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## Privacy, Pornography, and the Supreme Court, 21 J. Marshall L. Rev. 755 (1988)

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# PRIVACY, PORNOGRAPHY, AND THE SUPREME COURT

RICHARD F. HIXSON\*

Roscoe Pound, when he was dean of the Harvard Law School, said that Samuel D. Warren and Louis D. Brandeis had done "nothing less than added a chapter to our law" when, in their famous article, they identified "the right to privacy." With the appearance of that article, in 1890, privacy, as a right separate from corresponding rights of property, contract, and trust, began its long, frequently tedious, and sometimes bumpy journey through American jurisprudence. Judge Thomas Cooley is believed to have coined the phrase, "to be let alone," in his famous treatise on torts in 1879, but everyone agrees that it was Warren and Brandeis who put privacy on the legal map. No journal article is cited more in privacy litigation.<sup>1</sup>

There is no need to reiterate here what has become common knowledge, if not settled privacy doctrine, except to say that a number of scholars in recent years have challenged the legal implications of the Warren-Brandeis thesis. In general, a basic inconsistency emerges: on the one hand, the thesis supports unquestionably an ideal civilized and humane society's interest in limiting public discussion of private matters; on the other, there is the need in an open society for as much information as possible to circulate without penalty. Nowhere is this conflict more apparent, and more problematic, than in the effort to legalize privacy. It is basically, as Diane L. Zimmerman asserts, the "challenge of harmonizing privacy with free speech."<sup>2</sup> Or, as numerous others have debated, it is a matter of whether society has the right to enforce a morality on the ground that a shared norm is essential to society's welfare, perhaps even its very existence.

Milton R. Konvitz has drawn a more than subtle distinction between Judge Cooley's phrase, "the right to be let alone," and the more sweeping Warren-Brandeis phrase, "the right to privacy." Konvitz believes that the latter is at once more general and more

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1. For a review of constitutional privacy see RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* (1987) [hereinafter HIXSON].

2. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis Privacy Tort*, 68 *CORNELL L. REV.* 291, 294 (1983).

restrictive, suggesting what has been withdrawn from public view—the marital bedroom or a respectable married woman's past immoral life. It implies secrecy and darkness, elements of the private life that are detrimental to public welfare. Privacy, Konvitz notes, may also be essential to acts performed in public view, such as membership in an organization or worshiping in a church or synagogue. A person may be asserting his or her "right to privacy" when they dress in an unorthodox way or when they "loaf" in a public park. "A person may claim the right to be let alone when he acts publicly or when he acts privately," writes Konvitz.<sup>3</sup> Judge Cooley's right implies the kind of space a person may carry anywhere, into the bedroom or into the street.<sup>4</sup>

The legal right to privacy, as opposed to the moral right to solitude and seclusion, has now found its way into society's attempt to manage, if not control, popular pornography. As with the myriad of other zones of privacy determined by the courts, including the legal right to abortion, society has chosen the juridical route as a way out of its moral dilemma over obscenity. The *Roe* and *Doe* decisions of 1973 legalized abortion, but they also changed the Supreme Court's image by fostering renewed attacks on judicial activism and mobilizing both supporters and opponents of abortion. The rulings legalized abortion, but they did not legitimize the policies thus promulgated.<sup>5</sup> Similarly, the Court's many obscenity decisions, each so-called landmark, seem to add to the confusion, rather than resolve the issue, over how to regulate "trash" while protecting "art." Justice John M. Harlan labelled this issue the "intractable obscenity problem."<sup>6</sup>

Abortion and pornography are examples of the occasional issues that reflect competing concepts of values and morality, issues that transcend traditional debate over, let us say, competing economic interests. Yet, while the abortion question is also laced with financial wherewithal and public funding, it is not as much an economic issue as is pornography, which is an identifiable and burgeoning industry contributing to the Gross National Product. Some abortion specialists may charge handsomely, but their fees do not compare to the income of pornographers, whose "industry" the United States Commission on Pornography and Obscenity estimated "earned" between \$200 million and \$500 million in 1969.<sup>7</sup> And, notwithstanding

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3. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS., 272, 279 (1966).

4. *Id.* at 279-80.

5. HIXSON, *supra* note 1, at 71-89 (see especially chapter 4 *Disagreement on Zones*).

6. *Interstate Circuit Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring).

7. W. KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 214

implied threats to free speech in recent White House pronouncements on restricting funding to abortion advisory services, decisions affecting pornography strike at the very heart of the Constitution, that is, if the Court's most sweeping privacy holding, *Griswold v. Connecticut*,<sup>8</sup> is to have any lasting effect upon human behavior within the law.

Privacy has always been a factor in obscenity litigation, seldom critical or central but in the background nonetheless, for the reason alluded to recently by Justice Antonin Scalia: "[M]any accomplished people . . . have found literature in Dada and art in the replication of a soup can."<sup>9</sup> Despite the Court's uneven efforts over the years to define obscenity, it has tried to allow private taste to rule the day whenever feasible. In that case, where the Court held that "community standards" were not appropriate for judging the value of a work, Scalia went so far as to argue against an "objective" or "reasonable man" test of "serious literary, artistic, political, or scientific [value]," the third prong of *Miller v. California*.<sup>10</sup>

"De gustibus non est disputandum," Scalia said. "Just as there is no use arguing about taste, there is no use litigating about it." However, an invasion of private taste, while not completely free of litigious issues, is not nearly as contentious an issue as is the privacy of home. In another recent privacy decision, the Court found consensual sodomy (in the bedroom, no less) without constitutional protection.<sup>11</sup> Contrast this with what the Court believed in 1969, that the first and fourteenth amendments prohibit making the private possession of obscene material a crime. Prohibitions on private possession, Justice Thurgood Marshall said then, interfere with a person's "right to read or observe what he pleases — the right to satisfy his intellectual and *emotional* needs in the privacy of his own home."<sup>12</sup> *Emotional* is emphasized to suggest that the needs of the body, not unlike those of the mind in matters of personal privacy, were deemed beyond the pale in *Bowers*.

