1995

Freedom of expression in the U.S. and Japan : a comparative study of the regulation of obscene materials.

Yuko Watanabe
University of Massachusetts Amherst

FREEDOM OF EXPRESSION IN THE U.S. AND JAPAN
A COMPARATIVE STUDY OF THE REGULATION OF OBSCENE MATERIALS

A Thesis Presented

by

YUKO WATANABE

Submitted to the Graduate School of the
University of Massachusetts Amherst in partial fulfillment
of the requirements for the degree of

MASTER OF ARTS

September 1995

Political Science

FREEDOM OF EXPRESSION IN THE U.S. AND JAPAN
A COMPARATIVE STUDY OF THE REGULATION OF OBSCENE MATERIALS

A Thesis Presented
by
YUKO WATANABE

Approved as to style and content by:

Sheldon Goldman, Chair

Richard Minear, Member

Eric S. Einhorn, Department Head
Department of Political Science

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

There are things hard to define, despite the fact that we usually assume that we know what they are. One simple example is "beauty." Most of us presuppose that we know what "beauty" means, and use this term in our daily life. However, it is not easy to explain its precise definition. The same thing can be said about such things as "freedom," "liberty," or "love." In a sense, it is unnecessary to define these things, since they are things to be experienced or felt rather than defined intellectually. "Obscenity" is one of the things which we usually do not bother defining. Probably, many people believe that they know what "obscenity" is. On the other hand, I suspect that no one can logically explain what "obscenity" is. As long as this term is used in the private sphere of life, such ambiguity may be permissible. Just like other intangible things, obscenity may stay as something to be perceived intuitively. However, once this term is used legally, we need to be sure about its meaning.

There are numerous books dealing with the question of obscenity. In many societies, considerable amounts of effort and resources have been invested in order to answer the questions surrounding obscenity. Yet, the obscenity issue is still very controversial in most places in the modern world. In a sense, this issue is now getting more complicated. The technological development made larger scale of mass

communications and many new styles of expression possible. Industrialization and the world-wide market economy introduced mass-production and mass-consumption. Social fragmentation has escalated because of modern individualism, liberalism, and pluralism. Artists have been getting more diverse in their tastes and themes, and more challenging to the conventional norms. Because of these factors, various new sexual representations have appeared in public spaces. As a result, to answer questions concerning sexual representations is getting harder in our contemporary society. Donald A. Downs argues that every society is inherently ambivalent about sexual freedom. Materials dealing with sexual activity are prevalent in many modern societies, just because such materials manifest "the tensions that arise between desire and social norms" (Hall, Ed., 1992, 603). Governments have struggled with the question how to deal with these materials. Downs points out that this struggle is particularly acute in a liberal democracy, because of the conflict between liberal and democratic principles (Hall, Ed., 1992, 603). In both Japan and the U.S., two liberal democracies, the regulation of obscene materials has been a source of disputes for a long time. Despite the premise that no arbitrary deprivation of certain information or denial of certain ideas is allowed under the theory of liberal democracy, the standard of regulating obscenity seems to be highly subjective and even sometimes arbitrary.

Obscenity includes offensive, indecent or pornographic material. Precise definitions of "obscene" have been notoriously vague and even

unworkable. Etymologically, "obscene" may be a modification of the Latin "*scena*," meaning literally what is off, or to one side of the stage, beyond presentation (Nead, 1992, 25). The Latin root "*obscaenus*" means "ill-omened" or "adverse" (Downs, 1989, 9). Obscenity refers to those things considered not appropriate to be shown, because of being disgusting, offensive, filthy, foul, repulsive or morally unhealthy (Downs, 1989, 9). Downs says that the word "obscenity" is originally not only for sexual representation (Downs, 1989, 9). In both the U.S. and Japan, however, obscenity law has confined the concept of the obscene to sexually explicit depictions. For example, the U.S. Supreme Court held that "depictions of violence *per se* are not obscene" (Downs, 1989, 9). Legally, the criteria for obscenity have been revised over the decades. Judicial efforts to find a definition of obscenity remain elusive in both the U.S. and Japan, and what is or is not obscene has been subjected to a continuous debate. For example, in *State v. Lerner* (1948), the Court held that "(O)bscenity is a literary work that tends to arouse impure sex ideas in minds susceptible of such ideas" (Grazia, 1969, 144). However, this is not a definition but a test. Moreover, it is not clear how such a test should be applied practically, how a court can know if a literary work in question arouses sexual ideas in the reader's mind, or how a court can decide pureness or impureness of certain ideas. Until these points are clarified, the courts can censor, suppress, and punish what they just don't like. In 1964, United States Supreme Court Justice Stewart confessed his inability to define obscenity but claimed "I know it when I see it" (*Jacobellis v. Ohio*,

378 U.S. 184, 197). Such a reliance on subjectivity is the central problem with obscenity issues. Many scholars have criticized the definitions which have been too loose and too capricious to be legally workable. As Gellhorn points out:

> Those who urge increased repression of allegedly obscene books are of course convinced that "obscenity" can be identified. In reality, however, the word does not refer to a thing so much as to a mood (Downs, Ed., 1960, 22).

In 1954, in an effort to discern what constitutes obscenity, Federal Judge Ernest Tolin consulted the settled authority of judicial utterances. He found fourteen different judicial definitions of the term. As Lockhart and McClure complained, "(N)o one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature" (Downs, Ed., 1960, 24). It is now widely recognized that "obscenity" cannot be defined so that it will mean the same thing to all people all the time, since the boundary between acceptable and unacceptable sexually explicit expressions is unclear. Schroeder argues that:

> The ethnographic facts, ... show that there is not a single element of objective nature which is a constituent factor of every conception of either modesty or obscenity. Thus, ... the only unifying element common to all conceptions of modesty or of obscenity must be subjective - must be in the mind of the contemplating person, not in the thing contemplated (Schroeder, 1911, 259).

He mentions various standards of obscenity. Here are some examples. As is widely known, Chinese women are offended if they are

compelled to expose their naked feet. Some tribes, who do not mind wearing only little clothing, believe it indecent to eat in each other's presence. Based on this belief, even family members of these tribes turn their backs toward each other while eating. There are several other tribes in which women cover only their breasts. They consider it unnecessary to cover those parts of the body which everybody has been able to see from their birth, but breasts should be covered because they come later (Schroeder, 1911, 259-60). These examples are only a part of his observation. As we can see, ten different imaginations, interpretations, and logics make ten different acts obscene or modest. Blanshard says:

> Defining the word 'obscenity' in legal terms is something like estimating the number of angels that can dance on the point of a pin. It is a matter of imagination and surmise (Downs, Ed., 1960, 185).

This is true not only when we see things in international scope but also in one nation. In 1938, there was a case involving Life magazine which featured an article entitled "The Birth of a Baby." This was an article, accompanied by stills from a motion picture of the same name, and two sets of anatomical diagrams, aimed at educating the public to the avoidable dangers of childbirth. It was dignified and scientific in writing and illustration. Still, an influential Catholic lay organization accused this article of being obscene (Ernst and Schwartz, 1964, 114). According to the assumptions and imagination of the people in the Catholic organization, probably, the article and the pictures

were intolerably shameful or lewd. D.H. Lawrence, the author of Lady Chatterley's Lover, states that "(W)hat is pornography to one man is the laughter of genius to another" (Downs, Ed., 1960, 171). The concept of obscenity keeps changing over time, too. Gellhorn contends that "obscenity" is a variable and that "(I)ts dimensions are fixed in part by the eye of the individual beholder and in part by a generalized opinion that shifts with time and place" (Downs, Ed., 1960, 22). This claim sounds correct. D.H. Lawrence mentioned the fact that Hamlet, which shocked all the Cromwellian Puritans, shocks nobody today. The opposite can also be true. This is because the human being is a constantly changing creature. As a person changes, everything must change with him or her, including the meanings of the words one uses. Lawrence argues that "things are not what they seemed, and what's what becomes what isn't, and if we think we know where we are it's only because we are so rapidly being translated to somewhere else" (Downs, Ed., 1960, 171). In the United Kingdom, the Williams Committee in 1979 presented a comment concerning the difficulty in fixing a legally workable definition of obscenity. The Committee declared that the level of offensiveness is necessarily something relative to people's conception of current reactions. Even if some definite standard is fixed, such a standard will hardly be valid, since the social reality will have changed by the time the legislation is enacted (Article 19, 1991, 414).

It is a difficult question how to develop a constitutional standard when literature dealing with sex is concerned, because

societies are afraid of the degrading effects of "obscene" materials on sexual morality. However, if there is no clear definition of "obscenity", there should not be any punishment or suppression for it. This is the rule of "due process of law." On this point, Justice Brennan said in an interview;

> I put sixteen years into that damn obscenity thing. I tried and tried, and I waffled back and forth, and I finally gave up. If you cannot define it, you cannot prosecute people for it. ... I reached the conclusion that every criminal-obscenity statute ... was necessarily unconstitutional, because it was impossible from the statute, to define obscenity (Baum, 1992, 153).

It is not very likely that we can find a solid legal basis for punishing obscenity soon. There are many issues about which all factions may never find acceptable answers. Among these issues in the United States are:

> 1) Does obscenity or pornography do anyone any harm?;
> 2) Does pornography have a deleterious effect on social morality?;
> 3) Does the First Amendment, which guarantees free speech, protect obscenity?; and
> 4) Can obscenity laws be enforced, using community standards (as proposed by the Supreme Court) or any other criteria? (Downs and McCoy, Eds., 1984, 200).

In this thesis, I would like to consider these questions surrounding the governmental regulation of obscene materials in the U.S. and Japan. In both countries, this issue has been controversial, but the ways the two countries have dealt with this issue are different.

In this introductory chapter, I first briefly examine the significance of freedom of expression for a democracy. The American and

Japanese constitutional bases for freedom of expression and its limits will be discussed. The historical development of both freedom of expression and regulation of obscenity will be traced. I perceive that the two countries' differences in dealing with problems surrounding freedom of expression are due to the differences in general social and cultural conditions, the rights consciousness of the the citizens, the status of laws and the judiciary, the value system of the society, and the perceived relationships between the courts and morality. In Chapters II and III, I will look at several landmark cases in each country. The focus of this thesis will be on literary works. In both the U.S. and Japan, the definition of obscenity has been modified and liberalized over decades, but the standard is still problematic. In Chapter II, *Roth v. U.S.* (1957), *Memoirs v. Massachusetts* (1966), *Stanley v. Georgia* (1969), and *Miller v. California* (1973) will be discussed. In Chapter III, I will address the *Lady Chatterley* case (1957), the *Marquis De Sade* case (1969), and the *Yojôhan* case (1980). Based on the two preceding chapters, in Chapter IV, I will attempt to clarify the similarities and differences between the U.S. and Japan in their approaches to obscenity cases. Here, various terms which the courts use will be examined. These terms include "community standards," "prevailing ideas of society," "prurient interest," "patently offensive," "sense of shame," and the "nonpublic nature of the sex act." Different theories of regulating obscenity will be addressed in this chapter. In Chapter V, the concluding chapter, I will examine the following questions: What is the harm caused by "obscene" materials?;

What interest is supposed to be protected by regulating "obscene" materials?; Is the danger posed by "obscene" materials sufficient to justify the use of judicial power for its regulation? I will also examine the tension between the power of government and the ideal of freedom under liberal democracy. In the discussion concerning obscenity, the judiciaries have often mentioned public morality --- especially sexual morality. However, I question whether or not a state has the legitimate power to deprive a person of liberty in order to preserve "morality," and whether it is a legitimate function of a liberal and democratic government to decide what ideas are moral or immoral, or pure or impure.

A. Freedom of Expression in a Democracy

It is my belief that freedom of expression is one of the most important elements of a democracy. A democracy is a system of participation. This ideal, however, can be realized only when everyone has the right to think, speak, and write freely, and to receive the information one needs. In a primitive society, a person might be able to maintain one's freedom even if one lacks these intellectual rights. One can secure one's freedom using physical force. In a civil society, on the other hand, it is impossible for any individual to secure one's freedom without having these intellectual rights. Freedom of information - the right to seek, receive, and impart information and ideas - is unique among all the freedoms. It is the guide, the basis,

and the determinant of all the freedoms. Without freedom of information, any other freedoms cannot be fully achieved. Also, it is a freedom very basic to the idea and practice of any democracy, and it is a very special political right, because it makes the criticism of government possible and the exchange of ideas possible, without which there can be no real democracy. It means that the deprivation or violation of these basic freedoms by the state is a threat to democracy itself. Moreover, a democracy is a system whose core is tolerance of diversity among individuals. Under this system, states should not subjectively deny or promote particular values. In other words, debate and competition among conflicting views are regarded as positive and essential. This is another reason why those intellectual freedoms are crucially important.

B. Constitutional Basis for Freedom of Expression and Limits on It

In the U.S., freedom of speech and of the press are protected by the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

In Japan, freedom of speech, press, and all other forms of expression are guaranteed by Article 21 of the Constitution which reads:

> Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed; 2. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Both provisions read as if freedom of expression in these two countries were absolute. However, freedom of expression, like other freedoms, is not unconditionally unlimited. For example, maintenance of public order, state security, public health, and public morals can impose limits on the exercise of freedom. The crucial point concerning restriction of freedom of expression is how to strike a balance between freedom and these other interests. As Robert Emmet Long points out, "(T)here are gray areas involving the nation's moral well-being that are debatable" (Long, 1990, 44). On morality and individual rights in the U.S., Richard Stengel points out that there has been a tension "between the pursuit of individual liberty and the quest for Puritan righteousness, between Benjamin Franklin's open road of individualism and Jonathan Edwards' Great Awaking of moral fervor" (Long, 1990, 46). There are many unanswered questions concerning this balance:

> What is the role of the state in enforcing the morality of its citizenry? How far should government go in regulating private conduct? Is morality a question of individual rights? Or should the state play an active role in nurturing values deemed worthy by the community? (Long, 1990, 46).

The proliferation of obscenity and pornography has long been controversial, because regulation of obscenity embraces the questions concerning this balance between the pursuit of individual liberty and maintenance of morality.

C. Freedom of Expression and Regulation of Obscenity in Japan

Despite the fact that post-war Japan adopted a Constitution which was based on the American idea of democracy, and that the constitutional presuppositions with respect to the individual's rights are the same in the two countries, people's perceptions of freedom of expression appear to be different in these two societies. I believe that the function of freedom of expression is determined not only by law but also by society. Freedom of expression in Japan, as compared with that in the U.S., will be an interesting case study of the legal and social limits of tolerance.

The Japanese Constitution of 1949 guarantees freedom of expression, but over the years the courts have endorsed limitations in cases where free expression has come into conflict with the government. Although Article 21 of the Constitution states that no censorship shall be maintained, the Supreme Court approved censorship of materials imported into Japan and a comprehensive system for the censorship of school textbooks by the Ministry of Education (Article 19, 1991, 178). In fact, freedom of expression in Japan has been restricted by both formal and informal means. For example, there exist such taboos as criticism of the Emperor and royal family and of the relationship between organized crime, the police and politicians. Criticism of the U.S. military has been a taboo, also (Article 19, 1991, 178-9). As Article 19 pointed out, there is no press law in Japan. Instead, the media is largely self-regulating:

> There is widespread self-censorship due to a variety of informal pressures: the traditions of the Japanese people; influence exerted by owners, advertisers and government officials; and occasional violence against journalists and others targeted by extreme political groups (Article 19, 1991, 178).

In Japan, the first state concern with allegedly immoral expression is found in an ordinance issued in 1722. The first national law aimed at regulating expression for the maintainance of public morality was the press ordinance of 1869. This ordinance was revised in 1873 and 1875. In 1875, the penalty for translating and publishing materials disturbing public order and morality was prescribed for the first time. It was Article 259 of the Criminal Code of 1880 which introduced the legal notion of "obscenity" (Shimizu, 1970, 175-178). Currently, the regulation of obscene materials is prescribed in Article 175 of the Criminal Code which was originally enacted in 1907. It reads:

> A person who distributes or sells an obscene writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment at forced labor for not more than two years or a fine of not more than 5,000 yen or a minor fine. The same applies to a person who possesses the same for the purpose of sale.

The constitutionality of Article 175 has been questioned by scholars, on grounds that it improperly punishes expression that is not clearly dangerous to society, and that it does not clearly enough distinguish between obscene and unobjectionable material (Beer, 1984, 337). In addition to this provision, there are such laws regulating obscenity as the Customs Standards Law, the Entertainment Facilities Law, the Law

Regulating Businesses Affecting Public Morals, the Radio Law, the Broadcast Law, the Prison Law, and thirty-nine local youth protection ordinances. These are supplemented by a host of self-regulatory codes administered by various industry ethics committees. In the many laws, ministry and industry standards, the stress is on the regulation of material disturbing to "good morals and manners" (Beer, 1984, 337). One of the most controversial issues is the Custom Standards Law. Despite the prohibition of censorship prescribed in Article 21 of the Constitution, Article 21 of the Custom Standards Law of 1910 legalizes a censorship function over the import of "written material and pictures harmful to public order and public morals" (Beer, 1984, 337).

In 1951, obscenity was legally defined as an expression which "wantonly stimulates or arouses sexual desire, or offends the normal sense of sexual modesty (i.e., sense of shame) of ordinary persons, and is contrary to proper ideas of sexual morality" (Maki, 1964, 7). There are three landmark obscenity cases in Japan. I will take a look at these three cases in Chapter III; the *Lady Chatterley's Lover decision* (1957), the *Marquis de Sade* decision (1969), and the *Yojôhan* decision (1980). The Japanese Supreme Court has used terms such as "sense of shame" and "the nonpublic nature of the sex act" that have never been used by the U.S. Supreme Court. In my opinion, these words reflect something very peculiar to Japanese culture. The standard of obscenity in the Japanese Supreme Court has been "the prevailing ideas of society," which is not the sum of the idea of individuals but something

the courts can determine. The Japanese Supreme Court has consistently emphasized its "clinical role" in guarding morality.

One basic difference between the U.S. Supreme Court and the Japanese Supreme Court is the fact that the Japanese Supreme Court had no role in creating the concept of freedom, establishing the basic rules governing the relation between the state and the people, or in defining the nature of specific freedoms (Maki, 1964, 41 in Introduction). This is because the American occupation authority reformed the Japanese judicial and legal system comprehensively after World War II, and because Japan imported the concept of democratic freedom from the U.S. Maki argues that the role of the Japanese Supreme Court has been in the reconciliation of the doctrine of the public welfare with the guarantee of fundamental rights and freedoms (Maki, 1964, 41 in Introduction).

Pre-war Japan had been highly intolerant of freedom of expression, largely because of its group-oriented social norms. The Japanese have been traditionally reticent and suspicious about assertions of individual rights. Very often, assertion of individual rights can be taken negatively. Similarly, to manifest unorthodoxy or disagreement can be taken just as egocentric. Nakane Chie, in her prominent study of Japanese society, points out that a man will find himself opposed on any issue and ruled out by majority opinion, once he has been labelled as one whose opinions are contrary to those of the group (Nakane, 1970, 33-5). She also argues that an individual, however able, however strong his personality and high his status, has to compromise with his group's

decision, which then develops a life of its own (Nakane, 1970, 150). As Nakane found, Japan is a society which is heavily based on compromise, consensus, and harmony. Even after the modernization and the comprehensive constitutional and judicial reform by the occupational authority, stress on group consensus rather than on individualism has remained. Beer described democracy in Japan as "communitarian feudal democracy" (Ishida and Kraus, Eds., 1989, 85).

> Democratic notions of constitutionalism, individual rights, and freedom derived from varied Western sources also became widely known in Japan in the latter decades of the last century, but remained subordinate and suspect (Ishida and Kraus., Eds, 1989, 67).

An individualistic rights-consciousness, which is a basis for American democracy, appears to be innately incompatible with the Japanese people's manner of thinking and social norms. This tradition makes freedom of expression work differently in Japan as compared with the U.S. The "public welfare doctrine," which is intimately connected to the "communitarian" characteristic of Japanese culture, has played a very influential role in judicial decisions dealing with freedom of expression. It may be said that, because of such a doctrine, Japan is more restrictive with respect to freedom of expression.

D. Freedom of Expression and Regulation of Obscenity in the U.S.

It was only after the unlicensed publication in 1644 of John Milton's Areopagitica that freedom of information became a part of the

English tradition. The history of freedom of expression in the United States is a complex mixture of profound theoretical commitment to individual liberty and intolerance of dissent and unorthodox views (Article 19, 1991, 133). In the U.S., freedom of speech had been guaranteed by the constitutions of some of the states, and in 1791 the First Amendment to the federal Constitution was adopted. In the case, *Gitlow v. New York* (1925), the U.S. Supreme Court ruled that freedom of speech and press was part of the "liberty" that the states may not abridge. The idea implicit in the First Amendment is that of a citizenry engaging in robust political debate. However, there are laws which have restricted freedom of expression including libel, national security, and obscenity.

Traditionally, American law has used the concept of "obscenity" to draw the line between prohibited and permitted sexual representations. The first state obscenity law, proscribing the publication of "lewd or obscene" material, was enacted in Vermont in 1821; and in Massachusetts, an unofficial organization, The New England Watch and Ward Society, kept a constant lookout for possible threats to the community's welfare (MacMillan, 1983, 346). A major attempt to restrict sexually explicit materials in the U.S. arose in the mid-nineteenth century (Downs and McCoy, 1984, 229). The first reported American obscenity decision was *Commonwealth v. Holmes* in Massachusetts (Lockhart and McClure, 1960, 19). Federal concern with obscenity as distinct from state concerns, first developed as a result of the growing circulation of French postcards in the mid-nineteenth century.

The federal customs law of 1842 barred the importation of "indecent and obscene prints, paintings, lithographs, engravings and transparencies." However, the general concern with obscenity in the pre-Civil War period was low (MacMillan, 1983, 362), and the number of prosecutions before the Civil War were few (MacMillan, 1983, 347). At this time in U.S. history, obscenity was not an important issue. Basically, "obscenity" was not considered an exercise of freedom of expression (Goldman, 1991, 468). After the Civil War, the issue of obscenity started attracting people's attention. Anti-obscenity sentiment arose and was generated mainly by conservative political action groups like the New York Society for the Suppression of Vice founded by Anthony Comstock, who during the course of a forty-year campaign sought to purify American literature under the banner "MORALS, Not Art or Literature" (MacMillan, 1983, 347). For groups like the New York Society for the Suppression of Vice, the fundamental concern was the decay of morality. These groups focused on the impact of sexually explicit materials on basic societal and religious values. They urged regulation of representations of sex which "might" cause sexual arousal. Their underlying belief was that any public display of sex was harmful because it would undermine moral values and would endanger the moral climate in society resulting in the debasement of sex and marriage.

