from those of the Court's five member majority.[115]

C. *What the Justices Said and Did: The Final Picture*

By the end of the Warren Court period, the justices had still not agreed on how they or other decision-makers were to determine whether material was legally obscene.[116] The final positions of the

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amendment protection, but that it takes more than obscenity to override the right of privacy. The Court held that the "ideological content" of the material (*e.g.*, whether or not it is obscene) is irrelevant because the state cannot enact legislation that results in the control of an individual's thoughts. 394 U.S. at 565–66.

[112] 394 U.S. at 565.

[113] *Id.* at 566–67.

[114] *Id.* at 567.

[115] 394 U.S. at 568 (Black, J., concurring), 569 (Stewart, J., joined by Brennan & White, JJ., concurring). In his opinion, Justice Black reaffirmed his support of an "absolutists" interpretation of the first amendment, stating that mere possession of obscene material cannot constitute a crime because of first and fourteenth amendment guarantees. *Id.* at 568–69 (Black, J., concurring). This position was stated more forcefully in Ginzburg v. United States, 383 U.S. 463 (1966), where Justice Black said "the Federal Government is without any power whatever under the constitution to put any type of burden on speech and expression of ideas of any kind." *Id.* at 476. Justice Stewart, in his opinion in *Stanley*, argued that it was unnecessary to reach the first amendment question since the films involved had been seized as part of an illegal search. 394 U.S. at 569 (Stewart, J., concurring). The majority apparently disregarded this threshold issue in order to present new guidelines on obscenity.

[116] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (only five-man majority opinion with two concurrences).

justices sitting on the bench at the end of the Warren Court period can be summarized as follows:[117]

1. *Black and Douglas*: All ideas and material are protected under the Constitution unless it can be shown that they are so connected with illegal action as to constitute a clear and present danger to significant societal interests. No special context with respect to commercial exploitation of sex, appeals to sexual deviants, or protection of juveniles is recognized.[118] Justice Douglas but not Justice Black accepted the special context of personal privacy.[119]

2. *Stewart*: All material is protected under the Constitution with the exception of "hard-core" pornography.[120] No special context with respect to the commercial exploitation of sex or appeals to sexual deviants is recognized, though a societal interest with respect to children is recognized.[121]

3. *Marshall*: Government may regulate the commercial distribution of obscenity to protect juveniles and non-consenting adults. The special context of personal privacy is recognized.[122]

4. *Warren, Brennan, and Fortas*: Material may be suppressed whenever prurient appeal, patent offensiveness affronting contemporary community standards, and an utter lack of redeeming social value coalesce.[123] In determining obscenity, Justices Brennan and Fortas would use a national community standard[124] while Chief Justice Warren would permit a local community standard.[125] Special contexts pertaining to the commercial exploitation of sex, appeals to deviant sexual groups, and the protection of minors are recognized.[126]

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[117] This is an updated and expanded summary of typology first suggested by C. Peter Magrath. *See* Magrath, *supra* note 13, at 56–57.

[118] Magrath, *supra* note 13, at 561; *see, e.g.*, Ginzburg v. United States, 383 U.S. 463, 476 (Black, J., dissenting), 482 (Douglas, J., dissenting) (1966); Jacobellis v. Ohio, 378 U.S. 184, 196 (Black, J., joined by Douglas, J., concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (Douglas, J., joined by Black, J., dissenting).

[119] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 568 (1969) (Justice Douglas joined majority and Justice Black wrote concurring opinion).

[120] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 214–15 (1964) (Stewart, J., concurring).

[121] Magrath, *supra* note 13, at 56; *see, e.g.*, Mishkin v. New York, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 497 (1966) (Stewart, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[122] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 563–65 (1969); Ginsberg v. New York, 390 U.S. 629, 636–43 (1968) (Marshall, J., joined in majority opinion).

[123] Magrath, *supra* note 13, at 57; *see, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[124] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 192–94 (1964).

[125] *See, e.g.*, *id.* at 199 (Warren, C.J., dissenting).

[126] *See, e.g.*, Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting).

5. *White*: Material may be suppressed if its dominant appeal, taken as a whole, appeals to a prurient interest in sex.[127] Special contexts pertaining to the commercial exploitation of sex, appeals to deviant sexual groups, and the protection of minors are recognized.[128]

6. *Harlan*: All material is protected under the Constitution at the federal level with the exception of "hard-core" pornography. At the state level, material may be regulated if there is reasonable evidence that it appeals to a prurient interest in sex.[129] No special context with respect to the commercial exploitation of sex at the federal level is recognized, though appeals to deviant sexual groups at the state level is recognized. The special context of personal privacy is accepted at both federal and state levels.[130]

Although this summary tends to demonstrate the extent of the internal disagreement on the Warren Court, a somewhat different perspective emerges when attention is focused directly on what the justices did by voting to affirm or reverse convictions for obscenity. When it came to the casting of votes in cases involving the problem of "drawing the line" between obscene and non-obscene expression, a majority of Warren Court justices consistently demonstrated a permissive attitude toward the protection of sexually oriented expression. As can be seen in Table 4 below, the Warren Court generally voted to uphold the individual's right to freedom of expression over the governmental power to regulate the dissemination of obscenity.

Table 4[131]
Support of Freedom of Expression by
Warren Court in Cases Involving
Constitutional Standard
by Method of
Disposition

	Method of Disposition		
Decision	Formal	Per Curiam	All Cases
Favoring Individual	58.3% (7)	97.0%(32)	86.7% (39)
Against Individual	41.7% (5)	3.0% (1)	13.3% (6)
Total.....	100.0%(12)	100.0%(33)	100.0%(45)

[127] Magrath, *supra* note 13, at 57; Memoirs v. Massachusetts, 383 U.S. 413, 460–62 (1966) (White, J., dissenting).

[128] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 569 (1969) (White, J., joining Stewart, J., concurring); Memoirs v. Massachusetts, 383 U.S. 413, 460 (1966) (White, J., dissenting).

It should be noted, however, that the level of support for individual freedom and the protection afforded to sexually oriented material was considerably higher in cases resolved *via* the per curiam method than in cases decided with full written opinions. Indeed, with only one exception, all decisions against the individual took place in cases rendered by the formal method,[132] including many of the so-called "major" cases, *Roth*, *Alberts*, *Ginzburg*, *Mishkin*, and *Ginsberg*. However, since most of the per curiam decisions came in cases decided after 1966, it does appear that there was a trend of increasing permissiveness during the latter years of the Warren Court.

Perhaps a better indicator of the extent of the inter-agreement and permissiveness existing on the high Court can be found in Table 5, where the nine justices sitting at the end of the Warren Court period are ranked according to their support for individual liberty. Based on this data, it is clear that these justices demonstrated a re-

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[129] Magrath, *supra* note 13, at 56–57; Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486–92 (1962).

[130] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 215 (1964) (Harlan, J., dissenting); Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring).

[131] Favoring Individual—Formal Disposition: Stanley v. Georgia, 394 U.S. 557 (1969); United Artists Corp. v. City of Dallas, 390 U.S. 676 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Butler v. Michigan, 352 U.S. 380 (1957).

Against Individual—Formal Disposition: Ginsberg v. New York, 390 U.S. 629 (1968); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Alberts v. California, 354 U.S. 476 (1957); Roth v. United States, 354 U.S. 476 (1957).

Favoring Individual—Per Curiam Disposition: Henry v. Louisiana, 391 U.S. 655 (1968); Rabeck v. New York, 391 U.S. 462 (1968); Interstate Circuit Inc., v. City of Dallas, 391 U.S. 53 (1968); City of Dallas v. Interstate Circuit, Inc., 391 U.S. 53 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); Robert Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967); Gent v. Arkansas, 386 U.S. 767 (1967); Austin v. Kentucky, 386 U.S. 767 (1967); Redrup v. New York, 386 U.S. 767 (1967); Redmond v. United States, 384 U.S. 264 (1967); Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964); Tralins v. Gerstein, 378 U.S. 576 (1964); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1957).

Against Individual—Per Curiam Disposition: Landau v. Fording, 388 U.S. 456 (1967).

[132] The exception is Landau v. Fording, 388 U.S. 456 (1967).

markably high degree of consensus in support of individual liberty and the protection of sexually oriented material. Five of the justices supported freedom of expression more than ninety per cent of the time; only Justice Harlan failed to favor individual freedom in at least half the cases.

Table 5[133]
Support of Freedom of Expression by Warren Court Justices in Cases Involving Constitutional Standard

Justice	Favoring Individual	Favoring Government
Hugo Black	100.0% (43)	0% (0)
William O. Douglas	100.0% (43)	0% (0)
Potter Stewart	97.3% (36)	2.8% (1)
Abe Fortas	93.7% (30)	6.2% (2)
Thurgood Marshall	91.7% (11)	8.3% (1)
Byron White	80.6% (29)	19.4% (7)
William Brennan, Jr.	79.1% (34)	20.9% (9)
Earl Warren	53.8% (21)	46.2% (18)
John Marshall Harlan	31.0% (13)	69.0% (29)

Thus, it seems clear that by the end of the Warren Court period an overwhelming majority of the justices shared similar attitudes with respect to protecting sexually oriented expression. While the justices were unable to agree upon a satisfactory test for determining obscenity, there was considerable consensus with respect to the priority of policy goals or objectives. Eight of the nine justices, for example, consistently supported freedom of speech over other competing societal goals. Specifically, most of the justices now rejected an earlier view that "thought control" was a legitimate societal goal in regulating obscenity.[134] However, seven of the justices agreed that protecting

[133] *See* note 131 *supra*.

[134] Justices Black and Douglas argued against "thought control" from the outset. *See, e.g.*, Roth v. United States, 354 U.S. 476, 508 (1957) (Douglas, J., joined by Black, J., dissenting). In the *Stanley* case, Justice Marshall presented the majority view when he declared: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." 394 U.S. at 566. *See also* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965). In his article, Emerson states:

sexual expression could be outweighed by two competing societal goals: safeguarding the sensibilities of individuals who do not wish to be exposed to obscenity, and protecting the morality of minors.[135] Finally, while "thoughts" were deserving of constitutional protections, illegal "actions" were not. Five of the justices supported the view that the commercial exploitation of sex, *i.e.*, "pandering," was subject to governmental regulation.[136]

II

THE BURGER COURT AND THE PROBLEM OF OBSCENITY

When Warren Burger became Chief Justice in 1969, he did not have the votes necessary to change the obscenity policies of the Supreme Court.[137] Four years later, however, Chief Justice Burger was successful in mobilizing majority support behind a new approach to the problem of obscenity. Capitalizing on the changes in judicial personnel and the past pattern of internal disagreement and confusion, the new Chief Justice emerged as the leader of a five man majority[138] which supported the view that government, especially the national and state legislatures, should be able to control the dissemination of sexually oriented material without constant supervision by the Supreme Court. Toward that end, a majority of the justices discarded the increasingly permissive tests and rationales employed during the Warren Court period, established a new freedom restricting test for determining obscenity, expanded the number of societal goals which justified restrictions on freedom of expression, and, most recently, sanctioned the regulation of sexual expression to fulfill other more important policy objectives.

> Protection of [the] private sector—protection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization; urbanization; and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and totalitarian society.

Emerson, *supra* at 229.

[135] Justices Douglas and Black, however, do not place these societal goals above freedom of expression. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Douglas, J., joined by Black, J., dissenting); Mishkin v. New York, 383 U.S. 502, 514–15 (1966) (Black & Douglas, JJ., dissenting).

[136] *See* text accompanying notes 122–28 *supra*.

[137] *See* [Current Term] S. CT. BULL. (CCH) vi-ix.

[138] *See* note 140 *infra* and accompanying text.

The change in the Supreme Court's obscenity policy took place incrementally—in four stages. For the purpose of analysis, these stages may be conceptualized as follows: stabilization of policy, policy reversal, innovation and supplementation.[139] To a great extent, each of these stages appears to correspond to the changes taking place in judicial personnel. Curbing the expansion of Warren Court policy (stabilization), for example, was accomplished with the additions of Chief Justice Burger and Justice Harry Blackmun. Negation of prior policy and the adoption of a new policy were achieved following Nixon's appointment of Lewis Powell and William Rehnquist. Supplementation, the final stage, represents the current position and reflects the addition of Ford appointee, John Paul Stevens, to the high court.[140]

A. *Patterns of Behavior: Institutional Overview*

Constant involvement and a high level of internal disagreement continue to characterize Supreme Court decision-making on obscenity. During the eight year period, 1969-1977, for example, the Burger Court rendered decisions in twenty-seven obscenity cases, deciding at least one case in each term. While some of these cases involved procedural issues, the great majority of them (70.4%) raised questions about freedom of expression and the determination of obscenity. Unlike the Warren Court period, however, a majority of these cases were resolved through the formal written opinion method. A summary of the Burger Court's output in this policy area and the method used to resolve these cases is found in Table 6 below.[141]

Table 6[142]
Summary of Decisions on the Merits Made by the Burger Court in Obscenity Cases by Method of Disposition

	Method of Disposition		
Obscenity Case Classification	Formal	Per Curiam	Totals
Constitutional Standard .	16	7	23
Procedural Safeguards ...	5	3	8
Totals.....	21	10	31

In addition, the present Court has made extensive use of "memorandum orders," that is, unsigned statements usually denying writs of certiorari or dismissing cases on appeal.[143]

In addition to what appears to be a preoccupation with the problem of obscenity, a high level of internal disagreement continues to exist on the Burger Court. As can be seen in Table 7 below, the record of the Burger Court with respect to internal consistency is not unlike that of the Warren Court. More than four out of every five cases were resolved in non-unanimous decisions, although Burger Court decisions were often closer than Warren Court decisions.