This analysis of the effect privacy has had on Supreme Court obscenity decisions begins with *Paris Adult Theatre I v. Slaton*<sup>13</sup> for two reasons. First, *Paris Adult Theatre I* is tied to the most recent landmark decision on the subject, *Miller v. California*,<sup>14</sup> handed down previously on the same day. Second, the analysis begins with

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(1987) [hereinafter KENDRICK].

8. 381 U.S. 479 (1965).

9. *Pope v. Illinois*, 107 S. Ct. 1918, 1923 (1987) (Scalia, J., concurring).

10. 413 U.S. 15, 35 (1973).

11. *Bowers v. Hardwick*, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

12. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

13. 413 U.S. 49 (1973).

14. 413 U.S. 15 (1973).

*Paris Adult Theatre I* because of Chief Justice Warren E. Burger's great reliance on privacy in the five to four ruling. Although the Court's earlier per curiam decision in *Redrup v. New York*<sup>15</sup> hinted at privacy, in none of the three cases decided in *Redrup* was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for unwilling individuals to avoid exposure. In other words, so long as one could escape an invasion of one's privacy, no invasion could take place. In *Stanley v. Georgia*, decided two years later, the Court said that the private possession of obscene material at home was protected.<sup>16</sup>

In *Paris Adult Theatre*, two Atlanta movie houses had asserted that state regulation of access by consenting adults to obscene material violated the constitutionally protected right of privacy enjoyed by the theaters' customers. Burger retorted that it was "unavailing" to compare a theater, open only to the public for a fee, with the private home of *Stanley* and the marital bedroom of *Griswold*. He said that on numerous occasions the Court had refused to hold that commercial ventures, such as a motion picture house, were "private" for the purpose of civil rights litigation and statutes. He quoted from an article by Professor Alexander Bickel. Bickel wrote that a man may be entitled to read an obscene book in his room, but not if he demands the right to obtain such material in the market because that right affects "the world about the rest of us, and . . . impinge[s] on other privacies."<sup>17</sup>

Burger dismissed other "right to privacy" decisions. He noted that in *Palko v. Connecticut*<sup>18</sup> and in *Roe v. Wade*<sup>19</sup> that the Court held the fourteenth amendment to protect "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"<sup>20</sup> The privacy right encompasses and protects, he said, the intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. But, if obscene material unprotected by the first amendment carried with it a "penumbra" of constitutionally protected privacy, the chief justice opined that the Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which he interpreted as hardly more than

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15. 386 U.S. 767 (1967). The Supreme Court decided *Austin v. Kentucky* and *Gent. v. Arkansas* along with *Redrup*. All three cases were appeals from criminal convictions for selling explicitly sexual publications. *Id.* at 768-69. The Court reversed all three convictions and held that the first and fourteenth amendments to the United States Constitution protect the distribution and sale of such publications. *Id.* at 770.

16. 394 U.S. 557, 568 (1969).

17. *Paris Adult Theater*, 413 U.S. at 59 (quoting Bickel, *On Pornography II: Dissenting and Concurring Opinions*, 22 PUB. INTEREST 25, 33 (1971)).

18. 302 U.S. 319 (1937).

19. 410 U.S. 113 (1973).

20. *Paris Adult Theater*, 413 U.S. at 65.

reaffirming that "a man's home is his castle." Moreover, the Court, he said, had on other occasions refused to equate home privacy with a "zone" of privacy that follows a distributor or a consumer of obscene matter wherever he goes.<sup>21</sup> "The idea of a privacy right and a place of public accommodation are, in this context, mutually exclusive," Burger wrote.<sup>22</sup> Thus, the jurists firmly endorsed, as they had in specific privacy decisions over the years, the more restrictive Warren and Brandeis "right to privacy," rather than venture toward Judge Cooley's broader "right to be let alone."

*Paris Adult Theatre I*, as a strongly worded anti-privacy decision, affirmed that the privacy of pornography enjoys only negative status. If a right to privacy exists, it exists for the unconsenting majority, not for those who wish access to obscene material. The Court's "right to know" doctrine, explicitly recognized in *Lamont v. Postmaster General*,<sup>23</sup> has never applied to pornography. In *Lamont*, the Court unanimously held that the first amendment protects those who want to receive information and ideas as well as those who want to communicate with others. Justice William J. Brennan, in a separate concurrence, joined by Arthur J. Goldberg, stated: "I think the right to receive publications is . . . a fundamental right. It would be a barren marketplace of ideas that had only sellers and no buyers."<sup>24</sup> In *Martin v. City of Struthers*,<sup>25</sup> the Court first decreed that the first amendment "necessarily protects the right to receive" information. Later that year, Justice William O. Douglas went further in *Griswold* and said that the right to know was within the penumbra of the first amendment. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read."<sup>26</sup> Freedom of speech and press, however, did not include the right to receive obscene matter, as Burger had insisted in *Paris*

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21. *Id.* at 66. See also *United States v. Orito*, 413 U.S. 139 (1973) (right to transport or distribute obscene material is not inherent in right to possess obscene material in the home); *United States v. 12 200-Foot Reels of Film*, 413 U.S. 123 (1973) (right to privacy in the home does not create a right to import obscene materials purportedly for personal use); *United States v. Thirty Seven Photographs*, 402 U.S. 363 (1971) (right to read obscene materials at home does not prevent obscene material from being seized by United States Customs pursuant to importation regulations); *United States v. Reidel*, 402 U.S. 351 (1971) (right to privacy in the home does not imply the right to use the postal service to send out solicited obscene material).

22. *Paris Adult Theater*, 413 U.S. at 66-67.

23. 381 U.S. 301 (1965).

24. *Id.* at 308 (Brennan, J., concurring).