The Comstock Act (1873) prohibited the importation, carriage by mail, or interstate commerce of every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. "Many states adopted identical or similar 'little Comstock Acts' of

their own and a number of cities and towns followed suit" (Downs and McCoy, Eds., 1984, 229). Anthony Comstock succeeded in having destroyed "something over fifty tons of vile books; 28,425 pounds of stereotype plates for printing such books; 3,984,063 obscene pictures; 16,900 negatives for printing such pictures" (Charles G. Trumbull, Anthony Comstock, Fighter (1913) at 239. Quoted in MacMillan, 1983, 347). More recently, in the 1970s and 1980s, anti-obscenity groups enjoyed unprecedented growth. Among such groups are, Citizen for Decency Through Law (founded in 1957) and Morality in Media (founded in 1962).

The present criteria for obscenity are found in *Miller v. California* (1973). The *Miller* test was a product of almost two decades of the Supreme Court's concern with defining obscenity. To see the changes in the federal obscenity cases in the U.S., I will take a look at four cases in Chapter II; *Roth v. U.S.*(1957), *Memoirs v. Massachusetts* (1966), *Stanley v. Georgia* (1969), and *Miller v. California* (1973).

CHAPTER II

CASES IN THE U.S. SUPREME COURT

A. U.S. Obscenity Law Before 1957

Laws prohibiting the sale and distribution of obscene literature have existed in the United States since the early part of the nineteenth century. Until 1957, however, neither those laws nor their enforcement was taken to implicate the concerns of freedom of speech or freedom of the press. Obscenity laws were considered to be beyond the province of the First Amendment; the Supreme Court's passing statements to that effect in cases such as *Ex Parte Jackson* (1878) and *Near v. Minnesota* (1931) were merely restatements of settled understandings (Hall, Ed., 1992, 745). Before *Roth*, the criteria for obscenity were based on the test presented in *Regina v. Hicklin* (1868), whose measure were on the impact of isolated passages on the susceptible. In *United States v. Kennerley* (1913), Judge Learned Hand, in his dissenting dictum, argued that "(T)o put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy" (Lockhart and McClure, 1960, 7). In *Chaplinsky v. New Hampshire* (1942), the Supreme Court held that obscenity is outside the constitutional protection, because "such utterances are no essential part of any exposition of ideas" (Lockhart and McClure, 1960, 9). In *Butler v.*

Michigan (1956), the Court held a Michigan statute unconstitutional, which made it a crime to "publish materials tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth..." (Lockhart and McClure, 1960, 5). This last decision indicated the possibility of the departure from the Hicklin test.

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

1. Facts

Roth v. U.S. was a prosecution under the federal anti-obscenity statute, Title 18 Section 1461, making it a crime to distribute obscene matter through the mails. The appellant, Samuel Roth, was a New York writer and publisher who had been prosecuted in the 1930's for selling James Joyce's Ulysses, Arthur Schnitzler's Reigen, and Sir Richard Burton's translation of The Perfumed Garden. He had himself written books and articles on travel, religion, and mysticism, and edited Voltaire's Philosophical Dictionary.

In 1955, the Federal Government indicted him for distributing some less illustrious titles - Photo and Body, Good Times, and American Aphrodite Number Thirteen. In the Second Circuit Court of Appeals, his conviction was upheld. Roth appealed to the Supreme Court, which granted certiorari but limited the question on appeal to whether the Federal Government could under any circumstances punish the publisher

or seller of obscenity. The core issue at the Supreme Court was not the specific book that Roth himself had sold, but whether or not the Federal Government could legitimately proscribe the most obscene materials imaginable.

To aid the Court on the last point, the Government submitted to the Justices sealed exhibits (which Roth's lawyer never saw) consisting of the most offensive pictures and publications previously seized and condemned by the authorites. The use of sealed exhibits in this way was unprecedented and probably had a substantial effect on the outcome of the case. Thus, Roth's lawyers had three serious burdens in the oral argument:

> (1) they were fighting against a legal rule that had been firmly established in almost every society from time immemorial;
> (2) they were arguing an abstract question of law with no specific book or publication to put the problem in a practical context; and
> (3) they did not know what horrible examples confronted the Justices as they considered the problem (Friedman, Ed., 1970, 10).

The lawyers therefore chose a compromise strategy which would allow some government control of obscenity. They argued that individual states could punish such publications, but the Federal Government could not. The First Amendment spoke only to the Federal Government, not the states, and the broad protection of free speech enunciated there must be literally interpreted (Friedman, Ed., 1970, 9-10).

The primary constitutional question in Roth was "whether the federal obscenity statute violates the provision of the First Amendment." The federal obscenity statute provided that:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; 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, ... whether sealed or unsealed ...; is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both (Grazia, 1969, 290).

There were other questions. One was whether or not this obscenity statute violates "due process of law". Under the rule of "due process of law," there must be a clear ground for convicting a crime. In this sense, the clarity of the obscenity law was questionable. Another question was whether the States solely have the jurisdiction over punishing speech and press offensive to decency and morality.

2. Decision: The judgments were affirmed

The decision, which was given on June 24, 1957, joined two cases: *Roth* and another case, *Alberts v. California*, a state prosecution for selling obscene publications. In *Alberts*, the primary question was "whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment." The Supreme Court held that the unconditional

phrasing of the First Amendment was not intended to protect every utterance. Citing *Beauharnais v. Illinois* (1952), the majority opinion of the Court argued that obscenity is not within the area of constitutionally protected speech.

3. Discussion

Albrecht, the lawyer on behalf of the appellant, argued that putting limitations on what can be sent by mail is the function not of the Federal Government but of the states. The reason for this is that this is an exercise of state police powers. Further, he posed a question whether a federal criminal statute can punish speech as speech, even though that speech has no connection with any action of Congress over which the Federal Government has power or control. His argument contended that the federal obscenity statute encroaches upon the powers to punish speech and press which are reserved to the States by the Ninth and Tenth Amendments was rejected, since obscenity was held by the majority not to be expression protected by the First Amendment.

In *Roth*, the U.S. Supreme Court held that obscenity is not expression protected by the First Amendment. The Court argued that obscenity was outside the protection of speech and press intended by the First Amendment. It declared that there are two classes of speech; one class is under the protection of the First Amendment, and the other

is not. According to the history of the First Amendment, the Court claimed, obscenity belongs to the latter.

> All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956 (354 U.S. 476, 484-485).

According to the Court's opinion, the protection by the First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (354 U.S. 476, 484).

Justice Brennan's majority opinion based its conclusion not only on history and precedent but also on the view that, although the First Amendment protects all ideas with even the slightest social importance no matter how hateful they may be, it does not even cover obscenity because obscenity is by definition "utterly without redeeming social importance." By holding that obscenity was to be treated as constitutionally equivalent to conduct rather than speech, the Court allowed obscenity regulation to proceed without the necessity of the kind of showing of particular harm normally required for restrictions on the kinds of speech covered by the First Amendment. Consequently, although there have long been debates on the effect of sexually

explicit material on human conduct, the doctrinal exclusion of obscenity from First Amendment coverage made it unnecessary for the Court then (or since) to look at these debates critically (Hall, 1992, 746). Justice Harlan, dissenting in *Roth*, questioned the majority's phrasing "redeeming social importance." He pointed out that the Court did not indicate the breadth of this term. He asked whether this category was meant to include entertainment or artistic works which have little relationship to political or social change (354 U.S. 476, 496-508).

The Supreme Court held that obscenity was simply not speech and therefore could be prohibited. But, the practical problems are how to define obscenity and how to separate it from protected speech. The early leading standard of obscenity allowed material to be judged merely by the depraving and corrupting effect of an isolated excerpt upon a particularly susceptible audience. This obscenity test was called the *Hicklin* test, taken from the English case *Regina v. Hicklin* (1868). Some American courts adopted this standard, but later decisions have rejected it and substituted this test; whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately dealing with sex, and so it must be rejected as unconstitutionally restrictive of the freedom of speech and press. In the *Roth* decision, the Court ruled that this traditional test would no

longer be appropriate. The Court held that a work was obscene only if "taken as a whole" it appealed to the "prurient interest" of "the average person." In Chapter IV, I will examine the key terms employed by the Supreme Court in its definition of obscenity.

Even though all of these terms embrace enormous definitional problems, the substitution of "taken as a whole" for the selected-excerpts approach and the substitution of "the average person" for the most susceptible segment of audience (usually taken to be children) were designed to, and did in fact, remove from the threat of the obscenity laws most works, even those dealing quite explicitly with sex, whose goal was to convey ideas rather than sexual stimulation (Hall, Ed., 1992, 746).

Jutices Douglas and Black dissented. They believed that neither the state government nor the Federal Government could punish the sale or publication of obscene materials. They argued that:

> The test by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways... To allow the State to step in an punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment (354 U.S. 476, 509).

Justices Douglas and Black took a position of protecting society's interest in literature, because they believed that the effect of obscene literature on human conduct should be proven before regulating expression.

It was argued that the statutes in these two cases did not provide reasonably ascertainable standards of guilt and therefore violated the constitutional requirement of due process. The Supreme Court, however, held that the lack of precision was not crucially offensive to the requirement of due process. As long as the statutes were applied in accordance with the proper standard for judging obscenity, they did not offend constitutional safeguards against convictions based upon protected material.

Roth remains important both for having established the doctrinal foundations for the exclusion of obscenity from the coverage of the First Amendment and for providing the constitutional basis for the conclusion that the definition of obscenity must be established primarily on a First Amendment basis rather than that of the common law (Hall, Ed., 1992, 746). When *Roth* was decided, the proponents of free expression regarded this decision as negative. However, in the long run, the fact that *Roth* marked a clear departure from the old *Hicklin* test meant a lot. This decision provided a cue to renew traditional American obscenity law. *Roth* left several issues unresolved. It did not clarify what community was to be the basis for contemporary standards. Another issue was the possible tension between "redeeming social importance" and appeal to "prurient interest." Whether materials must evoke perversion, morbidity, or just a normal sexual desire to qualify as obscene was not made clear (Sunderland, 1974, 51). As Sunderland points out, *Roth* can be read as narrowing "obscenity" to a very limited

group of materials. On the other hand, another reading might indicate a much more inclusive category (Sunderland, 1974, 51).

C. *A book named "John Cleland's Memoirs of a Woman of Pleasure," G.P. Putnam's Sons (Intervenor) v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966)

1. Facts

John Cleland's Memoirs of a Woman of Pleasure (otherwise known as Fanny Hill) was written and first distributed in England around 1750. An American edition was published in 1963, and many states immediately brought obscenity charges against the book. New York State cleared the work, but both the Massachusetts Superior Court and the Massachusetts Supreme Judicial Court found it obscene. By a four-to-five vote, the Massachusetts Supreme Judicial Court held that this book was not entitled to constitutional protection. Overwhelming evidence of its literary worth was introduced in the case, and attorney Charles Rembar, in defending the book, used this testimony to great advantage in oral argument (Friedman, 1974, 244).

2. Decision: The judgments were reversed

On March 21, 1966 the Supreme Court decided *Memoirs*. On the same day, the Court handed down the decision in *Ginzburg* (383 U.S. 463) and *Mishkin* (383 U.S. 502). The judgment legalized Memoirs by a six-to-

three vote. Justice Brennan announced the judgment of the Court in which the specific elements of the obscenity test, which the Court set in *Roth v. U.S.*, were re-formulated. Justices Warren and Fortas joined Justice Brennan. Justice Douglas and Black concurred in the result the Court reached, and reaffirmed their position that the First Amendment forbids all limits on speech and press. Justice Stewart concurred in that he was against suppression in all three cases, but he argued that only hard-core pornography may be suppressed. Justice Harlan again argued that the First Amendment does not restrict the states the same way it restricts the national government.

3. Discussion

Before the state court, the sole question was whether Memoirs satisfied the test of obscenity established in *Roth v. United States*. The U.S. Supreme Court, in deciding *Memoirs*, invoked the definition of obscenity presented in *Roth:* "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Based on the *Roth* test, the Supreme Court argued that the following three elements must coalesce: it must be established that

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

The point the Supreme Court focused on was the third criterion, that is the "redeeming social value" test. After hearing various critics testified, the majority opinion of the U.S. Supreme Court held that the decision by the Massachusetts Supreme Judicial Court was wrong. The Massachusetts Supreme Court held the book obscene on the ground that it satisfied the "prurient interest test" and the "patent offensiveness test." The U.S. Supreme Court, on the other hand, argued that a book must meet all of the three tests - including the "redeeming social value" test - before it is proscribed. Charles Rembar points out that the Brennan opinion in *Memoirs* made law of the value theory. The majority opinion of the U.S. Supreme Court argued that the Massachusetts majority was wrong when it held that a book did not have to be unqualifiedly worthless in order to be suppressed. According to the Brennan opinion, a book could not be suppressed if it had any worth, even if the book is prurient and patently offensive. Charles Rembar, in arguing the publisher of Memoirs's case before the Supreme Court, had urged that if qualified critial opinion held that a book had literary value, it could not be considered legally obscene according to the *Roth* decision (Lewis, 1976, 219). Justice Harlan argued that:

> To establish social value in the present case, a number of acknowledged experts in the field of literature testified that Fanny Hill held a respectable place in serious writing, and unless such largely uncontradicted testimony is accepted as decisive it is very hard to see that the "utterly without redeeming social value" test has any meaning at all (383 U.S. 413, 459).

Justice Douglas also stated that:

> If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of Massachusetts Supreme Court (383 U.S. 413, 427).

Lewis points out that the opinion of critics had sometimes been held to be admissible in a court hearing, sometimes not, earlier in the century:

> Even when judges permitted critical reviews or testimony to be introduced, they generally indicated that such opinions were considered as limited "aids to the court" (Lewis, 1976, 219).

He says that as the result of a long series of events that culminated in the *Roth* decision and its subsequent interpretation, the opinions of literary authorities indirectly became, for a time at least, the decisive factor in an obscenity case (Lewis, 1976, 219).

Charles Rembar argued that the meaning of the *Memoirs* case was that the decision made writers and their works safe, as long as the works were something not "utterly without" merit. He claims that "assuming he can produce something" with merit is "equivalent to assuming that he is a writer at all." If he has some talent, and if he is making any effort to use that talent - whatever springs and urges may have put him (or John Cleland) to work - the law will never bother him... So far as writers are concerned, there is no longer a law of obscenity (Rembar, 1968, 490). This is why Charles Rembar gave the title The End of Obscenity to his book.

Although no more than three Justices agreed the social-value test, it was soon accepted as the official criterion of obscenity (Lewis, 1976, 218).

Justice White disagreed the view that the redeeming social importance criterion was a separate test for obscenity. He argued that:

> To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case - that such material is not protected *because* it is inherently and utterly without social value (383 U.S. 413, 461).

He thought the prevailing opinion in *Memoirs* to be contrary to the *Roth* decision that the character of a book is dependent on its predominant theme and not on the existence of minor themes of a different nature. Justice Clark presented his concern with the increasing flow of pornographic materials, and said that "(T)his book is too much even for me... There can be no doubt that the whole purpose of the book is to arouse the prurient interest" (383 U.S. 413, 441-446). Some of the expert opinions referred to in Justice Clark's dissenting opinion indicate that several such criteria were instrumental in establishing the "social importance" of Memoirs (Sunderland, 1974, 56). Lewis points out that a contention of Judge Spalding of the Massachusetts Supreme Judicial Court cannot be denied:

> The book is composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration (Lewis, 1976, 222).

Lewis claims that the plot seems an incidental dramatic frame whose chief purpose is to support the erotic episodes, even though literary critics testified that the novel does have structure, sharp characterization, humor, linguistic vigor and style, and some value as a historical record of its period (Lewis, 1976, 222). Sunderland points out that the Brennan, Fortas, and Warren opinion in *Memoirs* enunciated a test almost diametrically opposed to *Hicklin*:

> In sum, their minority test is this: if an isolated passage of the material advocates ideas or has literary, scientific, or artistic value or any other form of importance, then the material is not "utterly without social value," and therefore is protected (Sunderland, 1974, 56-7).

Indeed, under the *Memoirs* test, as long as the work has a minimal social value, it is protected no matter how "offensive" or how much the material appeals to "prurient interests." As a result, the materials which are constitutionally obscene are significantly limited. This point is the target which was attacked in *Miller v. California* (1973).

Justice Stewart presented his idea of limiting suppression to hard-core pornography. His opinion described hard-core pornography as a class of material in which all of the elements being prurient interest, patent offensiveness and utter absence of social importance (383 U.S. 463, 499). Charles Rembar described this idea as "an amalgam of all three tests" (Rembar, 1968, 480). According to this position, the presence of value would assure First Amendment protection. Justice Harlan also argued that he would limit suppression of anti-obscenity

efforts to hard-core pornography, but he limited this argument to the cases in which the federal government is concerned (383 U.S. 413, 455-460).

The Court's approach in *Memoirs v. Massachusetts* was much more permissive than in the past cases. However, on the same day as this decision was given, the Supreme Court decided *Ginzburg v. United States*, and stated that the methods of advertising and selling the material would be a determinant of judging the presence or absence of legal obcenity. This theory of pandering will be addressed in Chapter IV. In sum, in *Memoirs*, the focus was shifted from prurience to the presence or absence of minimal social value. The criteria set in the *Memoirs* remained in effect until 1973 when *Miller v. California* was decided.

D. *Stanley v. Georgia*, 394 U.S. 557 (1969)

This is one of the last decisions of the Warren Court, and the Court for the first time gave obscenity some constitutional protection (Goldman, 1991, 468). In this case, the problem of private possession was involved. The central question was whether or not a man should be prosecuted for merely owning or keeping an obscene film in his home if there was no attempt to sell or distribute it.

1. Facts

Robert Eli Stanley was under investigation. With a search warrant, police officers searched his home and looked for evidence of bookmaking. However, they found little evidence. Instead, they found three rolls of 8-mm film. After viewing it, police officers seized it on the ground that it was found obscene, and Stanley was arrested for possessing obscene material which was illegal under Georgia statute. Stanley was convicted, and the conviction was affirmed by the Georgia Supreme Court.

Wesley R. Asinof, the lawyer of the appellant, presented two basic questions. The first was whether the statute violated the First Amendment because it punished mere possession of obscene material. The second was whether the use of language in the statute and in the indictment to the effect that Stanley reasonably should have known of the obscene nature of the film permits the state to secure a conviction for possessing these films without showing actual knowledge on his part that they were obscene (Friedman, 1970, 309). Asinof's argument is that obscenity in the course of distribution is not protected, but possession is protected.

2. Decision: The judgments were reversed

The *Stanley* case produced rare unanimity in the Court. All nine Justices voted to reverse. Justices Stewart, Brennan, and White did not address the obscenity issue. These three contended that the material had been unlawfully seized. The majority opinion, on the other hand,

was based on the broader ground that possession of obscenity was protected by the First Amendment. Justice Marshall delivered the opinion of the Court, which held that:

> The First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime... As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home (394 U.S. 557, 568).

3. Discussion

Stanley was the first case which conferred constitutional protection on admittedly obscene materials in a specific and limited context. The opinion of the Court in *Stanley* argued that:

> It is true that *Roth v. United States* (354 U.S. 476) does declare, seemingly without qualification, that obscenity is not protected by the First Amendment... However, neither *Roth* nor any subsequent decision of this Court dealt with the precise problem involved in the present case... Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials... In this context, we do not believe that this case can be decided simply by citing *Roth* (394 U.S. 557, 560-563).

Confronting the argument that "prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution," the Court argued that there is no difficulty in proving an intent to distribute or in producing evidence of actual distribution. Moreover, the Court claimed that infringement of the individual's right to read or observe what he pleases would not be justified (394 U.S. 557, 567-568).

The Court argued that the right to receive information and ideas is a right fundamental to our society, regardless of their social worth. To support this proposition, it cited *Martin v. City of Struthers* (1943), *Griswold v. Connecticut* (1965), *Lamont v. Postmaster General* (1965), *Pierce v. Society of Sisters* (1925), and *Winters v. New York* (1948). However, each case is distinguishable from *Stanley*. *Martin* pertained to the receiving of not pornography but religious materials. In *Griswold*, the material involved was birth control information, which the courts had never regarded as something without "redeeming social value." In *Pierce*, the issue was a statute requiring children to attend public school. *Winters* clearly affirmed that "lewd, indecent, obscene, or profane" materials are subject to control (Sunderland, 1974, 60). In *Stanley*, the majority opinion focused on the dimension of "the privacy of a person's own home." The Court argued:

> He [Stanley] is asserting the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library (394 U.S. 557, 565).

The Court justified its reversal of the judgment by saying:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch (394 U.S. 557, 565).

The right to receive information takes on another dimension, specifically in the context of this case - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own

home. The Court argued that the right to be free from unwanted governmental intrusions into one's privacy is so foundamental that such an intrusion is allowed under only very limited circumstances. The Court cited Justice Brandeis's dissenting opinion in *Olmstead v. U.S.* (1928), in which he spoke of "the right to be let alone." The Court contended that "(W)hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home" (394 U.S. 557, 565).

In its ruling, Georgia actually denied the appellant's rights to satisfy his intellectual and emotional needs. What Georgia contended was that there are certain types of materials that the individual may not read or even possess. Georgia justified this assertion by arguing that the films in the present case are obscene. The U.S. Supreme court attacked this point by arguing:

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds... And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts... it is wholly inconsistent with the philosophy of the First Amendment (394 U.S. 557, 565-566).

Georgia asserted that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. The U.S. Supreme Court rejected this assertion by saying that there appears to be little

empirical basis for that assertion (394 U.S. 557, 566). The Court noted:

> Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that is may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits (394 U.S. 557, 567).

There exists a conflict between this aspect of *Stanley*'s and *Roth*'s rejection of the necessity to link obscenity with illegal or deviant behavior. *Roth* rejected this necessity because obscenity is outside the protection of the First Amendment. As Sunderland argues, this conflict may be reduced by recognizing a distinction between the public nature of the action involved in *Roth* (and subsequent obscenity cases) and the private nature of the action involved in *Stanley* (Sunderland, 1974, 61). The Court argued:

> It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children [See *Ginsberg v. New York* (1966)], or that it might intrude upon the sensibilities or privacy of the general public [See *Redrup v. New York* (1967)]. No such dangers are present in this case (394 U.S. 557, 567).