Table 7[144]
Unanimity in Obscenity Cases Decided by the Burger Court by Method of Disposition

	Method of Disposition	
Decision	Formal	Per Curiam
Split	93.75% (15)	71.4% (5)
Unanimous	6.25% (1)	28.6% (2)
Totals	100.0% (16)	100.0% (7)

[139] These stages correspond to what appears to be a norm in policy development. As Martin Shapiro has noted, "[t]he prototype of American domestic policy-making, at least since the New Deal, has been innovation followed by supplementation." Shapiro, *Obscenity Law: A Public Policy Analysis*, 20 J. PUB. L. 503, 503 (1971).

[140] For a statement on the Justice's appointment to the Court, see [Current Term] S. CT. BULL. (CCH) vi-ix.

[141] Tables 6 and 7 do not include two cases which were decided by an equally divided court *via* per curiam opinions. *See* Grove Press v. Maryland State Bd. of Censors, 401 U.S. 480 (1971); Radich v. New York, 401 U.S. 531 (1971). Justice Douglas did not participate in either case. Data in all tables reflect cases decided through January 1, 1978.

[142] Constitutional Standard—Formal Disposition: Ward v. Illinois, 431 U.S. 767 (1977); Splawn v. California, 431 U.S. 595 (1977); Smith v. United States, 431 U.S. 291 (1977); Marks v. United States, 430 U.S. 788 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87 (1974); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); California v. LaRue, 409 U.S. 109 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971). Constitutional Standard—Per Curiam Disposition: Papish v. University of Missouri, 410 U.S. 667 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972); Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Gable v. Jenkins, 397 U.S. 592 (1970); Cain v. Kentucky, 397 U.S. 319 (1970). Procedural Safeguards—Formal Method: McKinney v. Alabama, 424 U.S. 669 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S.

While the Warren Court seldom divided five-to-four, the Burger Court divided five-to-four in almost three-fourths (11 of 15) of the non-unanimous cases decided with full written opinion. In all but one of these cases, the justices seemed to form two distinct blocs: the four Nixon appointees and Justice White voting as a majority and Justices Brennan, Marshall, Douglas, and Stewart voting in the minority.[145]

As was the case during the prior period, some Burger Court justices were more active than others in these fifteen non-unanimous decisions. In contrast to the rather passive role taken by Earl Warren, Chief Justice Burger wrote most of the majority opinions, especially in the pre-1974 period.[146] As Table 8 helps illustrate, Justices Brennan and Douglas wrote the most dissents. Justice Douglas was also the most prolific, writing eight opinions in the ten non-unanimous cases in which he was a participant.

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546 (1975); Blount v. Rizzi, 400 U.S. 410 (1971); United States v. The Book Bin, 400 U.S. 410 (1971); Rowan v. Post Office Department, 397 U.S. 728 (1970). Procedural Safeguards—Per Curiam: Rabe v. Washington, 405 U.S. 313 (1972); Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971).

[143] During the 1975–1976 term, for example, "Memorandum Orders" were reported in twelve obscenity cases. Generally, these cases involved a denial of review through certiorari by a six-to-three vote. Only Justices Brennan, Marshall, and Stewart consistently voted to grant certiorari and reverse a lower court's conviction.

[144] Split Decision—Formal Dispostion: Ward v. Illinois, 431 U.S. 767 (1977); Splawn v. California, 431 U.S. 595 (1977); Smith v. United States, 431 U.S. 291 (1977); Marks v. United States, 430 U.S. 188 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hamling v. United States, 418 U.S. 87 (1974); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); California v. LaRue, 409 U.S. 109 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971). Unanimous Decision—Formal Disposition: Jenkins v. Georgia, 418 U.S. 153 (1974). Split Decision—Per Curiam Disposition: Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Gable v. Jenkins, 397 U.S. 592 (1970); Cain v. Kentucky, 397 U.S. 319 (1970). Unanimous Decision—Per Curiam Dispostion: Papish v. University of Missouri, 410 U.S. 667 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972).

[145] The exception is the recent decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Here, the majority consisted of Chief Justice Burger and Justices Powell, Rehnquist, White, and Stevens. The dissenters were Justices Brennan, Stewart, Marshall, and Blackmun. *Id.* at 51.

[146] Justice Burger's deference for local autonomy gained majority support in Miller v. California, 413 U.S. 15 (1973). This policy was based upon the belief that the size and diversity of the United States precluded the formulation of an obscenity standard that would satisfy all fifty states. *Id.* at 30–34. For a discussion of the *Miller* opinion, see text accompanying notes 191–224 *infra*. *Cf.* Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (nothing in Constitution requires "the standards of a hypothetical statewide community" be applied by juries in state obscenity cases).

Table 8[147]
Summary of Written Opinions Submitted in Obscenity Cases Decided by Formal Method of Disposition by Individual Justice

Written Opinions	Justices of Burger Court												
	Black	Blackmun	Brennan	Burger	Douglas	Harlan	Marshall	Powell	Stevens	Stewart	Rehnquist	White	Total
Majority	0	1	0	5	0	0	0	2	1	0	3	3	15
Judgment of Court	0	0	0	0	0	0	0	0	0	0	0	1	1
Concurring	0	0	1	0	1	2	1	1	1	2	0	0	9
Dissenting	2	1	10	1	7	0	2	0	3	2	0	1	29
Total	2	2	11	6	8	2	3	3	5	4	3	5	54

From a comparative perspective, the justices sitting on the Burger Court submitted more majority opinions, fewer concurring opinions and judgments of the Court, and more dissenting opinions in approximately an equal number of non-unanimous cases.

B. *What the Justices Said*

I: Stabilization

Shortly after his appointment, Chief Justice Warren Burger indicated that he was opposed to the Warren Court's handling of the problem of obscenity. The major thrust of his disagreement was directed at the lack of deference shown by the Supreme Court to the judgments made by decision-making agencies at the state level. In *Cain v. Kentucky*,[148] for example, Chief Justice Burger dissented from the Court's per curiam reversal of that state's decision to ban

[147] For the cases forming the basis for this table, see note 144 *supra*.

[148] 397 U.S. 319 (1970).

the public showing of the film *I, A Woman.*[149] In his view, the Court "should not inflexibly deny to each of the states the power to adopt and enforce its own standards as to obscenity."[150] A similar view was expressed in the *Walker v. Ohio*[151] case where Chief Justice Burger, in objecting to yet another per curiam reversal of a state court's finding of obscenity, declared that he could find no justification for the high Court's "assuming the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal."[152]

The Burger position was not a new one. John Marshall Harlan had consistently advocated this view, at least in state obscenity cases.[153] This viewpoint soon gained the support of a third justice when Justice Blackmun, the second Nixon appointee, announced in *Hoyt v. Minnesota*[154] that he found himself "generally in accord" with the Burger-Harlan position.[155] "I am not persuaded," explained Justice Blackmun in dissent, "that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders."[156] Chief Justice Burger and Justices Harlan and Blackmun were especially upset over the majority's continued use of the summary per

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[149] Justices Burger and Harlan voted to affirm in *Caine*. 397 U.S. at 319–20 (Burger, C.J., dissenting) (Harlan, J., dissenting). Justices Douglas, Black, Brennan, Stewart, White, and Marshall voted for reversal. *See id.* at 319.

[150] 397 U.S. at 319 (Burger, C.J., dissenting).

[151] 398 U.S. 434 (1970).

[152] *Id.* (Burger, C.J., dissenting). The justices, with the exception of Marshall, voted along the same lines as they had in the *Caine* case. *See id.*

[153] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 458–60 (Harlan, J., dissenting) (although Constitution requires state obscenity laws be rationally related to "accepted notions of obscenity," local traditions, varying moral standards, and disparate conditions across country necessitate establishment of state standards for defining obscenity); Jacobellis v. Ohio, 378 U.S. 184, 203–04 (1964) (Harlan, J., dissenting) (although federal obscenity statutes should be examined under *Roth* test, states' statutes should be examined under test of rationality which would permit states to ban material which "has been reasonably found in state judicial proceedings to treat with sex in fundamentally offensive manner, under rationally established criteria for judging such material"); Roth v. United States, 354 U.S. 476, 503–08 (1957) (Harlan, J., dissenting) (there is no danger to first amendment guarantees in allowing states, who are charged with "direct responsibility for the protection of the local moral fabric," to suppress borderline material, so long as federal regulation is limited to hard-core pornography).

[154] 399 U.S. 524 (1970).

[155] *Id.* at 525.

[156] *Id.* at 524. Justices Douglas, Black, Brennan, Stewart, White and Marshall held for summary reversal. *See id.*

curiam method to overturn lower courts which had conscientiously attempted to apply Supreme Court standards.[157] "I cannot agree," stated Justice Blackmun, "that the Minnesota trial court and those six justices [on the Minnesota supreme court] were so obviously misguided in their holding that they are to be summarily reversed on the authority of *Redrup*."[158]

Additional support for the Supreme Court's new position of deference to state obscenity policy emerged in several other per curiam decisions, two of which were resolved by an equally divided Court. In these latter cases, the Court affirmed findings of obscenity regarding the showing of the film *I Am Curious Yellow*[159] and the displaying of a sculptor's representation of the American flag as a phallus.[160] Although it is not possible to identify authoritatively the division of the Court in these four-to-four decisions, it seems probable that the four affirmative votes were cast by the Chief Justice and Justices Blackmun, Harlan, and White. Thus, the new policy of def-

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[157] *Id.* at 524–25. The summary per curiam method of reversal began in Redrup v. New York, 386 U.S. 767 (1967). Faced with a continuing divergence of opinions over the question of obscenity, the Court resorted to this practice whenever five members of the Court determined the material not to be obscene, using their own separate tests. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 (1972) (Brennan, J., dissenting). Since *Redrup*, "no fewer than [thirty-one] cases have been disposed of in this fashion." *Id.* at 82 n.8; *see, e.g.*, Bloss v. Michigan, 402 U.S. 938 (1971); Childs v. Oregon, 401 U.S. 1006 (1971); Walker v. Ohio, 398 U.S. 434 (1970); Hoyt v. Minnesota, 399 U.S. 524 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Caine v. Kentucky, 397 U.S. 319 (1970); Carlos v. New York, 396 U.S. 119 (1969); Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. Pensacola, 390 U.S. 340 (1968); Robert Arthur Management Corp. v. Tennessee *ex rel.* Canale, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 60 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Aday v. United States, 388 U.S. 477 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967).

[158] 399 U.S. at 524–25 (Blackmun, J., concurring).

[159] Grove Press v. Maryland St. Bd. of Censors, 401 U.S. 480 (1971); Radich v. New York, 401 U.S. 531 (1971). For a discussion of these cases, see notes 160–62 *infra* and accompanying text. In *Grove Press*, the finding of obscenity rested on a determination that the film appealed to prurient interests, that it described sex beyond the limits of candor, and that it was without any social redeeming value. Wagnheim v. Maryland St. Bd. of Censors, 255 Md. 297, 297, 258 A.2d 240, 241 (1969), *aff'd sub nom.* Grove Press v. Maryland St. Bd. of Censors, 401 U.S. 480 (1971).

[160] Radich v. New York, 401 U.S. 531 (1971). The defendant was convicted of violating a New York flag desecration statute when, as a protest against the Vietnam war, he created a sculpture which depicted the American flag enwrapping a phallic symbol, as a human body hanging from a noose, and as a gun caisson. People v. Radish, 26 N.Y.2d 114, 117, 257 N.E.2d 30, 31, 308 N.Y.S. 2d 846, 847–48 (N.Y. 1970), *aff'd*, 401 U.S. 531 (1971).

erence now commanded the support of four justices, the two Nixon appointees and two holdovers from the Warren Court period. Of the four, only Justice White had strongly supported freedom of expression by voting to overturn lower court convictions for obscenity.[161]

The policy of deference, however, was not intended to apply to lower courts that supported freedom of expression against governmental restraint. The emerging Burger Court was to deal harshly with lower courts that sought to build upon the permissive policy articulated by the Warren Court in *Stanley*.[162] While the justices favoring a more restrictive approach still lacked the votes to establish a new policy, they were successful in achieving "stabilization" in policy, that is, the halting of any further development of permissive Warren Court obscenity policy. This stabilization was accomplished in the 1971 decision of *United States v. Reidel*[163] and *United States v. Thirty-Seven Photographs*[164] where the Court disagreed with lower federal courts and limited the applicability of *Stanley*, supported convictions under two federal obscenity statutes, and reaffirmed the traditional view that obscenity was not entitled to the protection of the first amendment.[165]

What is most surprising about *Reidel* is the extent of the support for limiting the scope of *Stanley* and affirming allegiance to the *Roth-Alberts* rationale. All but two of the Justices (Black and Douglas) agreed that the federal obscenity statute was constitutional as applied to the use of the mails for the distribution of explicit sexual material to willing adult recipients.[166] Speaking for the majority, Justice White declared that *Stanley* "neither overruled nor disturbed the

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[161] *See* Table 5 in text *supra* and accompanying note.

[162] *See, e.g.*, United States v. Orito, 413 U.S. 139, 141–42 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 126–29 (1973).

[163] 402 U.S. 351 (1971). Norman Reidel was indicted under a federal obscenity statute for mailing a pornographic book which was solicited and paid for by a postal inspector. *Id.* at 353. Citing *Stanley*, the district court held the statute to be unconstitutional, when applied to consenting adults, by reasoning that if a person has the right to receive and possess material in the privacy of his home, then someone else must necessarily have the right to deliver it to him. *Id.* at 355.

[164] *Id.* at 363. Customs agents, acting under federal law, seized thirty-seven photographs from a United States citizen who was returning from abroad. *Id.* at 365–66. The district court held the federal statute to be unconstitutional because it permitted the forfeiture of obscene material destined for private use contrary to *Stanley*. United States v. Thirty-Seven Photographs, 309 F. Supp. 36 (C.D. Cal. 1970), *rev'd*, 402 U.S. 363 (1971).