25. 319 U.S. 141 (1943). In *Martin*, a Jehovah's witness was fined for violating a city ordinance forbidding her to distribute religious literature. *Id.* at 142. The Supreme Court reversed stating that the City of Struthers ordinance took away its citizens' right to decide whether they wanted to receive the literature. *Id.* at 149. As a result, the Court held that the ordinance violated the first amendment rights of both the residents and the distributors and was, therefore, unconstitutional. *Id.*

26. *Griswold*, 381 U.S. at 482.

### Adult Theatre I.

Although the term "privacy" appears nowhere in the Constitution, the Supreme Court discovered protection for private activities in the Bill of Rights as early as 1886. In *Boyd v. United States*,<sup>27</sup> the Court said that the doctrines of the amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."<sup>28</sup> Justice Joseph P. Bradley identified the invasions as follows: "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . ."<sup>29</sup> With this, privacy won a permanent place in American constitutional law.

Over the years a number of privacy invasions have been found unconstitutional in a tedious case-by-case process. For example, the Court found electronic eavesdropping acceptable in 1928 when wire-tapping was in its infancy. The Court, however, later outlawed electronic eavesdropping. Brandeis, in a widely quoted dissent in *Olmstead v. United States*,<sup>30</sup> identified the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men."<sup>31</sup> But it was left to Justice John M. Harlan, in strong dissent in *Poe v. Ullman*,<sup>32</sup> to suggest that privacy enjoyed protection under the fourteenth amendment. "I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's private life."<sup>33</sup>

As if to anticipate *Griswold* four years later, Harlan said that the reach of the fourteenth amendment due process clause was not limited to the first eight amendments, but rather, that privacy also constituted a fundamental right.<sup>34</sup> Justice Harlan stated: "It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."<sup>35</sup> As with other privacy rulings, a specific instance of invasion was viewed as the basic reason for broad protection. Harlan's dissent created the biggest umbrella for privacy at the time, which the majority adopted in *Griswold*. Harlan's due process approach, however,

27. 116 U.S. 616, 630 (1886).

28. *Id.*

29. *Id.*

30. 277 U.S. 438 (1928).

31. *Id.* at 478 (Brandeis, J., dissenting).

32. 367 U.S. 497, 522 (1961).

33. *Id.* at 539 (Harlan, J., dissenting).

34. *Id.* at 543 (Harlan, J., dissenting). In dissent, Harlan calls for a heightened form of scrutiny.

35. *Id.*

appeared too liberal until it was accepted in the controversial abortion decisions of 1973.

With *Griswold*, the Court made its clearest statement to date, as well as its most sweeping, on the constitutional foundations of privacy.<sup>36</sup> The ruling invalidated a Connecticut law, upheld in *Poe*, forbidding the dissemination of birth control information as a violation of a right to marital privacy.<sup>37</sup> Justice Douglas, writing for the seven-member majority, said that any important liberty not safeguarded by the Bill of Rights can be found in the "penumbra" of a specific guarantee.<sup>38</sup> "Various guarantees create zones of privacy," he wrote, and cited the right of association, for example, as part of the first amendment.<sup>39</sup> He noted other facets of privacy contained in the third, fourth, and fifth amendments, and included the ninth for good measure: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>40</sup>

Harlan, who concurred but did not join the majority completely, said that the penumbra approach, while sufficient to strike the Connecticut statute, did not go far enough.<sup>41</sup> He found that the Court's "incorporation" doctrine could be used later to restrict the fourteenth amendment due process clause.<sup>42</sup> Differing dramatically from Douglas, Harlan said the decision did not rest on "radiations" from the Bill of Rights, stating that "the Due Process Clause . . . stands . . . on its own bottom."<sup>43</sup> Harlan's position is dramatic because, while it recognized the private and personal nature of marriage, it implied that confusion would probably follow when the courts, like the shepherd boy who cried wolf once too often, are confronted with genuine infringement. Such confusion has occurred whenever any perceived private right to obscene matter has confronted the courts.

Justices Hugo L. Black and Potter Stewart were the lone dissenters in *Griswold*.<sup>44</sup> Justice Black dissented because he could find no *specific* language in the Constitution protecting a "broad, abstract and ambiguous" right of privacy.<sup>45</sup> Justice Stewart dissented because he could find no such *general* rights in any part of the Con-

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36. *Griswold*, 381 U.S. at 479.

37. *Id.* at 486.

38. *Id.* at 484 ("Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

39. *Id.*

40. *Id.*

41. *Id.* at 501.

42. *Id.* at 502.

43. *Id.* at 500.

44. *Id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

45. *Id.* at 509 (Black, J., dissenting).



stitution.<sup>46</sup> Their respective positions are important, even portentous, because of the implied thesis that the *right* to privacy has grown out of proportion to be meaningful or effective. The positions are also important when applied to the various obscenity decisions in which both justices participated. Black positioned himself as the absolute free-speech advocate regardless of pornography's social worth, and Stewart positioned himself the pragmatist when it came to trying to define specifically what it was the Court wanted to restrict.

In the *Roth-Alberts* decisions of 1957, Black agreed with Douglas, who simply said that government should be concerned with anti-social conduct, not with noxious utterances.<sup>47</sup> Stewart said that criminality should be limited to hard-core pornography, although it could never be intelligently defined. Regarding hard-core pornography, he said: "I know it when I see it."<sup>48</sup> *Roth-Alberts*, written by Justice Brennan, gave birth to a new test for adjudicating obscenity. This new test posed the question of "whether to the average person, applying contemporary community standards, the dominant theme of the material appeals to prurient interest."<sup>49</sup> In *Jacobellis v. Ohio*,<sup>50</sup> the Court said that "community" meant "national," and that the primary test for measuring censurable material was "utterly without redeeming social importance."<sup>51</sup> Stewart agreed, but his agreement came before he suggested banning only hard-core pornography, however he was able or not able to define it.