What is distinctive in the decision of *Stanley* was the fact that the Court decided that the purely private possession in the home of even legally obscene material could not be punished. Justice Marshall's

opinion is unclear about the basis for this conclusion. Under one interpretation, it is based primarily on the Fourteenth Amendment restrictions on search and seizure. Under another, it is based on freedom of speech and the press. Under still another, it is based on a more broadly premised right of privacy that makes it impermissible for the state to restrict conduct affecting no one except the actor (Hall, Ed., 1992, 821-2). Because of its ambiguity, scholars like Sunderland have criticized *Stanley* to be "poorly written and neither closely reasoned nor adequately supported" (Sunderland, 1974, 68).

Stanley was cited by the Court in various occasions. However, the Court seemed to be careful in extending its implication. In *Twelve Reels of Film* (1973), the majority opinion rejected the assertion that *Stanley* created a right to acquire or import obscene materials from another country and restricted *Stanley*'s application to the explicitly narrow and precisely delineated privacy right on which that case rested. The Court also rejected the reasoning that *Stanley*'s establishment of the right to possess obscene material in the privacy of the home "creates a correlative right to receive it, transport it or distribute it." In *U.S. v. Reidel* (1971), Justice Harlan expressed the limited scope of *Stanley* in this way: *Stanley* recognized "a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid" (Sunderland, 1974, 61). Justice Douglas, on the other hand, thought *Stanley* extended protection to the reading of an "obscene" book on an airline or bus or train, and to transporting such a book in one's baggage (Sunderland, 1974, 58). In *Osborne v. Ohio* (1990), Justice

Byron White for the Court held *Stanley* inapplicable to private possession of child pornography and warned that "*Stanley* should not be read too broadly" (Hall, Ed., 1992, 822).

E. *Miller v. California*, 413 U.S. 15 (1973)

1. Facts

Marvin Miller owned a mail-order pornographic materials business in California. He sent the advertisements through the mails. These advertisements consisted primarily of pictures and drawings explicitly depicting groups of men and women engaging in a variety of sexual activities. One of these brochures was brought to the recipients who had not requested those materials. They complained to the police, and Miller was prosecuted for violating the California's criminal obscenity statute. The primary question addressed by the Court was that of defining the "standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment" (Sunderland, 1974, 8).

2. Decision: Vacated and remanded for further proceedings

Citing *Roth v. U.S.* and *Chaplinsky v. New Hampshire*, the Court reaffirmed that obscene materials are not protected by the First Amendment. The Court offered criteria for defining obscenity, which is now called "the *Miller* test." Chief Justice Burger delivered the

opinion of the Court, and was joined by Justices White, Blackmun, Powell, and Rehnquist. There were dissenting opinions by Justice Douglas, and by Justice Brennan with whom Justices Stewart and Marshall joined.

3. Discussion

In *Miller*, the Court suggested that the essence of obscenity is its offensiveness or repulsiveness. One of the most significant parts was the definition of "pornography." The definition of pornography presented by the Court was "a portrayal of erotic behavior designed to arouse sexual excitement." According to the Court in *Miller*, not every pornography is "obscene." Besides, not only sexual materials but also nonsexual materials may be "obscene" (Sunderland, 1974, 8).

Miller was recognized by the Court as a re-examination of standards from previous obscenity opinions (Sunderland, 1974, 8). The Court structured guidelines for the determination of obscenity, guidelines which it characterized as rejecting both the plurality standard of *Memoirs*, that materials must be "utterly without redeeming social value," and the "ambiguous concept of 'social importance'" (Sunderland, 1974, 9). The criteria set by the Court in *Miller* were:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest...;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (413 U.S. 15, 24).

The first criterion, the "prurient interest" test, was from *Roth* and *Memoirs*. The Court confirmed that the work must be judged as a whole. The meaning of "prurient interest", which was unclear in *Roth* and *Memoirs*, is not evident in *Miller*, either. The second test, the "patently offensive" test, is basically the same as the test formulated in *Roth*, but modified. To make the decision clearer, two examples of what may be regulated by the states under this part of the test were given:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals (413 U.S. 15, 25).

Thus, the Court permits prohibition of specific descriptions of excretion. On this point, Pilpel argues:

> This is really a kind of schizophrenia - presumably specific sex acts are forbidden because they might be too titillating and lead to overt and "immoral" behavior; the only comparable fear I can imagine on which to base the forbidding of specific descriptions of excretion is that they might lead to too much, or maybe too little, excretory activity (Downs and McCoy, Eds., 1984, 233).

The Court cited the statutes of Hawaii and Oregon, which it regarded as acceptably specific provisions. The Court maintained that the types of materials which may be regulated are confined to a narrow category of expressions:

> Under the holdings announced today, 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 (413 U.S. 15, 27).

Therefore, it was clearly declared that the *Miller* decision grants constitutional protection to sexual materials unless those materials are extreme and depict "hard-core sexual conduct." The materials are protected unless they fall within this narrow class. It should be noted that the "patent offensiveness" need not be based on the work "taken as a whole." Apparently, any passages of a "patently offensive" character, no matter how minor a part of the work they constitute, are sufficient to meet this test. The Court did not explain why the words "taken as a whole" are not included in the "patent offensiveness" test (Sunderland, 1974, 14).

The third criterion of the *Roth* and *Memoirs* test was changed significantly. Under the *Miller* test, "socially redeeming value" of a material may not be used as a defense against a charge of obscenity. The Court, in *Miller*, clearly declared that:

> We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of *Memoirs v. Massachusetts* ... That concept has never commanded the adherence of more than three Justices at one time (413 U.S. 15, 24).

Under the *Miller* test, patently offensive work which appeals to prurient interest must have "serious literary, artistic, political, or scientific value" if it is to be saved from being banned as obscene (Downs and McCoy, Eds., 1984, 232). It seems still to be true that a

book must fail all three tests to be held obscene. It must appeal to prurient interest; it must be patently offensive under current community standards; and it must lack any serious literary, artistic, political, or scientific importance.

In sum, the *Miller* test considerably narrowed the range of materials which are constitutionally defined as obscenity.

Justice Douglas presented his dissenting opinion. According to him, the difficulty of setting the standards of judging obscenity comes from the fact that "obscenity" is never mentioned in the Constitution; therefore, it is not a constitutional term. His basic contention is that the First Amendment does not except obscenity from its protection (413 U.S. 15, 40). Douglas claimed that the Court has failed in defining obscenity even though it has worked hard (413 U.S. 15, 37).

> We deal with highly emotional, not rational questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity (413 U.S. 15, 46)

He argued that the people should debate and decide what they want to ban as obscene and what standards they want the legislature and the courts to apply, and that the courts should use these opinions as guidelines.

Four judges - Justices Douglas, Brennan, Stewart, and Marshall - disagreed entirely and agreed with each other that "there should be no ban on obscenity addressed to adults in private." The underlying belief was that the First and Fourteenth Amendments both prohibit the

government from suppressing materials even if such materials have "obscene" contents. They contended that this is especially true when distribution of materials involves only consenting adults. The dissenting judges contended that the net result of the majority's holding is an almost complete negation of the right established in the *Stanley* case to enjoy obscenity in private. However, the action involved in *Stanley* was private while *Miller* involved action which was public.

The "prurient interest" test and the "patently offensive" test were used in *Roth* and *Memoirs*. In these previous decisions, it was held that these tests should be applied in relationship to "contemporary community standards." However, it had not been clarified what the "community" means. The *Miller* decision rejected the national community as a basis for the tests. The Court argued that requiring a State to show violation of a national "community standard" would be futile. This is because the U.S. is "simply too big and too diverse" for the Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation (413 U.S. 15, 30). The Court pointed out the fact that both the prosecution and the defense, during the trial, assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America (413 U.S. 15, 31). In conclusion, it was clearly stated that:

> Obscenity is to be determined by applying "contemporary community standards" not "national standards" (413 U.S. 15, 37).

The *Miller* decision, of course, reflects its precedents. For example, the Court reaffirmed *Roth*'s thesis that obscenity is outside the protection of the First Amendment. This contention has not changed at all. The Court also followed the *Memoirs* test, in that it basically kept relying on both the "prurient interest" and the "patent offensiveness" tests as criteria. As I mentioned, the third test of *Memoirs* was modified substantially. Compared to previous obscenity decisions, the *Miller* decision was less ambiguous. The Court declared that the regulation should be limited to materials depiciting "hard-core sexual conduct."

Seven years before *Miller*, in *Memoirs* (1966), the Supreme Court presented significantly permissive standards for the regulation of obscenity. In 1970, the President's Commission on Obscenity and Pornography ("The Johnson Commission") presented its report that found no evidence of a causal link between obscene materials and crime, sexual deviancy, or juvenile delinquency. The Commission issued a recommendation that "federal, state, and local legislation should not seek to interfere with the rights of adults who wish to do so to read, obtain, or view explicit sexual material" (The Obscenity Report, 1971, 99). American society was becoming increasingly permissive toward sexual expression during the 1960s and 1970s. It is widely known that "(B)ooks and magazines with words and photographs devoted in whole or

part to sex and nudity have proliferated at a greater rate since the 1950s" (Sobel, Ed., 1979, 3). On this social change, Sobel argues:

> Many Americans have already noted the changes over the past two decades that have brought pornography up from under the counters of a few furtive newspaper vendors to favored positions in many news stalls, from the clandestine productions of stag-party impresarios to the seriously reviewed offerings of the "legitimate" theater, from the sleazy depictions of sex adventures filmed hastily in somebody's apartment to fully professional cinematic works produced and directed by motion picture luminaries and with serious actors appearing in the omnipresent "nude scene" (Sobel, Ed., 1979, 1).

Major growth of the pornography industry occurred during this time. The number of pornographic magazines available at the newsstands grew from zero in 1953 to forty in 1977. Sales of pornographic films in Los Angeles alone grew from $15 million in 1969 to $85 million in 1976 (Lederer, Ed., 1980, 41). In this sense, 1973 was in the middle of a time when the commercial exploitation of obscenity was expanding. In its five obscenity decisions of June 1973, the Burger Court sought to redress the balance by empowering local communities to make their own quality-of-life decision concerning sexually oriented materials.

CHAPTER III

CASES IN THE JAPANESE SUPREME COURT

A. *The Lady Chatterley's Lover Decision* (1957)

Koyama et al. v. Japan, 11 Keishû No.3-997

1. Facts

Ito Hitoshi, who was a prominent novelist, and Koyama Kyujiro were charged with violating Article 175 of the Criminal Code by translating and publishing D.H. Lawrence's Lady Chatterley's Lover. The two-part unexpurgated translation sold well, with about 80,000 copies of the first volume and 70,000 copies of the second marketed in the spring and early summer of 1950. Many authors and newspapers were critical of the general distribution of the unexpurgated edition but joined the Japan P.E.N. Club and the Association of Literary Writers in protesting the indictment. In an unusual procedure, the court of first instance, at the request of both defense and prosecution, allowed the testimony of twenty-four amateur and professional witnesses as to the alleged obscenity of the book (Maki, 1964, 3; Beer, 1984, 348).

On January 28, 1952, the Tokyo District Court held the work as a whole not obscene, though it closely resembled pornography in twelve places. The translator, Ito, was aquitted. However, Koyama was convicted on grounds of salacious advertising, and fined (Maki, 1964,

3). The defense appealed on the ground that the publisher had been wrongly convicted, and the prosecution appealed on the ground that translator also should have been found guilty (Maki, 1964, 3). On December 10, 1952, the Tokyo High Court held that the twelve passages in Lady Chatterley's Lover made it obscene. Ito was convicted and fined for having translated and assented to the publication of the book. Koyama was also fined (Beer, 1984, 348). Both defense and prosecution appealed to the Supreme Court.

2. Decision: The judgment was affirmed

On March 13, 1957, the Supreme Court quashed the appeals of Ito and Koyama while reaffirming the obscenity of Lady Chatterley's Lover along lines followed in the high court (Beer, 1984, 348). In its judgment, the Court affirmed the definition of obscenity which was presented in a precedent decided in 1951.

3. Discussion

In the first part of its ruling, the Supreme Court examined the literary content and the theme of Lady Chatterley's Lover. The Court observed that "(T)he most important themes, which run through the entire novel, are the primacy of the complete satisfaction of sexual desire and the philosophy of life that recognizes in love the perfection of humankind and the significance of human life" (Maki,

1964, 6). At least, the Court recognized that the central theme of Lady Chatterley was seriously philosophical. The Court pointed out that while the author questioned the conventional code, morality and concept of sex, he was critical of the sexual tendencies in the new age. From the content of Lady Chatterley and Lawrence's introduction, the Court observed that Lawrence advocated a new sexual code and a morality that respects the harmony and equality of the spirit and the flesh. Based on such an understanding, the Supreme Court confirmed that Lady Chatterley is an artistic work which is inherently different from pornography. Apparently, the Supreme Court was correct in its interpretation of the theme of Lady Chatterley. Further, the Court stated that the judgment of whether the view advocated by the author should be affirmed is a question relating to morality, philosophy, religion, and education. This means that the mere immorality of the idea does not automatically justify the punishment of the work. The Court argued that "... even though the conclusion is reached that they are antimoral and unedifying, it is impossible for that reason alone under existing law to punish the sale and distribution [of the book]..." (Maki, 1964, 6).

The question before the Court was not whether Lawrence's idea is conventional or unconventional, but whether the elements included in Lady Chatterley "fall within the purview of 'obscene writing' of Article 175 of the Criminal Code" (Maki, 1964, 6). On this question, the Court presented its unique argument:

> the judgment to be made is one involving the interpretation of law, namely, that it relates to a legal value judgment and is not a question of determination of fact (Maki, 1964, 8).

Later, scholars criticized the construction of this argument. The Supreme Court contended that the judgment as to whether the work itself falls under the heading of Article 175 of the Criminal Code as an obscene writing is a problem of the interpretation of law. It is hard to understand why the judgment of obscenity is not a factual determination.

On the appeal that the guarantee of freedom of expression in Article 21 of the Constitution is almost unrestricted, the Court ruled that the prohibition of obscene literature is compatible with the "public welfare (*Kôkyô no Fukushi*)" prescribed by Articles 12 and 13 of the Constitution. The Japanese Supreme Court, in many occasions, has used the concept of the "public welfare" to justify limitation on human rights. Article 12 states:

> The freedom and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public.

Article 13 states:

> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

According to the Court's understanding, the sale of obscene writings is an abuse of Article 21 rights - Freedom of expression (*Hyôgen no Jiyû*) - and "contains the danger of inducing a disregard for sexual morality and sexual order" (Beer, 1984, 348). It was held that the aim of law under Article 12 and 13 of the Constitution is the promotion of the "public welfare," which includes the maintenance of "the minimum morality" necessary for social order regarding sexuality (Beer, 1984, 348).

Counsel Tamaki Shôichi argued that "under the new Constitution, which prohibits a system of censorship, whether or not there may be a violation of the 'public welfare' must be left to the independent judgment of each person" (Maki, 1964, 14). He also claimed that even if restriction in the name of the "public welfare" is permissible, the basis for deciding permissibility must be clear before the fact (Maki, 1964, 13). The Supreme Court responded that the judgment of the restriction about present case, which was based on the "prevailing ideas of society (*Shakai Tsûnen*)", was not unclear. The Court also argued that the presence or absence of "an offense against the public welfare must be determined objectively." It means that this judgment is "not something that can be entrusted to the independent judgment of each person" (Maki, 1964, 14).

Counsel Tamaki Naoya argued that such a fundamental human right as the freedom of expression is "absolutely unrestricted and cannot be limited even for the public welfare" (Maki, 1964, 14). On this point, the Court replied that "the abuse of the rights is prohibited by the

stipulations of Article 12 and 13 of the Constitution" (Maki, 1964, 14). Citing precedents, the Court held that even those fundamental human rights stand "under restriction for the public welfare." and that these rights are "not absolutely unlimited" (Maki, 1964, 14). It continued that the protection of a sexual code and the maintenance of a minimum sexual morality are clearly to be considered parts of the "public welfare." Counsel Masaki Hiroshi contended that the present book is in conformity with the "public welfare" because it deals with the problem of sex seriously. The Supreme Court responded that even though the translation in the present case is sincere and its content is in accord with the "public welfare," that does not offset or dissipate its obscenity.

Counsel Tamaki Shoichi pointed out the prohibition of censorship and the impossibility of knowing before the fact what is impermissible in the name of the "public welfare." The Supreme Court's reply was that prohibition of prior censorship does not mean the impossibility of prohibiting the distribution and sale of obscene literature (Maki, 1964, 16). It did not reply to the question concerning the lack of "fair notice."

Despite the opinions questioning the consitutionality of Article 175 of the Criminal Code, the Supreme Court did not find Article 175 unconstitutional at all. As we can see in the above-mentioned argument presented by the Court, its decision relied heavily on its belief that the prohibition of obscene literature under Article 175 is in

conformity with the "public welfare;" therefore, it is constitutional. The problems of the public welfare doctrine will be addressed later.

In defining obscenity, the court first cited prewar and postwar precedent. The Court quoted the Great Court of Cassation's definition of obscenity in a June 10, 1928 decision (Taishin In, Case No. 1928, Re 1465):

> It designates writings, pictures, or any other objects which stimulate or arouse sexual desire or could lead to its gratification, and, accordingly such obscene objects necessarily are those that produce the sense of shame or disgust in human beings (Maki, 1964, 6-7).

The Court also quoted First Petty Bench decision (the *Sandê Goraku* decision) in 1951 saying:

> ... [obscene matter] is that which wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality (Maki, 1964, 7)

The Court added:

> In order for a writing to be obscene, it is required that it wantonly arouse and stimulate sexual desire, offend the normal sense of shame, and run counter to proper concepts of sexual morality (Beer, 1984, 348; Maki, 1964, 7).

It should be noted that the Supreme Court in 1957 unanimously affirmed the criteria for obscenity which were set in 1951 (Ashibe and Takahashi, Eds., 1994, 111).

The Japanese Supreme Court consistently contended that obscene literature offends the ordinary person's "Sense of Modesty Regarding Sex"(*Seiteki Shûchishin*; alternatively, "the sense of shame"), which is a natural consequence of the privacy of sex (*Seikôi hikôzen no gensoku*; or "the nonpublic nature of the sex act") (Beer, 1984, 348-9). The majority opinion argued:

> As a general rule, the possession, irrespective of differences of civilization, race, clime, and history, of a sense of shame is a fundamental characteristic that sets man apart from the beasts. Shame, compassion, and reverence are the most fundamental emotions that man possesses... These emotions constitute the foundation of universal morality... The existence of the sense of shame is especially striking in respect to sexual desire (Maki, 1964, 7).

It was clearly stated that sexual desire itself is not evil, and that this instinct is a natural aspect of mankind. However, the Court argued that "human nobility" (Maki, 1964, 7) is conscious of a feeling of revulsion toward sexual desire, and called this feeling "the sense of shame," which is something universal. Basically, the Court believes that the sense of shame, in company with reason, controls the sexual desire and entire sexual life of human beings. The sense of shame, according to the Court, is the main emotional factor which has been contributing to the maintenance of order and morality in respect to sex.

Next, the Court extended this argument to explain why obscene materials are harmful to the society. The Court contended that obscene material "stimulates and arouses sexual desire and clearly makes known

the existence of the animal side of man's nature," and "it involves the sense of shame" (Maki, 1964, 8). The most curious contention is coming:

> It paralyzes conscience in respect to matters of human sex; it ignores the restraint of reason; it comports itself wildly and without restraint; and it contains the danger of inducing a disregard for sexual morality and sexual order (Maki, 1964, 8).

This part of the reasoning is very slippery and simplistic. It is very questionable if mere stimulation of sexual desire "immediately paralyzes conscience in respect to matters of sex", and leads individuals to "ignore the restraint of reason." This assertion lacks credibility. The Court should have presented some reliable evidence of the causal relationship between obscene materials and decay of sexual morality.

Justice Mano presented his opinion criticizing the Court's reasoning. He claimed that the Supreme Court erred in using such questionable general norms as the sense of shame and the privacy of sex. On the "non-public nature of the sex act," he argued that doing sex in public and describing sex in literature are two totally different things. He contended that the "non-public nature of the sex act" signifies no more than that the sex act is not performed in public (Maki, 1964, 19). As Mano said, "The translation itself cannot perform the sex act, either publicly or privately" (Maki, 1964, 20). Also, he pointed out that the description of the sexual scenes in the present translation does not depict the public performance of the sex act

(Maki, 1964, 20). As Justice Mano criticized, the Supreme Court conflated the actual sex act and mere depicition of sex.

Another point Justice Mano picked up was the Court's contention that the non-public nature of the sex act is unchangeable and universal. According to the Court, "while prevailing social ideas vary with time and place, man's sense of shame and the privacy of sex are norms for all but a very few unhealthy societies and individuals" (Beer, 1984, 349). The Court held that the judgment of the presence or absence of obscenity must be determined in accordance with "prevailing ideas of society." By "prevailing ideas of society," the Court meant "the norms of sound men of good sense" (Beer, 1984, 349). According to the Court's understanding, the prevailing ideas of society "are not the sum of the understanding of separate individuals and are not a mean value of such understanding; they are a collective understanding that transcends both" (Maki, 1964, 9). It means that standard is not based on public opinion or on actual prevailing ideas but on the judiciary's understanding. The Supreme Court admitted that "prevailing social ideas" are constantly changing and require modification. It recognized especially that the concepts relating to sex have been changing because of the wider freedom advocated in contemporary society. However, the majority opinion contradictorily contended that "in every society, it is recognized that there are norms that must not be overstepped and that there are norms that must be generally observed" (Maki, 1964, 10). The Court assigned itself a "clinical role" in maintaining sound morality. Consequently, if the moral sense of the majority is judged to

be dulled or changed undesirably, the Court legitimately exercises its power to correct it. Scholars criticized this claim by the Court which practically declared that the judgment of what the prevailing ideas are is under the jurisdiction of judges. Justice Mano questioned the legitimacy of this contention by the Court. Mano claimed that the mission of the judge is "to interpret and to apply the law honestly, dispassionately, and impartially," and that "this is the proper and most important attitude for the judge to take" (Maki, 1964, 23).

