Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Obscenity

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Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)

The Paris Adult Theater of Atlanta, Georgia, regularly showed films that were obscene under the standards laid down in Miller v. California *(1973). In order to avoid offending pedestrians, the owners posted a sign on the door declaring, "Adult Theatre – You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter." Lewis Slaton, the local district attorney, filed a civil complaint against the Paris Adult Theater in 1970. His complaint alleged that the theater was exhibiting obscene films in violation of state law. The local trial court dismissed the complaint on the ground that the Constitution of the United States permitted persons to show adult films as long as they provided reasonable notice as to the contents of the film and did not allow minors into the theater. When that decision was reversed by the Supreme Court of Georgia, the Paris Adult Theater appealed to the Supreme Court of the United States.*

Chief Justice Burger and Justice Brennan disputed the legitimate constitutional justifications for regulating obscenity. What did each believe were the legitimate constitutional justifications? Which justifications do you believe are correct? Consider, in light of Miller, *Justice Brennan's belief that obscenity can never be adequately defined, that any definition will trench on constitutionally protected speech. Is this correct? If this is correct, then should government ever be allowed to regulate obscenity?*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. . . . The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. . . .

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot),

what is commonly read and seen and heard and done intrudes upon us all, want it or not. . . .

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But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, and kind of state regulation is 'impermissible.' We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth v. United States* (1957), this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' . . .

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If we accept the unprovable assumption that a complete education requires the reading of certain books . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' . . . . Nothing, however, in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation.

. . . The idea of a 'privacy' right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

It is also argued that the State has no legitimate interest in 'control (of) the moral content of a person's thoughts,' . . . and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theaters. . . . Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by Stanley, or any of the other 'areas or zones' of constitutionally protected privacy, the mere fact that, as a consequence, some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests. . . .

Finally, petitioners argue that conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take. Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a

tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' . . .

JUSTICE DOUGLAS, dissenting.

. . . Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that 'obscenity' was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply. . . .

The other reason I could not bring myself to conclude that 'obscenity' was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the Colonies had no law excluding 'obscenity' from the regime of freedom of expression and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none. . . . So I became convinced that the creation of the 'obscenity' exception to the First Amendment was a legislative and judicial tour de force; that if we were to have such a regime of censorship and punishment, it should be done by constitutional amendment.

People are, of course, offended by many offerings made by merchants in this area. They are also offended by political pronouncements, sociological themes, and by stories of official misconduct. The list of activities and publications and pronouncements that offend someone is endless. Some of it goes on in private; some of it is inescapably public, as when a government official generates crime, becomes a blatant offender of the moral sensibilities of the people, engages in burglary, or breaches the privacy of the telephone, the conference room, or the home. Life in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct.

'Obscenity' at most is the expression of offensive ideas. There are regimes in the world where ideas 'offensive' to the majority (or at least to those who control the majority) are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

I am sure I would find offensive most of the books and movies charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me. I never read or see the materials coming to the Court under charges of 'obscenity,' because I have thought the First Amendment made it unconstitutional for me to act as a censor. I see ads in bookstores and neon lights over theaters that resemble bait for those who seek vicarious exhilaration. As a parent or a priest or as a teacher I would have no compunction in edging my children or wards away from the books and movies that did no more than excite man's base instincts. 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.

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JUSTICE BRENNAN, with whom JUSTICE STEWART and JUSTICE MARSHALL join, dissenting.

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Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup v. New York* (1967) approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

. . . [A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when (we) see it,' . . . 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.

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. . . I have considered the view, urged so forcefully since 1957 by our Brothers Black and Douglas, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

. . . [T]he concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be unprotected speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.

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The . . . state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests. It may well be, as one commentator has argued, that 'exposure to (erotic material) is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. . . . (And it) constitutes an invasion of his privacy. . . .' . . . Similarly, if children are 'not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees,' . . . then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles. . . .

But, whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. That court assumed for the purposes of its decision that the films in issue were exhibited only to persons over the age of 21 who viewed them willingly and with prior knowledge of the nature of their contents. And on that assumption the state court held that the films could still be suppressed. The justification for the suppression must be found, therefore, in some independent interest in regulating the reading and viewing habits of consenting adults.

In *Stanley v. Georgia* (1969) we pointed out that '(t)here appears to be little empirical basis for' the assertion that 'exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence.' . . . In any event, we added that 'if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .'

Moreover, in *Stanley* we rejected as 'wholly inconsistent with the philosophy of the First Amendment,' . . . the notion that there is a legitimate state concern in the 'control (of) the moral content of a person's thoughts,' . . . and we held that a State 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.' . . . That is not to say, of course, that a State must

remain utterly indifferent to—and take no action bearing on—the morality of the community. The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. . . . And much legislation—compulsory public education laws, civil rights laws, even the abolition of capital punishment—is grounded, at least in part, on a concern with the morality of the community. But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined. And, since the attempt to curtail unprotected speech necessarily spills over into the areas of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tread heavily on rights protected by the First Amendment.

. . . If, as the Court today assumes, 'a state legislature may . . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior,' . . . then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State, in an effort to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. . . .

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In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults--are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. . . . I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.