The *Roth-Alberts* Court "squarely" addressed, for the first time, whether obscenity is protected by the freedoms of speech and press, either under the first or fourteenth amendment. The Court concluded that because obscenity is "utterly without redeeming social importance," it is not protected.<sup>52</sup> The first amendment is not absolute, Brennan said, and was not intended to protect every utterance. "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 guarantees, unless excludable because they encroach upon the limited area of more important interests."<sup>53</sup> Brennan distinguished between sex and obscenity. He said obscene material deals with sex in a manner appealing to prurient interest, but that the portrayal of sex in art, literature, and scientific works is not itself sufficient rea-

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46. *Id.* at 527-30 (Stewart, J., dissenting).

47. *Roth v. United States*, 354 U.S. 476, 512-13 (1957) (Douglas, J., dissenting).

48. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

49. *Roth*, 354 U.S. at 489.

50. 378 U.S. 184 (1964).

51. *Id.* at 196.

52. *Roth*, 354 U.S. at 484-85.

53. *Id.* at 484.

son to deny material constitutional protection.<sup>54</sup> The Court rejected the old Hicklin test, long used by courts to judge obscenity by the effect of isolated passages on the most susceptible persons.<sup>55</sup>

Chief Justice Earl Warren, while concurring in the result, questioned the wisdom of the broad language used by the majority.<sup>56</sup> In a passage that has since come to symbolize a double-bind for the Court, as well as for pornographers and buyers of obscene materials, Warren wrote:

The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.<sup>57</sup>

He said it was proper for the state and federal governments to punish individuals who were "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."<sup>58</sup> This is a double-bind because of the implied dilemma it presents to pornographers and their clients, both of whom are to be judged, according to the chief justice, by "morbid and shameful conduct," not the obscenity of the wares.<sup>59</sup> Subsequent rulings have tended to focus on behavior, a privacy issue not taken into account by the majority in *Roth-Alberts*. Six years later, in *Paris Adult Theatre I*, behavior formed the basis of the Court's decision in an opinion written by Burger, the new chief justice.

Meanwhile, Harlan, who concurred in *Alberts* and dissented in *Roth-Alberts*, feared that the "broad brush" used by the majority might loosen the tight reigns which he believed state and federal governments should hold on the enforcement of obscenity legislation. In keeping with the concern for personal privacy he expressed in *Poe* (albeit for contraceptive advice and not obscene material), Harlan said he could not understand how the Court could resolve constitutional problems without making its own judgment on the character of the material. Harlan wrote:

I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.<sup>60</sup>

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54. *Id.*

55. *Id.* at 488.

56. *Id.* at 494-96 (Warren, C.J., concurring).

57. *Id.* at 495.

58. *Id.*

59. *Id.*

60. *Roth*, 354 U.S. at 498 (Harlan, J., dissenting).

Harlan feared more the censorial powers of the federal government than the regulation of "human conduct" by the states. "Congress has no substantive power over sexual morality," but the states "bear direct responsibility for the protection of the local moral fabric."<sup>61</sup> Justice Harlan, however, was not a privacy absolutist. He, like a majority of the Court over time, firmly believed the Court should never attempt to cloak certain forms of behavior with the right of privacy. "Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."<sup>62</sup>

Douglas, in a strong *Roth-Alberts* dissent joined by Black, said that by sustaining the convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. Government should be concerned with antisocial conduct, not with utterances. "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."<sup>63</sup> Douglas and Black, and Harlan to a degree, would allow private access to otherwise obscene materials, with legality hinging on personal conduct rather than content.

Warren, Douglas, Black, and Brennan dissented the same day in *Kingsley Books Inc. v. Brown*.<sup>64</sup> In *Kingsley*, Felix Frankfurter, writing for the majority, upheld the constitutionality of a state statute that permitted municipal injunctions against the sale or distribution of allegedly obscene books or magazines and that authorized seizure or destruction if the material were found obscene at trial. Warren relied upon the "manner of use" approach he employed in *Roth-Alberts*.<sup>65</sup> "It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint."<sup>66</sup> Douglas, too, adopted that position, saying: "The nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity prosecution."<sup>67</sup> For example, in New York City the publisher may have been selling his booklets to juveniles, while in Rochester he may have sold to professional people. Brennan said the statute was "fatally defective" because it failed to accord the right

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61. *Id.* at 504.

62. *Poe*, 367 U.S. at 552-53 (Harlan, J., dissenting).

63. *Roth*, 354 U.S. at 513-14 (Douglas, J., dissenting).

64. 354 U.S. 436 (1957).

65. *Id.*

66. *Id.* at 446 (Warren, J., dissenting).

67. *Id.* at 447 (Douglas, J., dissenting).

to an immediate jury trial, where a representative cross-section of the community would reflect "contemporary community standards," as prescribed by *Roth-Alberts*. In all of the dissenting opinions, the underlying values are personal choice, the manner of use, and individual conduct. Each value is an aspect of privacy that has influenced the Court in one way or another.

Knowledge, or proven scienter, was made a precondition of punishment for the crime of selling obscene books in the Court's next important ruling, *Smith v. California*.<sup>68</sup> Unanimously, the Court reasoned that if the bookseller is criminally liable, whether or not he knows what is in the books in his shop, he will restrict his inventory to those he has personally inspected, thereby limiting the public's choice. Black would have had the opinion more sweeping, noting separately that no government agency, including Congress and the Court, has the power to subordinate speech and press to what it thinks are more important interests.

If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the desirability or constitutionality of this Court's becoming a supreme board of censors—reading books and viewing television performances to determine whether, if permitted, they might adversely affect the morals of the people throughout the many diversified local communities in this vast country. Censorship is the deadly enemy of freedom and progress.<sup>69</sup>

Frankfurter concurred because the trial court violated the fourteenth amendment's due process clause by excluding the testimony of qualified witnesses regarding the prevailing literary standards and moral criteria by which such books are deemed not obscene. Harlan said the conviction was defective because the judge had denied every attempt to introduce evidence of community standards.