The Court's arrogation to itself of a clinical role was sharply criticized by Japanese scholars, and did not appear in the *de Sade* decision in 1969. However, the relationship between the courts and morality has not been completely resolved. Current interpretation of Article 175 of the Criminal Code is based on the belief that maintenance of the minimum morality is in the public interest, which should be protected by the judiciary. In *Chatterley*, the Supreme Court recognized that law is "not burdened with the duty to maintain all morality and good customs," but it still argued:

> Law incorporates into itself only "the minimum morality," namely, the morality which alone possesses a considerable significance for the maintenance for the social order it is designed to achieve. What each provision of the Criminal Code mentions as a crime is, in short, something that can be recognized as a type of conduct in violation of this minimum morality (Maki, 1964, 8).

The Supreme Court in *Chatterley* took a position that other values do not mitigate the obscene nature of the work. The Court acknowledged that Lady Chatterley's Lover involved serious criticisms of

industrialization, economics, traditional class-based society, and human nature. It also clearly declared that the translation of Lady Chatterley cannot be recognized as pornography. Pornography, according to the Court's understanding, is what is "largely lacking in artistic qualities" (Maki, 1964, 11). Lady Chatterley, on the other hand, has significant artistic qualities. However, Lady Chatterley was held to be obscene because the passages noted disregard the normal sense of shame and morality by wanton appeal to passion (Beer, 1984, 349). It should be noted that the Court, in this judgment, focused on the separate individual passages rather than on the work taken as a whole. The majority opinion contended that the work's artistic or literary value does not reduce the work's obscene nature. The Court did not compare the social value and the harm which the work may bring. Under the Court's logic, it is also impossible to make such a comparison, because the Court believed that legal and moral judgment is different from and irrelevant to artistic judgment. Even if Lawrence's book is a work of art, the determination of its artistic or literary value is outside the court's responsibility.

> We cannot approve the principle of the supremacy art, which emphasizes only the artistic nature of a composition and rejects criticism from the standpoint of law and morality. Even though a composition may have high artistic merit, it does not necessarily follow that its obscene nature is thereby dissipated. Though it be art, it has no right to present obscene matters publicly. The artist, too, in the pursuit to his mission must respect both the sense of shame and moral law and he must not act contrary to the duties borne by the people at large (Maki, 1964, 11-12).

To take artistic and literary value into consideration does not necessarily mean "the principle of the supremacy of art." It is questionable if it is reasonable to discard an artistic or literary work without examining its other social value, when the work's value is recognized by the court itself. Such an emphasis on morality seems rather like "the principle of the supremacy of morality."

The Japanese Supreme Court totally dismissed the argument of the appeal that the translation in the present case is not obscene because of the absence of evil intent. It was held that criminal intent was deemed present, "because the appellants knew the twelve passages existed," and "were aware of the book's distribution and sale" (Beer, 1984, 348). The court cited Article 38-3 of the Criminal Code which reads:

> An ignorance of the law cannot be deemed to constitute a lack of intention to commit a crime, but punishment may be reduced according to circumstances (Beer, 1984, 359).

According to the Supreme Court, to establish criminal intent under Article 175 of the Criminal Code, the recognition by the parties that the writing is obscene is not required. Also, it was held that sincerity of publishers is irrelevant to the presence or absence of obscenity. Later, Koyama confessed what he originally intended in publishing Lady Chatterley. He said that he, as a publisher, wanted to disseminate a correct knowledge, thought, and philosophy about sex in the era when the widespread distribution of gross sexual materials were going on. He and Ito chose Lady Chatterley, since it was the

masterpiece of Lawrence who dedicated his life to the questions surrounding sex (Higuchi, Ed., 1985, 73). The Supreme Court contended that neither the seriousness of its treatment of the problem of sex nor the sincerity of the accused should affect the court's decision. Not only rejecting the presence or absence of criminal intent, the Court also refused to take any surrounding context into consideration in judging the obscenity of Lady Chatterley. In the Tokyo District Court, it was argued that the selling method of Lady Chatterley made this work obscene, even though the work itself was not obscene. This theory is what is called "pandering" in the U.S. The Japanese Supreme Court rejected this theory.

In the *Chatterley* decision, the focus was on the question: "What is obscenity?" As the first case in which the constitutionality of Article 175 and its relationship with Artilce 21 of the Constitution were argued, this decision meant a lot. Sakamoto summarizes the significance of Chatterley as follows. First of all, it should be noted that the Grand Bench of the Supreme Court unanimously affirmed the three criteria for obscenity which were presented in a past case decided in the Petty Bench six years before. Second is the Supreme Court's understanding that the judgment of the degree of sexual stimulation and offensiveness is not a judgment of facts but a legal value judgment. Moreover, the Court contended that the standard of such a judgment should be based on "prevailing ideas of society," which do not mean a sum of the ideas held by each individual. This formulation is curious. Third, it was clearly held by the Supreme Court that

obscenity is against the "public welfare" (Ashibe and Takahashi, Eds., 1994, 111). The *Chatterley* decision was criticized by many scholars, and later cases revised its ruling. In particular, the Court's paternalistic stance and underlying legal moralism have been attacked. Scholars have questioned the legitimacy of the Court's way of using the "public welfare" doctrine. Sakamoto argues that the maintenance of sexual order and minimum sexual morality cannot be regarded as the "public welfare" (Ashibe and Takahashi, Eds., 1994, 111). Even if the maintenance of sexual order constitutes the "public welfare," the Court should have examined whether Article 175 of the Criminal Code is the least restrictive alternative in pursuing this aim. In *Chatterley*, the Court endorsed the constitutionality of Article 175 of the Criminal Code, just by arguing that Article 175 is a provision to protect a sound sexual order. In this judgment, the Court failed to distinguish the regulation of obscene action in public, which is prescribed in Artice 174 of the Criminal Code, and the regulation of obscene expression.

B. *The Marquis de Sade Decision* (1969)

Ishii et al. v. Japan, 23 Keishû No.10-1239

1. Facts

In 1959 and 1960, an abridged translation (one-third) of Marquis de Sade's In Praise of Vice (Akutoku no Sakae) was published in two

volumes. The second part of this work, The Travels of Juliette (Juliette no Henreki) was alleged to contain fourteen obscene descriptions. Shibusawa Tatsuo, a French specialist translator, and Ishii Kyôji, the publisher, were indicted for the sale (about 2,500 copies) and possession for sale (about 290 copies) of obscene writings (Beer, 1984, 349).

On October 16, 1962, the Tokyo District Court acquitted the accused. The court did not mention any Constitutional questions, and just followed the *Chatterley* doctrine in noting three conditions for the establishment of obscenity under Article 175 of the Criminal Code: 1) wanton appeal to sexual passion; 2) offense to the average man's sense of shame; and 3) opposition to proper concepts of sexual morality. The court found The Travels of Juliette not obscene, because the extremely grotesque and brutal depictions and unreality preclude fulfillment of the first condition. However, the second and the third conditions were deemed present. On this decision, the prosecution argued that the three conditions for establishing obscenity are not independent from each other, and therefore that the work in question is obscene since it satisfies the second and the third conditions, and since it specifically violates "the principle of the nonpublic nature of the sex act." On November 21, 1963, the Tokyo High Court reversed the decision of the Tokyo District Court, and held the work to be obscene. The court rejected the prosecution's argument that a work is obscene because it violates "the principle of the nonpublic nature of the sex act." The basic difference between the district court and the

high court was that the latter held that all three conditions for establishing obscenity were met, and fined Shibusawa and Ishii. The accused appealed to the Supreme Court, contending that this judgment erred in interpreting and applying Article 175 of the Criminal Code and violated Articles 21 and 23 of the Constitution in holding In Praise of Vice to be obscene literature first by differentiating between the dimensions of obscenity and artistry or intellectuality in a literary work, and then by making a work the object of criminal action for obscenity under Article 175 of the Criminal Code even if it is of high artistic and intellectual value (Ito and Beer, 1978, 184).

2. Decision: The judgment was affirmed

On October 15, 1969, the Supreme Court quashed the appeal in an eight-to-five decision. The Court maintained the position taken in the *Chatterley* decision, which basically held that a work can be judged as obscene even if it contains artistic or other values, and that the regulation of obscenity is compatible with the "public welfare" of the nation.

3. Discussion

Just like the Court in *Chatterley* twelve years before, the Supreme Court held that the moral and legal dimensions are distinct from the artistic and intellectual dimensions of a literary work, and argued

that the court's responsibility is "not to pass judgment on the presence or absence of its artistic and intellectual merits in themselves" (Ito and Beer, 1978, 185). It declared that the task of the courts is to determine the presence or absence of obscenity solely in the legal sense. An argument existed which contended that "in determining the presence or absence of a crime of obscenity, legal interests damaged by obscenity in a written work should be balanced against its public benefits as an artistic intellectual writing, on analogy with a legal principle used in relation to crimes of defamation" (Ito and Beer, 1978, 185). The Court clearly rejected this theory. The Supreme Court contended that "it is not impossible to consider obscenity and artistry or ideas as distinct dimensions of a work and to judge obscene in its moral and legal aspects a work that is artistic and intellectual" (Ito and Beer, 1978, 184). This means that it is possible for a work to be held artistic and obscene at the same time. In this part of the reasoning, the Court followed the the logic of the *Chatterley* decision. The Court rejected the arguments which hold that "works with artistic and intellectual value cannot be liable to punishment as obscene writings" (Ito and Beer, 1978, 184).

What was new in the *de Sade* decision was that the Court recognized the possibility that the artistic or intellectual elements of the work affect the degree of obscenity. The key passage in the majority's reasoning was:

> There may be cases where the artistry and intellectual content of a work may diminish and moderate the sexual stimulus caused by its

> portrayal of sex to a degree less than that which is the object of punishment in the Criminal Code, so as to negate the work's obscenity; but as long as obscenity is not thus negated, even a work with artistic and intellectual values cannot escape treatment as obscene writing (Ito and Beer, 1978, 184-5; Beer, 1984, 350).

In its decision, the Supreme Court clearly declared that freedom of expression under Article 21 and academic freedom under Article 23 of the Constitution are "extremely important as foundations of democracy" (Ito and Beer, 1978, 186), but it followed the *Chatterley* decision's understanding of the limitation on these freedoms. The Court argued that these freedoms are not absolute or without limits, that their abuse is forbidden, and that they are placed under limitations for the "public welfare." Therefore, the Court claimed that penalizing the distribution and sale of artistic obscene writings for a sound social order is not contrary to Article 21 or 23 of the Constitution. Rather, the Court held that it would be beneficial to "uphold order and healthy customs in sexual life" (Ito and Beer, 1978, 186), which is part of the "public welfare" of the whole nation. This argument is identical with that in *Chatterley*. The Court argued for the maintenance of a sound sexual order, but it never discussed the question of "whether or not a certain degree or frequency of exposure to obscene material has any positive or negative empirical relationship to such matters as sex crime rates or the development of respect for the dignity and beauty of human sexuality" (Beer, 1984, 353).

Justice Irokawa agreed with the majority opinion in that freedom of expression is necessarily limited in several cases. However, he contended that:

> We must strictly avoid an attitude which casually uses the abstract notion of the public welfare and cuts down on freedom of expression with great dispatch (Ito and Beer, 1978, 214).

This argument was a solid criticism of the majority opinion, which made no reference to what the public welfare is in this case. Another criticism was presented by Justice Tanaka, who argued:

> The majority's definition of obscenity is acceptable, if degrees of obscenity and the relativity of the "ordinary person standard" are recognized; but the court's customary way of interpreting the public welfare and freedom is fundamentally in error (Ito and Beer, 1978, 214; Beer, 1984, 351).

The Supreme Court held, as had the original judgment, that "fourteen passages in Juliette are too boldly candid in portraying sexual conduct, are lacking in human feeling, unrealistic, fanciful, and are joined with scenes of ugly brutality" (Beer, 1984, 350). The Court acknowledged that Juliette is different from pornography because of these characteristics and its intent, but held that "it suffices wantonly to stimulate and arouse sexual passion in the ordinary person" (Ito and Beer, 1978, 186). Therefore, Juliette was found obscene.

In the Tokyo High Court, it was held that if there is one obscene part in a work, that part makes the work as a whole obscene. In determining the presence or absence of obscenity, the Supreme Court

argued that individual passages must be judged not in isolation but in relation to the whole work of which they are integral parts. It should be noted that this argument was something that could not be found in the *Chatterley* decision. However, the Court also argued that:

> There is no reason to consider it improper to judge the presence or absence of obscenity in a specific passage when that judgment is made in connection with the whole work (Ito and Beer, 1978, 185).

Based on this logic, the Court held the entire book obscene since fourteen sections of Juliette are obscene (Beer, 1984, 350).

Chief Justice Yokota questioned the obscenity of the work, in his dissenting opinion which was concurred in by Justice Ôsumi. Yokota argued that the fourteen passages in question are "weak in obscene emotion" (Ito and Beer, 1978, 198):

> The obscenity of the fourteen passages (10 percent of the book), which graphically portray debauchery, sodomy, bestiality, and unnatural love, is diminished beyond the critical point by contiguous sections depicting such behavior as flagellation, torture, and killing by fire, as well as by the sharp social criticism and ideas of the rest of the book (Beer, 1984, 351).

Just like Justice Yokota, Justice Tanaka did not find the work in question obscene, because "its contents are generally vacuous, unrealistic, and abnormal, they are portrayed as continuous with cruel and revolting scenes before and after, and they give rise to a strong sense of loathing in the general reader rather than to obscene feelings" (Ito and Beer, 1978, 210). Because of these portrayals,

Tanaka claimed, its obscenity is diminished significantly. Justice Irokawa also claimed that a thorough reading of Juliette might literally sicken, rather than sexually stimulate, the general reader (Beer, 1984, 351).

On the other hand, Justice Okuno, in his dissenting opinion, argued that the obscenity of Juliette was fostered, rather than diminished or erased, by the relationship between the fourteen passages and the scenes of brutality (Ito and Beer, 1978, 201).

The Supreme Court rejected the contention that the book's effect on readers should be considered. In its judgment, the Court argued that under present law, the judges are charged not with assessing readers' impressions of the book at issue but with determining whether or not a work is possessed of obscenity, according to the "prevailing ideas of society, man's sense of shame, and the privacy of sex" (Ito and Beer, 1978, 188; Beer, 1984). According to the Court, the impression of the general reader is nothing more than just a reference. Just like the Court in the *Chatterley* decision, the Court placed the standard of judgment on the "prevailing ideas of society." However, the normative characteristic of the "prevailing ideas of society," which was presented in *Chatterley*, was not very evident in the *de Sade* decision.

The appellants contended that facts of such matters as the methods of publishing and selling writings, and the scope, the degree and the classes of people in the readership, the attitude of authors, and other matters forming the premises for judgment concerning the obscenity of the work were not investigated. Therefore, they argued that "the

judgment concerning obscenity is not based on lawful evidence and does not follow proper procedures, and thus violates Articles 31 and 37 of the Constitution" (Ito and Beer, 1978, 189). The Supreme Court replied to this argument by saying that the Court "does not adopt a position based on a relativistic notion of obscenity in judging obscenity in this case" (Ito and Beer, 1978, 189). The Court also argued that this case is an instance "in which the judgment of first instance established the existence of the facts constituting the crime" (Ito and Beer, 1978, 189), and that the Supreme Court in such a case does not need further fact-finding to hold a judgment.

Justice Tanaka pointed out that the majority in the present case seems to acknowlege the relativity of the concept of obscenity by saying that "the literary and intellectual content of a book may diminish its obscene effects to a point where illegal obscenity is not present." This argument was what the *Chatterley* decision rejected. However, the Court rejected the relativity of societal values and the role of literary values in judicial determinations regarding obscenity. Justice Tanaka claimed that the Court's position on this point is confused and ambiguous (Ito and Beer, 1978, 206-10; Beer, 1984, 352).

The effect on an obscenity judgment of salacious advertising was not clear from the majority opinions in *de Sade* (Beer, 1984, 353). Moreover, the question of protection of youth was argued only in Justice Iwata's opinion (Beer, 1984, 353). Justice Irokawa argued that examination of surrounding circumstances such as the method of publication, distribution, and sales, the format of the printing, and

the methods of promotion and advertising is necessary. In his dissenting opinion, he claimed that:

> It is reasonable to regulate salacious advertising, or publication of obscene extracts from a work otherwise recognized for its social value (Ito and Beer, 1978, 215; Beer, 1984, 351).

There were six separate opinions. Each of them had distinctive elements, but one similarity between them was that each one proposed to judge obscenity by taking other values into consideration.

Justice Iwata, who presented a separate opinion, agreed with the conclusion of the majority opinion that artistically, intellectually, or academically valuable works can be judged obscene at the same time. He acknowledged the obscenity of the fourteen passages in question, and agreed with the majority in that Juliette is obscene under Article 175 of the Criminal Code. Yet, he contended that it is wrong to make the distribution, sale, and public display of the works a crime without examining the methods and manner of their publication, and other circumstances (Ito and Beer, 1978, 194). Iwata's opinion stressed the academic, historical, scientific, intellectual, and/or literary values of Juliette. He contended that the proper interpretive method was to balance the legal benefits of regulating obscenity against the social values of the work as a whole (Beer, 1984, 351). He proposed the comparative consideration of the legal interests:

> When the benefit to society (public interest) from publication of those writings is greater than the legal interests infringed upon due to obscenity, then the publication of those writings for the sake of that benefit to society (public interest), as a

> justifiable act under Article 35 of the Criminal Code, does not constitute obscenity (Ito and Beer, 1978, 195).

After pointing out the necessity of examining these conditions, however, Justice Iwata agreed with the conclusion that the publication of this book should be penalized under Article 175. He pointed out that this work was published and sold with the aim of general distribution, that the fourteen passages in question graphically describe sex scenes in lewd and concrete detail, and that such a work is "harmful to a proper sense of modesty regarding sex, and is contrary to healthy concepts of sexual morality" (Ito and Beer, 1978, 196). His conclusion was that "the benefits accruing to society from the publication and sale of this book are not sufficient to compensate completely for the above harmful effects" (Ito and Beer, 1978, 196).

Justice Yokota stressed the intellectual value of the work by contending that Marquis de Sade, in this work, speaks "his unique thought and philosophy concerning the laws of nature, or politics and religion" (Ito and Beer, 1978, 197). Yokota pointed out that de Sade attacked both Christian civilization and the enlightenment thought originated from naive progressivism. To challenge optimism about human nature, de Sade tried to reveal the darker sides of human nature and hidden dimensions of social order, religion, and morals. Further, Yokota claimed that de Sade's writings' "revolutionary ideas and their utopian ideas continue to be accorded great importance in the field of the history of social thought, in the area of medical science and psychology, and in intellectual and artistic movements that emerged in

the present century, such as surrealism and existentialism" (Ito and Beer, 1978, 200).

Moreover, Justice Yokota considered it inappropriate to penalize the acts of the accused, even if the translation of Juliette is obscene:

> Even if a book is obscene, penalties under Article 175 infringe upon freedom of expression if excision of the obscene sections detracts from the literary and intellectual value of the whole work (Ito and Beer, 1978, 198; Beer, 1984, 351).

He proposed to consider the matter of priority in each case. According to Yokota, a problem is "how to adjust the demand that distribution and other acts regarding obscene writings not be permitted, with the demands of freedom of expression with respect to writings with intellectual value and the like" (Ito and Beer, 1978, 199). To determine the priority, he argued, it is necessary to examine the degree of obscenity. If a work contains passages with strong obscenity, priority should be given to the demands of controlling obscenity over the demands of distributing the work even with artistic and intellectual values.

> If, on balance, the degree of obscenity found, even though not great, is more important to the substance of a work than its artistic and thought content, its sale may be restricted (Ito and Beer, 1978, 199; Beer, 1984, 351).

Justice Yokota complained that the majority opinion undervalues the demands of freedom of expression under Article 21 of the Constitution.

As cited already, he contended that the obscenity in this case is weak, and that "obscene passages in the translation at issue are less important than the passages with intellectual and artistic value" (Ito and Beer, 1978, 201). Therefore, in the present case, he proposed to give priority to freedom of expression rather than to the demand of regulating the distribution of the work.

Like the majority and several other judges, Justice Okuno acknowledged that the obscene, artistic, intellectual, and literary elements are not always mutually exclusive, and these can be just different dimensions of one work. Justice Okuno, like Justice Yokota, proposed comparative consideration of priority over legal interests in each case. His key contention is as follows:

> In such cases, to fix one's attention only on the aspect of obscenity in that work, to forbid its publication and sale, and to punish contrary acts, is to deprive people in general of their right to receive the artistic, intellectual, and literary values of that work, and to violate the freedom of expression of the author (Ito and Beer, 1978, 201-2).

He pointed out that, under Article 230-2 of the Criminal Code, libelous speech may escape punishment if the facts in a case indicate the speech at issue touches the public interest and was uttered for public benefit. Okuno contended:

> This legal principle is a generally appropriate basis for Transcending Legal Provisions and Negating Illegality (*Chôhôkiteki Ihô Sokyaku*) whenever an alleged offense involves an exercise of freedom of expression that has public value (Ito and Beer, 1978, 202; Beer, 1984, 351).

He argued that the Supreme Court completely ignored the artistic, intellectual, and literary value of the work in question, and looked solely for obscenity without any consideration or judgment of the work's public nature (Ito and Beer, 1978, 202). Justice Okuno concluded that punitive measures were inappropriate if the various elements of Juliette were weighed (Ito and Beer, 1978, 201-2; Beer, 351). Similarly, Justice Tanaka contended that the work is of high artistic and intellectual value. He also pointed out that it was not found that the translator and the publisher intended to translate and sell this work with a specific emphasis on the point of its obscenity (Ito and Beer, 1978, 210).

