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FREEING LITERARY AND ARTISTIC EXPRESSION DURING THE SIXTIES: THE ROLE OF JUSTICE WILLIAM J. BRENNAN, JR.

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"Who Is His Parish Priest?"

In June 1963, one year before Justice William J. Brennan, Jr., untied authors and publishers from the leash of *obscenity* that was restraining sexual expression in the United States, Anthony Lewis wrote a piece in *Esquire* about the Supreme Court's obscenity cases.[1] Lewis was prescient. He observed that the Court was in the process of "liberating the country from puritanism,"[2] and foretold a radicalization of the landmark obscenity decision *Roth v. United States*[3] that would bring practically absolute freedom to literary and artistic works. Although by the time of Lewis's writing the Court had not added much to what had been said by Brennan in *Roth*—concerning the constitutional status of literature and art in relation to federal and state police powers[4]—it had quietly done a good deal: having freed from suppression a film called *The Game of Love*,[5] a homosexually-oriented magazine called *One*,[6] "dismally unpleasant, uncouth, and tawdry" homosexually-oriented magazines titled *MANual, Trim* and *Grecial Guild Pictorial*,[7] a nudist magazine called *Sunshine and Health*,[8] and the film version of *Lady Chatterley's Lover*.[9] Meanwhile, lower courts had started "following" Brennan's decision in *Roth* in ways that favored literary freedom: In San Francisco, a trial judge

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 I wish to thank *Cardozo Law Review* Editor Stephen Kaufman for the heroic research and editorial assistance rendered by him in preparing this piece for publication.

1 Lewis, *Sex . . . and the Supreme Court*, ESQUIRE, June 1963, at 82.

2 *Id.*

3 354 U.S. 476 (1957).

4 *Id.* at 484, 488.

5 Times Films Corp. v. Chicago, 365 U.S. 43 (1961).

6 One, Inc. v. Olsen, 355 U.S. 35 (1958).

7 Manual Enters. v. Day, 370 U.S. 478, 490 (1962).

8 Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

9 Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

threw out obscenity charges against the publisher of Allen Ginsberg's poem *Howl;*[10] in Chicago, a federal court enjoined the Post Office from refusing to accept, for mailing, copies of an issue of the magazine *Big Table I* containing allegedly obscene excerpts from Wiliam Burroughs's novel-in-progress *Naked Lunch* and from Jack Kerouac's *Old Angel Midnight.*[11] Both decisions cited *Roth* and were based upon findings that the challenged work had literary and social value.[12]

Lewis accurately portrayed the "nine not-so-old men" sitting on the high bench as moving the United States "from one of the most timid countries in dealing with sex in the arts to what many believe is now by far the most liberated in the Western world."[13] As Lewis observed, "Gradually, without much notice but with developing momentum," the justices were cutting "back the censor's power over literature and the arts generally."[14] What Lewis did not realize was that Brennan, the son of an immigrant Irish Catholic boiler-stoker, was the justice working at it hardest.

It was sixteen years after[15] the Supreme Court had acted to free Henry Miller's *Tropic of Cancer*[16] before I learned that the person

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[10] People v. Lawrence Ferlinghetti, citation unknown (San Fran. Mun. Ct. 1957). This case is referred to in F. LEWIS, LITERATURE, OBSCENITY AND LAW 197-198 and n.30 (1976).

[11] Big Table v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960).

[12] *Id.* at 260, *Ferlinghetti* —, at —. The events leading up to these decisions are described in E. DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS, chs. 17-18 (forthcoming January 1992).

[13] Lewis, *supra* note 1, at 82.

[14] *Id.*

[15] As difficult as it is to decipher how justices work ex post facto, it is even harder to find out what enters into their judgments and opinions as these are being formulated. This secrecy, of course, protects the integrity of the Court's work and discourages extra-legal attempts to influence it. The justices are under no legal duty to explain their decisions and opinions to anyone at any time and will rarely discuss them with outsiders. The opinions published to justify their decisions are all that is required, and even this duty is traditional, not legally imposed. When Justice Abe Fortas declined to answer the questions of Senators who were investigating his qualifications to become Chief Justice—by inquiring into his beliefs relevant to issues before the Court—he acted properly and in what appeared to be the only way possible for the integrity of the Court's processes to be maintained. During his confirmation hearings to become a justice of the Supreme Court, Judge Robert H. Bork permitted senators to explore his values and thought processes to an unprecedented degree; in the end, although this doomed Bork's nomination, it also gave the country at large (the hearings were televised) an unprecedented and compelling opportunity to understand American constitutional law and the judicial process.