The Court could not agree on an opinion in *Manual Enterprises, Inc. v. Day*,<sup>70</sup> but six justices concurred that the post office could not bar a magazine from the mails without proof of the publisher's knowledge that the advertisements inside promoted obscene merchandise. Here, the "merchandise" was photos of nearly nude male models. The decision is important because of the Court's effort to define "hard-core" and its attempt to reinforce its "national standard of decency," which was implied but left dangling in *Roth-Alberts*. "Patent offensiveness," "self-demonstrating indecency," and "obnoxiously debasing portrayals of sex" were used to describe obscene material which would, of course, appeal to "prurient interest." Harlan, who wrote the central opinion, joined by Stewart, found the

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68. 361 U.S. 147 (1959), *reh'g denied*, 361 U.S. 950 (1960).

69. *Id.* at 159-160.

70. 370 U.S. 478 (1962).

magazines "dismally unpleasant, uncouth and tawdry," appealing only "to the unfortunate persons whose patronage they were aimed at capturing," but he could not label them "obscene."<sup>71</sup>

Two years later, in *Jacobellis*, the Court reaffirmed its commitment to the *Roth-Alberts* test and the national standard. Brennan, for the plurality, said that obscenity was excluded from constitutional protection only because it is "utterly without redeeming social value." Disagreement emerged over the standard. Chief Justice Warren and Justice Tom C. Clark believed that "community" meant local, not national, that being "the only reasonable way . . . to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation."<sup>72</sup> Brennan had relied upon Judge Learned Hand's dictum in *United States v. Kennerley* in which the jurist spoke of leaving what is "shocking to the public taste" to the gradual development of "general notions about what is decent."<sup>73</sup> Brennan thus concluded that "society at large . . . the public or people in general" would define what is decent. "It is, after all, a national Constitution we are expounding."<sup>74</sup>

Harlan, in dissent, said that he would make the test one of "rationality" for the states, and that they should not be prohibited from banning any material which, taken as a whole, has been found in judicial proceedings "to treat with sex in a fundamentally offensive manner."<sup>75</sup> On the same day, and with the plurality opinion again written by Brennan, the Court struck a state statute allowing prosecutors to obtain warrants for the seizure of allegedly obscene material prior to an adversary hearing to determine their obscenity.<sup>76</sup> Harlan again dissented, joined by Clark, on the basis that the plurality's view "straitjackets the legitimate attempt of Kansas to protect what it considers an important societal interest."<sup>77</sup>

The next decision reaffirming the three-part test of *Roth-Alberts* was *Memoirs v. Massachusetts*<sup>78</sup> in which a plurality of the Court, in an opinion by Brennan, noted that for a book to be proscribed it must be found to be *utterly* without redeeming social value, even though it may possess the requisite prurient appeal and be patently offensive.<sup>79</sup> Thus, Brennan added another prong to *Roth-Alberts*. Justices Stewart and Black concurred with Justice

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71. *Id.* at 490.

72. *Jacobellis*, 378 U.S. at 203 (Warren and Clark, J.J., dissenting).

73. *Id.* at 193 (quoting *United States v. Kennerly*, 209 F. 119, 121 (D.C.S.D.N.Y. 1913)).

74. *Id.* at 193.

75. *Id.* at 204 (Harlan, J., dissenting).

76. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

77. *Id.* at 225 (Harlan and Clark, J.J., dissenting).

78. 383 U.S. 413 (1966).

79. *Id.*

Brennan's opinion for reasons stated in two other pornography cases decided on the same day as *Memoirs*.<sup>80</sup>

Two other opinions, one by Douglas, who concurred, and the other by Clark, who dissented, are most interesting for the frustration they emit and the political nature of pornography they suggest. Clark said that he had "stomached" such cases for almost ten years without much outcry.<sup>81</sup> "Though I am not known to be a purist—or a shrinking violet—this book is too much for me."<sup>82</sup> He accused the publisher, G.P. Putnam's Sons, of "preying upon prurient and carnal proclivities for its own pecuniary advantage."<sup>83</sup> Douglas, elaborating more than was his custom, instructed:

Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of the postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. Happily we do not bow to them.<sup>84</sup>

Walter Kendrick has confronted the same issue in its proper historic context—the centuries-old urge, in Kendrick's words, "to regulate the behavior of those who seem to threaten the social order."<sup>85</sup> Kendrick traces pornography's evolution from Pompeii, through the American experience, and on to what he calls the post-pornographic era. "The most remarkable fact about 'pornography' in the post-pornographic era is not that the argument [that obscenity threatens order by causing antisocial behavior] refuses to die—earthquakes generate aftershocks—but that it has made some progress and produced some results."<sup>86</sup> While emphasizing the dismal side of this development, the author also noted that such progress has granted the arts a freedom unprecedented in human history. Violence, rather than sex, is the new target:

The latest phase of the pornography debate seems to entail its elevation from morals to politics, the long overdue recognition that what we have been arguing about the entire time is a matter of power, of access to the world around us, of control over our own bodies and our

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80. Justice Stewart, under his reasoning in *Ginzburg v. United States*, 383 U.S. 463, 497-501 (1966) and *Mishkin v. New York*, 383 U.S. 502, 578 (1966) did not find *Memoirs* hardcore pornography; and Justice Black, adhering to his reasoning in both cases, found the *Memoirs* Court to be without conditional power to censor regardless of the subject matter. *Ginzburg*, 383 U.S. at 476-82; *Mishkin*, 383 U.S. at 502-18.

81. *Memoirs*, 383 U.S. at 441 (Clark, J., dissenting).

82. *Id.*

83. *Id.* at 455.

84. *Id.* at 427-28 (Douglas, J., concurring).