It was in *de Sade* that the "hard-core pornography only" policy was presented for the first time in the Japanese Supreme Court. In his dissenting opinion, Justice Irokawa tried to clarify what obscenity is, and what pornography is. He divided obscene writings into two kinds. The first is pornographic writings which are "indecent writings for the sake of indecency intended solely to arouse sexual interest" (Ito and Beer, 1978, 211) and which have "no redeeming social value" (Ito and Beer, 1978, 211). The second category is the writings which take "sex as its subject matter and includes descriptions of sexual activities" (Ito and Beer, 1978, 211), but does not stand "on the basis of arousing sensual and lascivious preoccupation and interest" (Ito and Beer, 1978, 211). Justice Irokawa agreed with the prohibition of distribution and sale of the first category, because pornography "will contribute to the decay and degradation of a sound order in society regarding sex" (Ito

and Beer, 1978, 211). Concerning the second category, Irokawa proposed to take a very careful comparative consideration of the values, because he recognized a close relationship between a nation's culture and the freedom to write, disseminate, and receive literature, ideas, and information. He argued that we must be extremely cautious about restricting free speech and free press (Ito and Beer, 1978, 214). Accordingly, he contended that punitive measures under Article 175 of the Criminal Code are proper only in the cases of extreme pornography. Justice Irokawa found that there are portrayals of sexual activities in this book which are unnecessarily explicit. However, he also argued that the translation in the present case does not stimulate or arouse sexual desire, and concluded that it is an error to hold this work to be obscene (Ito and Beer, 1978, 217).

The concept of "freedom to know" was presented by Justice Irokawa in his dissenting opinion. He contended that freedom of expression under Article 21 of the Constitution includes freedom of speech and press, and the freedom to know. Irokawa argued that "freedom of expression is meaningless without the freedom to read, listen, and see," and that "the freedom to appreciate a literary work and receive its values must be fully respected along with the freedom to publish, distribute, and so on" (Ito and Beer, 1978, 213):

> Even if the distribution of such works have some undesirable affect on the order in society regarding sex, the distribution should not be penalized under Article 175 of the Criminal Code as long as there is substantial social value in publishing that work and letting it be appreciated (Ito and Beer, 1978, 213).

Justice Tanaka, who dissented from the majority's judgment, emphasized the extreme importance of freedom of expression in democracy. He contended that freedom of expression and academic freedom are absolute. However, Justice Tanaka clearly acknowledged that there are intrinsic limitations on these freedoms. He argued that, in these cases, only "inherent limits (*naizaiteki seiyaku*)" on freedom are intended by the Constitution. It means that the exercise of freedom must reflect respect for the freedom of others and recognition of the existence of different individuals' freedom. According to Tanaka's opinion, punishment under law for libel or for distribution and sale of obscene writings should arise only from judicial recognition of acts that are in themselves contrary to the inherent limits of freedom.

In *Chatterley*, eleven judges agreed in affirming the original judgment, and only two judges presented separate opinions. In *de Sade*, on the other hand, six judges presented their individual opinions, and each of them had some distinctive point. This is the most fundamental difference between these two decisions. This fact itself may mean that there was a significant change in prevailing ideas of society during a period of twelve years, with respect to sexual representation. Beer points out that the fundamental difference between the majority and the dissenting Justices in *de Sade* is in the interpretive methodologies (Beer, 1984, 352). The majority, like the *Chatterley* court, based its judgment on analytic correlation of Article 175, the public welfare, prevailing ideas of society, and the fourteen objectionable passages in Juliette. The dissenters and Justice Iwata emphasized the balancing of

relevant public interests and direct recourse to the Constitution's stress on freedom. The former see obscene parts as casting a shadow over the whole, while the latter see the possibility of the brightness of the whole dispelling the shadow cast by the obscene sections.

The ruling by the Supreme Court basically followed the logic presented in *Chatterley*, but there were some substantial changes. Beer points out:

> The majority view went beyond *Chatterley* doctrine in more clearly stating that obscene sections render an entire work obscene; recognizing the possibility of literary writings close to but less than obscene; applying the public welfare standard to academic freedom for the first time (Beer, 1984, 350).

As I mentioned already, one more change from *Chatterley* was that the Supreme Court in *de Sade* proposed to judge the work's obscenity in relation to the whole work. However, the Court did not present any concrete method of judging obscenity.

C. *The Yojôhan Decision* (1980)

Nosaka et al. v. Japan and Nakagawa et al. v. Japan, 34 Keishû No.6-433

1. Facts

In 1972, the story Yojôhan Fusuma no Shitabari, which was supposedly written by the famous writer Nagai Kafû, was printed in July edition of a magazine Omoshiro Hanbun. In June, 28,458 copies of the magazine were sold. The publisher, Nakagawa, and the chief editor,

Nosaka, were accused of illegal distribution of obscene material under Article 175 of the Criminal Code. Two thirds of this story was occupied by explicit descriptions of intercourse in a geisha house.

On April 27, 1976, the Tokyo District Court held Yojôhan to be obscene. In its judgment, the court followed the *Chatterley* doctrine. The court argued that the sales of such sexually explicit material as the work in question violate "the principle of the nonpublic nature of the sex," and that violation of this basic principle also disturbs the sexual order and the sexual morality of a society. The court affirmed previous decisions in its understanding of the meaning of "obscenity" under Article 175 of the Criminal Code and the criteria for judging the presence or absence of obscenity. Three conditions for "negating illegality (*ihôsei sokyaku*)" were presented:

1) The sincere objective of the work:
2) A legitimate selling method; and
3) The interest which the sale of the material brings to a society outweighs the harm which was caused by the sale of the material.

However, the court denied "Negating Illegality" in this case (Ashibe and Takahashi, Eds., 1994, 114). On March 20, 1979, the Tokyo High Court again affirmed the constitutionality of Article 175 of the Criminal Code. However, its reasoning was different from the Tokyo District Court's decision. The court followed the precedents in the understanding of the meaning of "obscenity," but it made the standard and method of judging the presence or absence of obscenity more concrete. The court set three criteria for obscenity:

1) Description of the genitals or the sexual acts is bold, detailed, concrete, and appealing to readers' emotion and sensation;
2) The dominant effect of the work as a whole appeals to prurient interests in readers; and
3) According to the prevailing ideas of society, the work is judged as offensive (Ashibe and Takahashi, Eds., 1994, 114).

As the elements which should be taken into consideration in judging the dominant effect of the work, the court presented such elements as the proportion of the work taken up with above mentioned sexual descriptions, the relationship between such descriptions and the thought expressed in the work, and the effect of the work's serious societal value which may sublimate or overcome the sexual excitement. The Tokyo High Court's ruling did something more than just follow precedent. The court proposed a method of judging obscenity which is more detailed compared to its precedents. The accused appealed to the Supreme Court, arguing the unconstitutionality of Article 175 of the Criminal Code (Ashibe and Takahashi, Eds., 1994, 114).

2. Decision: The judgment was affirmed

On November 28, 1980, the Supreme Court held Yojôhan to be obscene. The Court followed three criteria for obscenity set by *Chatterley*. The constitutionality of Article 175 in its relation to Article 21 of the Constitution was affirmed again. The Court reached this decision just by following the previous two decisions. There was an argument contending that Article 175 is so vague that it constitutes

a violation of Article 31 of the Constitution. The Court rejected this argument by saying that this article is not unclear. The Supreme Court agreed with the Tokyo High Court's decision in that the presence or absence of obscenity must be judged by assessing the work as a whole. After examining Yojôhan as a whole, the Supreme Court found it to meet the three criteria for obscenity under Article 175 of the Constitution.

3. Discussion

The Supreme Court in the Yojôhan decision basically followed the formulation set in *Chatterley* and affirmed in *de Sade*. The three basic criteria for obscenity were left intact. However, the Supreme Court in *Yojôhan* appeared to pursue more clarity and objectiveness in judging obscenity. This is probably because the Court acknowledged the fact scholars had criticized *Chatterley* and *de Sade* for the vagueness of their criteria for criminal obscenity.

The fundamental question that the courts must answer in the present case, the justices held, was whether or not a work "appeals primarily to prurient interests in readers." In *de Sade*, the Court held that the judgment of obscenity must be made by assessing a work as a whole. This argument was presented in *de Sade* for the first time, but the *de Sade* Court did not mention "how" such an assessment should be made practically. In *Yojôhan*, the Supreme Court presented five elements which should be examined in determination of the presence or absence of "appeal to prurient interests." The concept of "prurient interest" was

not presented at the Supreme Court before *Yojôhan*. Concerning the elements which should be considered, the Supreme Court followed the idea presented by the Tokyo High Court.

> 1) The relative boldness, detail, and general style of its description of sexual behavior;
> 2) The proportion of the work taken up with sexual description;
> 3) The relationship in a literary work between such descriptions and the intellectual content of the story;
> 4) The degree to which artistry and thought content mitigate the sexual excitement induced by the writing; and
> 5) The relationship of sexual portrayals to the structure and unfolding of the story (Beer, 1984, 353).

In *de Sade*, the Supreme Court focused on the theme of the work in question. In *Yojôhan*, on the other hand, the Court's focus shifted from the theme to the descriptions contained in the work.

The Court used the term "prevailing ideas of society," but did not mention the meaning of this term. The Court simply followed the ruling made 23 years before, which argued that the "non-public nature of the sex act" is at the core of prevailing ideas of society. Given the great transformation of society between 1957 and 1980, the Supreme Court should have at least addressed this issue. In 1983, Justice Ito presented his opinion that "prevailing ideas of society" should be flexibly determined in accordance with social change. With this argument, Ito rejected the validity of the principle of the "non-public nature of the sex act" (Ashibe and Takahshi, Eds., 1994, 115). It should be noted that the arguments discarding the element of "contrary to proper ideas of sexual morality" can be observed in several lower

courts recently (Ôya, 1981, 60). Moreover, lower courts began presenting the argument that "prevailing ideas of society" should reflect the existing social reality rather than the normative standard of the judiciary (Ôya, 1981, 60 and 62). However, Ôya points out that it is still difficult to judge and establish solid standards reflecting the social reality. He concludes that "prevailing ideas of society" cannot be an appropriate standard of judging obscenity (Ôya, 1981, 60).

It is observed that both the Tokyo High Court and the Supreme Court in *Yojôhan* aimed to limit the regulation of obscenity to "hard-core pornography" and materials close to this category. Yet, the precise standard of "hard-core pornography" was not fixed in *Yojôhan*. Later, on March 8, 1983, the Supreme Court was faced this question. In his supplementary opinion, Justice Ito argued that the crucial criterion for "hard-core pornography" is the absence of any redeeming social value. On the judgment of obscenity of "pseudo hard-core pornography," he proposed to examine comparatively the work's harm and social value. Also, he claimed that such a comparative examination needs to be done with a special cautiousness in the cases involving works with political, academic, or artistic value. However, critics contend that the harm of sexual expression has not been specified, and that the social value of the work is not the object of judicial determination but something the audience should determine (Ashibe and Takahashi, Eds., 1994, 115). There has been a contention that "it is easy to distinguish pornography from others, even if it is hard to define it legally" (Ôya, 1981, 62). Another claim often taken for

granted is that "there is a consensus on regulating public display of hard-core pornography" (Ôya, 1981, 62). However, to limit the regulation of obscenity to "hard-core pornography" may not be as easy as usually assumed.

The *Yojôhan* decision loosened the restriction of obscenity, on the one hand, and made the criteria for Article 175 of the Criminal Code more concrete and clearer, on the other hand (Ôya, 1981, 60). However, there is disagreement concerning the assessment of this decision. Scholars like Kitani regard this ruling as important, while other scholars like Matsui do not evaluate it positively. The latter points out the fact that the Court did not change the basic definition of or criteria for obscenity (Ôya, 1981, 57 note 2). In *Yojôhan*, the question of the constitutionality of Article 175 was not discussed at all. The issue of the "public welfare" was not addressed. The legitimacy of the selling method was argued at the Tokyo District Court, but it was not a focus of the decision at the Supreme Court. The criminal intent or other subjective factors on the side of the writer and publisher were not examined, either. Largely because it was decided at the Petty Bench of the Supreme Court, the *Yojôhan* Court was under limitations set by the previous two decisions at the Grand Bench. In avoiding conflict with its precedents, the *Yojôhan* decision lacked thoroughness. The discussion as a whole stayed very shallow. The social transformation between 1957 and 1980 should have been reflected in the decision or at least in the discussion at the Supreme Court. It is even strange that the Supreme Court persistently kept the guidelines which were set more

than two decades before, as if they were unquestionably correct. Yet there was some important development in *Yojôhan*. The most significant advance in this decision was that the Supreme Court made the method of judging obscenity less ambiguous by presenting the elements which should be examined in making a judgment.

CHAPTER IV

THE THEORIES AND STANDARDS OF REGULATING OBSCENITY

In this chapter, I will address the basic theories of regulating obscenity and the terms used in judicial decisions from the U.S. and Japan discussed in the last chapter. In the first part, the theories developed in the U.S. will be addressed. Some of the theories were employed in Japanese cases, while some others were not. In the second part, I will examine and compare the standards of obscenity and the terms used by the American and Japanese courts.

A. Theories

1. The Bad Tendency Test

This test was prevalent in the earlier days of the discussion concerning the First Amendment. Under this doctrine, the U.S. Supreme Court in *Gitlow v. New York* (1925) stated;

> That a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question (Emerson, 1963, 50).

In this decision, the Court was practically saying, "the legislature was entitled to extinguish the spark without waiting until it has

enkindled the flame or blazed into conflagration" (Emerson, 1963, 50). The "bad tendency" test renders freedom of expression nothing, since freedom of expression receives no protection whenever there is any conflict between expression and other social interests. The crucial problem of this test is that it allows only expression which is harmless to the Establishment. The standard of "bad tendency" can be ideologically biased. Once such subjectivity is allowed, what comes next is totalitarianism in the area of expression. The "bad tendency" test was rejected by the Court in *Dennis v. U.S.* (1951) (Emerson, 1963, 51 note 6). However, the Court's wording in *Gitlow* seems very similar to the traditional Japanese Court's argument. In Japan, such an emphasis on the "public welfare" and public morals remains prevalent in the courts, even though it has been criticized by Japanese academics.

2. The Clear and Present Danger Test

The "clear and present danger" test was presented by Justice Holmes in *Schenck v. U.S.* (1919):

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent (Emerson, 1963, 51).

Originally, Justice Holmes presented this argument in order to justify the regulation of expression. Later, however, this test was used to protect freedom of expression, and has been regarded as an advancement

from the "bad tendency" test. The "clear and present danger" test protects expression even though that expression is in conflict with other social interests. This test was employed by the majority of the U.S. Supreme Court in the 1940s, and then abandoned by the Court in *Dennis* (1951) decision. According to Emerson, there were five major objections to this test. First, the "clear and present danger" test's focus on effectiveness of the expression in influencing action is incompatible with the doctrine of free expression under the First Amendment. Second, this test is very vague. Third, this test often involves difficult factual judgments which the court is inherently unable to make. Fourth, the "clear and present danger" test was originally adopted in the cases where a direct prohibition of expression by criminal or similar sanctions was involved. It is questionable if this test is applicable to other kinds of cases. Fifth, the "clear and present danger" test was expanded to include other factors than the immediate impact of expression in influencing action. As a result, the difference between the "clear and present danger" test and the ad hoc balancing test became insignificant (Emerson, 1963, 51-3). At the beginning of the 1950s, the "clear and present danger" test was abandoned by the U.S. Supreme Court. Emerson points out that "(T)he substitute - the gravity of the evil, discounted by its improbability - excised the main features of the original test by eliminating or minimizing the requirement that the danger be immediate and clear" (Emerson, 1963, 53). In this sense, the "clear and present danger" test became the "clear and possible danger" test. The "clear and present

danger" test reemerged as the "clear and imminent danger" test in *Brandenburg v. Ohio* (1969) and is now a firm part of the First Amendment law. In Japan, the "clear and present danger" test has been broadly supported among academics. There are a significant number of local legislations and judicial decisions which adopted this standard (Sone, 1985, 22).

3. The Ad Hoc Balancing Test

The ad hoc balancing test is that "the court must in each case balance the individual and social interest in freedom of expresson against the social interest sought by the regulation which restricts expression" (Emerson, 1963, 53-4). This test, presented by Chief Justice Vinson in *American Communication Association v. Douds* (1950), has been adopted by the Supreme Court in a number of subsequent decisions. Basically, this method does not present a fixed standard of judgment. Emerson argues that the principal difficulty with this test is that it frames the issues in a very broad and undefined way, which is almost unstructured. Therefore, it can hardly be described as a rule of law (Emerson, 1963, 54). Five major criticisms are as follows. First, the ad hoc balancing test presents no substantial doctrine which guides a court in reaching its decision. Second, this test involves factual determinations which are not only very difficult and time-consuming but also improper for the judicial process. Third, the ad hoc balancing test deprives the judiciary of its independent judgment, and

gives more power to the legislature. Fourth, the ad hoc balancing test makes the First Amendment insignificant. Under this test, the restriction of expression is within the legislature's discretion. The courts can restrain the legislature only when the judgment itself is unreasonable. For this, the First Amendment is not necessary, because the due process clause can achieve the same degree of protection. Fifth, this test lacks advance notice of the rights essential to be protected. Ultimate decision is always left to the resolution in each case (Emerson, 1963, 54-6). The ad hoc balancing test is a product of the attempt to reconcile the conflicting interests surrounding free expression. However, this test cannot offer any stable and reliable legal guideline for regulating expression. Under this test, it is very hard for individuals to know whether or not a certain expression is to be protected, until the expression actually comes up for discussion in the court. Such unpredictability is a serious defect of this method, because it lacks "a fair notice." In the Japanese Supreme Court, Justice Okuno and Justice Iwata claimed to use this test in the *de Sade* decision (1969). Also, the Japanese Supreme Court, in the *Hakata Station Film* decision (1969), unanimously agreed to employ this test.

4. The Two-Level Theory of Free Speech

In deciding cases involving the First Amendment, the U.S. Supreme Court has focused on the social utility of expression. In *Chaplinsky v. New Hampshire* (1942), the Court argued that obscenity falls outside the

category of speech protected under the First Amendment. What the Court meant was that there are two categories of speech; one is protected under the First Amendment, and the other is not. Fifteen years later, in *Roth v. U.S.*(1957), the Court endorsed this theory. It was held that "(A)ll 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. Obscenity, on the other hand, is "utterly without redeeming social importance." The Court quoted *Chaplinsky* and concluded that obscenity is not within the area of constitutionally protected speech or press (315 U.S. 568, 571-572). The majority's opinion argued that it is unnecessary to consider the issues behind the phrase "clear and present danger," since obscenity is not in the area of constitutionally protected speech. In his article "The Metaphysics of the Law of Obscenity," Kalven questions the legitimacy of the two-level theory of free speech as a doctrine, and claims that this theory seems difficult to accept as a doctrine. He criticizes the Court's usage of this theory as "a strained effort to trap a problem" (Kalven, 1960, 10-11). According to the two-level speech theory, there are two categories of communications. The communications of the first category are entitled to be tested under the "clear and present danger" test, even if they are against majority opinion of the time or hated by majority. On the other hand, the communications of the second category are so worthless that no extensive judicial examination is necessary before prohibiting them (Kalven, 1960, 11). Under this theory, the Court must only decide

if a work belongs to the first or the second category of speech. Once the work is judged to belong to the second category, there is no need for the Court to bother to consider the presence or absence of danger. The expressions in the second category are to be banned not because they are dangerous but because they are worthless. On this two-level theory of free speech, Justice Harlan, in his dissenting opinion in *Roth*, criticized that "(T)he Court seems to assume that 'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants," and pointed out the difficulty in using the two-level theory where classification at the first or second level depends on a key term as vague as obscenity (Kalven, 1960, 20).

However, it has not been really proved that certain sexually explicit materials, which are held "obscene" by the courts, always lack worth and utility. Kalven says, "In the process of defining obscenity, the Court said nothing about social worthlessness" (Kalven, 1960, 15). On this issue of social utility, Kalven contends that the Court "has confined itself on each occasion to the historical point that libel and obscenity have long been regarded as worthless speech subjected to prohibition" (Kalven, 1960, 12). He refers to *Gitlow v. New York* (1925) and argues that "the question ... would be about the social utility of revolutionary speech and not the utility of the particular pamphlet" (Kalven, 1960, 11). This comment is applicable to sexually explicit materials, too. Even if the depiction is very unorthodox or even contrary to the conventional morality, "(I)t is the premises and not

the conclusion that are worth protecting" (Kalven, 1960, 11). In this sense, the work of de Sade and Lady Chatterley's Lover, in Japanese Supreme Court cases, should have been considered seriously, since their premises were a serious attack on the conventional moral framework itself.

For a long time, the courts have asked what the social utility of obscenity is, and have reached the conclusion that obscenity is worthless expression. On this point, Kalven claims that the problem lies in the way the question has been put. He argues:

> It seems hardly fair to ask: what is the social utility of obscenity? Rather the question is: what is the social utility of excessively candid and explicit discussions of sex? (Kalven, 1960, 12)

This criticism is sound. Traditionally, the U.S. Supreme Court has dismissed certain sexually explicit materials as not worth protecting, just by saying obscenity lacks redeeming value. However, as Kalven points out, the real question was "(W)hat is the social utility of sexually explicit materials?" There are various objectionable exercises of speech, but it does not immediately mean that they are necessarily and totally worthless and useless. In this sense, one of *Miller*'s criteria for obscenity - "Taken as a whole, the work lacks serious literary, artistic, political, or scientific values" - should be taken as an independent requirement. In Japan, such an element as the artistic and/or literary value of the work was treated as totally irrelevant to the judgment of presence or absence of obscenity in the *Chatterley* decision. In the *de Sade* decision, the Court admitted the

possibility that these values make the work exempt from obscenity charges. In the *Yojôhan* decision, the Court decided to take these elements into consideration.

However, even if certain expression lacks social utility or redeeming value, does it automatically mean that it is outside the protection of the First Amendment? Does expression have to have social utility or worth in order to be protected by the First Amendment? Under the two-level speech theory, "(I)n determining the constitutionality of any ban on a communication, the first question is whether it belongs to a category that has any social utility" (Kalven, 1960, 11). The First Amendment itself never mentions social utility as a premise of its protection.

In his book, Free Speech and Its Relation to Self-Government (1960), Meiklejohn argues that free speech is indispensable to the informed citizenry required to make democratic self-government work. The people need free speech because they vote. As a result, his argument distinguishes sharply between public and private speech. This theory explains why communications relevant to the political process should be guaranteed, but it does not explain why the novel, the poem, the painting, the drama, or the piece of sculpture falls within the protection of the First Amendment (Kalven, 1960, 16). Kalven points out that the majority opinion in *Roth* has made a major contribution in the sense it showed a shift from *Hicklin*. However, he criticizes it as unsatisfactory, because "it gave a major endorsement to the two-level theory that may have unhappy repercussions on the protection of free

speech generally" (Kalven, 1960, 17). David A.J. Richards argues that attempts to regulate the contents of communications by law are incompatible with the principle of equal liberty (Richards, 1980, 101-2). According to him, the First Amendment rests on a moral basis that cannot be reduced to "a utilitarian calculus of the political usefulness of a debate on divergent points of view" (Richards, 1980, 120).