[16] Officially, the *Tropic of Cancer* case was Grove Press, Inc. v. Gerstein, 377 U.S. 577 (1964), decided the same day as a case involving Louis Malle's film *The Lovers*, Jacobellis v. Ohio, 378 U.S. 184 (1964). In the *Grove Press per curiam* opinion prepared by Brennan, Justices Black, Douglas, Brennan, Stewart and Goldberg voted to free *Tropic of Cancer*, citing only their opinions in *Jacobellis*. Chief Justice Warren and Justices Clark, Harlan and White would have denied certiorari. Because of the absence of full written opinions in *Grove Press*, *Jacobellis* has historically been cited for the reasoning of the justices in both cases, including

responsible for that spectacular act was Brennan. The greatest part of the Supreme Court's work is invisible and I did not find out how to penetrate the secrecy surrounding the brethren's processes—their decision-reaching and opinion-creating activities—until early in the eighties, while working with historian Roger Newman on a book about motion picture censorship and the law.[17] In doing research for that book we examined the motion picture obscenity case files among the private Court papers of Justice John Marshall Harlan. Later, working on the book from which this article is excerpted, I obtained permission to study the papers of Justice Abe Fortas and Brennan.[18]

The document that gave me the clue that it was Brennan who persuaded the Warren Court to free American literary and artistic expression was a Brennan *Memorandum to the Conference*.[19] In the memorandum, Brennan informed the other justices sitting in *Grove Press v. Gerstein*[20] that he had read *Tropic of Cancer* and did not think it was "obscene." Not long after his note went around, Brennan, who had written the opinion for the Court in *Roth*, also composed the opinion that would announce and explain why Henry Miller's novel (then the subject of ongoing litigation in numerous jurisdictions) was protected by first amendment guarantees of speech and press and could not be held "obscene." Brennan did this in the *Tropic of Cancer* case from Florida[21] that I had brought to the Court on a writ of certiorari, and an appeal from an Ohio conviction involving the motion picture *The Lovers* that New York lawyer Ephraim London had

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what I refer to as "the Brennan doctrine." Throughout the article I follow the convention of referring to *Jacobellis* as the *Tropic of Cancer* case. *See also infra* notes 165-66 and accompanying text.

17 E. DE GRAZIA & R. NEWMAN, BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT (1982).

18 Access to Brennan's papers deposited at the Library of Congress requires Brennan's permission. Access to Fortas's papers (located at Yale University's Sterling Library) requires the permission of Fortas's widow. Douglas's papers (located at the Library of Congress) and Harlan's papers (located at Princeton University's Seeley G. Mudd Manuscript Library) are open to scholars and journalists.

Another legitimate but more controversial way to pierce the secrecy of the Court is to speak to former law clerks, as was done extensively by Bob Woodward and Scott Armstrong for the ground-breaking book on the Burger Court, B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). Most of the information for that book was based on interviews with 170 former law clerks. Chief Justice Burger reputedly "declined to assist [the authors] in any way." *Id.* at 3. "Virtually all the interviews were conducted 'on background,' meaning that the identity of the source [was] kept confidential." *Id.*

19 June 18, 1964 (available among Harlan's Court papers in Princeton University's Seeley G. Mudd Manuscript Library).

20 377 U.S. 577 (1964).

21 Grove Press, Inc. v. Florida, *ex rel* Richard E. Gerstein, 156 So. 2d 537 (Fla. Dist. Ct. App. 1963).

argued before the Court.[22] Looking back to those events I am impressed at how neatly first amendment justice can be done.

At the time of the *Tropic of Cancer* decision, Brennan seemed an unlikely candidate for the role of liberating American literature in general and Henry Miller's novel in particular. The book itself had an unholy reputation: as recently as 1953, it had been barred by the United States Customs Service and federal courts from entry into the United States because it was full of "sticky slime."[23] Before the courageous Barney Rosset brought the novel out in 1961, under his Grove Press imprint, not even a publisher as daring as Sam Roth—who had published pirated parts of James Joyce's *Ulysses*—had dared to publish anything from *Tropic of Cancer*.[24] Moreover, in *Roth* Brennan had authored what seemed to be a freedom-dragging opinion. Finally, there was the fact that, characteristically, Brennan carried out his work of first amendment doctrinal construction quietly

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[22] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[23] Besig v. United States, 208 F.2d 142, 145 (9th Cir. 1953). Here is an excerpt from that Court of Appeals decision:

> Each of The *Tropics* is written in the composite style of a novel-autobiography, and the author as a character in the book carries the reader as though he himself is living in disgrace, degradation, poverty, mean crime, and prostitution of mind and body. The vehicle of description is the unprintable word of the debased and morally bankrupt. Practically everything that the world loosely regards as sin is detailed in the vivid, lurid, salacious language of smut, prostitution, and dirt. And all of it is related without the slightest expressed idea of its abandon. Consistent with the general tenor of the books, even human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness. These words of the language of smut, and the disgraceful scenes, are so heavily larded throughout the books that those portions which are deemed to be of literary merit do not lift the reader's mind clear of their sticky slime. And it is safe to say that the 'literary merit' of the books carries the reader deeper into it. *Id.*