85. KENDRICK, *supra* note 7, at 235.

86. *Id.* at 235-36.

own minds. For two hundred and fifty years—ever since the first obscene artifacts were unearthed at Pompeii—a certain problematic of power has been unfolding; and now, at last, the naked truth of it seems to stand exposed.<sup>87</sup>

The Court ruled on *Ginzburg v. United States* and *Mishkin v. New York*<sup>88</sup> on the same day as *Memoirs*. Brennan, writing for the Court's five to four decision in *Ginzburg*, said that the manner in which material is marketed, advertised, and displayed is a factor in determining whether a work is obscene, a procedure he described as "the sordid business of pandering."<sup>89</sup> Chief Justice Warren, whose conduct criterion now seemed to sway the Court, once described the activity as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers."<sup>90</sup> Brennan relied on Warren's position, that a person, not a book, is at issue.<sup>91</sup> "The conduct of the defendant is the central issue, not the obscenity of a book or picture," said Warren in *Roth-Alberts*.<sup>92</sup>

In *Mishkin*, seven members found scienter adequate and a New York statute constitutionally valid when applied to convictions for distributing obscene books appealing to "deviant" prurient interests and sexual practices. Harlan dissented in *Ginzburg* on the grounds that the federal government is restricted to banning from the mails only "hard-core" pornography, which he said was not in the narrow class of the publications involved. But he joined the judgment in *Mishkin*, reiterating the view of his *Memoirs* dissent, that the fourteenth amendment required a state to apply criteria rationally to the notion of obscenity. Stewart, who had originally urged limiting judgments to hardcore pornography, strongly objected to the *Ginzburg* holding, saying that if the first amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, "mine or any other's."

A particular era in Supreme Court obscenity decisions began to close in the late 1960s, spurred by the appointment of a new chief justice, and into the early 1970s, marked by the retirement of Black and Douglas. In its per curiam opinion in *Redrup v. New York*,<sup>93</sup> the Court reviewed its long and unsettled, if not tormented bout with obscenity. While reversing convictions for selling obscene books to willing adults, the Court made brief mention of the fact that two

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87. *Id.* at 236.

88. *See supra* note 80.

89. *Ginzburg*, 383 U.S. at 467.

90. *Roth*, 354 U.S. at 495-96.

91. *Ginzburg*, 383 U.S. at 475.

92. *Roth*, 354 U.S. at 495.

93. 386 U.S. 767 (1967).

members, Black and Douglas, had consistently adhered to the view that a state is utterly without power to suppress, control, or punish the distribution of any writings or pictures on the ground of their "obscenity." A third member, Stewart, had proffered that a state's power was narrowly limited to a distinct and clearly identifiable class of pornography, which the justice had described as "hard-core." Others, led by Brennan, have subscribed to a similar standard that a state may not inhibit the distribution of literary material unless it fails the three-part *Roth-Memoirs* test, a coalescent definition of obscenity. Another member, Harlan, had not viewed the "redeeming social value" element of *Memoirs* as an independent factor in judging obscenity. In all positions, there existed at least an implied right of privacy for both the seller and the buyer, even in Warren's conduct approach, if otherwise protected private behavior did not disrupt the public welfare.

Starting with *Redrup*, the Court went further and embarked on a series of summary reversals for the distribution of materials that at least five members, applying their separate but similar tests, found to be protected by the first amendment. Chief Justice Burger, who replaced Chief Justice Warren in 1969, alluded to the thirty-one cases decided in this manner in a footnote to *Miller v. California*.<sup>94</sup> "Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy,'" Burger said. As will become evident, the summary solution was short-lived. In the interim before *Miller*, the Court dealt with two cases that firmly tied privacy to pornography: *Interstate Circuit Inc. v. Dallas*<sup>95</sup> and *Stanley v. Georgia*.<sup>96</sup>

Thurgood Marshall, who had just joined the Court in 1967, wrote the eight-to-one opinion in *Interstate Circuit*, voiding for vagueness an ordinance designed to classify films as suitable or not suitable for persons under sixteen. Marshall said the Dallas ordinance was so vague as to risk inhibiting film makers, distributors, and exhibitors. Local exhibitors, who could not afford to lose the youthful audience when a film may be of marginal interest to adults, may contract to show only the totally inane, the Justice said. Harlan, by this time tired of the "intractable obscenity problem," said that, in all except rare instances, no substantial free-speech interest was at stake, given the right of the states to control obscenity. "From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into

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94. 413 U.S. 15, 22 n.3 (1973).

95. 390 U.S. 676 (1968).

96. 394 U.S. 557 (1969).



the Court, mostly in state cases, all to no better end than second-guessing state judges."<sup>97</sup>

In *Stanley*, as noted earlier, the justices dealt with the issue of the "private" possession of obscene material. Marshall again wrote a unanimous decision for the Court. "Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home," Marshall said.<sup>98</sup> As if to anticipate an essential finding of the Commission on Pornography and Obscenity issued the following year in 1970, Marshall said that there was "little empirical basis" for the state's assertion that exposure to obscene materials might lead to deviant sexual behavior or crimes of sexual violence.<sup>99</sup> The Commission's report verified Marshall's conclusion, stating unequivocally that "empirical research designed to clarify the question [on the effects of pornography] has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."<sup>100</sup> In *Paris Adult Theatre I*,<sup>101</sup> Burger dismissed the majority's view (as had President Richard M. Nixon), while believing the minority's claim that there is "at least an arguable correlation between obscene material and crime."<sup>102</sup> Meanwhile, the Court, with Burger at the helm joined by new Justices Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist, went about the business of trying to make Harlan's intractable problem tractable.