5. "Constant Obscenity" and "Variable Obscenity"

On the concept of obscenity, there are two basic positions. Here, the issue is "whether obscenity is an inherent chracteristic of obscene material, so that material categorized as obscene is always obscene at all times and places and in all circumstances, or whether obscenity is a chameleonic quality of material that changes with time, place, and circumstance" (Lockhart and McClure, 1960, 68). These two conceptualizations are respectively called "constant obscenity" and "variable obscenity." Lockhart and McClure, who question the validity of the concept of "constant obscenity," find it difficult to draw a line between non-obscene materials and the material that is obscene though not hard-core pornography (Lockhart and McClure, 1960, 75). They pose other questions:

> What is to be done about material, indisputably hard-core pornography, that is addressed to an audience of social scientists for purely scientific purposes? What, if anything, is to be done about the panderer who pushes non-obscene material as if it were

> obscene, seeking out an audience of the sexually immature to exploit their craving for erotic fantasy? And although the general public cannot constitutionally be denied access to non-obscene material because it might have a deleterious influence upon youth, is it constitutionally permissible to prohibit the dissemination of such material to adolescents? (Lockhart and McClure, 1960, 76)

Given the difficulty of fixing a satisfactory test for materials which are placed somewhere between Lady Chatterley's Lover and hard-core pornography, they contend that "the United States Supreme Court ... might well decide to hold the line for constant obscenity at the level of hard-core pornography" (Lockhart and McClure, 1960, 76). After they point out the defects of setting a "constant" concept of obscenity, Lockhart and McClure advocate a "variable" concept of obscenity, which would make the validity of censorship depend upon the particular material's primary audience and upon the nature of the appeal to that audience. They argue that, since there is no such thing as inherently obscene literature, materials must be judged by their appeal to and effect upon the audience to which they are directed (Clor, 1969, 118). Lockhart and McClure quote D.H. Lawrence's words saying "(G)enuine pornography is almost always underground; it doesn't come into the open," and argue that:

> Given the nature and appeal of hard-core pornography, it is clear that the proper hypothetical person to use in testing material of this kind is not the average or normal person but rather the sexually immature who wallow in the hard-core pornography to satisfy their immature craving for erotic daydreams (Lockhart and McClure, 1960, 74).

Under the concept of variable obscenity, material is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination (Lockhart and McClure, 1960, 77). The Supreme Court did not adopt a concept of variable obscenity in *Roth*. In *Roth*, Justice Warren argued for the possibility that "(A) wholly different result might be reached in a different setting" (Lockhart and McClure, 1960, 68), but this argument was ignored. In the *Kinsey Institute* case (*U.S. v. 31 Photographs*, 1957), a federal district court adopted the concept of variable obscenity and ruled that hard-core pornography, imported from abroad by the Kinsey Institute for scientific study, was not obscene (Lockhart and McClure, 1960, 70). In Japan, the courts adopted the concept of variable obscenity in some instances. In the *de Sade* case (1969), the Tokyo High Court held that when the readers are limited to a certain group of people, the standard of judging obscenity should be placed at the average of that group rather than the average of the general population. The concept of variable obscenity is not perfect, either. First of all, it is questionable whether judges and/or juries can determine the impact of the material on a specific audience. For example, how can judges know what the readers feel after reading the material in question? Second, according to this conception of obscenity, it is unpredictable whether or not a certain expression will be judged obscene. As a result, there would be chilling effect on expression.

6. Pandering

In the debate over the obscenity provisions of the Model Penal Code, Henry Hart urged that the criminal offense of disseminating obscene material be defined as pandering to an interest in obscenity. The American Law Institute rejected Hart's proposal because of its difficulty of enforcement (Lockhart and McClure, 1960, 69). The pandering test, however, was introduced in *Ginzburg v. U.S.* (1966). The Supreme Court held that a publication appealing to the public's prurient interest in sex and advertised as such may be deemed obscene, although the material, standing alone, is not obscene under the *Roth* test or even under the *Memoirs* test. Under this theory, a book may be obscene depending on its prospective purchasers and the method of distributing and advertising it. Various contexual elements are considered in determining whether or not a material is obscene (Ringel, 1970, 112-3). This approach was also suggested by Justice Brennan in *Memoirs*. In Japan, the Tokyo District Court presented this theory in the *Chatterley* case. The court found Lady Chatterley to be close to, yet different from, pornography. However, the court held that the salacious way of advertisement made it something akin to pornography.

B. Criteria for Obscenity

Next, I will examine the teminology that both Supreme Courts have used in their obscenity decisions. Some of the terms are overlapping,

and some of them sound similar but differ in their actual meaning. I chose the terms which I think crucial in deciding obscenity cases.

1. "Average," "Normal," or "Ordinary" Person

Until *Roth*, the standard of obscenity was that held in *Regina v. Hicklin* (1868) and determined by the affects on "those whose minds are open to such immoral influences." One of the most criticized aspects of the old *Hicklin* test for obscenity was its reference to particularly susceptible persons as the standard for judging material alleged to be obscene (Lockhart and McClure, 1960, 70). Even though the court followed the *Hicklin* test, in *U.S. v. Kennerley* (1913), Judge Learned Hand argued that the *Hicklin* test would "reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few" (Kalven, 1960, 6). In this same decision, Judge Learned Hand said, "I scarcely think ... that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members" (Lockhart and McClure, 1960, 110). This argument was an indication of the possibility of negating the *Hicklin* test. In *Butler v. Michigan* (1956), "(T)he Court was saying that the average adult is not merely the preferred test audience for materials distributed generally; it is the constitutionally required test audience" (Kalven, 1960, 7). In *Roth*, finally, the Court revised the standard for judging obscenity. What the Court made clear was that material must be judged by its effect on the "average" or "normal" person instead of the weak

and immature. However, it is not clear at all who is average, normal, or ordinary. In a totalitarian society, the government may set some arbitrary criteria to define "a normal person." Similarly, in a theocracy, it was easy to distinguish heretic and deviant. In a liberal democracy, however, diversity among individuals is supposed to be respected. Most people think of themselves as normal and average in modern Japanese and American societies. As a result, it is very difficult to say what is normal or abnormal.

Lockhart and McClure argue that any concept of the "average" or "normal" person cannot be fully satisfactory. The Massachusetts's formulation of the "average" person as a composite representing all elements of society including the young and susceptible retains the restrictiveness of the *Hicklin* test (Lockhart and McClure, 1960, 72). On the other hand, the concept of "average" person as the common man, or the man in the street is also problematic.

Another question concerning the validity of the "average" person test concerns the judgment of obscenity in hard-core pornography. Lockhart and McClure argue that the prurient interest of the "average" person cannot be the legitimate test of obscenity in the cases of hard-core pornography, because

> hard-core pornography appeals to the sexually immature because it feeds their craving for erotic fantasy; to the normal, sexually mature person it is repulsive, not attractive (Lockhart and McClure, 1960, 72).

Lockhart and McClure conclude that reference to the "average" or normal person was just an expression of disapproval of the "particularly susceptible persons" test. As they point out, if the concept of variable obscenity is accepted, the concept of the average or normal person has little place (Lockhart and McClure, 1960, 78).

It seems that the U.S. Supreme Court employed the term "according to contemporary community standards" in order to modify the defects in the concept of the "average" person. In Japan, the Supreme Court has used wording similar to "average" person; "the normal sense of sexual modesty of ordinary persons." The Japanese Supreme Court, on the other hand, has not added anything to make the concept of "normal" clearer. Instead, the Court has argued that "the prevailing ideas of society" should be the criteria of judgment.

2. "Contemporary Community Standards" (the U.S.) and "Prevailing Ideas of Society" (Japan)

In *Roth* (1957), the U.S. Supreme Court held that the presence or absence of obscenity may be judged by the application of "contemporary community standards." In *Smith v. California* (1959), Justice Frankfurter argued:

> The determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection on the particular experience of life, but on the basis of contemporary community standards (Ringel, 1970, 96).

The national standards test was adopted in such cases as *Excellent Publications Inc. v. U.S.*(1962) and *State v. Hudson County News* (1963). In *Jacobellis v. Ohio* (1964), the Court held that the term "contemporary community standards" must not be interpreted in a parochial sense, but is to be equated with the contemporary community standards of the nation as a whole, since the area of expression that is protected is governed by the Federal Constitution (Ringel, 1970, 102-3). The logic of the proponents of the national standards test is that the First Amendment rights must be applied equally to all the states just because those rights are a part of the Federal Constitution. The American Law Institute, although a bit ambiguous, favored national community standard by arguing that "since a large part of the responsibility in this area has been assumed by the national government enoforcing federal obscenity legislation, a country-wide approach is almost unavoidable" (Lockhart and McClure, 1960, 111 footnote 601). In *Hudson v. U.S.* (1967), the Court held that the term "community" used in *Jacobellis* refers to the nation as a whole, not to the local community. The Court argued that the national scale must be taken because the meaning of the term "obscenity" is not intended to vary from place to place (Ringel, 1970, 104).

The adoption of a national standards test was criticized, because it "takes away from the individual states their right to deal with their local problems. It tends to centralize in the federal government the power to control criminal prosecutions in the respective states" (Ringel, 1970, 109). In Wisconsin, in *McCauley v. Tropic of Cancer*

(1963), the statewide test was adopted. The California Supreme Court, in *In Re Giannini* (1968), argued that "(I)n order to provide guidance in the event of further prosecutions, however, we hold that the trial judge correctly ruled that the relevant community is the State of California" (Ringel, 1970, 103). This case, *In Re Giannini*, however, was a case which involved "topless" dancing in a nightclub. It was not a case which involved publication of books or motion pictures.

The most crucial deficiency of the national standard lies in the fact that its application was almost unworkable, because of diversity among states across the U.S. This is why it was rejected in *Miller v. California* (1973), as we saw in Chapter II. However, focus on a very narrow geographic area does not necessarily make it easier to find a standard for obscenity. Douglas Wallace conducted a survey of 1083 adult volunteers from the Detroit Metropolitan Area to find out if there was a reliable "community standard" for evaluating a series of erotic pictures. What Wallace found was a considerable amount of variability in response to both the attitude items and the erotic stimuli, but he says that this is not a great surprise given the heterogeneity with respect to age, education, religion, religiosity, sex and sexual attitudes. Wallace claims:

> While it may be possible to find or construct a small group of individuals who will totally agree with each other in their evaluation of visual erotica, on the dimensions relevant to the concept of legal obscenity the probability that such a consensus will be obtained will decrease in a nonlinear manner as the size of the group increases linearly (Wallace, 1973, 66).

Wallace found no uniform standard or criterion being used by subjects as they evaluated the stimulus items. His findings did not support the single contemporary community standard hypothesis. He concluded that "the social issue of obscenity ultimately reduces itself to one of individual differences" (Wallace, 1973, 67).

Lockhart and McClure conclude that the phrase "contemporary community standards" have little place in obscenity cases, and that his wording was used by the Court just to express its disapproval of the application of the Victorian standards in the *Hicklin* test (Lockhart and McClure, 1960, 113).

On the question as to who should determine what is obscene, D.H. Lawrence contends:

> We have to leave everything to the majority, everything to the majority, everything to the mob, the mob, the mob. They know what is obscene and what isn't, they do. If the lower ten million doesn't know better than the upper ten men, then there's something wrong with mathematics. Take a vote on it! Show hands, and prove it by count! (Downs, Ed., 1960, 171).

Lawrence's claim points out the basic rule of democracy. In Japan, however, there appears that "there's something wrong with mathematics." In judging obscenity, the Japanese Supreme Court repeatedly held that such a judgment has to be in accordance with "the prevailing ideas of society." This term sounds very similar to the term "contemporary community standards" in the U.S. Supreme Court's decisions, but these two are different. According to the Japanese Supreme Court's understanding, "the prevailing ideas of society" are "not the sum of

the understanding of separate individuals and are not a mean value of such understanding" (The *Chatterley* decision; cited in Maki, 1964, 9). The Court clearly declared that "(T)he judgment of what the prevailing ideas of society are is, under our present system, entrusted to judges" (Maki, 1964, 9). There is no law which states that such a judgment is entrusted to judges. The Court's contention presupposes that judges surely know what ideas are prevailing among the "mob" in the current society. It may be assumed that the Japanese Supreme Court is saying basically that "the upper fifteen men - Justices - know better than the lower one hundred twenty million." If the upper fifteen men know better than the lower one hundred twenty million, there is no place for democracy. This attitude of the Japanese Supreme Court represents the judiciary's arrogance. Also, I believe that one difference between the U.S. and Japan shapes the Japanese Court's attitude. What the U.S. has and Japan does not is a jury system. Judge Learned Hand, in *Kennerley* (1913), claimed that:

> If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence (Kalven, 1960, 7).

The jury system is one of the fundamental elements in American democracy, which promotes and secures the participation of the "mob" in the legal arena. In Japan, the jury system was abolished in 1943 (Toshitani, 1985, 166). I do not think that a jury system necessarily makes the better decisions or more just decisions, but the

participation of the people must make a difference in judgment. This is especially true when it comes to the issue of obscenity. I do not believe that fifteen supposedly intelligent and decent judges really know what ideas about sexual expression are the most prevalent among the "mob" in the constantly changing society.

3. "Prurient Interest" and "Sexual Arousal"

On the central question; "What is obscenity?," the Supreme Court in *Roth* just said that "obscene material is material which deals with sex in a manner appealing to prurient interest" (*Roth*, p.487; cited in Lockhart ad McClure, 1960, 55). The term "prurient" is derived from the Latin word "*pruriens*" which means "itching", "to long for", "wanton" (Ringel, 1970, 93). The concept of "prurient interest" is defined by the Court in its *Roth* decision as "having a tendency to excite lustful thoughts." On such a definition of obscenity, Kalven points out:

> The key word "prurient" is defined by one dictionary in terms of "lascivious longings" and "lewd." The obscene, then is that which appeals to an interest in the obscene (Kalven, 1960, 15).

Similarly, Lockhart and McClure point out that:

> The definition of obscenity as sexual material that appeals to prurient interest, however, merely pushes the central question back a notch. If obscenity is sexual material that appeals to prurient interest, what is the appeal to prurient interest that makes sexual material obscene? What is the essential nature? (Lockhart and McClure, 1960, 55-6).

It appears that nobody has ever known, knows, or will know what constitutes the essential nature of obscenity. This situtation must be the same in Japan. The Japanese Supreme Court used a term which is similar to "appeal to prurient interest." In Japan, to be held as obscene, the material has to "wantonly stimulate and arouse sexual desire." I can find no substantial difference between "appealing to prurient interest" and "arousing sexual desire." If I have to point out any difference between the U.S. and the Japanese Supreme Courts, I would point out the wording of the Japanese Court - "wantonly." I do not think the word - "wantonly" -means anything substantial here. This means just a mood or image. To put such an intangible word in the criteria for a judgment is very typical of the Japanese courts. How either the Japanese or the U.S. Supreme Courts can know whether an expression arouses sexual desire or prurient interest in the readers' mind remains unanswered. Charles Rembar once said; "Pornography is in the groin of the beholder" (Time, July 11, 1969, 39). As previously mentioned in Chapter 1, what makes the issue of obscenity difficult is the gap among individuals with respect to what constitutes acceptable or unacceptable sexual representation. The current "prurient interest" test is so subjective that it is very questionable as to how such a capricious test can be applied universally. What stimulates an average person with "prurient interest" can be nothing to another similarly average person. What is healthy sex to one average person can be just disgusting to another. Just as there are different preferences for foods, there are millions of different standards, tastes, and

preferences for sex, sexuality, and sexual representation. In addition to the differences in taste, Ringel points out that age cannot be overlooked as a factor to be considered in measuring prurient interest (Ringel, 1970, 99-100).

Another critique points out that it is questionable if government may seek to control people's thoughts - whether or not they are lustful thoughts. Ringel says, "When we speak of 'prurient interest,' we speak of what goes on in one's mind" (Ringel, 1970, 100). Even if the courts choose to seek to curb lustful thoughts, they have another problem in the practical application of the "prurient interest" test. Lockhart and McClure question:

> If, as the Court seems to say, material that *appeals* to prurient interest is material that has a *tendency* to excite lustful thoughts, what degree of causal relationship between the material and the thought is required? (Lockhart and McClure, 1960, 49).

It was not made clear in *Roth* whether materials must evoke perversion, morbidity, or a normal sexual desire to qualify as obscene. Subsequent case law has refined "prurient interest" to "a sick and or morbid interest in sex." To the American Law Institute, "prurient interest" is a "shameful or morbid interest in nudity, sex, or excretion; it is "an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity" (Lockhart and McClure, 1960, 56). No one, however, seems to know the essential nature of "prurient interest," the American Law Institute and

countless judicial opinions notwithstanding. Such a vague term should not be used as a criterion for legal judgment.

4. "Patently Offensive" and "Offend the Sense of Shame"

In 1954, Lockhart and McClure, in their article "Law of Obscenity," argued that "mere offensiveness cannot constitutionally justify censorship" ("Law of Obscenity," 378; cited in Clor, 1969, 118). I believe that once mere offensiveness becomes a legitimate reason to suppress expression, freedom of expression will be curtailed significantly, because "offensiveness" can be interpreted very ideologically and politically. Salman Rushdie once questioned; "What is freedom of expression? Without freedom to offend, it ceases to exist." In the U.S. and Japan, however, offensiveness has been regarded as a legitimate reason to regulate obscenity.

In the U.S., the Court added the "patently offensive" test to the *Roth* test in *Manual Enterprises v. Day* (1962). Justice Harlan asserted that the *Roth* decision established the "patently offensiveness" concept no less than the "prurient interest" concept. On this assertion, Clor argues that "his opinion does not succeed in revealing just where in the *Roth* case this concept is to be found" (Clor, 1969, 63-4). *Manual Enterprises v. Day* was a case which involved magazines held to be published primarily for homosexuals. The distinguising features of this case arise from the fact that the prurience of the magazines was not contested and was indeed acknowledged by all parties. The publisher

avowed that he had designed them to appeal to the prurient interest of homosexuals (Clor, 1969, 60). The publishers sought injunctive relief in the U.S. District Court. An injunction was denied, and the denial was affirmed by the Circuit Court of Appeals. The U.S. Supreme Court reversed the lower courts. One of the reasons for reversal was that "such magazines which have no interest for sexually normal individuals cannot be legally obscene, since they are not so offensive on their face as to affront current community standards of decency" (Ringel, 1970, 100-1). The Court held that "the material challenged under section 1461 cannot be found to be obscene unless it is proved to be both patently offensive and taken as a whole appeals to prurient interest" (Ringel, 1970, 101). In *Memoirs* (1966), *Ginsberg* (1968), and *Miller* (1973), this "patently offensive" test was affirmed.

In *U.S. v. Kennerley* (1913), Judge Learned Hand pointed out that it seems hardly likely "that shame will for long prevent us from adequate portrayal of the most serious and beautiful side of human nature" (Kalven, 1960, 6). In Japan, however, the Supreme Court and lower courts have traditionally emphasized the sense of shame in deciding obscenity cases. It is true even in the *Yojôhan* case which was decided in 1980. It seems to me that this notion of shame, especially in matters of sexual modesty (*Seiteki shûchishin*) has been utilized in a very specific way by the Japanese Supreme Court. Also, the Court's emphasis on "the non-public nature of the sex act" (*Seikôi hikôzen no gensoku*) and its way of utilizing this concept in judging obscenity are very peculiar to the Japanese Supreme Court. This must be partially

attributable to the culture which has emphasized the notion of "shame." I will come back to this topic in the conclusion. The Japanese Court's emphasis and exaggeration of protection of the sense of shame can be an unreasonable repression and infringement of individual freedom of expression. Is there a pressing necessity to protect the "sense of shame"? It seems to me that this is a minor thing which happens in a person's private jurisdiction, especially in the case of reading materials. When it comes to problems involving a captive audience, offense of the sense of shame is not a minor problem.

Another question about the Japanese criteria for judging obscenity is the ambiguity of the terms the courts have used. The Japanese Supreme Court set criteria for materials to be held obscene; they must: 1) wantonly stimulate and arouse sexual desire: 2) offend the normal sense of sexual modesty (sense of shame) of ordinary persons: 3) be contrary to proper ideas of sexual morality. These three conditions seem to be very interdependent compared with the American criteria. For example, the second and third seem to be overlapping and even repetitive. It is hard to imagine material which satisfies the first and the second criteria but not the third. Moreover, the degree of offensiveness required to render an expression obscene is clearer in the American criteria than in the Japanese. The U.S. Supreme Court, in *Miller*, stated that material has to describe or depict, in a patently offensive way, sexual conduct "specifically defined by the applicable state law." The Japanese Supreme Court, on the other hand, has not

offered such a guideline in distinguishing acceptable and unacceptable descriptions. It is problematic in terms of "a fair notice."

C. Basic Differences Between Japan and the U.S.

There are some elements peculiar to the Japanese Supreme Court's approach. First, the concept of "the public welfare" used by the Japanese judiciary is something more than "the general welfare" in the American context. I believe that the public welfare doctrine is so powerful that freedom of expression in Japan has been curtailed in an unreasonably restrictive way. Second, the U.S. Supreme Court has focused on the work's utility or value in judging obscenity. The Japanese Court, on the other hand, has traditionally and consistently emphasized "shame" and "sexual morality," which are very hard to grasp. Obviously, the U.S. Court has also been concerned with sexual morality. However, the Japanese Court has shown its moralistic concern more clearly. In addition, I believe that such notions as "*Shûchisin*" and "*Haji*" are something more than just "shame" in English. These notions are unique to Japanese culture. Third, the U.S. Court has used the term "contemporary community standards," which never appeared in any of the Japanese Court's decisions, as the criterion for obscenity. Even though this term, "community standards," is problematically vague, it at least has a more democratic sound than the Japanese method - allowing the judiciary to define "prevailing ideas of society." As a result of this method, the Japanese judiciary has appeared to have achieved the status

of an authoritative preacher of morality. This paternalistic stance of the judiciary is more explicit in the Japanese Supreme Court than its American counterpart. Probably, this last difference is due partly to the difference in the judicial process. Unlike the U.S., Japan has no jury system. Also, the fact Japan is much smaller and more homogeneous than the U.S. allows for some judicial differences.