[165] *See* United States v. Reidel, 402 U.S. at 354–57; United States v. Thirty-Seven Photographs, 402 U.S. at 375–77.

[166] 402 U.S. at 352.

holding in *Roth*."[167] The district court had erred in two important respects. First, it did not recognize that *Stanley* was not so much an obscenity case as it was a case involving the right of privacy—the freedom to think, fantasize, and read in one's own home without fear of governmental intrusion. Second, the lower court had failed to comprehend that these two cases involved fundamentally different constitutional questions. The private possession of explicit sexual material was an issue in *Stanley* but not in *Roth*, while the commercial distribution of obscenity through the mails was involved in *Roth* but not in *Stanley*.[168] While the majority acknowledged that *Stanley* had identified a "right to receive" sexual material,[169] the justices maintained that such a right "is not so broad as to immunize the dealing in obscenity in which Reidel engaged here—dealings which *Roth* held unprotected by the First Amendment."[170] Unfortunately, the majority did not explain how a consenting adult, sitting in the privacy of his own home, could exercise this "right to receive" when disseminators of obscenity had no concomitant right to send such material through the mail. Only dissenting Justices Black and Douglas addressed themselves to this incongruity, arguing that a person who had a constitutional right to possess obscene material in the privacy of the home also had a right to receive such material "voluntarily" through the mail.[171]

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[167] *Id.* at 354. Justice White's majority opinion was supported by an unusual mixture of conservatives (Chief Justice Burger, Justices Blackmun and Harlan) and liberals (Justices Brennan and Stewart). Justice Harlan concurred, while Justice Marshall concurred in part and dissented in part. *Id.* at 357–62.

[168] *See id.* at 354–55. Feeling that "[t]he District Court gave *Stanley* too wide a sweep," Justice White indicated that the right to possess obscene material in private, enunciated in *Stanley*, could not encompass the right to sell such material, because such an extrapolation would contradict *Roth*, something which *Stanley* never intended to do. *Id.* at 355. *But cf.* Griswold v. Connecticut, 381 U.S. 479 (1965) (since use of contraceptives is protected by constitutional right of privacy, state may not prevent doctor from supplying means by which one engages in such protected activity).

[169] Stanley v. Georgia, 394 U.S. at 564. Justice Marshall characterized the right to receive ideas and information irrespective of any social value as "fundamental to our free society." *Id.*; *cf.* Levy v. Louisiana, 391 U.S. 68, 71 (1968) (fundamental right may only be abridged upon showing compelling reason). *See generally* Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[170] 402 U.S. at 355. *But cf.* Karalexis v. Byrne, 306 F. Supp. 1363, 1365–68 (D. Mass. 1969), *vacated and remanded on other grounds*, Byrne v. Karalexis, 401 U.S. 216 (1971) (preliminary injunction granted against future prosecutions for exhibiting obscene movies to paying public on grounds that material was not pandered, its offensive nature was clearly indicated to viewing public, and minors were excluded from theatre).

[171] 402 U.S. at 381. Surprisingly, Justice Marshall did not view the majority opinion as an attack on *Stanley*. In his concurring opinion, he argued that Reidel's activities were not protected under the *Stanley* policy since the appellee had not done enough to insure that his

The scope of the *Stanley* policy was also raised in the *Thirty-Seven Photographs* case.[172] This time, however, only four of the justices voted to reverse a lower court's view that an individual had a right to import obscene material for perusal in the privacy of his home.[173] In presenting the plurality position, Justice White argued that the *Stanley* policy was not applicable to the case at hand. According to Justice White:

> That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. . . . Whatever the scope of the right to receive obscenity . . . that right . . . does not extend to one seeking to import obscene materials from abroad whether for private use or public distribution.[174]

Protest against this emasculation of *Stanley* was widespread. Justices Marshall, Stewart, Black, and Douglas all agreed that the plurality had presented no plausible reason to distinguish the private possession of obscene material which was protected under *Stanley* from the importation of obscenity for purely private use.[175] Justice Marshall, for example, argued that it was "disingenuous to contend that Stanley's conviction was reversed because his home, rather than his person or luggage, was the locus of the search."[176] The purpose

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merchandise did not fall into the hands of minors. *Id.* at 361–62 (Marshall, J., concurring). Justice Marshall's position, however, is not entirely convincing, for Reidel had required potential buyers of his material to declare their age. Without elaboration however, Justice Marshall declared that this was not enough. *Id.* at 361 (Marshall, J., concurring).

[172] 402 U.S. at 376. Although the "right to receive" issue was considered, this case also involved a lower court's determination that the federal importation of obscenity statute was unconstitutional for failing to meet the procedural requirements set forth in Freedman v. Maryland, 380 U.S. 51 (1965). 402 U.S. at 366–67. A majority of the Justices (White, Burger, Harlan, Brennan, Stewart, and Blackmun) rejected this view, finding that the statute could be judicially construed to provide the kind of prompt judicial determination of obscenity that was required under *Freedman*. *Id.* at 373–75.

[173] 402 U.S. at 365. The plurality consisted of Justices White, Burger, Blackmun, and Brennan. Justices Harlan and Stewart filed concurring opinions while Justice Black, joined by Justices Douglas and Marshall, dissented. *Id.* at 377–88.

[174] *Id.* at 376.

[175] *Id.* at 379, 381; *cf.* United States v. Articles of Obscene Merchandise, 315 F. Supp. 191, 195–96 (S.D.N.Y.) (proscription against importation of obscene material for private use held constitutional).

[176] 402 U.S. at 360. In limiting the application of societal interest, the Court in *Stanley* rejected three such interests as inappropriate in the context of private possession: (1) the moral health of the community was rejected as a form of thought control; (2) the prevention of sexual

of *Stanley*, explained its author, was to limit the number of societal interests which could be used to justify a regulatory policy.[177] Since the items in this case were in the respondent's private possession with no threat to either minors or non-consenting adults, Justice Marshall concluded that the imported photographs were entitled to constitutional protection.[178]

Justice Stewart expressed a similar view. While he agreed that the first amendment did not prohibit the border seizure of obscene material destined for commercial distribution, he also argued that the Constitution did not permit a policy of seizing materials intended for the purely private use of the importer.[179] "If the Government can constitutionally take the book away from him as he passes through customs," stated Justice Stewart, "then I do not understand the meaning of *Stanley*."[180]

Justices Black and Douglas presented the strongest condemnation of the plurality opinion. In their view, the plurality was "bowing to popular passions" and attempting to overrule the *Stanley* policy.[181] This policy has been so limited, wrote Justice Black, that it is apparently only applicable when "[a] man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[182]

During the 1971-1972 term, the number of supporters of a permissive obscenity policy were further reduced. Justice Black, one of the strongest defenders of freedom of sexual expression, had been replaced by former American Bar Association president Lewis Powell. In addition, the generally conservative (though not in federal cases) John Marshall Harlan had been succeeded by William Rehnquist, a

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misconduct resulting from the exposure to obscene material was dismissed for the failure to show any empirical connection between obscenity and sexual deviance; and (3) the need to facilitate the enforcement of laws against the distribution by proscribing possession was rejected in the face of the first amendment and the right to privacy. 394 U.S. at 565–68.

[177] *Id.*

[178] 402 U.S. at 360–61. Constitutional protection might end, explained Justice Marshall, if and when commercial distribution takes place. *Id.* at 361.

[179] *Id.* at 379 (Stewart, J., concurring). *But see* United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 128 (1973) (*Stanley* protects privacy of home, but does not permit *importation* of obscene material, even for strictly private use).

[180] 402 U.S. at 379.

[181] *Id.* at 382.

[182] *Id.* Taken together, *Reidel* and *Thirty-Seven Photographs* indicate how mistaken some commentators were regarding the likely impact of the *Stanley* policy. In his extensive study of *Stanley*, for example, Professor Katz argued that the Court had "clearly enervated the *Roth* doctrine, for the privacy approach affords a distinction that, of necessity, severely limits *Roth's* ken . . . *Stanley* may well prove a classic example of destruction by distinction." *See* Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 204.

conservative.[183] The Supreme Court now seemed ready to move beyond the stabilization of policy stage.

An early indication of future Burger Court policy can be found in *Kois v. Wisconsin*,[184] the first obscenity case decided with the participation of all four Nixon appointees. In this case, the justices overturned a conviction for the publication of a sex poem in an underground newspaper.[185] The justices maintained that the poem's content and placement within the newspaper "bears some of the earmarks of an attempt at serious art."[186] One year later, seriousness of purpose replaced "utterly without redeeming social value" in the Burger Court's reformulation of the *Roth-Alberts* test.[187]

II: Reversal and Innovation

On June 21, 1973, sixteen years after the historic *Roth-Alberts* decision, Chief Justice Burger announced that a majority of the justices had now reached agreement on a new and comprehensive approach to the problem of obscenity.[188] The new policy was set forth in five separate cases,[189] all decided by five-to-four votes, and it in-

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[183] *See* [Current Term] S. CT. BULL. (CCH) vi–ix.

[184] 408 U.S. 229 (1972).

[185] *Id.* at 232.

[186] *Id.* at 231. In reversing the lower court, the Supreme Court relied on Thornhill v. Alabama, 310 U.S. 88 (1940), for the proposition that " 'freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully *all matters of public concern* without fear of restraint or of subsequent punishment.' " 408 U.S. at 230. The petitioner's poem in *Kois* was found to be within the protection afforded freedom of expression along with the accompanying pictures, since they were rationally related to the article. *Id.* at 231.

[187] In another per curiam opinion involving the contents of an underground newspaper, six of the justices voted to reverse a lower court's decision upholding the suspension of a campus reporter who had violated university regulations pertaining to "indecent conduct and speech." Papish v. University of Missouri, 410 U.S. 667, 667–78 (1973). The majority felt that the publication of a political cartoon depicting the raping of the Statue of Liberty by policemen and an article concerning a campus organization called "The Motherfuckers" was constitutionally protected. Chief Justice Burger and Justice Rehnquist, joined by Burger and Blackmun dissented. *Id.* at 671–78.

[188] Miller v. California, 413 U.S. 15, 29 (1973). Chief Justice Burger stated that the practice of issuing unelaborated per curiam decisions utilized consistently since *Redrup*, had come to an end, and that the *Miller* Court would "attempt to provide positive guidance to federal and state courts." 413 U.S. at 29.

[189] *See* Miller v. California, 413 U.S. 15, 36–37 (1973) (state may prosecute distribution of obscene material mailed to unwilling recipients); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (state may suppress showing of obscene films to consenting adults); Kaplan v. California, 413 U.S. 115, 119–20 (1973) (mere words, without accompanying illustrations, can constitute obscenity); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 128 (1973) (federal government can proscribe importation of obscene material intended purely for personal use); United States v. Orito, 413 U.S. 139, 143–44 (1973) (federal government can restrict interstate transportation of obscene material).

cluded three key elements: the rejection of the permissive standards and rationales employed prior to the Burger Court; the establishment of a freedom-restricting test for determining obscenity, and the continuation of a deferential attitude toward state regulatory policies on obscenity. Specifically, the four Nixon appointees along with Justice White agreed to reaffirm obscenity's exclusion from first amendment protection,[190] to discard the permissive *Memoirs* test,[191] to accept "public morality" as a legitimate societal interest for regulating obscenity,[192] to extend the coverage of the obscenity test to non-illustrated sexual books,[193] and to limit further the "right to receive" concept by denying constitutional protection to sexual material disseminated solely to consenting adults.[194]

This reversal of past policy and the establishment of a new approach to obscenity was first announced in *Miller v. California*.[195] Although this case could have been easily resolved on the basis of prior Warren Court decisions protecting the sensibilities of non-consenting adults and juveniles,[196] the new majority evinced no intention of adhering to the strictures of judicial restraint. Instead, the justices acknowledged a broader objective—to facilitate the regulation of obscenity by replacing liberal Warren Court policies with "standards more concrete than those in the past."[197] The *Miller* case seemed to be a most appropriate vehicle for accomplishing this objective: it involved a statute[198] which incorporated the permissive

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The Chief Justice wrote the majority opinion in all five cases and was joined by Justices Blackmun, Powell, Rehnquist and White. Separate dissents were filed by Justices Douglas and Brennan (who were joined by Stewart and Marshall).

[190] Miller v. California, 413 U.S. 15, 23 (1973).

[191] *Id.* at 24–25.

[192] Paris Adult Theatre I v. Slaton, 413 U.S. 44, 57–60 (1973). "[T]here is a 'right of the Nation and of the States to maintain a decent society. . . .' " *Id.* at 59–60 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964)).

[193] Kaplan v. California, 413 U.S. 115, 119 (1973).

[194] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973).

[195] 413 U.S. 15 (1973).

[196] Since advertising brochures depicting sexual activites had been sent to an unwilling recipient, the majority could have relied on previously established policies. *See, e.g.*, Stanley v. Georgia, 394 U.S. at 567 (possibility of intrusion upon privacy of general public is legitimate objection to public distribution of obscene material).

[197] 413 U.S. at 20.

[198] The California statute, in pertinent part, stated:

> "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

CAL. PENAL CODE § 311 (a) (West 1970).

Memoirs test while authorizing the use of a statewide, rather than national, community standard.[199]

Of course, the Burger Court did not seek to overturn all Warren Court policy. Policies which could generate convictions under national and state obscenity laws were given strong support. Thus, the justices gave effusive praise to the Warren Court's original pronouncement in *Roth-Alberts*.[200] What the justices could not support, however, was the reformulation of *Roth-Alberts* in *Memoirs*[201] where, according to the Chief Justice, the Court "veered sharply away" from its initial policy.[202] In Chief Justice Burger's view, the *Memoirs* reformulation made it much more difficult to obtain convictions because, unlike *Roth-Alberts*, which merely presumed obscenity was lacking in social value, it required an independent and affirmative determination that the material was "utterly without redeeming social value."[203] And since almost all expression has some minimal level of social value, the Chief Justice only slightly overstated his case when he said that the social value element made it "virtually impossible" to prove obscenity.[204] Thus, the "redeeming social value" criterion had to be abandoned.