On June 21, 1973, the Supreme Court announced five obscenity decisions.<sup>103</sup> Chief Justice Burger wrote each of the five to four opinions, joined by Blackmun, Powell, Rehnquist, and Byron R. White. Dissenting in each decision were Douglas, Brennan, Stewart, and Marshall. On that single day, the new majority reacted to 16 years of "disharmony," Brennan's words, "utterly without redeeming social value" were substituted with "does not have serious literary, artistic, political or scientific value" redefined community standards as those of the state or local municipality. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."<sup>104</sup> Of importance are Burger's opinion in *Miller* which outlined the revised standards, and

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97. *Interstate Circuit*, 390 U.S. at 707 (Harlan, J., concurring).

98. *Stanley*, 394 U.S. at 565.

99. *Id.* at 566.

100. KENDRICK, *supra* note 7.

101. *Paris Adult Theater I*, 413 U.S. 49 (Burger, J., dissenting).

102. *Id.* at 58.

103. *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Foot Reels of Film*, 413 U.S. 123 (1973); *California v. Kaplan*, 413 U.S. 115 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973).

104. *Miller*, 413 U.S. at 24-26.

Brennan's dissent in *Paris Adult Theatre* which reviewed the years of disharmony.

Burger focused on *Miller's* origins, that sexually explicit materials had been thrust by "aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." He said the Court had recognized that states have a legitimate interest in prohibiting the dissemination or exhibition of obscene material "when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."<sup>105</sup> This was in reference to the "casual practice" of *Redrup*,<sup>106</sup> in which the Court reversed convictions for selling obscene books to willing adults.

Justice Marshall's later solution to the problem of "unwilling" versus "willing" recipients is instructive, though not totally relevant. Recipients of objectional mailings, he said, may "effectively avoid further bombardment of their sensibilities simply by averting their eyes."<sup>107</sup> Consequently, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."<sup>108</sup> Burger agreed with the unanimous decision that the post office could not ban the mailing of *unsolicited* advertisements for contraceptives. However, since obscenity has never been considered "information relevant to important social issues" such as family planning and the prevention of venereal disease, nor as a subject left completely to private taste, Marshall's solution is meaningless, but fetching nonetheless. Besides, it is harder to avert one's eyes from pornography!

Meanwhile, in his review of *Roth-Alberts* and *Memoirs*,<sup>109</sup> Burger said that the cases had imposed an almost impossible burden of proof on prosecutors, requiring them to prove a negative, that the material was "utterly without" value. That evolutionary concept had never commanded the adherence of more than three justices at one time, the chief justice said. Thus, for the first time since *Roth* in 1957, a majority agreed on "concrete guidelines" to isolate hard-core pornography from protected expression, Burger said, as well as provide "positive guidance" to federal and state courts. He also noted that Brennan, in dissent, had abandoned his former position because of "institutional stress," moving closer to the absolutist, "any-

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105. *Id.* at 18-19.

106. *Redrup*, 386 U.S. 767.

107. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

108. *Bolger*, 463 U.S. at 72 (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1968)).

109. For a discussion of the Court's decision in *Roth-Alberts*, see the text accompanying notes 49-55. For the Court's finding in *Memoirs*, see text accompanying note 78.

thing goes" view of Black and Douglas.<sup>110</sup>

Continuing his attack, Burger said that states could control the traffic in pornography—as they regulate access to medicinal morphine—if they act under statutes specifically defining obscenity, carefully limited and confined to works which depict or describe sexual conduct. A state offense must also be limited to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."<sup>111</sup> These elements constituted the new *Miller* standard.

On the matter of community standards, Burger said that nothing in the first amendment requires that a jury must consider hypothetical and unascertainable "national" standards when attempting to determine obscenity. "It is neither realistic nor constitutionally sound to read the first amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."<sup>112</sup> Douglas, now standing alone as an absolutist according to Burger, protested that the majority had given juries of lay citizens a task that even the Court had shown little talent for doing—deciding what is obscene. The new test, he thought, "would make it possible to ban any paper or any journal or magazine in some benighted place."<sup>113</sup>

Because obscenity cases usually generate "tremendous emotional outbursts," they have no business in the courts, Douglas asserted. He also stated that obscenity cases touch the combined moral-political nerve that is so close to the surface of American society as to make rationale judgments uncommon. In paraphrase of Kendrick's assessment, notwithstanding Douglas' equally poignant observation, perhaps the most dismaying aspect of any anti-pornography campaign is its exact resemblance to every such effort that preceded it. "Whatever its guise, the pornographic urge remains unchanged—immune to argument, invincibly self-righteous, engorged with indignant passion."<sup>114</sup>

Brennan, joined by Stewart and Marshall, said that the California statute was overbroad and, therefore, invalid on its face. He deferred to his dissent in *Paris Adult Theatre*, wherein the same majority held that adults-only movie theaters may be banned, even if they don't invade the privacy of others and even if patrons are properly warned. The majority's reasoning, as written by Burger, was

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110. *Miller*, 413 U.S. at 28-29.

111. *Id.* at 30.

112. *Id.* at 32.

113. *Id.* at 44 (Douglas, J., dissenting).

114. KENDRICK, *supra* note 7, at 239.

that a "sensitive, key relationship of human existence, central to family life, community welfare, and the development of personality, can be debased and distorted by crass commercial exploitation of sex."<sup>115</sup> Douglas, whose dissent in this second 1973 ruling anticipated Brennan's, said that he had never been trapped into seeing or reading something offensive. "[But] I never supposed that government was permitted to sit in judgment on one's tastes or beliefs—save as they involved action within the reach of the police power of government."<sup>116</sup> Brennan's dissent is especially helpful in trying to understand the puzzle of pornography.

After sixteen years of experimentation and debate, Brennan said he had concluded that none of the formulas, including the one announced in *Miller*, could reduce the vagueness to a tolerable level which struck an acceptable balance between the first and fourteenth amendments and the state interest in regulating the dissemination of certain sexually oriented materials. "Although we have assumed that obscenity does exist and that we 'know it when [we] see it,'<sup>117</sup> we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."<sup>118</sup> He feared three problems with vague standards: the failure to give adequate notice to persons engaged in conduct supposedly proscribed by the law; the potentially chilling effect on speech in general; and the "institutional stress" that Brennan believed inevitably results when the line separating protected from unprotected speech is excessively vague.