CHAPTER V

CONCLUSION

A. Harms Caused by "Obscene" Expression

In both Japan and the U.S., it has been held that freedom of expression is not absolutely unlimited. In both countries, one of the unanswered serious questions concerning obscenity is: What is the real interest which is to be protected by regulating obscene expressions? To regulate or penalize certain acts legally, there has to be a substantial interest to be protected by such a regulation. Otherwise, such a regulation would be against the rule of due process of law. In the U.S., it has been contended that there are four possible evils:

(1) The incitement to antisocial sexual conduct;
(2) Psychological excitement resulting from sexual imagery;
(3) The arousal of feelings of disgust and revulsion; and
(4) The advocacy of improper sexual values (Kalven, 1960, 4).

In addition, the impact of obscenity on character can be asserted as a fifth possible evil (Kalven, 1960, 4).

1. Anti-Social Conduct and Sex Crime

One position advocating regulation bases its claim on the concern with sex crimes and other socially undesirable conduct. Edgar Hoover

contended that:

> The increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built (Downs, Ed., 1960, 24).

Those who advocate the regulation of obscenity because of this concern believe that the thoughts stimulated by sexually explicit expression are steps to socially undesirable actions (Downs, Ed., 1960, 24). However, the link between obscene materials and sex crimes has not been established. The report by The Presidential Commission on Obscenity and Pornography ("The Johnson Report") presented a recommendation saying that "there is no warrant for continued governmental interference with the full freedom of adults to read, obtain or view whatever such material they wish" (The Obscenity Report, 1971, 99). This recommendation was based on their finding that there was no link between antisocial conduct and consumption of pornography. Beer contends that "(U)ntil highly probable evidence arises of their substantial social danger, it might be better to downplay the content of erotica as being close to irrelevant to law and judicial decisions on obscenity" (Beer, 1984, 354). Gellhorn argues that those who take the position of Hoover just overstate the significance of words and pictures and understate the other elements of life that shape human behavior, and that freedom of communication and freedom to read ought not to be among the sacrifices when the gain is so dubious and the

deprivation so plain (Downs, Ed., 1960, 25-6). It has never been proven that the danger posed by obscene materials is sufficient to justify the exercise of judicial power for its suppression. On this point, Pilpel claims that the "clear and present danger" test still appears to be the only sound constitutional basis for regulation. The Supreme Court has used this test for all speech and press with the exception of obscenity (Downs and McCoy, Eds., 1984, 236). It is not clear why this test has not been applied to obscenity.

2. Juvenile Delinquency

The effect of obscene writings on juvenile delinquency is another concern. On this issue, Gellhorn argues that the most exhaustive study of juvenile delinquency showed that reading seems to be of small moment in shaping antisocial tendencies. He refers to the study by the Bureau of Mental Health Services of the Domestic Relations Court of New York, which found a marked retardation among the children whose conduct has brought them before the court:

> Far from discovering that delinquency grew out of reading, the clinicians have discovered that among New Yorkers it is more likely to grow out of inability to read (Downs, Ed., 1960, 25).

Even if exposure to explicit sexual materials does negatively affect young persons, it does not necessarily justify limiting freedom of expression of adults. Moreover, reading materials are different from visual materials in that the former require intellectual ability to be

understood. It takes time, effort, and ability to understand the message contained in reading materials. Okudaira claims that a juvenile who can read and understand Yojôhan, for example, is to be considered to possess a certain level of rationality, and to be treated equally to a mature adult (Okudaira, Tamaki, and Yoshiyuki, 1986, 165).

3. Stimulation of Sexual Desire and Arousing Revulsion

Both Supreme Courts have taken it for granted that materials stimulating sexual desire or unconventional sexual ideas are detrimental. However, should literature be censored just because it has the potential to arouse lustful desire? Even if certain sexually explicit materials "offend a sense of shame" or "arouse lust," it is not necessarily evident whether or not offending a sense of shame or arousing sexual desire is a harm which is serious enough to justify the regulation of otherwise free expression. Gellhorn contends that "(U)nless the human race is to vanish entirely, we can scarcely afford to regard the arousing of normal sexual desires as a social danger to be curbed at all costs" (Downs, Ed., 1960, 24). There is a position which advocates the regulation of obscene materials in terms of people's right "not to see." However, in the case of reading materials, if one person finds that they are offensive, s/he is free to stop reading. If s/he voluntarily chooses to read something knowing its offensiveness, should the state intervene to stop him or her from being

offended? Kalven argues that "(A)rousing disgust and revulsion in a voluntary audience seems an impossibly trivial base for making speech a crime" (Kalven, 1960, 4). In his article, "Restraints On Book Reading," Walter Gellhorn persuasively presents an argument for freedom to read:

> It is one thing to say that nobody should force upon everybody's unwilling eyes or ears a communication they deem outrageous. It is quite another thing to say that everybody must first approve the content of the communication before it may be transmitted to anybody who is willing to receive it. Books are voluntarily read. They are not obtruded upon the passer-by, regardless of his choice. To be let alone, as Justice Brandeis said, is the most precious of all human rights. In the one case it dictates that none should be compelled to read or listen to what he abhors. In the other it dictates that none should be precluded from writing or reading as his own rather than another's taste may determine (Downs, Ed., 1960, 40).

In the conclusion of this article, Gellhorn argues:

> Like any other freedom, the freedom to read can be used unwisely. But fear that freedom may be improvidently exercised does not justify its destruction. Foolish reading cannot be ended by force (Downs, Ed., 1960, 41).

As he contends, reading is a very private and voluntary act. In the case of reading, readers are not a captive audience. They choose to read and to keep reading. As Kalven argues, as long as a mature person voluntarily chooses to read certain materials, a government does not have to worry about the negative feeling s/he might have owing to the reading (Kalven, 1960, 4). On the state's concern to regulate adult erotica, Beer contends:

> A questionable paternalism, an excessively pejorative reading of the ordinary person's type and degree of interest in erotica, and exaggeration of the resultant social benefits seem implied by a preoccupation with legal control of adult erotica (Beer, 1984, 354).

Beer argues that "(U)nder the right of privacy, as long as another person's right not to be exposed to erotica against his/her will is not violated, the individual adult should have a constitutional right to receive, hear, see, and/or read erotica" (Beer, 1984, 354). As Beer suggests, I believe that the issue which should be taken seriously is the right of people who do not want to see certain things. He says;

> More realistic and reasonable seems a legal preoccupation with protecting every man's right not to have his privacy with regard to sex invaded by unwanted and offensive exposure to salacious advertising and other selling techniques (Beer, 1984, 354).

I believe that the prevailing manner of advertising and selling sexually explicit materials in Japan is very inconsiderate of individual rights compared with that of the U.S. During a commute to Tokyo by train, it is inevitable that one sees salacious advertisements in the train, on the platform, in the newspapers, or in the magazine the person sitting next to you is reading. Similarly, the fact that in Japan pornography is sold in vending machines on the street reflects a lack of sensitivity to people who do not want to see it. As Beer points out, the privacy-based theory is good in the sense that freedom of expression and the right to know and enjoy according to one's private needs, wants, and conscience would receive full protection.

4. The Public Welfare Doctrine

The Japanese Supreme Court has repeatedly maintained that obscene expression is harmful to the "public welfare," because "it contains the danger of inducing a disregard for sexual morality and sexual order" (Maki, 1964, 8). The Japanese Supreme Court has been criticized for using this public welfare doctrine very widely and freely. Besides Articles 12 and 13 of the Constitution, such articles as Articles 22 and 29 of the Constitution also contain the term the "public welfare," but none of these provisions makes clear what the "public welfare" is. In *Japan v. Sugino* (1950), the Court presented a definition of the "public welfare" meaning the maintenance of order and respect for the fundamental human rights of the individual, but this wording is dangerously wide and too abstract to be a legally workable definition. In addition to these provisions in the Constitution, Article 1 of the Civil Code prescribes that "(A)ll private rights shall conform to the public welfare." According to the Japanese Supreme Court's decisions, the "pubic welfare" appears to be the supreme value under the Japanese Constitution. However, this may actually be a supreme value under the Japanese "communitarian feudal democracy" (Ishida and Kraus, Eds., 1989, 85), which I already mentioned in Chapter I.

The "public welfare" doctrine has been used to justify the limitations on freedom. However, I believe that freedom of expression is essential to the public welfare, not only to the maintenance of the

public welfare, but also to the promotion and sophistication of the public welfare.

5. Morality

The negative effect on public morality and sexual values is one of the major harms allegedly caused by certain sexually explicit materials. Both the U.S. and Japanese Supreme Courts, as we have seen, have articulated their concern with public morality on several occasions. In contemporary society, however, people can hardly agree on standards of conduct, language, manners, and on what can be seen and heard. The degree of the lack of consensus is different in the U.S. and Japan, but reaching a consensus is increasingly difficult in both societies. The Reverend Jerry Falwell, founder of the Moral Majority, Inc., argues that America's traditional values are being undermined by those who remove God from all public institutions. He claims:

> Humanists believe that man is his own god and that moral values are relative, that ethics are situational... Humanism places man at the center of the universe... Man lives a meaningless existence in which the only important thing is for him to make himself happy in the here and now. It is a philosophy of "do your own thing." Its slogan is "If it feels good, do it." Neither philosophy offers moral absolutes, a right and a wrong (O'Neill, Ed., 1985, 153-4).

According to Falwell, this "false" amoral concept of the humanist threatens the stability of the nation (O'Neill, Ed., 1985, 151). Janice Raymond formulates this chaos as a "tyranny of tolerance," meaning that every individual desire has become a political or cultural difference.

No value judgment can be made, because that is being divisive (Itzin, Ed., 1992, 174). Raymond's comment is made in her article "Pornography and Politics of Lesbianism," which is a critical discussion of Lesbian sado-masochist groups. In this article, she presents her concern with the current situation in which everything is acceptable in the name of individual difference. In a sense, her concern is sound. It seems that we are living in a world which has no ground for the judgment of right or wrong. In another sense, however, this may be an unavoidable aspect of a modern liberal society.

In Western societies, the Church has been an influential preacher of sexual morality for a long time. However, by the end of the Protestant reformation, the power of the Church had been vastly diluted and passed largely to the civil authority (Daily, 1973, 213). Daily points out that "(I)n maintaining laws regarding obscenity, the civil authority was taking over the duties of the Church" (Daily, 1973, 213). A secular government, however, is not supposed to be the paternalistic administrator of the morality of the nation. It is very questionable whether or not literature can be repressed just because it offends the moral code of the censor. David A.J. Richards contends that obscenity law is "a desperate but doomed attempt to give a repressive morality legal force" (Richards, 1980, 120; Hunter, Saunders, and Williamson, 1993, 201). Richards' comment was made in his critique of the U.S. Supreme Court, but it is very applicable to its Japanese counterpart as well. The Japanese Supreme Court has repeatedly argued that the "prevailing ideas of society" are the standard of obscenity, but these

ideas are not a social reality but rather something the Court should judge. The Japanese Supreme Court has recognized itself as being charged with the clinical role in maintaining morality. In *Paris Adult Theatre I v. Slaton* (1973), the U.S. Supreme Court used an argument similar to the traditional Japanese approach, which justifies regulation of certain expression, in the name of the social interest of preserving sound moral order. On the U.S. Supreme Court's decisions in 1973, which include the *Paris* and *Miller* cases, Richards argues that these obscenity decisions incorrectly "endorsed a particular moral and political view at the expense of other views and capacities for experience, under the guise of making a morally neutral legal judgement" (Richards, 1980, 120). Critics such as Justices Black and Douglas argued that "all obscenity laws are a form of thought control - a virulent restraint and a government effort to regulate not what we do, not even what we say, but what may come into our minds" (Downs and MacCoy, Eds., 1984, 235). In a democracy, neither a government nor a court is a preacher of morality. As many Japanese scholars have argued, the Japanese Supreme Court's claim that the courts are the guardian of sound morality should be regarded as an arrogation of authority. Pilpel claims that many of the Justices are saying, in effect, "This obscene material which we must look at in the course of our judging process can't and doesn't hurt us, but we're afraid it might hurt the rest of you" (Downs and McCoy, Eds., 1984, 237). It appears that the Supreme Court believes that "those who are qualified to identify evil and mistake should be empowered to prevent their dissemination" (Downs,

Ed., 1960, 21), which is a common belief to justify censorship. I suspect that this stance allows a moral paternalism or even a moral totalitarianism. The state which is dedicated to democratic principles should not demand our absolute obedience in every aspect of our lives. Democracy is a regime which recognizes that "there are aspects of human life which the state may not legitimately control" (Hallowell, 1954, 117). Basically, I do not think that the judiciary in a liberal democracy should judge which ideas are moral or immoral, pure or impure, or normal or abnormal. To have an idea, which might be regarded as unorthodox or immoral according to the Court's standard, is not something to be penalized unless it causes some evident social harm.

In Denmark, all restrictions on pornography were dropped by 1969. This legalization of pornography, however, "doesn't mean they approve" (Moskin, 1969, 73). One Danish psychiatrist, Dr. Hertoft, explained the Danish background by describing that "(P)eople said we may not like pornography, but we want to make our own choice. They don't accept that the state wants to be parent of the people" (Moskin, 1969, 73). The basic questions posed in the removal of restrictions were as follows: Why should someone be punished for buying an erotic book or sexy picture? Should the power of the state be used to enforce rules of morality? Does pornography have a damaging effect on the user or anyone else? (Moskin, 1969, 73). These are questions which have to be answered before legalization, but most of these questions have never been seriously examined in either Japan or the U.S. In Denmark, people decided to let the self-regulating forces of society control the porno

business. This means that people chose self-determination over the paternalistic intervention of government in preserving sexual morality. Self-determination is one of the fundamental premises of democracy. On the issue of self-determination and morality, the Johnson Report concluded:

> Governmental regulation of moral choice can deprive the individual of the responsibility for personal decision which is essential to the formation of genuine moral standards. Such regulation would also tend to establish an official moral orthodoxy, contrary to our most fundamental constitutional traditions (The Obscenity Report, 1971, 103).

In the U.S., until the case *Kingsley International Pictures Corporation v. Regents of the University of New York* (1959), the courts found material obscene simply because it challenged current moral standards. Lockhart and McClure argue that *Kingsley Pictures* put an end to censorship for ideological obscenity. In this decision, the Court ruled that the the constitutional guarantee of the freedom to advocate ideas protects the right to advocate that adultery may be proper in some circumstances. The main thrust of the opinion in this ruling was a declaration of the constitutional right to advocate unconventional ideas and behavior "immoral" by current standards (Lockhart and McClure, 1960, 99-100). Given that the objectionable nature of some ideas played a prominent role in many obscenity decisions before 1959, *Kingsley Pictures* certainly marked a significant progress. I believe that it is an individual responsibility to decide the best moralilty among all possible moral standards. One problem is that the principle

of individual choice or self-determination presupposes that every individual is a rational moral agent.

Those who advocate regulating sexually explicit materials very often believe that "obscene" materials will lead a society to the breakdown of sexual morality. The following claim by Clor is representative. Clor believes that the objective of government in censoring obscenity is not to turn people's mind toward more worthy thoughts, but to inhibit influences which corrupt moral character.

> Constant exposure to literary and visual materials which overemphasize sensuality and brutality, reduce love to sex, and blatantly expose to public view intimacies which have been thought sacred or private must eventually result in an erosion of moral standards (Clor, 1969, 170).

It seems to me that both Japanese and American courts have agreed with Clor. Both judiciaries have been very fearful of the negative impact of sexually explicit expression on sexual morality, and this is why sexual descriptions have been treated very restrictively. However, it is not necessarily clear why "sexual" morality has been treated as very special among various moralities. On this point, Kalven argues that the topic of obscenity is freighted with all the anxieties and hypocrisies of society's attitude toward sex (Kalven, 1960, 45). Clor cites Margaret Mead's observation: "Every known human society exercises some explicit censorship over behavior relating to the human body, especially as that behavior involves or may involve sex" (Clor, 1969, 190). He points out that there is no known society in which matters relating to sex are left wholly to individuals or to spontaneous social

activity (Clor, 1969, 190). Further, Clor maintains that "(D)emocracy cannot be characterized simply as the maximization of individual liberty in every area of life" and that a person who devoted exclusively to the satisfaction of sensual appetites is not a citizen body at all (Clor, 1969, 200). Therefore, he concludes that it is natural for government to be concerned with the sensual side of life. Clearly, both the American and Japanese governments have been highly concerned with the sensual side of life. In Japan's case, the Japanese Supreme Court's wording in the three decisions discussed in Chapter III reflects a very "Japanese" way of thinking about sex and sexual representation. The Japanese courts have repeatedly used the notions like "nonpublic nature of the sex act" and "sense of shame." Of course, the sex act is supposed to be "nonpublic" in the U.S., too. The U.S. Supreme Court, however, never used such a term in its decisions. The Japanese seem to consider not only the sex act itself but also the mere discussion of sex as nonpublic. Traditionally, sex has been considered as something concealed and as something exclusively kept inside marriage. Gellhorn points out that the concept of obscenity is itself a product of censorship and concealment.

> The Japanese, conditioned by their training to regard kissing as an entirely private exercise, are said to find American movies filled with obscenity because they unabashedly portray heterosexual osculation; and as a consequence films that do not bring a blush to the most demure Americans must be drastically edited before they are deemed appropriate for general exhibition in Japan (Downs, Ed., 1960, 22).

This comment was made in 1956, and the situation has since changed. Abramson and Hayashi found that Japanese regulations of pornography are even looser than American regulations in several senses (Malamuth and Donnerstein, Eds., 1984, 173-183). However, it is my perception that the Japanese in the 1990s still regard sex as something which should not be discussed openly. Every decent, it seems, person is supposed to behave as if s/he had nothing to do with sex. This cultural heritage may be interpreted as extreme modesty or shyness. Yet, I think such a Japanese attitude toward sex is different from Puritan anti-sex-morality which is inherently highly repressive about sex itself. It is widely recognized that the U.S. became much more permissive toward sexual representations since the 1960s. Apparently, American society is now open about sex and sexuality. However, at bottom, repressive attitudes toward sex, sexuality, and sexual representation still seem to be surviving in American culture, because of perennial Puritanism. For a long time, abortion and homosexuality have been discussed in the light of religious and moral value judgments. The discussion of obscenity and pornography also seems to reflect this sexual morality rooted in Puritanism.

B. Modern Doctrine of Free Speech

It is very questionable that certain expression should be prohibited simply because it is embarrassing and distasteful to the majority, or disgusting to average sensibilities. It is my opinion that

the concept of "offensiveness" can be given a political interpretation by the majority or/and government. If pure distaste can be the ground for suppression of a particular expression, freedom of expression will be significantly limited. If the First Amendment permits the government to suppress a publication which is offensive to a particular judge, freedom under the First Amendment can be limited very arbitrarily. Charles Rembar, the lawyer who won in *Memoirs v. Massachusetts* (1966) argued that "(T)he (First) amendment is not designed to give effect to majority wishes." As Rembar pointed out, for that, no First Amendment is required. Freedom of speech and of the press means freedom for what the majority thinks is bad, or thinks is evil, or dislikes, or even hates with unequivocal hate (Friedman, Ed., 1970, 11-2 in Introduction). Perhaps, this original philosophy of the First Amendment is already forgotten or undermined.

In the Communist view, there is no room for argument about the desirability of suppressing disturbing ideas:

> "Why should freedom of speech and freedom of the press be allowed?" Lenin asked. "Why should a government which is doing what it believes to be right allow itself to be criticized? ... Why should any man be allowed to buy a printing press and disseminate pernicious opinions calculated to embarrass the government?" (Downs, Ed., 1960, 27).

Gellhorn claims that he fears that there are non-Communist Americans who may share this particular bit of the hated ideology (Downs, Ed., 1960, 27).

> Since 1791 the First Amendment has stood as a safeguard of the freedom of expression. The doctrine of political freedom it is intended to implement is not a bit of eighteenth-century muddleheadedness. It reflects, rather, the lesson learned from history that truth cannot be established by proclamation and that belief cannot be created by extirpating non-believers (Downs, Ed., 1960, 27).

Judge Hand once argued that "any organization of society which depresses free and spontaneous meddling is on the decline, however showy its immediate spoils" (Downs, Ed., 1960, 28). Gellhorn maintains that the proscription of writings because of their feared effects on accepted beliefs is not only unconstitutional but also unwise (Downs, Ed., 1960, 27).

Donald A. Downs points out that the First Amendment is based on such liberal precepts as the legal tolerance and marketplace of ideas. The principle of legal tolerance is that "individuals and society must tolerate disagreeable speech unless it is clearly dangerous, part of criminal action, or conspicuously without social value" (Downs, 1989, 4). The liberal approach holds that the best way to achieve political and social justice is through an open marketplace of ideas (Downs, 1989, 4). Justice Holmes once maintained that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (Downs, Ed., 1960, 21). Richards also claims that we can never be sure of knowing what the truth is, and the most likely way of approximating it and preserving a democratic society is to maintain a free marketplace of ideas (Hunter, Saunders, and Williamson, 1993, 200).

Sexually explicit materials have been treated as outside this free marketplace of ideas. Indeed, "(I)t is hard to see why the advocacy of improper sexual values should fare differently, as a consitutional matter, from any other exposition in the realm of ideas" (Kalven, 1960, 4). Pilpel says, "There should be as free a marketplace for sexual ideas and descriptions as we have now with reference to other kinds of ideas and descriptions (Downs and McCoy, Eds., 1984, 236). As to the regulation of obscenity, there are two opposing positions. One is that the restriction of obscene materials from society is a threat to freedom of expression, because it is an attempt to prevent people from holding particular views about sexual relations and behavior. On the other hand, there is an argument that obscene materials are an appeal to the libido, not to reason, and therefore are not within the area of expression protected by the First Amendment at all. My idea is close to the former position. I believe that rejecting particular ideas concerning sexuality and sexual relations is incompatible with the fundamental idea of the marketplace of ideas, which is based on tolerance of diversity among the values each individual holds.