In place of the discredited *Memoirs* standard, the five justice majority in *Miller* proposed the following new tripartite test for determining obscenity:

> (a) whether the average person applying contemporary 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,[205] sexual conduct specifically defined by the

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[199] 413 U.S. at 31.

[200] For a discussion of the *Roth* test of obscenity, see notes 22–51 *supra* and accompanying text.

[201] For a statement of that reformulation, see Memoirs v. Massachusetts, 383 U.S. at 418, and text accompanying notes 62–67 *supra*.

[202] 413 U.S. at 21.

[203] *Id.* at 21–22.

[204] *Id.* at 22. According to Chief Justice Burger, the *Memoirs* standard represented "a drastically altered test that called on the prosecution to prove a negative, *i.e.*, that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." *Id.*

[205] "Patently offensive" material was defined as that material which "goes substantially beyond customary limits of candor in description or representation of such matters." 413 U.S. at 17 n.1; *see, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (nudity alone cannot satisfy the standard of "patently offensive").

The "patently offensive" test for obscenity originated in Justice Harlan's opinion in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486 (1962) (phrase used to describe "hard-core" pornography). For a discussion of the changing interpretations of the "patently offensive" standard in the obscenity cases between *Manual Enterprises* and *Miller*, see Note, 18 ST. LOUIS U.L.J.

applicable state law,[206] and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[207]

All three parts must coalesce for a finding of obscenity.[208] Thus, a patently offensive and prurient work could still be brought within the protection of the first amendment if one of the specified "serious" values was present.[209]

Despite assurances that this new standard was not, as the dissenters maintained, "repressive," there can be little doubt that the justices desired to impose significant restrictions on the dissemination of sexual material.[210] Although the Chief Justice stated that the new test was applicable only to hard-core pornography,[211] his description of patently offensive sexual conduct covers the kinds of activities that routinely were given constitutional protection during the Warren

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297, 308–09 (1973). *See also* Leventhal, *The 1973 Round of Obscenity—Pornography Decisions*, 59 A.B.A.J. 1261, 1263 (1973) (noting that words "taken as a whole" are deleted from *Miller* test for patent offensiveness without any explanation by Court).

[206] Only representations of physical conduct, rather than mere expression, may be deemed obscene under the *Miller* test. 413 U.S. at 24–26. The sexual conduct may be defined either in the statute itself or through judicial construction. *Id.* at 24; *see, e.g.*, Gibbs v. State, 255 Ark. 997, 1006, 504 S.W.2d 719, 724 (1974) (court sustained Arkansas statute which did not specifically define "patently offensive" conduct because such definition had been provided by judicial interpretation of statute).

[207] 413 U.S. at 24. *See also* Note, 40 BROOKLYN L. REV. 442, 450 (1973) (*Miller* Court failed to clarify degree of seriousness required). One commentator suggests that the reason the *Miller* Court adopted the new "serious value" test lies in the Court's acceptance of the Meiklejohn model of the first amendment. This model contends that the first amendment does not protect the private right of speech but, rather, protects only that speech which contributes to the ability of citizens to govern themselves, *i.e.*, all speech relevant to an issue which the voters must decide. Comment, *In Quest of a "Decent Society": Obscenity and the Burger Court*, 49 WASH. L. REV. 89, 123–28 (1973). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12–16, at 668–69 (1978) (arguing that Court is, in fact, guilty of cultural discrimination).

[208] 413 U.S. at 24–25; *see* Jacobellis v. Ohio, 378 U.S. at 191 (balancing of elements of obscenity test is not permitted).

[209] Chief Justice Burger does not indicate whether his listing of "serious" (at one point he says "genuinely serious") values is meant to be exhaustive. It is not clear, for example, whether a serious sex education manual or what one commentator calls "a hilarious movie on mishaps in a nudist camp" would fit into one of the Court's categories. *See* Levanthal, *supra* note 205, at 1264–65.

[210] As Justice Powell has recently stated, "[c]learly it was thought that some conduct which would have gone unpunished under *Memoirs* would result in convictions under *Miller*." Marks v. United States, 430 U.S. 188, 194 (1977).

[211] 413 U.S. at 27. The *Miller* test limited obscenity to "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or "of masturbation, excretory functions and lewd exhibition of the genitals." *Id.* at 25; *see, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (film *Carnal Knowledge* not obscene despite fact that "ultimate sexual acts" are depicted because the camera does not focus on the actors' bodies during those scenes). *But cf.* Comment, *Obscenity: A Step Forward by a Step Back?*, 38 ALBANY L. REV. 764, 782 (1974) (contending that Court's reference to "hard core" pornography caused *Miller* test to be unclear); Note, 33 MD. L. REV. 421, 444–45 (1973) (same).

Court period.[212] Even more telling is Chief Justice Burger's explanation of how the new test would operate with respect to questionable material. In his view, a textbook on human anatomy could be constitutionally "saved" thanks to serious scientific value.[213] If a medical textbook represents "borderline" type material in terms of prurience and patent offensiveness, then it follows that a great deal of all sexual material could be viewed as being obscene under the Court's new standard.

In addition to narrowing the boundaries surrounding constitutionally protected sexual material, the justices claimed their new approach would bring greater clarity and certainty to the law of obscenity.[214] Clearly, the emphasis on sexual conduct and the inclusion of an illustrative "model" state statute would appear to do this.[215] However, it is extremely difficult to see how the substitution of "serious value" for "redeeming social value" was likely to produce greater certainty in the law. As in the past, this would seem to be a matter primarily for a jury to decide.[216] Yet, as Chief Justice Burger concedes, juries sitting in different parts of the country are likely, as they have in the past, to reach contrary judgments on the same material.[217]

There is one part of the Court's test which seems deliberately designed to produce greater uncertainty. This is the new interpretation that was given to the "contemporary community standards" element of the obscenity test. Although a majority of the Warren Court justices had never specifically embraced the use of a "national" standard, many of those charged with applying the Court's test seemed to

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[212] *See* notes 76–83 *supra* and accompanying text.

[213] 413 U.S. at 26.

[214] *Id.* at 29. *But see* Note, *Obscenity—United States Supreme Court Adopts a New Test*, 18 ST. LOUIS U.L.J. 297, 317 (1973) (raising number of questions left in wake of *Miller* decision).

[215] Despite a disclaimer that the judiciary was precluded from proposing regulatory schemes for legislatures, Chief Justice Burger provided the following examples of what might be proscribed: "(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 exhibitions of the genitals." 413 U.S. at 25. The Court's suggestions did not go unheeded. After this decision, more than 150 anti-pornography bills were introduced in 38 of the 44 legislatures in regular session during 1973–1974. *See* Pilpel & Parsons, *Dirty Business in Court*, 1 CIV. LIB. REV. 30, 32 (1974).

[216] For a discussion of the role that expert testimony is to play in helping juries reach determinations on obscenity, see *Paris Theatre I*, 413 U.S. at 56; McGaffey, *A Realistic Look at Expert Witnesses in Obscenity Cases*, 69 NW. U.L. REV. 218 (1974).

[217] 413 U.S. at 26 n.4. Chief Justice Burger addressed himself to this phenomena by responding that "[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Id. But see* Comment, 28 ARK. L. REV. 357, 370 (1974) (discussing difficulties of appellate review in absence of recorded testimony by experts as to applicable "contemporary community standards of prurient appeal").

assume that such a standard should be used.[218] The Burger Court justices, however, would have nothing to do with a "national" standard which they viewed as being "unascertainable" and hence, purely "hypothetical."[219] Instead, these justices favored the use of state and local community standards. It was neither "realistic nor constitutionally sound," explained Chief Justice Burger, "to require the people of Maine or Mississippi to accept the norms and attitudes of people living in Las Vegas or New York City."[220] Unfortunately, the justices were silent as to why state or local standards would be any more "ascertainable" than a national one.[221]

This view, appearing to be an unwitting venture into what Nixon called the "New Federalism,"[222] also raises an important constitutional problem. If one accepts the wisdom of Chief Justice Burger's view regarding differences between attitudes in Mississippi and New York City, then it follows that the reach of the first amendment will

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[218] According to Robert Rosenblum, a national standard was used in most lower federal courts and in half of those states which identified some geographical area in statutes. *See* Rosenblum, *The Judicial Politics of Obscenity*, 3 PEPPERDINE L. REV. 1, 12–19 (1975). *But see* Schagrue & Zeig, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157, 167–69 (1974) (some courts applied standards other than national standard for obscenity prior to *Miller* decision).

[219] *Miller*, 413 U.S. at 30–31; Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (implying that state community standards are also "hypothetical" and stating that juries need not be instructed to apply standards of any particular community); *cf.* Hamling v. United States, 418 U.S. 87, 105 (1973) (national community standard is not required in cases involving federal obscenity statutes).

[220] 413 U.S. at 32.

[221] The majority seems to assume that jurors are either representative of their community or have some knowledge of community values. With respect to representatives, empirical studies have consistently demonstrated that juries seldom reflect a cross-section of any community. *See* Alker, *Jury Selection as a Biased Social Process*, 14 LAW & SOC'Y REV. 9 (1976). On the subject of ascertaining community standards, satirist Russell Baker has said it best:

> Community standards of obscenity . . . are most nearly expressed by what television audiences will still sit for. This is because the community does not go to movies anymore, nor read books. The people at the movies and those with books in their laps are not the community. They are oddballs. The community is watching television.

N.Y. Times, Nov. 25, 1973, § 6 (Magazine), at 6; *cf.* Comment, *supra* note 217, at 360 (arguing that state and local standards are not ascertainable). *See generally* Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 HARV. L. REV. 1838, 1843 n.39 (1975) (providing list of some of "contemporary community standards" utilized by various courts); *see also* Leventhal, *The 1973 Round of Obscenity—Pornography Decisions*, 59 A.B.A.J. 1261, 1263 (1973) (posing question of whether "a college bookstore is to be governed by the standards of the college community or of the town or county in which the college is located").

[222] In his State of the Union message before Congress, President Nixon characterized the "New Federalism" as a return to a "grass-roots" type of government, whereby power from Washington was to be given back to state and local government. N.Y. Times, Jan. 23, 1970, at 22, Col. 2.

be greater in the latter than in the former. What may be declared obscene in Mississippi and beyond the reach of the first amendment may be found non-obscene and constitutionally protected in New York City.[223] Given the number of states and local communities in the nation, it strains credibility to think that the adoption of a provincial approach to community standards is likely to bring greater certainty to the law on obscenity.

While *Miller* presented the new obscenity test, the decision in *Paris Adult Theatre I v. Slaton*[224] provided the rationale for the Court's new restrictive policy. Writing for the same five justice majority, the Chief Justice "categorically" rejected the view that material could acquire constitutional protection by limiting the intended audience to consenting adults.[225] By so doing, the justices refused to accept the limited state interest theory articulated by Justice Marshall in the *Stanley* case.[226] Quoting freely from the early opinions of Justice Brennan and Chief Justice Warren, the majority maintained that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerby."[227]

One such "interest" or policy objective identified by the justices was "the social interest in order and morality."[228] Obscene expression may be regulated, explained the Chief Justice, because it is a

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[223] *See, e.g., Roth*, 354 U.S. at 503–08 (Harlan, J., concurring in part and dissenting in part) (arguing against uniform regulation of obscenity for all states); United States v. Various Articles of Obscene Merchandise, 433 F. Supp. 1132, 1136 (S.D.N.Y. 1976), *rev'd on other grounds*, 562 F.2d 185 (2d Cir. 1977) (national community standard may not be applied, even if federal statute is involved); *Jacobellis*, 378 U.S. at 200–01 (Warren, C.J., dissenting) (national community standard is not attainable).

[224] 413 U.S. 49 (1973).

[225] *Id.* at 57. In *Slaton*, the petitioners were the owners and managers of adult movie theatres who sought affirmatively to limit their audiences to consenting adults. The posted signs saying "Atlanta's Finest Mature Feature Films," "Adult Theatre—You must be 21 and able to prove it," and "If viewing the nude body offends you, Please Do Not Enter." The trial court held that the consenting adults only policy was permitted under the Court's policy in *Stanley*. Relying on *Reidel*, the Supreme Court reversed, saying that the films in question constituted hard-core pornography which was not protected by the Constitution. *Id.* at 52–53.

[226] In *Stanley*, Justice Marshall said that a state may regulate obscenity in the interest of protecting minors and unwilling adults from having to confront it, but that it may not ban obscene material solely on the ground that it might lead to antisocial conduct. 394 U.S. at 567.

[227] 413 U.S. at 57–58. For a general overview of the legislative purposes for obscenity regulation, see Comment, 49 WASH. L. REV. 89, 118 (1973). *But see* Comment, *supra* note 217, at 36 (reviewing arguments against obscenity regulation which were put forth in *Miller* dissenting opinions).