In attempting to draw a new line, allowing the states to suppress material on the unprotected side, Brennan said that the *Miller* restatement, only academically different from the *Roth-Memoirs* test, was likely to permit far more sweeping suppression, including material deserving of protection. He said first amendment protections had never before been limited to expressions of *serious* literary or political value. "Whether it will be easier to prove that material lacks 'serious' value than to prove it lacks any value at all remains . . . to be seen."<sup>119</sup> He said that too many statutes are predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion. Brennan concluded that in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the Constitution prohibited suppression on the basis of the contents of allegedly obscene matter. States may, of

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115. *Paris Adult Theatre I*, 413 U.S. at 63.

116. *Id.* at 72 (Douglas, J., dissenting).

117. *Id.* at 84 (quoting *Jacobellis*, 378 U.S. 184, 197, (1964) (Brennan, J., dissenting)).

118. *Paris Adult Theatre I*, 413 U.S. at 84 (Brennan, J., dissenting).

119. *Id.* at 98.

course, continue to regulate distribution, but not ban total access. This solution is reasonable, though not as absolute as some people would like. Douglas, for one, might have questioned even "unconsenting" as too much of a restriction. Consenting or nonconsenting, willing or unwilling, was a matter of personal choice to Douglas, not external force.

In the years since *Miller*, the Court has issued numerous rulings including: jurors are qualified to determine "community standards;" local standards are appropriate but not unbridled; states may prohibit child pornography; cities may geographically zone against adult movie houses; adult book stores used for prostitution are unprotected; and community standards are not applicable in a jury determination on social value.<sup>120</sup> In none of these cases, however, was the specter of privacy seen as a protection for either the seller, or the buyer of pornography. Burger's placement of privacy rights outside the realm of obscenity in *Paris Adult Theatre* was sufficient to quash that issue for the time being. The only recent decision which confirms the public's suspicion that the Court is unsympathetic to privacy, in the context of allegedly deviant if not obscene behavior, is the 1986 *Bowers v. Hardwick*<sup>121</sup> sodomy case.

In a five to four opinion, Justice White explained that Hardwick, a practicing homosexual, was charged with violating Georgia's statute criminalizing sodomy. The "act" took place with an adult male in Hardwick's bedroom, to which police had access when entering his home on a warrant for another matter. The Court of Appeals for the Eleventh Circuit reversed the district court's dismissal and remanded for trial, holding that the Georgia law violated Hardwick's right to privacy as protected by the ninth amendment and by the Due Process Clause of the fourteenth amendment. In reversing the judgment, the Supreme Court said that the Constitution did not confer any fundamental right on homosexuals to engage in acts of consensual sodomy.

Justice White said that past formulations by the Court had not extended such a right to homosexuals. "Proscriptions against that conduct have ancient roots," he said.<sup>122</sup> In *Palko v. Connecticut*, the category of rights qualifying for "heightened judicial protection" were said to include liberties "implicit in the concept of ordered liberty," to the degree that "neither liberty nor justice would exist if

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120. *Pope v. Illinois*, 107 S. Ct. 1918 (1987); *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *reh'g denied*, 475 U.S. 1132 (1986); *New York v. Ferber*, 458 U.S. 747 (1982); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974).

121. 478 U.S. 186, *reh'g denied*, 107 S. Ct. 29 (1986).

122. *Id.* at 192.

[they] were sacrificed." A slightly different description appeared in *Moore v. East Cleveland*, where such liberties were characterized as "deeply rooted in this nation's history and tradition."<sup>123</sup>

In turning away from the penumbra approach used in *Griswold*, where the Court "found" a blanket protection for privacy in the Bill of Rights and the fourteenth amendment, White said that the Court was most vulnerable and came nearest to illegitimacy when it dealt with judge-made constitutional law "having little or no cognizable roots in the language or design of the Constitution."<sup>124</sup> The majority also dismissed the notion that an individual's home is a completely unfettered "zone" of privacy, which was the essence of *Stanley*, because that decision, unlike *Bowers*, was "firmly grounded in the First Amendment." *Stanley* itself had recognized the absence of protection for the possession of drugs, firearms, or stolen goods in the home. Chief Justice Burger, in a concurring opinion, put the obscenity issue squarely, if not knowingly, in the political ballpark. "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."<sup>125</sup> The fear that the Supreme Court would become the "Super Censor" had finally come to pass!

In his minority opinion, Justice Blackmun said that *Bowers* was not simply a case about homosexual rights, any more than *Stanley* was simply a case about watching pornographic films at home. "Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, as Brandeis had said in *Olmstead v. U.S.*, 'the right to be let alone.'<sup>126</sup> Blackmun drew upon Justice Holmes' admonition, that "it is revolting to have no better reason for the rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>127</sup> Blackman stated that the Court failed to endorse the fundamental interest individuals have in controlling the nature of their intimate associations with others.

Neither privacy nor pornography are societal problems solved easily by the Court, nor by federal or state legislatures, nor, for that matter, by the public at large. Both are valued, but for different reasons and by different segments of society. Each, when defined precisely, has been accorded certain protections; privacy if it does not

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123. 431 U.S. 494, 503 (1977).

124. *Bowers*, 478 U.S. at 194.

125. *Id.* at 197.

126. *Id.* at 199 (Blackmun, J., dissenting). See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

127. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

clash too severely with democratic openness, and pornography if it is deemed useful. In *Bowers*, as with *Paris Adult Theatre* before it, the Court was confronted with both problems, but failed to solve either. One suspects that the Justices, when required to function as a panel of legal moralists, will continue to contrive tests to regulate both privacy and pornography. Justice Brennan's confession on the failure of such formulas is wise advice, and his suggestion that consenting adults be let alone is good counsel.