In addition to the marketplace of ideas and legal tolerance, four other assumptions underlie the modern doctrine of free speech. First, the modern doctrine of free speech assumes that the individual citizen is autonomous and responsible. Speakers are not held responsible for illegal actions taken in response to their speech, unless the speech incites immediate lawless action. Second, the modern doctrine takes a limited notion of equality, defined as equal treatment under the law

and equal opportunity to compete in the public forum or marketplace of ideas. This notion of equality entails state neutrality in allocating the right to speech. Third, the modern doctrine's concept of citizenship and right applies to the individual rather than a class or group. Fourth, the doctrine makes a basic, if imperfect and inexact, distinction between speech and action. Speech is protected unless it constitutes unlawful or tortuous action or is directly tied to unlawful action, such as libel, incitement, solicitation, conspiracy or the like (Downs, 1989, 5).

Downs referred to this modern doctrine of free speech in his critique of the anti-pornography ordinance authored in late 1983 by MacKinnon and Dworkin. In this paper, I have not explored the area of pornography as distinct from obscenity, since it is another huge topic. However, I need to mention briefly this anti-pornography ordinance since it embraces another important dimension of the contemporary discussion over sexually explicit materials. By means of this ordinance, two nationally prominent anti-pornography feminists brought about a controversy concerning the regulation of pornography. Their anti-pornography ordinance is based on the belief that the current framework of the First Amendment protects only the freedom of speech of men, and silences women at the same time. The authors basically challenged the state neutral doctrine as inappropriate. They attack the traditional "obscenity" approach as being sex-neutral, and thus incompatible with reality. What was new about the logic of this ordinance was their formulation of pornography as sex discrimination,

thus a violation of women's civil rights. They basically defined pornography as materials which eroticize dominance and submission, or depict women in a degrading manner. Even though this ordinance had problems in terms of its constitutionality, its new approach was at least inspiring and innovative.

In 1986, in *American Booksellers Association Inc. v. Hudnut*, the ordinance was held unconstitutional. The U.S. Supreme Court cited the appellate court decision in Chicago that the Indianapolis law was an attempt at "thought control," and affirmed, without issuing an opinion, the rulings by lower courts. In fact, Dworkin and MacKinnon dealt with pornography not as mere speech, but as action. According to Andrea Dworkin's theory, thoughts and ideas are made "as suspect as actions" (Dworkin, 1989, 156). This merging of speech and action was severely criticized. Another criticism is that this ordinance's definition of pornography was based on a sexist viewpoint. With this ordinance, MacKinnon and Dworkin questioned both the First Amendment itself and underlying modern doctrine of free speech. Their claim is that "(T)he modern doctrine of free speech, ... assumes an essential equality of social condition that simply does not exist, so it perpetuates the power of the gender favored by the status quo" (Downs, 1989, 15 in Introduction). All of the above-mentioned four assumptions underlying the modern doctrine of free speech were challenged by these feminists. First, under the ordinance, speakers (makers of pornography) are held responsible for the crimes committed by its users. Second, the ordinance requires states to go beyond the neutral position. Third, the

ordinance treats women as a group, which is counter to the individualistic presumption. Fourth, the ordinance merges speech with action.

To a certain extent, the concern of anti-pornography feminists with sexist images and messages carried by pornography is reasonable. However, the liberal doctrine of free speech has to be preserved in a "liberal" democracy. The First Amendment, even if it has a problem according to the anti-pornography feminists' view, largely relies on liberal principles. In the anti-pornography feminists' view, the constitutional framework, which is based on a liberal philosophy, is totally dominated by male interests. This argument is just like their typical contention that every act of sex between heterosexuals is total war and domination. In Andrea Dworkin's view, sex is power, and all power belongs to the man. Downs claims that the anti-pornography ordinance lacked perspective and a sense of limits. He contends that "(I)f all liberal reality was a hell of domination, the anti-pornography ordinance was a promise of total, utopian justice" (Downs, 1989, 50). In summary, Dworkin and MacKinnon's ordinance is not acceptable under the current American constitutional framework, because their merger of speech and action is incompatible with the liberal principle of free speech which is one of the foundations of democracy. However, they were successful at least in giving people a new perspective. In Japan, the discussion of sexually explicit materials is still limited to the one which is based on the tradtional moralistic "obscenity" perspective, which is sex-neutral. The formulation of

pornography as a form of sex discrimination has not, as yet, been really prevalent in Japan. I do not think that anybody has ever attacked Article 21 of the Constitution by saying, "Freedom of expression under this article is beneficial only for men, and is oppressive for women." Clearly, there are lots of inequalities between men and women in Japan, and men are privileged in many ways. It is interesting that the argument focusing on sexism has not been presented in Japan, which appears to be more sexist and more patriarchal than the U.S.

C. Freedom of Expression and Liberal Democracy

Both the U.S. and Japan belong to the category of "liberal democracy." In a democracy, the majority has the right to restrain an individual's liberty "in order to protect society from potential harm and to support communitarian norms or sexual virtue" (Hall, Ed., 1992, 602-3). In a liberal state, however, tolerance of individual diversity is a fundamental rule. Also, according to liberal principles, not only potential harm but "direct, demonstrable harm to others" (Hall, Ed., 1992, 603) is required before restricting expression. In this sense, these two theses are inherently contradictory. I believe that such a popular slogan as "Freedom and Peace" is also inherently contradictory. If we pursue absolute freedom, we have to accept the possible disruption of peace. If we want perfect peace, we have to give up certain freedoms in exchange. Similarly, I believe that freedom of

expression inherently has the potential to disturb decency or the conventional moral code. Yet, the First Amendment largely relies on liberal principles. In a "liberal" democracy, the liberal doctrine of free speech has to be preserved and respected as much as possible. As Downs claims, the liberal approach to the First Amendment is "necessary to an open society, and an open society is a necessary condition for achieving social justice," and "state neutrality is still necessary to any workable regime of free speech" (Downs, 1989, 146). Even if allegedly obscene material contains objectionable expression or ideas, these ideas are still ideas. As long as speech is just taking the form of speech, and as long as an idea stays an idea, liberal principles protect them. Moreover, I believe that freedom to know includes the freedom to know the darker or the hidden sides of human nature and society.

Freedom of expression is different from other freedoms in that it is not only an end itself but also a means of obtaining other things. Freedom of expression is a means of securing other fundamental human rights, and of maintaining a democratic order (Okudaira, 1988, 59). In Justice Benjamin Cardozo's words, freedom of speech and press is "the matrix - the indispensable condition" of our other freedoms (Downs and McCoy, Eds., 1984, 237). In this sense, infringement of freedom of expression is something more than just infringement of one freedom. This is why we should be very careful in restricting this freedom.

Freedom of expression is intimately related to the idea and practice of a democracy. Emerson argues that "(T)he crucial point ...

is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government" (Emerson, 1963, 10). Because freedom of expression is such an important factor in a democracy, Emerson argues that the limitation on it should be restricted to exceptional cases. Similarly, Gellhorn claims, "(S)ince the free flow of words is essential to the proper functioning of our governmental and intellectual institutions, restrictions upon that flow should be regarded as abnormalities requiring especially convincing justification" (Downs, Ed., 1960, 38). In the area of obscenity, as we can see in both Japanese and American cases, it is hard to say there is a convincing justification for regulating certain expression. The regulations in both countries have been largely based on ideological biases on the side of the courts, which reject ideas challenging the current moral standards. Such an ideological intervention by the state is regarded as illegitimate in other areas of expression, but obscenity has been treated as an exception because it allegedly affects sexual morality, about which the states have been exceptionally nervous.

As long as we cannot prove any substantial harm to be prevented by restricting publication or distribution of obscene materials, the regulation of certain expression would be inherently a threat to freedom of expression and to a liberal society. I do not think such alleged harms as an increase in sex crime, juvenile delinquency, offense of readers' sense of shame, danger of indulging in sex, and moral deterioration can reasonably justify the regulation of certain

sexually explicit materials. I believe that they are either too trivial or not well-proven to be a solid justification for restricting otherwise free expression. Moreover, I do not think that restricting publication and distribution of certain sexually explicit materials is either essential or effective in preserving sexual morality and dignity. Article 175 of the Japanese Criminal Code, which penalizes publication and distribution of "obscene" materials altogether is dangerously broad. However, I am not saying that current methods of producing, advertising, presenting, and distributing sexually explicit materials are without problems. As mentioned already, regulation based on the right of privacy is something the courts should think about seriously.

Basically, I have taken a position favoring freedom of sexual expression. Yet, Suzanne Kappeler's argument, which follows, makes me rethink whether or not the "No Censorship" position is the most desirable. She claims that "(T)he freedom our society protects is not the freedom of expression, but the freedom of the market" (Itzin, Ed., 1992, 89), and continues;

> To be "for freedom of expression," when that means being for the status quo of the market and the pornography industry, can by no stretch of the imagination be seen as being for freedom... "No Censorship" position does not mean a shift of responsibility from the state to the individual, but a shrinking of all responsibility (Itzin, Ed., 1992, 90-1).

Especially when it comes to the pornography industry, this problem is serious. Pornography, which I did not examine in this paper, has been

an important issue in the U.S. and has been emerging as such in Japan. As Kappeler points out, this is an issue not only about expression but also about market. There are people who are profiting by taking advantage of other people's prurient interests. Also, in the pornography industry, women and children are exploited economically and sexually. The pornography industry is an industry which exploits the poorest and most vulnerable group of population. Once a freedom is established, there always appear people who abuse the freedom. It is not known whether the pornography industry exists to satisfy the demand, or people buy pornography just because there is an available supply. Kappeler's comments makes one notice another dimension of this issue.

It is unlikely that the Courts of Japan and the U.S. will suddenly stop regulating allegedly obscene materials. If the Courts still choose to regulate them, the standard of obscenity should at least be placed on "the prevailing ideas of society," not in the sense the Japanese Court has been using it, but in a real sense. This will approximate what the American courts have been calling "contemporary community standards." The standard of obscenity must be "contemporary" and reflect the prevailing ideas, which keep changing. To set such standards, as D.H. Lawrence claimed, the judgment should be left not to particular judges but to the majority of a community. That is a fundamental rule of democracy.

However, as Toqueville warned, in a democracy, there is such a thing as "the tyranny of the majority." There is always a danger in a

democracy that the majority will impose its will on a minority. This is why freedom of expression needs special protection in a democracy. Hallowell argues that the principle of majority rule does not mean that we abandon all qualitative judgments in favor of a quantitative method.

> If the principle of majority rule means that the will of the majority must be conceived as unlimited and absolute, then it is a principle, as the framers of our Constitution realized, that is indistinguishable from tyranny. For the essence of tyranny is unrestrained will -- whether it be the will of one man, of several, or of many. And the tyranny of a majority is no less cruel or unjust - indeed, may be more so - than the tyranny of a single individual (Hallowell, 1954, 120).

As Hallowell points out, the principle of majority rule does not mean the will of majority should unconditionally prevail over the will of the few. Rather, this principle is founded upon the belief that "the widest possible popular discussion and participation in the formation of policy is likely to yield wiser decisions than a discussion limited to the few" (Hallowell, 1954, 121). To secure the popular discussion and participation, freedom of expresion is essential. Once freedom of expression becomes a formality in a constitution, a liberal democracy can easily become something not entirely different from totalitarianism. In this sense, I believe that Charles Rembar's claim highlights a very crucial characteristic of freedom of expression in a democracy:

> Freedom of speech and of the press means freedom for what the majority thinks is bad, or thinks is evil, or dislikes, or even hates with unequivocal hate (Friedman, Ed., 1970, 11-2 in Introduction).

If the courts choose to regulate expressions, they have to be extremely careful not to allow "the tyranny of the majority" to control the situation. Specifically concerning sexual expression, it seems to be very easy to allow control by the tyranny of the majority in both the U.S. and Japan.

BIBLIOGRAPHY

Article 19. Information Freedom and Censorship: World Report 1991. Chicago, IL: Library Association Publishing Ltd., 1991.

Ashibe, Nobuyoshi. Kenpô Hanrei wo Yomu (Reading the Constitutional Cases). Tokyo: Iwanami Shoten, 1987.

Ashibe, Nobuyoshi, and Takahashi, Kazuyuki, Eds. Kenpô Hanrei Hyakusen (One Hundred Selected Constitutional Cases): Bessatsu Jurisuto (Jurist Special Edition), No. 130. Tokyo: Yûhikaku, 1994.

Baum, Lawrence. The Supreme Court, Fourth Edition. Washington, D.C: Congressional Quarterly Press, 1992.

Beer, Lawrence W. Freedom of Expression in Japan: A Study in Comparative Law, Politics, and Society. Tokyo, New York, and San Francisco: Kôdansha International Ltd., 1984.

Berger, Fred, Ed. Freedom of Expression. Belmont, CA: Wadsworth Publishing Company, 1980.

Clor, Harry M. Obscenity and Public Morality: Censorship in a Liberal Society. Chicago, IL: The University of Chicago Press, 1969.

Daily, Jay E. The Anatomy of Censorship. New York, NY: Marcel Dekker, Inc., 1973.

Downs, Donald Alexander. The New Politics of Pornography. Chicago, IL: The University of Chicago Press, 1989.

Downs, Robert B., Ed. The First Freedom: Liberty and Justice in the World of Books and Reading. Chicago, IL: American Library Association, 1960.

Downs, Robert B., and MacCoy, Ralph E., Eds. The First Freedom Today: Critical Issues Relating to Censorship and to Intellectual Freedom. Chicago, IL: American Library Association, 1984.

Dworkin, Andrea. Pornography: Men Possessing Women. New York, NY: G.P. Putnam's Sons, 1981.

Dworkin, Andrea. "Against the Male Flood: Censorship, Pornography, and Equality" in Harvard Women's Law Journal, Vol. 8, 1-29. 1985.

Dworkin, Andrea, and MacKinnon, Catharine A. Pornography and Civil Rights: A New Day for Women's Equality. 1988.

Emerson, Thomas I. Toward a General Theory of the First Amendment. New York, NY: Random House, Inc., 1963

Ernst, Morris L., and Schwarts, Alan U. Censorship: The Search for the Obscene. New York, NY: The MacMillan Company, 1964.

Ernst, Morris L., and Seagle, William. To the Pure: A Study of Obscenity and the Censor. New York, NY: Kraus Reprint Co, 1969.

Feinberg, Joel. The Idea of Obscene. Lawrence, Kansas: University of Kansas Press, 1979.

Freeman, Jo, Ed. Women: A Feminist Perspective, Fifth Edition. Mountain View, CA: Mayfield Publishing Company, 1995.

Friedman, Leon, Ed. Obscenity: The Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases. New York, NY: Chelsea House Publishers, 1970.

Gerber, Albert B. Sex, Pornography, and Justice. New York, NY: Lyle Stuart, Inc., 1965.

Gilmore, Donald H. Sex, Censorship, and Pornography. San Diego, CA: Greenleaf Classics, 1969.

Goldman, Sheldon. Constitutional Law: Cases and Essays, Second Edition. New York, NY: Harper Collins Publishers, Inc., 1991.

Hall, Kermit L., Ed. The Oxford Companion to the Supreme Court of the United States. New York and Oxford: Oxford University Press, 1992.

Hallowell, John H. The Moral Foundation of Democracy. Chicago, IL: The University of Chicago Press, 1954.

Hata, Yasuji, and Funakoe, Kôichi, Eds. Democrasî to Hô (Democracy and Law), Kyoto: Mineruva Shobô, 1994.

Hawkins, Gordon, and Zimring, Franklin E. Pornography in a Free Society. New York and Cambridge: Cambridge University Press, 1988.

Higuchi, Yôichi, Ed. Kenpô no Kihon Hanrei (Basic Consitutional Cases): Bessatsu Hôgaku Kyôshitsu. Tokyo: Yûhikaku, 1985.

Hunter, Ian., Saunders, David., and Williamson, Dugald. On Pornography: Literature, Sexuality and Obscenity Law. New York, NY: St. Martin's Press, 1993.

Ishida, Takashi, and Kraus, Ellis S. Democracy in Japan. Pittsburgh, PA: University of Pittsburgh Press, 1989.

Ito, Hiroshi, and Beer, Lawrence W. The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-1970. Seattle, WA: University of Washington Press, 1978.

Ito, Hiroshi. The Japanese Supreme Court: Constitutional Policies. New York, NY: Markus Wiener Publishing, Inc., 1989.

Iztin, Catharine, Ed. Pornography: Women, Violence, and Civil Liberties. New York and Oxford: Oxford University Press, 1992.

Johnson, Paula, and Goodchilds, Jacqueliene D. "Pornography, Sexuality, and Social Psychology" in The Journal of Social Issues, Vol.29-3, 231-238. 1973.

Kalven, Harry, Jr. "The Metaphysics of the Law of Obscenity" in The Supreme Court Review, 1-45. 1960.

Kawashima, Takeyoshi. Nihonjin no Hôishiki (Legal Consciousness of Japanese People). Tokyo: Iwanami Shoten, 1967.

Kutchinsky, Berl. "The Effect of Easy Availability of Pornographyon the Incidence of Sex Crimes: The Danish Experience" in The Journal of Social Issues, Vol. 29-3, 163-181. 1973.

Lederer, Laura, Ed. Take Back the Night: Women on Pornography. New York, NY: William Morrow, 1980.

Lewis, Felice Flanery. Literature, Obscenity, and Law. Carbondale and Edwardsville, IL: Southern Illinois University Press, 1976.

Linz, Daniel, and Malmuth, Neil. Pornography. New York, NY: Sage Publications, 1993.

Lockhart, William B. and McClure, Robert C. "Censorship of Obscenity: The Developing Constitutional Standards" in Minnesota Law Review, Vol.45-5, 5-121. 1960.

Long, Robert Emmet, Ed. Censorship: The Reference Shelf, Vol. 62-3. New York, NY: The H.W. Wilson Company, 1990.

MacKinon, Catharine. "Pornography, Civil Rights, and Speech" in Harvard Civil Rights-Civil Liberties Law Review, Vol.20, 1-70. 1985.

MacKinnon, Catharine. Feminism Unmodified: Discourses of Life and Law. Cambridge, MA: Harvard University Press, 1987.

MacKinnon, Catharine. Toward a Feminist Theory of the State. Cambridge, MA: Harvard University Press, 1989.

MacMillan, P.R. Censorship and Public Morality. Hants (England): Gower Publishing Company Limited, 1983.

Maki, John. Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-1960. Seattle, WA: University of Washington Press, 1964.

Malamuth, Neil M., and Donnerstein, Edward, Eds. Pornography and Sexual Aggression. Orlando, San Diego, and New York: Academic Press, Inc., 1984.

Matsui, Shigeki. "Masumedia to Hô" Nyûmon (Introduction to "Mass-media and Law"). Tokyo: Kôbundô, 1988.

Moskin, J. Robert. "The Dane's Bold Experiment: Legalized Pornography" in Look (July 29, 1969), 73-4. 1969.

Nakane, Chie. Japanese Society. Berkeley, CA: University of California Press, 1970.

Nead, Linda. The Female Nude: Art, Obscenity and Sexuality. London and New York: Routledge, 1992.

Okudaira, Yasuhiro. Hyôgen no Jiyû II (Freedom of Expression II). Tokyo: Yûhikaku, 1986.

Okudaira, Yasuhiro. Naze "Hyôgen no Jiyû" Ka (Why "Freedom of Expression"?). Tokyo: Tokyo Daigaku Shuppan Kai, 1988.

Okudaira, Yasuhiro., Tamaki, Shôichi., and Yoshiyuki, Jun'nosuke. Seihyôgen no Jiyû (Freedom of Sexual Expression). Tokyo: Yuhikaku, 1986.

O'Neill, Terry, Ed. Censorship: Opposing Viewpoints. St. Paul, MN: Greenhaven Press, 1985.

Ôya, Minoru. "Yojôhan Fusuma no Shitabari" Jiken Jôkokushin Hanketsu no Igi to Mondaiten (The Significance and Problems with the Yojôhan Decision at the Appellate Court)" in Jurisuto, No.736, 56-62. Tokyo: Yûhikaku, 1981.

Randall, Richard S. Freedom and Taboo: Pornography and the Politics of a Self Divided. Berkeley and Los Angeles, CA: University of California Press, 1989.

Rembar, Charles. The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill. New York, NY: Random House, 1968.

Richards, David A.J. The Moral Criticism of Law. Encino, CA: Dickenson, 1977.

Richards, David A.J. "The Moral Theory of Free Speech and Obscenity Law" in Berger, Fred, Ed. Freedom of Expression, 99-127. 1980.

Ringel, William E. Obscenity Law Today. Jamaica, NY: Could Publications, 1970.

Schroeder, Theodore Albert. "Obscene" Literature and Constitutional Law: A Forensic Defense of Freedom of the Press. New York, NY: Privately printed for forensic uses, 1911.

Sharp, Donald B., Ed. Commentaries on Obscenity. Metuchen, NJ: The Scarecrow Press, 1970.

Shimizu, Hideo. Hô to Hyôgen no Jiyû (Law and Freedom of Expression). Tokyo: Gakuyô Shobô, 1972.

Shimizu, Hideo. Masumedia no Hô to Rinri (Law and Ethics of Mass-media). Tokyo: Gakuyô Shobô, 1987.

Sobel, Lester A., Ed. Pornography, Obscenity, and the Law. New York, NY: Facts on File, 1979.

Sone, Takehiko. Hyôgen no Jiyû to Keiji Kisei (Freedom of Expression and Penal Regulation). Tokyo: Hitotsubusha, 1985.

Sunderland, Lane V. Obscenity: The Court, the Congress, and the President's Commission. Washington, D.C: American Enterprise Institute for Public Research, 1974.

United States Reports, Vol. 354. Washington, D.C: United States Government Printing Office, 1957.

United States Reports, Vol. 383. Washington, D.C: United States Government Printing Office, 1966.

United States Reports, Vol. 394. Washington, D.C: United States Government Printing Office, 1969.

United States Reports, Vol. 413. Washington, D.C: United States Government Printing Office, 1975.

Upham, Frank K. Law and Social Change in Postwar Japan. Cambridge, MA: Harvard University Press, 1987.

U.S. Commission on Obscenity and Pornography. The Report of the Commission on Obscenity and Pornography. New York, NY: Bantam Books, 1970.

Von Mehren, Arthur T. Law in Japan: The Legal Order in a Changing Society. Cambridge, MA: Harvard University Press, 1963.

Wallace, Douglas H. "Obscenity and Contemporary Community Standards: A Survey" in The Journal of Social Issues, Vol.29-3, 53-67. 1973.

Zillman, Dolf, and Bryant, Jennings, Eds. Pornography: Research Advances and Policy Considerations. Hillsdale, NJ: Lawrence Erlbaum, 1989.