[228] 413 U.S. at 61 (quoting *Roth*, 354 U.S. at 485).

form of "moral pollution" which undermines the good health of the society as a whole.[229]

However, the governmental interest in controlling the commercial distribution of obscenity encompasses more than the promotion of what has been called the "public morality."[230] In language strikingly similar to that used by Lord Justice Cockburn in the nineteenth century *Hicklin* case, Chief Justice Burger argued that government has a legitimate interest not only in protecting the collective community but also in protecting individuals from the consequences of their own free will. In his view, the state may act "to protect the weak, the uninformed, the unsuspecting, and the gullible fom the exercise of their own volition."[231] In addition to having a "corrupting and debasing" effect on an individual's personality, the Chief Justice maintained that government may act on the assumption that exposure to "obscene" materials may have a "tendency" to produce antisocial behavior.[232]

The resurrection of the "bad tendency" test represented the response of the Burger Court to the empirical studies conducted by the President's Commission on Obscenity and Pornography.[233] One of the specific objectives of this advisory body, created by Congress during the Johnson Administration, was "to study the effect of obscenity and pornography upon the public . . . and its relationship to crime and other anti-social behavior."[234] The findings of the Commission, however, were markedly at variance with the Court's stated view. Relying on both survey research and aggregate data,[235] the Commis-

[229] 413 U.S. at 62–64. This argument was made by former Chief Justice Warren in *Jacobellis*, where he maintained that it was an obligation of government "to maintain a decent Society." 378 U.S. at 199 (Warren, C.J., dissenting).

[230] *See* H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969); Kristol, *Pornography, Obscenity and the Case for Censorship*, N.Y. Times, Mar. 28, 1971, § 6 (Magazine), at 25-26, 112-16. For a systematic treatment of the effects of obscenity on political authority, see Paletz & Harris, *Four Letter Threats to Authority*, 37 J. POL. 955–79 (1975).

[231] 413 U.S. at 64.

[232] *Id.* at 61–64. The "bad tendency" test was used in the 1920's to punish subversive activities. It was a restrictive variation on the "clear and present danger" test which required proof of causality between speech and illegal action. Under the "bad tendency" test, however, expression could be regulated without a demonstration of causality. Gitlow v. New York, 268 U.S. 652, 667 (1924). In *Paris*, Chief Justice Burger remarked that, even absent "conclusive proof of a connection between antisocial behavior and obscene material" legislatures may formulate rational policies based on "various unprovable assumptions." 413 U.S. at 60–61.

[233] For a summary of a number of these empirical studies, see 29 J. SOC. ISSUES 1 (1973).

[234] THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 1 (1970).

[235] The Commission used the following procedures in studying the effects of sexual material: "(1) surveys employing national probability samples of adults and minors; (2) 'quasi-experimental' studies of selected population groupings; (3) controlled experimental studies; (4) studies of rates and incidence of various sex offenses and illegitimacy at the national level." THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 23 (1970).

sion had concluded that exposure to obscene material had no adverse effect upon the sexual behavior or attitudes of individuals toward morality, and furthermore, did not lead to antisocial behavior.[236] With respect to individual attitudes, for example, the Commission made the following determinations: "Exposure to erotic stimuli appears to have little or no effect upon already established attitudinal commitments regarding either sexuality or sexual morality. . . . The overall picture is almost completely a tableau of no significant change."[237]

A similar conclusion was reached about the causal relationship which the Burger Court seemed to assume existed between exposure to obscene stimuli and criminal or antisocial behavior. According to the Commission: "Research to date thus provides no substantial basis for the belief that erotic materials constitute a primary or significant cause of the development of character deficits or that they operate as a significant determinative factor in causing crime and delinquency."[238]

Yet, the Commission had been careful not to overstate this position. It recognized the difficulty in applying conclusions based on aggregate data to the behavior of specific individuals. Thus, while it could state with some certainty that there was no conclusive relationship between exposure to erotic material and antisocial behavior, the Commission had to concede that "it is obviously not possible, and never would be possible, to state that never on any occasion, under any conditions, did any erotic material ever contribute in any way to the likelihood of any individual committing a sex crime."[239]

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[236] *Id.* at 139.

> If a case is to be made against 'pornography' in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults.

Id. But see id. at 383–424 (Hill-Link Minority Report). *See also* Comment, *Community Standards and the Regulation of Obscenity*, 24 DEPAUL L. REV. 185, 187 n.10 (1974) (Commission reached "anticipated 'liberal' conclusion").

[237] THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 26 (1970).

[238] *Id.* at 243.

[239] *Id.* The limitations of social science and the Commission's methodology are discussed in Clor, *Science, Eros and the Law: A Critique of the Obscenity Commission Report*, 10 DUQ. L. REV. 63 (1971); Lockhart, *The Findings and Recommendations of the Commission on Obscenity and Pornography: Case Study in the Role of Social Science in Formulating Public Policy*, 24 OKLA. L. REV. 209 (1971); Wilson, *Violence, Pornography, and Social Science*, 22 PUB. INTEREST 45 (1971). A defense of the Commission's methodology may be found in Johnson, *The Pornography Report: Epistemology, Methodology and Ideology*, 10 DUQ. L. REV. 190 (1971).

While the five justice majority rejected the major conclusion and findings of the Commission, it did embrace the disclaimer quoted above along with the Commission's minority report.[240] Citing the minority report, favorable to the censorship of sexually oriented material,[241] the Chief Justice maintained that it was constitutionally permissible for the states to base anti-obscenity policies on unprovable assumptions.[242] Ignoring the findings of some social scientists, Chief Justice Burger argued that lawmakers could base public policy on the "morally neutral judgment" that the commercial exhibition of obscene material might have "a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'"[243]

The five justice majority also legitimized the use of unprovable assumptions by the Congress. In *United States v. Orito*,[244] for example, the Court dismissed a claim of "privacy" and upheld the congressional use of the commerce clause to prohibit the transportation of "obscene" material in non-public carriers.[245] Citing both *Reidel* and *Thirty-Seven Photographs*, the Chief Justice reiterated his view that the right to possess "obscene" material in the privacy of the home did not include a correlative right to transport or receive such material.[246] Nor does the claim of "privacy" extend to the importation of sexually oriented material for purely personal use within the home.[247] In the Court's view, to permit an individual personally to bring "obscene" material into the United States from a foreign country would be similar to allowing the importation of narcotics for personal consumption. According to Chief Justice Burger, the national government has a legitimate interest in prohibiting the use of both

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[240] 413 U.S. at 58; *see* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 383–424 (Hill-Link Minority Report).

[241] Cited are the writings of Alexander Bickel, Walter Berns, and Ernest van der Haag. 413 U.S. at 59 & n.2.

[242] *Id.* at 60–63.

[243] *Id.* at 69.

[244] 413 U.S. 139 (1973).

[245] *Id.* at 142–43.

[246] *Id.* at 141–42; *see* United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting); Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 911 (1974) (*Orito* Court, in effect, overruled *Stanley*); *cf.* Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 71 (1974) (*Stanley* was limited to its facts by *Slaton*).

[247] *See* 413 U.S. at 141–43; United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 128 (1972).

interstate and foreign commerce for the transportation of any material which might "harm" juveniles and the general public.[248]

Finally, in *Kaplan v. California*,[249] the use of unprovable assumptions was defended with respect to the suppression of a plain-covered and unillustrated book containing descriptions of explicit sexual activities.[250] The Chief Justice argued that a state could "reasonably" conclude that such material had a tendency to encourage or cause antisocial behavior and that it was not necessary to wait until the social scientists demonstrated empirically that a cause and effect relationship actually exists.[251] Moreover, in language again reminiscent of the repressive *Hicklin* case, Chief Justice Burger took judicial notice of the continuing impact of widely circulated books and maintained that the kind of material involved in this had a tendency "to reach [deprave and corrupt?] the impressionable young."[253]

Although the Chief Justice was able to marshall majority support for this new freedom restricting obscenity policy,[253] he was less successful in eliminating the internal disagreements which had dominated Warren Court decision-making in this area.[254] Justices

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[248] 413 U.S. at 57–58.

[249] 413 U.S. 115 (1973).

[250] *Id.* at 116–17, 119–21. With respect to unprovable assumptions, see note 232 *supra*. On this topic the Court observed:

> 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 deposed and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empicial data.

Paris Adult Theatre I v. Slaton, 413 U.S. at 63.

[251] 413 U.S. at 120. The Chief Justice declared in *Slaton*, that it was not up to the courts to resolve "empirical uncertainties" underlying state legislation, except where the legislation "plainly impinges upon" rights protected by the Constitution. *Id.* at 60. He concluded that the legislature could "quite reasonably determine" the existence or non-existence of adverse effects of obscene material on social relationships. *Id.* at 61. For a discussion of the role of unprovable assumptions in other areas of state and federal regulations, *see id.* at 61–63. For a review by one attorney and two behavioral scientists of the empirical evidence on the effects of psychosexual stimuli, see Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

[252] 413 U.S. 120; *cf.* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 383–412 (1970) (Hill-Link Minority Report) (indicating at least an arguable correlation between obscene material and crime).

[253] The Chief Justice was joined in the majority opinion by Justices White, Blackmun, Powell, and Rehnquist. 413 U.S. at 115.

[254] *See, e.g.*, Ginzburg v. United States, 383 U.S. at 476 (Black, J., dissenting), 493 (Harlan, J., dissenting), 497 (Stewart, J., dissenting), 482 (Douglas, J., dissenting); Mishkin v. New York, 383 U.S. at 515 (Harlan, J., concurring), 515 (Black, J., dissenting), 518 (Stewart, J., dissenting);

Douglas, Brennan, Stewart, and Marshall dissented in all five cases.[255] Yet, among the dissenters in these cases, there was movement away from the seriatim approach of past years.[256] Only two alternative approaches were advocated: the reiteration of past policy by Justice Douglas and the articulation of a new position by Justice Brennan joined by Justices Stewart and Marshall.[257]

With the departure of Hugo Black, William O. Douglas now stood alone in arguing for an "absolutist" interpretation of the first amendment. In his view, the first amendment prevented the government from making any policy regulating the tastes, beliefs, and ideas of the people:

> The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. . . . The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people.[258]

Thus, for Justice Douglas, "obscenity" was nothing more than the expression of unorthodox or offensive ideas which ought not to be a concern of any authoritative decision-making agency.

Recognizing, perhaps, the lack of support for this position, Justice Douglas offered a proposal which seemed designed to bring some certainty to the Court's "earnest and well intentioned" but doomed attempt to define obscenity.[259] His proposal involved the use of a civil proceeding to determine "obscenity" prior to any criminal action. "If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed," explained Justice Douglas, "and thereafter a

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Memoirs v. Massachusetts, 383 U.S. at 421 (Black & Stewart, JJ., concurring), 424 (Douglas, J., concurring), 441 (Clark, J., dissenting), 455 (Harlan, J., dissenting), 460 (White, J., dissenting).

[255] *See* United States v. Orito, 413 U.S. at 145 (Douglas, J., dissenting), 147 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 (Douglas, J., dissenting), 138 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting) (1973); Kaplan v. California, 413 U.S. at 122 (Douglas, J., separate opinion) (Brennan, J., joined by Stewart & Marshall, JJ., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. at 73 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting), 70 (Douglas, J., dissenting); Miller v. California, 413 U.S. at 37 (Douglas, J., dissenting), 47 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

[256] *See* note 255 *supra*.

[257] *See* note 255 *supra*.

[258] Miller v. California, 413 U.S. at 44–45 (Douglas, J., dissenting).

[259] As to the elusive nature of defining "obscenity," see Ginzburg v. United States, 383 U.S. at 476 (Black, J., dissenting).

person publishes, shows, or displays that particular book or film, then a vague law has been made specific . . . [and] would not violate the time-honored void-for-vagueness test."[260]

While there were no surprises in the Douglas position, Justice Brennan, the author of most Warren Court obscenity policy,[261] announced in *Miller* that he had made "a substantial departure"[262] from his previous viewpoints.[263] Although he continued to express the belief that there is a class of expression which is obscene and not entitled to constitutional protection, Justice Brennan maintained that it was not possible to devise a precise test or definition of obscenity.[264] According to Justice Brennan, the inability to provide a satisfactory definition has produced several undesirable consequences: (1) the failure "to provide adequate notice to persons who" create or disseminate sexually oriented materials;[265] (2) the suppression of marginal or "borderline" material which qualifies for first amendment protection;[266] and (3) institutional difficulties including both the Court's inability to end its continuing involvement with this policy problem and the difficulties encountered by legislative and judicial decision-making agencies in trying to comprehend and apply Supreme Court guidelines.[267] "I am forced to conclude" explained Justice Brennan, that the "concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice or to prevent sub-

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[260] Miller v. California, 413 U.S.at 42–43; *cf.* Ginzburg v. United States, 383 U.S. at 478 (Black, J., dissenting) (vagueness reason for opposition to *Roth* test).

[261] Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

[262] 413 U.S. at 48.

[263] *Compare* Paris Adult Theatre I v. Slaton, 413 U.S. at 84 *with* Memoirs v. Massachusetts, 383 U.S. at 414–21 *and* Roth v. United States, 354 U.S. at 479–94.

[264] Paris Adult Theatre I v. Slaton, 413 U.S. at 84.

[265] *Id.* at 86. Justice Brennan noted that the Court had repeatedly held that "the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination." *Id.* at 85–86; *see, e.g.*, Robe v. Washington, 405 U.S. 313, 316 (1972); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690–91 (1968); Winters v. New York, 333 U.S. 507, 578–80 (1948). With regard to the standard formulated in the 1966 cases, Justice Black declared: "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity.'" Ginzburg v. United States, 383 U.S. at 480–81 (Black, J., dissenting).

[266] 413 U.S. at 88–89. The first amendment, Justice Brennan observed, requires a narrow definition of obscenity in order to "minimize the interference with protected expression." *Id.* at 89. *See generally* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); Blount v. Rizzi, 400 U.S. 410 (1971); The Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Freedman v. Maryland, 380 U.S. 51 (1965); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (plurality opinion).

[267] 413 U.S. at 91.

stantial erosion of protected speech . . . and to avoid very costly institutional harms."[268] Therefore, Justice Brennan abandoned his own *Roth-Alberts* and *Memoirs* tests and rejected the new standard articulated by the Burger Court.[269] All of these tests he deemed unacceptable under the "void-for-vagueness" doctrine.[270]

What Justice Brennan did support albeit belatedly, was the limited state interest policy advanced by Justice Marshall in *Stanley*. Justice Brennan explained his conversion to the Marshall view in the following manner:

> In short, while I cannot say that the interests of the States—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults . . . . I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents.[271]

As Justice Brennan suggested, obtaining majority support for a new test did not automatically resolve what Justice Harlan once called "the intractable obscenity problem."[272] Major questions remained regarding coverage, applicability, and implementation. With respect to applying "contemporary community standards," for example, it was not clear whether the justices had completely banned the use of a "national" standard, required the use of "statewide" or "local" standards, or left the matter in the hands of the states.[273] Nor was it clear which community should be used in deciding federal obscenity cases.[274] Also left unanswered was the matter of whether judges and

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[268] *Id.* at 103.

[269] In Justice Brennan's view, the majority view was not so much a new approach as it was a "restatement" of *Roth-Alberts*: "Today a majority of the Court offers a slightly altered form of the basic *Roth* test, while leaving entirely unchanged the underlying approach." *Id.* at 83.

[270] *Id.* at 83–84.

[271] *Id.* at 112–13 (citations omitted).

[272] *See* Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704 (1968) (Harlan, J., concurring).

[273] *Compare* Jacobellis v. Ohio, 378 U.S. at 192–95 (Brennan, J., joined by Goldberg, J.) (community standard national) *with id.* at 200–01 (Warren, C.J., joined by Clark, J., dissenting) (community standard local) *and* Miller v. California, 413 U.S. at 31–34 (Burger, C.J.,) (statewide community standard).

[274] *See* Hamling v. United States, 418 U.S. 87, 105–06 (1974); Hunsaker, *supra* note 246, at 422–33.

juries should rely on their own judgments or rely on expert witnesses in determining community standards.[275] Questions remained with respect to the applicability of the *Miller* standard to cases which had begun prior to *Miller* but which were now on apeal. Finally, and perhaps most important, was the unanswered question of proper implementation. Would the new obscenity test end the Supreme Court's continual involvement with this policy problem and eliminate the distasteful task of having to make independent judgments as to whether material was or was not legally obscene?

In responding to these questions, the *Miller* majority continued to advance its policy of extreme restrictiveness with respect to the dissemination of sexually oriented material. In *Hamling v. United States*,[276] for example, the justices sought to clarify their position on contemporary community standards, the use of expert witnesses, and the applicability of the new obscenity test to cases begun prior to 1973. Speaking for the majority, Justice Rehnquist allowed that the defendants were entitled to receive any benefits afforded by the new obscenity test.[277] However, it is not made clear how the Court's freedom-restricting standard could offer protection not afforded by the more permissive *Memoirs* formula. Yet, Justice Rehnquist went through the motions of applying each of the *Miller* elements before reaching the inevitable conclusion that the material in question, a brochure advertising an illustrated version of the Presidential Report on Obscenity and Pornography, could be found obscene under both *Miller* and *Memoirs*.[278]

Even the lack of specificity in the federal obscenity statute was given judicial approval.[279] In what appeared to be a major retreat

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[275] On the subject of expert testimony, see Hunsaker, *supra* note 246, at 917; Note, *The Use of Expert Testimony in Obscenity Litigation*, 1965 WIS. L. REV. 113.

[276] 418 U.S. 87 (1974).

[277] *Id.* at 102. On this point, the Court said: "prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review." *Id.*

[278] 418 U.S. at 110–24. The *Miller* and *Memoirs* tests for obscenity, however, differed significantly. Absent pandering, *i.e.*, the commercial exploitation of erotic material solely for its prurient appeal, the "social value" criteria of *Memoirs* allowed an appellate court to legitimize the distribution of erotic material where it found a medium of social value. *See* Memoirs v. Massachusetts, 383 U.S. at 420–21. Under the *Miller* standard, the input from the appellate court on the question of obscenity was limited greatly. The *Miller* test permitted only the trier of fact to determine the presence of any social value in the material under scrutiny by application of prevailing community standards. *See* Miller v. California, 413 U.S. at 31–34.

[279] The relevant statute provides:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

from the second element of the *Miller* test, Justice Rehnquist maintained that general terminology could be construed as applying to the specific examples of "hard core" sexual conduct that were listed in the *Miller* decision but not included in the statute.[280] Thus, the majority seemed to undermine that part of the *Miller* formula which was designed to counter charges of vagueness and failure to afford fair notice.[281]

The central issue in *Hamling*, however, was whether the Constitution requires the use of "national" community standards in federal obscenity cases. Relying on Warren Court policies, the district judge had instructed the jury to use the "'community standards of the nation as a whole'" and had prohibited the introduction of defense evidence pertaining to "local" standards.[282] While Justice Rehnquist conceded that the trial judge may have erred in requiring "national" standards, he refused to accept Justice Brennan's dissenting view that the refusal to permit the introduction of the evidence on "local" standards deprived the defendants of due process of law. From the majority perspective, the trial judge committed mere "harmless" error which could not have "materially affected the deliberations of the jury."[283]

Justice Rehnquist spent considerable time trying to delineate the "contemporary community standards" policy of the *Miller* majority. He noted that the justices had not required the use of any particular geographic area for determining community standards. What *Miller* did establish, explained Justice Rehnquist, was that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination."[284] Expert testimony is not necessary; in-

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> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . .

18 U.S.C. § 1461 (1976).

[280] 418 U.S. at 114.

[281] For a proposal reducing the uncertainties in the *Miller* test while maintaining its framework, see Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 557–87 (1975).

[282] 418 U.S. at 103.

[283] *Id.* at 108.

[284] *Id.* at 104. Several of the federal courts had advocated this local community standard prior to *Hamling*. *See, e.g.*, United States v. Various Articles of Obscene Merchandise, 363 F. Supp. 165, 167 (S.D.N.Y. 1973). The First Circuit, however, has repeatedly decried the abandonment of a "national" standard at least in the context of federal prosecutions. *See, e.g.*, United States v. Palladino, 490 F.2d 499, 502–03 (1st Cir. 1974); United States v. One Reel of Film, 481 F.2d 206, 210–11 (1st Cir. 1973) (Coffin, C.J., concurring).

deed, it may be excluded.[285] Under the Court's policy, therefore, there is no uniform national standard for determining obscenity. As Justice Brennan observed in his dissent, national distributors may now have to contend with the community standards "of every hamlet into which their goods may wander."[286]

Although defendants being tried prior to *Miller* were entitled to any benefits afforded by this policy, it seemed inconceivable that the test would ever provide any real assistance. On first impression, this appeared to be exactly what happened in *Jenkins v. Georgia*,[287] where the Burger Court unanimously overturned a conviction for the exhibition of the critically acclaimed motion picture *Carnal Knowledge*.[288] Although Jenkins had originally been found guilty under a state obscenity statute that had incorporated the *Memoirs* test, the Georgia supreme court had affirmed the conviction on the basis of *Miller*, arguing that "hard-core" pornography was not protected under either *Memoirs* or *Miller*.[289] After viewing the film, the justices were forced to conclude that "the film could not, as a matter of constitutional law, be found to depict conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene."[290] Thus, on second look, it is apparent that this case did not really involve the reaping of benefits under the Court's new policy; rather, it involved a situation where both a local jury and the state's highest court were unable to isolate "hard-core" pornography through the application of either *Miller* or *Memoirs*.

Of course, the Burger Court was not about to abandon its policy because the courts of one state were unable to understand it. In language curiously similar to Justice Brennan's in *Roth*, Justice Rehnquist explained that "nudity alone is not enough to make material legally obscene."[291] More important, juries should not think that they have "unbridled discretion" in determining patent offensiveness. As a check on jury discretion, Justice Rehnquist stated that

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[285] 418 U.S. at 104; *see* Paris Adult Theatre I v. Slaton, 413 U.S. at 56. *See generally* Bates, *Pornography and the Expert Witness*, 20 CRIM. Q. 250 (1978).

[286] 418 U.S. at 144–45 (Brennan, J., dissenting). Justice Brennan's dissent was supported by Justices Marshall and Stewart. *Id.* at 141. The utilization of varied local standards, and the concomitant absence of a uniform national standard for determining obscenity, raises an acute problem in the context of federal obscenity statutes. *See, e.g.*, Smith v. United States, 431 U.S. 241 (1977).

[287] 418 U.S. 153 (1974).

[288] *Id.* at 161.

[289] 230 Ga. 726, 726–27, 199 S.E.2d 183, 184–85 (1973).

[290] 418 U.S. at 161.

[291] *Id.*

first amendment rights were to be protected by appellate review where necessary.[292]

But *Carnal Knowledge* contained more than passing nudity. Justice Rehnquist conceded that the subject matter of this film was sexual and that it contained scenes in which "ultimate sexual acts" were understood to be taking place.[293] While he declared that this film "is simply not the 'public portrayal of hard core sexual conduct for its own sake,'"[294] which was made punishable by *Miller*, there is no way that the judges in Georgia could have known that this material was not obscene under that test.[295] But one thing is clear in this case. By reversing the decision of the Georgia courts, the Burger Court provided convincing evidence that it had failed to resolve the "institutional" part of the obscenity problem: the Court had not been relieved of the time-consuming and distasteful task of making independent judgments on the question of obscenity. As Justice Brennan noted in his concurring opinion, "it is clear that as long as the *Miller* test remains in effect 'one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.'"[296]

Many of the issues touched upon in *Hamling* and *Jenkins* were raised again in several later cases. In *Marks v. United States*,[297] for example, there was unanimity that the due process clause of the fifth amendment precluded the retroactive application of *Miller* to the defendant's detriment—where the offense took place before and the trial began after this decision.[298] However, four of the justices refused to go along with the Justice Powell led majority when it remanded the case for a new trial using the *Memoirs* test and any ben-

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[292] *Id.* at 160. This check on the fact finder lessened the importance of the jury's role as it was envisaged in the *Miller* decision. *See* Schwed, Jenkins v. Georgia *and* Hamling v. United States: *Testing the* Miller *Obscenity Test*, COLUM. HUMAN RIGHTS L. REV. 349, 356 (1975).

[293] 418 U.S. at 161.

[294] *Id.*

[295] The limited importance of this decision was immediately recognized by Nathan Levin who observed that "[t]he Court did nothing in the *Carnal Knowledge* case that was remotely promising. In fact it did nothing other than give *Carnal Knowledge* a free pass, good for that film only." Levin, *What's Happening to Free Speech*, 14 THE NEW REPUBLIC 174 (July 27, Aug. 3, 1974).

[296] 418 U.S. at 164–65. Justice Brennan was again joined by Justices Marshall and Stewart, *Id.* at 164. Justice Douglas filed a separate opinion in which he repeated his basic position that "any ban on obscenity is prohibited by the First Amendment." *Id.* at 162.

[297] 430 U.S. 188 (1977).

[298] *Id.* at 191–92; *see* Bowie v. City of Columbia, 378 U.S. 347, 353–54 (1964) (due process clause prohibits *ex post facto* application of judicial interpretations).

efits afforded by *Miller*.[299] Significantly, John Paul Stevens, the newest Justice, seemed to agree with what Justices Brennan, Marshall, and Stewart had been saying since *Miller*, *i.e.*, that the Court's constitutional standard and statutes incorporating this standard are so unconstitutionally vague as to make "evenhanded enforcement of the law . . . a virtual impossibility."[300] His major theme, however, was that sexually oriented material, including "obscenity," has "value" and is entitled to constitutional protection. "However distasteful these materials are to some of us," stated Justice Stevens, "they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace."[301] Finally, Justice Stevens questioned the logic underlying the federal obscenity statute. Echoing what Justices Brennan, Marshall, and Stewart had been saying for some time, Justice Stevens said that he could not understand how an adult could be prosecuted for distributing to others material that he had a constitutional right to possess.[302]

The problem of determining community standards in federal obscenity cases was again considered in *Smith v. United States*.[303] Seeking to benefit from Iowa's policy of not proscribing the dissemination of obscenity to consenting adults,[304] the petitioner argued that he should have been tried on the basis of "statewide" standards and allowed to question members of the jury panel on *voir dire* with respect to their knowledge of community standards.[305] Speaking for the *Miller* majority, Justice Blackmun rejected these contentions and sustained the validity of the federal obscenity statute.[306]

Although the petitioner argued in *Smith* that his intrastate mailing of the magazine *Intrigue* to consenting adults should have been governed by state law and standards, the five justice majority concluded that state policies were not controlling in federal prosecutions. Specifically, the Court held that the state's statute was "not conclusive with regard to the attitudes of the local community on obscen-

[299] 403 U.S. at 197–98. Justice Brennan, joined by Justices Stewart and Marshall, dissented in part. *Id.* While Justice Stevens wrote a separate opinion to the same effect, *id.*, they all would have simply reversed the conviction instead of remanding for a new trial. *Id.*

[300] *Id.* at 198.

[301] *Id.*

[302] *Id.*; *see* Stanley v. Georgia, 394 U.S. at 564–66. Justice Stevens even questioned the judicial ability to intelligently assess the jury's determination of relevant community standards. 430 U.S. at 198.

[303] 431 U.S. 291 (1977).

[304] *See* IOWA CODE § 725 (1971). *See also id.* § 2804 (Cum. Supp. 1978) (making general distribution of obscene material illegal) (effective Jan. 1, 1978).

[305] 431 U.S. at 298.

[306] *Id.* at 309.

ity."[307] Reaffirming what had been said in *Hamling*, Justice Blackmun noted that "community standards" is a matter for jurors to decide as factfinders, based on "their own understanding of the tolerance of the average person in their community."[308]

In denying the states a major role in determining community standards in federal obscenity cases,[309] the justices effectively limited the potential impact of a permissive state obscenity policy. In *Miller* and *Slaton*, the Chief Justice had spoken approvingly of "statewide" standards and the right of the states to adopt a "laissez faire" policy.[310] But as Justice Blackmun now conceded, other than defining the geographic area from which the jury is selected and legislating juror instructions, there is little that a permissive state can do to effect community standards.[311]

Although three separate opinions were submitted to this case, only the dissent of Justice Stevens broke new ground.[312] In what amounted to a further development of his position, Justice Stevens declared that "criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection."[313] His disenchantment with criminal prosecutions was based on his view that all federal criminal statutes require the use of a uniform national standard, something which he felt was unascertainable with respect to obscenity. Needless to say, he felt that the Court's reliance on local standards only compounds the problem by substituting anarchy for uniformity.

While Justice Stevens argued that the use of local standards is inappropriate in criminal actions, he also argued that such "flexibility

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[307] *Id.* at 307.

[308] *Id.* at 305. Indeed, both patent offensiveness and prurient interest are subject to jury determination of community standards. Only the third element of the *Miller* test is not covered by such standards. Thus, permissive states might have more of an impact if they concentrated attention on the "serious" value element. *See id.*

[309] The Court noted that while states may define "substantive limitations" or examples of proscribed conduct depicted in obscene material, the standard for determining obscenity was not one capable of being "defined legislatively." *Id.* at 303.

[310] Paris Adult Theatre I v. Slaton, 413 U.S. at 64; Miller v. California, 413 U.S. at 31.

[311] Justice Blackmun concluded by noting that "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State." 431 U.S. at 307.

[312] *Id.* at 309. Justice Powell concurred and said that state laws are not controlling in federal prosecutions unless there is congressional approval. Since he could find no congressional intent to incorporate state obscenity statutes into federal law, he voted to affirm the conviction. Justice Brennan, joined by Justices Stewart and Marshall, dissented. For these justices, the federal obscenity statute remains "clearly overbroad and unconstitutional on its face." *Id.* at 311 (Brennan, J., dissenting).

[313] *Id.*

is a desirable feature of a civil rule designed to protect the individual's right to select the kind of environment in which he wants to live."[314] Under his approach, obscenity would not be treated as a separate category of expression as under *Roth* and *Miller*. However, all expression, including obscenity, might be subject to some governmental regulation if it produced a nuisance.[315] There is no absolute constitutional right, explains Justice Stevens, to broadcast from soundtrucks or to display erotic material in a residential area.[316] In the case at hand, however, Justice Stevens found no nuisance: the material was sent to a consenting adult in a plain sealed envelope that could not have offended any innocent third party in the community.[317]

In addition to expounding on the meaning of contemporary community standards, the Court was called upon to assess the degree of specificity required to satisfy the sexual conduct element of the *Miller* test.[318] It was in *Miller*, that the Chief Justice had offered a list of prohibited sexual conducts and declared that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law as written or construed."[319] Indeed, this statement had impressed some observers as providing guidance to state legislatures and "fair notice" to disseminators of sexually oriented expression.[320] In *Ward v. Illinois*,[321] however, the *Miller* majority all but abandoned its commitment to provide certainty through specificity when it upheld a conviction for the selling of sado-masochistic material under a state law

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[314] *Id.* at 317. Stevens credits former Chief Justice Warren for developing this policy. *Id.*

[315] *Id.* at 318.

[316] *Id.*

[317] *Id.* at 321. In the recently decided case of Pincus v. United States, 436 U.S. 293 (1978), Chief Justice Burger displayed a rare permissive attitude when he declared that minors should not be considered in determining whether material offends contemporary community standards. According to Chief Justice Burger, a jury might "reach a lower 'average' when children are part of the equation than they would if they restricted their consideration to the effect of allegedly obscene materials on adults." *Id.* at 297. Justice Powell was the lone dissenter.

[318] Citing *Hamling's* interpretation of the statute in question, the *Smith* Court declared that the specificity requirement enunciated in *Miller* was satisfied since "the substantive conduct encompassed by [the statute was] confined to 'the sort of "patently offensive representations of the specific 'hard-core' sexual conduct given as examples in *Miller v. California.*"'" 431 U.S. at 304.

[319] Miller v. California, 413 U.S. at 27.

[320] *See, e.g.*, Note, Miller v. California: *A Mandate for New Obscenity Legislation*, 45 MISS. L.J. 435 (1974).

[321] 431 U.S. 767 (1977).

which continued to use the *Roth* definition and *Memoirs* test for determining obscenity after the change in Supreme Court policy.[322]

Since the Illinois statute contained no listing of prohibited sexual conduct,[323] the majority was forced to look elsewhere for justifications to sustain the law against charges of vagueness, overbreadth, and noncompliance with the *Miller* specificity requirement. Much of what was said in Justice White's majority opinion, however, seemed designed to test one's credulity. In finding that the statute was in compliance with current Supreme Court policy, for example, Justice White noted that the state's highest court had judicially construed the law as incorporating the first two elements of the *Miller* test prior to Ward's appeal.[324] It did not matter that no mention was made at this time regarding Chief Justice Burger's specific examples of prohibited conduct because there was nothing to indicate that the Illinois supreme court "chose to create a fatal flaw in this statute."[325] This view, explained Justice White, was supported by a later decision in which all of the *Miller* examples were specifically incorporated into the Illinois statute.[326] Yet, even this did not resolve the problem of vagueness since "sado-masochism" was not one of the examples of sexual conduct contained on Chief Justice Burger's list.[327] Responding to this point, the Court said that the Burger list was never meant to be "exhaustive."[328] But if the list is not exhaustive, then obscenity remains an open-ended offense and the goal of specificity cannot be attained.

What is most troublesome about the majority opinion, however, is its assertion that the appellant had been given "fair notice" independently of the compliance with the *Miller* issue. Even if the Illinois statute had not been construed as incorporating *Miller*, explained Justice White, the appellant should have been aware that sadomasochistic materials had been declared obscene under the state's law "long before *Miller*" and prior to the time of his prosecution.

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[322] *Id.* at 774–75.

[323] The statute in question defines obscene as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

ILL. REV. STAT. ch. 38, § 11–20(b) (1973).

[324] 431 U.S. at 775.

[325] *Id.*

[326] *Id.*

[327] *See* Miller v. California, 413 U.S. at 25.

[328] 431 U.S. at 773. In fact, the Court relied on *Mishkin* for the proposition that the sadomasochistic material in question was not protected by the first amendment. *Id.* at 773–74.

Moreover, he should have known that similar material had been declared obscene in the *Mishkin* case.[329] What the justices seem to be saying, perhaps unintentionally, is that all material of a sado-masochistic nature should be viewed as being obscene or, at the very least, potentially obscene. This seems to come dangerously close to the premise which underlies the repressive "crime by analogy" concept.[330]

Among the dissents, the Stevens opinion is again the most important.[331] For the first time, Justice Stevens was joined by Justices Brennan, Marshall, and Stewart in calling for the de-criminalization of obscenity. As the spokesman for the new minority coalition, Justice Stevens offered the following argument and prediction:

> One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in *Miller* held out the promise of a principled effort to respond to that argument. By abandoning that effort today, the Court withdraws the cornerstone of the *Miller* structure and, undoubtedly, hastens its ultimate downfall.[332]

III. Supplementation

In addition to establishing its own standard for determining obscenity, the Burger Court has sought to further develop its anti-pornography policy by supplementing its basic definitional approach with special "contexts" which permit the regulation of sexual expression that would otherwise be entitled to first amendment protection. Such regulation had been found permissible when government sought to achieve more important policy values. Occasionally, supplemental policymaking took the form of reaffirming support for restrictive "contexts" identified by the Warren Court, *e.g.*, pandering. For the most part, however, the justices sought out new ways to prevent the dissemination of sexually oriented material. Specifically, the Court de-

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[329] *Id.* at 771; *see* Mishkin v. New York, 383 U.S. at 506–07.

[330] The concept of crime by analogy originated under the Soviet criminal code prior to its revision during Khrushchev's time. This theory made punishable, by analogy to express crimes, those political acts that were not specifically prohibited by Soviet law. W.W. KULSKI, SOVIET REGIME: COMMUNISM IN PRACTICE 158 (4th ed. 1963).

[331] *See id.* at 777. Joined by Justice Stewart but not by Justice Marshall, Justice Brennan dissented on the ground of overbroadness. *Id.* It is not yet clear whether Justice Marshall has completely abandoned the Brennan view or whether he felt that Justice Stevens' dissent was more compatible with his policy preferences in the particular case.

[332] *Id.* at 782.

cided that a state's interest in regulating intoxicating beverages and a city's interest in controlling the location of commercial property are sufficiently important to justify the placing of incidental or minor constraints on sexual material. But when less substantial policy objectives were involved or where more than an incidental burden was placed on first amendment freedom, the justices were unwilling to permit intrusions upon constitutionally protected expression.

1. *Pandering.* The Burger Court's position on pandering was set forth in *Splawn v. California.*[333] In this case, the *Miller* majority went beyond the *Ginzburg* policy by holding that a jury could find a seller of films guilty of obscenity based on the commercial exploitation of others involved in the distribution process. Writing for the Court, Justice Rehnquist declared that there was "no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene."[334] While conceding that petitioner's offense occurred prior to the inclusion of pandering into the California Penal Code, Justice Rehnquist rejected the argument that this constituted a violation of the prohibition against ex post facto laws. In the Court's view, the pandering section did not create any new substantive offense; rather, it indicated what kinds of evidence might be considered by a jury in determining obscenity.[335]

In a dissent joined by Justices Brennan, Marshall, and Stewart, Justice Stevens expressed the view that the majority opinion was inconsistent with recent decisions which had granted first amendment protection to "truthful" statements made for a commercial purpose. "Even if the social importance of the films themselves is dubious," explained Justice Stevens, "there is a definite social interest in permitting them to be accurately described. Only an accurate description can enable a potential viewer to decide whether or not he wants to see them."[336]

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[333] 431 U.S. 595 (1977).

[334] *Id.* at 598.

[335] *Id.* at 599–601.

[336] *Id.* at 603-04. Justice Stevens also argued that the Court's decision on Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976), permitted the advertising of prescription drug prices, overruled the *Ginzburg* decision. 431 U.S. at 603 n.2. Though joining the dissent, Justice Brennan did not agree with this interpretation. He said it was not necessary to go beyond the determination that there was a violation against the prohibition against *ex post facto* laws. *Id.* Justice Brennan, joined by Justices Stewart and Marshall, also dissented on the ground of overbroadness. *Id.* at 601 (Brennan, J., dissenting). Justice Stewart wrote a short dissenting statement, indicating support for the positions of both Justices Brennan and Stevens. *Id.* at 602 (Stewart, J., dissenting).

2. *Alcoholic Beverage Control.* In *California v. LaRue*,[337] a six man majority, including all four Nixon appointees, held that the twenty-first amendment[338] provided the states with sufficient authority to prohibit live sexual entertainment in establishments licensed to sell liquor by the drink.[339] Speaking for the majority, Justice Rehnquist stated that the regulation was not "irrational" and was consistent with the amendment which "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."[340] Thus, expression which could not be suppressed under the *Miller* test was now made subject to governmental regulation *via* the twenty-first amendment.

This interpretation was vigorously challenged by dissenters Brennan and Marshall. Justice Brennan argued that he could find nothing "in the language or history of the Twenty-first Amendment [which] authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."[341] Justice Marshall agreed with this analysis, observing that "the framers of the Amendment would be astonished to discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution."[342]

3. *Planning and Land Use.* In *Young v. American Mini Theatres, Inc.*,[343] another five man majority upheld the constitutionality of Detroit zoning laws which sought to prevent the deterioration of neighborhoods through limiting the concentration of "adult" motion picture theaters and other "adult" establishments, *e.g.*, bookstores, and bars. Under the ordinances, no "adult" theater could be located within 1,000 feet of any similar establishment or within 500 feet of a residential area. A theater was classified as "adult" if it regularly exhibited films which were "characterized by an emphasis" on sexual matters.[344]

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[337] 409 U.S. 109 (1972).

[338] The twenty-first amendment of the Constitution provides in part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

[339] 409 U.S. at 114–15, 118–19. In this case, Justice Stewart joined the five man *Miller* majority as well as submitting his own concurring opinion. *See id.* at 109.

[340] *Id.* at 114.

[341] *Id.* at 123 (Brennen, J., dissenting).

[342] *Id.* at 134–35 (Marshall, J., dissenting). Justice Douglas also dissented, arguing that it was premature to consider the constitutional issues. *Id.* at 122–23.

[343] 427 U.S. 50 (1976).

[344] *Id.* at 52–53, 72–73.

Representing the views of the Chief Justice and Justices Rehnquist, Powell, and White, Justice Stevens conceded that the majority was supporting a content-based classification scheme which placed limitations on material that would otherwise be granted constitutional protection. "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements," explained Justice Stevens, "is not a sufficient reason for invalidating these ordinances."[345] For the majority, "[t]he city's interest in planning and regulating the use of property for commercial purposes" was more important than any incidental restrictions placed on sexual expression.[346] Furthermore, the justices rejected the claim that the use of undefined words and phrases rendered the ordinances unconstitutionally vague under the due process clause of the fourteenth amendment.[347]

One additional question was raised in this case. The system of classifying theaters on the basis of film content had been challenged on equal protection grounds. With the defection of Justice Powell, there was no majority on this issue.[348] Speaking for the plurality, Justice Stevens maintained that there had been no denial of equal protection in that "the city's interest in the present and future character of neighborhoods adequately supports its classification of motion pictures."[349] Thus, only a plurality of the justices were willing to identify the preservation of the quality of urban life as the kind of major policy objective which would warrant the regulation of all sexual expression. Justice Powell, on the other hand, argued that the ordinance should be sustained as "an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[350]

The four dissenting justices all argued that the city's zoning power had been used to place unconstitutional restraints on freedom. Representing the dissenters, Justice Stewart argued that the majority policy represented a "drastic departure from established principles of First Amendment law" by legitimizing "a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion pictures that exhibit nonobscene but sexually oriented films."[351]

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[345] *Id.* at 62.
[346] *Id.* at 62–63.
[347] *Id.* at 58–60.
[348] *Id.* at 73.
[349] *Id.* at 72.
[350] *Id.* at 73.
[351] *Id.* at 84.

4. *Nonconsenting Adults and Juveniles.* It was not the intention of the Burger Court, however, to sanction all intrusions upon constitutionally protected sexual material. In *Erznoznik v. City of Jacksonville,*[352] for example, the Court held that a city could not constitutionally make it a "public nuisance" for a drive-in movie theater to show films containing nudity on a screen which was visible from a public street.[353] Six of the justices, including Nixon appointees Powell and Blackmun, found the ordinance invalid on its face for discriminating against motion pictures solely on the basis of content.[354] The justices rejected arguments that an ordinance which applies only to movies containing nudity could be sustained as a means of protecting citizens against unwilling exposure to potentially offensive material, promoting traffic safety, or protecting the morals of minors. "Where First Amendment freedoms are at stake," declared Justice Powell for the majority, "we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here."[355]

The three dissenters took issue with the majority for its lack of deference to state regulatory policies. In an opinion that was joined by Justice Rehnquist, the Chief Justice argued that state government has a legitimate interest in regulating nudity and that it was "not unreasonable for lawmakers to believe that public nudity on a giant screen . . . may have a tendency to divert attention from their task and cause accidents."[356] Justice White thought that the issue was not traffic safety but the rights of citizens who might be offended by public displays of nudity. In his dissent, he argued that government possesses sufficient authority to protect the sensibilities of these citizens.[357]

C. *What the Justices Did: Changing Judicial Attitudes*

Thus five years after its formulation, a majority of five justices continue to provide support for a freedom restricting policy with respect to obscenity. Although it first appeared that the *Miller* majority had gained an ally with President Ford's appointment of John Paul Stevens, it appears that this justice has emerged as the leader of a

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[352] 422 U.S. 205 (1975).
[353] *Id.* at 211–12.
[354] *Id.* at 205, 211–12.
[355] *Id.* at 217–18.
[356] *Id.* at 218, 222.
[357] *Id.* at 224.

four man dissenting bloc which favors a generally permissive attitude toward the dissemination of sexually oriented material. Barring a change in judicial personnel, this five-to-four division seems likely to endure for some time, for as Justice Stevens has observed, "[t]here is no reason to believe that the majority of the Court which decided *Miller* . . . is any less adamant than the minority."[358]

The extent of the Burger Court's commitment to regulate sexual material is made evident in Table 9. While the Warren Court had supported freedom of expression against governmental restraint in more than eighty-five percent of the cases,[359] a majority of the justices on the Burger Court have favored the individual in less than forty percent of the cases.

Table 9[360]
Support of Freedom of Expression by Burger Court in Obscenity Cases by Method of Disposition

Decision	Method of Disposition		
	Formal	Per Curiam	All Cases
Favoring Individual	18.7% (3)	85.7% (6)	39.1% (9)
Against Individual	81.3% (13)	14.3% (1)	60.9% (14)
Total	100.0% (16)	100.0% (7)	100.0% (23)

Although there appears to be a significant difference in the behavior of the justices when the cases are examined by method of disposition,

[358] Liles v. Oregon, 425 U.S. 963, 963 (1976).

[359] *See* Table 4 in text *supra*.

[360] Favoring Individual—Formal Disposition: Marks v. United States, 430 U.S. 188 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 418 U.S. 153 (1974). Against Individual—Formal Disposition: Ward v. Illinois, 431 U.S. 767 (1977); Splawn v. California, 431 U.S. 595 (1977); Smith v. United States, 431 U.S. 291 (1977); Young v. American Mini Theatres Inc., 427 U.S. 50 (1976); Hamling v. United States, 418 U.S. 87 (1974); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); California v. LaRue, 409 U.S. 109 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

Favoring Individual—Per Curiam: Papish v. University of Missouri, 410 U.S. 667 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972); Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Cain v. Kentucky, 397 U.S. 319 (1970). Against Individual—Per Curiam: Gable v. Jenkins, 397 U.S. 592 (1970).

there is something misleading about the per curiam data. Only two of these cases were decided with the participation of all four Nixon appointees.[361]

Support for the regulation of sexual expression is also evident in the extremely large number of instances where the Court has refused to review convictions for obscenity. During the past four years, for example, more than two dozen requests for writs of certiorari were denied.[362] In virtually all of these cases, however, Justices Brennan, Marshall, and Stewart dissented, indicating that they would grant the request for high court review and reverse the convictions.[363]

The extent of the shift to a more restrictive obscenity policy is apparent in the voting behavior of the individual justices. As can be seen in Table 10, there is a significant difference in the support given to sexual expression by the Nixon appointed justices and the holdovers from the Warren Court period.

Table 10[364]
Support of Freedom of Expression by Burger Court Justices in Obscenity Cases

Justice	Votes for Individual	Votes for Government
Thurgood Marshall	91.3% (21)	8.7% (2)
William Brennan	87.0% (20)	13.0% (3)
Potter Stewart	82.6% (19)	17.4% (4)
John Paul Stevens	80.0% (4)	20.0% (1)
Byron White	31.8% (7)	68.2% (15)
Lewis Powell	31.2% (5)	68.7% (11)
Harry Blackmun	28.6% (6)	71.4% (15)
William Rehnquist	18.7% (3)	81.2% (13)
Warren Burger	13.0% (3)	87.0% (20)

[361] *See* Papish v. University of Missouri, 410 U.S. 667 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972).

[362] Christian v. United States, 432 U.S. 910 (1977); Harmer v. Motion Picture Film Entitled "The Devil in Miss Jones", 430 U.S. 967 (1977); Taylor v. Tennessee, 430 U.S. 965 (1977); American Theatre Corp. v. United States, 430 U.S. 938 (1977); Slepicoff v. United States, 425 U.S. 998 (1976); Matheny v. Alabama, 425 U.S. 982 (1976); Liles v.Oregon; 425 U.S. 963 (1976); Sanders v. Georgia, 424 U.S. 931 (1976); Danley v. United States, 424 U.S. 929 (1976); McKinney v. Parsons, 423 U.S. 960 (1975); Kutler v. United States, 423 U.S. 959 (1975); Sandquist v. California, 423 U.S. 900 (1975); Ratner v. United States, 423 U.S. 898 (1975);

As expected, all of the Nixon appointees, Burger, Rehnquist, Blackmun, and Powell were consistent supporters of obscenity regulation. They received considerable support from Justice White, a holdover from the Warren Court period. Justice White's position represents a complete change in attitude as he has gone from being a supporter of individual liberty in more than 80% of the cases during the Warren Court period to a defender of governmental regulation in more than two-thirds of the Burger Court cases.[365] Clearly Justice White has shifted from a generally liberal to a conservative position on obscenity. It is difficult to explain this change in voting behavior. Perhaps Justice White has been influenced by the Chief Justice[366] or one of the other Nixon appointees. [367] Or, maybe, he feels that the Nixon appointees have returned to the spirit of *Roth-Alberts*. Justice White always proclaimed support for the Court's original obscenity policy.[368] The other three holdovers from the Warren Court, namely, Justices Brennan, Stewart, and Marshall, continue their consistent support for individual freedom. They have been joined in this position by Justice Stevens. This five-to-four breakdown favoring an anti-obscenity policy contrasts sharply with the pattern which developed on the Warren Court. On that Court, as noted above, five of the justices supported individual liberty more than 90% of the time while only one justice consistently supported governmental regulation.

There can be little doubt that the Burger Court has brought a significant degree of consistency to the law of obscenity. The seriatim

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Miller v. United States, 422 U.S. 1025 (1975); Miller v. United States, 422 U.S. 1024 (1975); Womack v. United States, 422 U.S. 1022 (1975); Carter v. United States, 422 U.S. 1020 (1975); Friedman v. United States, 421 U.S.1004 (1975); Ridens v. Illinois, 421 U.S. 993 (1975); Dachesteiner v. United States, 421 U.S. 954 (1975); Dyke v. Georgia, 421 U.S. 952 (1975); Adult Book Store v. M.E. Sensenbrenner, 421 U.S. 934 (1975); Atheneum Book Store, Inc. v. City of Miami Beach, 420 U.S. 982 (1975); Herman v. Arkansas, 420 U.S. 953 (1975); Hill v. United States, 420 U.S. 952 (1975); Harlow v. City of Birmingham, 420 U.S. 950 (1975); McKinney v. City of Birmingham (I), 420 U.S. 950 (1975); McKinney v. City of Birmingham (II), 420 U.S. 950 (1975); Pierce v. Alabama, 419 U.S. 1130 (1975); Ballew v. Alabama, 419 U.S. 1130 (1975); Pryba v. United States, 419 U.S. 1127 (1975).

[363] *See* note 362 *supra*.

[364] For the case providing the basis for this table, see note 142 *supra*.

[365] *Compare* Table 5 *supra* and accompanying note *with* Table 10 *supra* and accompanying note.

[366] The role of the Chief Justice has been discussed by D. Danelski, The Influence of the Chief Justice in the Decisional Process (Paper Delivered at the 1960 Annual Meeting of the American Political Science Association).

[367] The influencing of one justice by another through persuasion, bargaining, etc., is discussed in W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

[368] *See, e.g.*, Miller v. California, 413 U.S. at 36-37; Memoirs v. Massachusetts, 383 U.S. at 460–62 (White, J., dissenting); Mishkin v. New York, 383 U.S. at 507.

approach of the past has been replaced by two competing and almost equally supported positions. Five of the Justices (Burger, Blackmun, Powell, Rehnquist, White) support the *Miller* test for determining obscenity. These justices have also been willing to permit the regulation of sexually oriented expression when more policy objectives have been involved. In addition to protecting juveniles and nonconsenting adults, these five justices believe that the maintenance of "public morality" is one such important policy goal. In later cases, support has been given to the goals of regulating intoxicating beverages and the use of property for commercial purposes. Justice Stewart joined the five man majority in the former, while Justice Blackmun defected in the latter.

Four Justices (Brennan, Marshall, Stewart, Stevens) have supported an alternative view. They have argued that the crime of obscenity cannot be defined with any precision and that statutes seeking to punish this offense are unconstitutional under the void-for-vagueness doctrine. While they all favor the speedy demise of the *Miller* policy, fundamental differences remain in their positions. Only Justice Stevens, for example, has been willing to abandon completely the logic which has traditionally placed obscenity in a separate category beyond the protection of the first amendment. With the possible exception of Justice Marshall, the holdover justices from the Warren Court period continue to premise their policy positions on the "two-tier" speech theory. This approach, however, permits little if any governmental intrusion upon expression included in the protected category. An exception to this is the protection of juveniles and nonconsenting adults. According to Justice Stevens' view, on the other hand, all expression is considered to be protected by the first amendment and subject to possible governmental regulation. He is the only dissenter who desires to treat obscenity as a "nuisance" subject to civil proceedings and to permit the regulation of sexual expression when it occurs as a consequence of a city's attempt to plan the location of commercial property through its zoning power. Finally, Justice Brennan is alone in not wanting to overturn the "pandering" policy which he formulated in the *Ginzburg* case.

SUMMARY

Despite widespread support for the protection of sexually oriented material, the justices of the Warren Court were unable to translate this policy goal into agreement upon a single standard for determining obscenity. As the author of most Warren Court decisions in this policy area, Justice William Brennan was, for more than

twelve years, unable to mobilize majority support for his policy. The Warren Court justices produced confusion instead of clarity in their decisions. The confusion was evident in numerous split decisions, the absence of a majority position in key cases, the proliferation of concurring and dissenting opinions, and the reliance on summary per curiam judgments instead of formal written opinions. This internal disagreement provided an environment which was to prove extremely conducive for changing the Supreme Court's obscenity policy.

Former President Richard M. Nixon also played a significant role in changing the Court's obscenity policy. He had promised to change the ideological orientation of the high court through his power of appointment. While his selection of four "judicial conservatives" did not have a major impact in most policy areas, it did have an important effect on obscenity. After first succeeding in halting the development of Warren Court policies, Chief Justice Burger led a five man majority in a reversal of past policy and the creation of a freedom restricting approach which was compatible with governmental attempts to control obscenity. Clearly, Mr. Nixon understood what many behaviorally oriented students of the judiciary had been arguing for some time, that personal policy preference was a major determinant of judicial behavior in controversial policy areas.[369] Nixon had chosen well, for the new majority consisted of all four of his appointees and holdover Justice Byron White. The other three Warren Court holdovers joined with Ford appointee John Paul Stevens in presenting a generally unified alternative approach on obscenity. These justices demonstrated a strong commitment to provide constitutional protection for most sexually oriented material. But this agreement has come too late, for those favoring a relaxed attitude toward obscenity no longer have the votes to implement their common policy objectives. Indeed, the Burger Court continues to be able to supplement its basic anti-pornography approach with new regulatory policies.

"So long as I am in the White House," said Richard Nixon, "there will be no relaxation of the national effort to control and eliminate smut from our national life."[370] Mr. Nixon is no longer in the White House, but his appointees remain. They are more than willing to use their power to help achieve Mr. Nixon's policy objective.

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[369] Contemporary treatments on the role of judicial attitudes in the decisional process may be found in G. SCHUBERT, THE JUDICIAL MIND REVISITED (1974). *See also* D. RHODE & H. SPAETH, SUPREME COURT DECISION MAKING (1976).

[370] Paletz & Harris, 37 J.POL. 955 (1975) (quoting Wall St. J., Nov. 9, 1970, at 14, Col. 4).