[24] The book, however, in its French or Mexican edition, could be purchased from the dedicated literature-loving Frances Steloff, who ran the Gotham Book Mart in New York and once had to defend her bookstore in court (with the help of first amendment lawyer Horace Manges, whose services were provided gratis to Steloff by Random House co-founder and chairman Bennett Cerf) against a criminal prosecution brought in 1936 by John Sumner of the New York Society for the Suppression of Vice, for selling André Gide's homosexually-oriented autobiographical novel *If It Die*. It was from Steloff that Barney Rosset—whose Grove Press became the eventual publisher in the United States of *Tropic of Cancer*—bought the copy of *Cancer* that he used to write his college paper on Henry Miller. The case involving *If It Die* was People v. Gotham Book Mart, Inc., 158 Misc. 240, 285 N.Y.S. 563 (1936). *Gotham Book Mart* came before the enlightened magistrate Nathan D. Perlman. Perlman, twelve years later, wrote an excellent dissent to a three-judge New York court's suppression of Edmund Wilson's *Memoirs of Hecate County*. Perlman took into account Wilson's talents, his reputation, and the "straightforward and sincere" character of his novel, and found it "not obscene, lewd, lascivious, or indecent within the meaning of the statute." (Citation unknown; copy on file with author.)

and unobtrusively. His opinions were never inflammatory; he made progress in small, quiet steps. As the late Harry Kalven observed, "The Brennan style" was "to avoid absolute protection and the futile debate it is likely to engender, but to keep the jurisdiction yielded to the censor as small as possible."[25] Because Brennan, unlike Justices Hugo L. Black and William O. Douglas, never explicitly advocated an "absolutist" doctrine of free expression,[26] he was late to lift the spirits of those[27] who are convinced, as I am, that the first amendment free-

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[25] H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 373 (1988).

[26] However Brennan's "actual malice" doctrine, New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), and his "utterly without social importance" doctrine, *Jacobellis*, 378 U.S. at 191, came close. *See supra* note 29.

[27] Conservatives were also late to recognize Brennan's role. It was not until the mid-eighties that neoconservative intellectuals and the Reagan administration understood the leading role that Brennan played in the Supreme Court's expansion of civil and political rights, and in recognizing human dignity as an overarching principle of American constitutional law. Thus, in 1986, Brennan was attacked publicly as an exponent of a "radically egalitarian jurisprudence," and accused of holding a philosophy and espousing rights stemming from what "looks suspiciously more like a political or social agenda than a theory of law." Address by Assistant United States Attorney General William Bradford Reynolds, University of Missouri School of Law (Sept. 12, 1986). Reynolds, *Securing Equal Liberty in an Egalitarian Age*, 52 MO. L. REV. 585, 591-592 (1987) [hereinafter Reynolds Address]. Justice Department spokesman Terry Eastland boasted that the speech was the strongest direct attack on an individual member of the Supreme Court by any high-ranking official of the Reagan administration. *See Aide in Justice Department Holds that Brennan Has 'Radical' Views*, N.Y. Times, Sept. 13, 1986, § 1, at 1, col. 6. Brennan's "liberal social agenda," it was alleged, "has little or no connection with the Framers' Constitution, Bill of Rights, or any subsequent amendment." Reynolds Address, *supra* at 592. And Brennan's jurisprudence is "a theory that seeks not limited government in order to secure individual liberty, but unlimited judicial power to further a personalized egalitarian vision of society." *Id.* at 591. Reynolds also took the opportunity to blast the work of legal philosopher Ronald Dworkin, who is Professor of Jurisprudence at Oxford University and the New York University School of Law, for being similarly oriented. Reynolds Address, *supra* at 593-99. A year later, when the neoconservative (and former Nixon Solicitor General of "Saturday Night Massacre" fame) Judge Robert H. Bork came under scrutiny by the Senate for appointment to the high court, Dworkin demolished Bork's posture of "judicial restraint." Dworkin, *The Bork Nomination*, N.Y. Review of Books, Aug. 13, 1987 at 3.

Earlier, Dworkin had placed himself firmly on the side of a free press and freedom for sexually-oriented expression in his book *A Matter of Principle*, where he defended the "right to pornography" as an aspect of his theory of liberalism, according to which people are entitled to be treated with equal respect, and under which it would be a failure to perform that duty if one restricted another's liberty on the ground that his taste in books or films was prurient or depraved. R. DWORKIN, A MATTER OF PRINCIPLE 335 (1985). Dworkin holds that liberalism's "constitutive morality" is "a theory of equality that requires official neutrality amongst theories of what is valuable in life." *Id.* at 203. Dworkin had been an expert witness in a celebrated English obscenity trial of a magazine called *Oz* that took place in the Old Bailey courthouse. There he upset the presiding judge by testifying that whereas "the publication of a magazine like this is a vindication of some important moral principles. . . . [T]his prosecution is, in this sense, . . . a corruption of public morals." T. PALMER, THE TRIALS OF OZ 166 (1971). *See also* Dworkin, *Pornography, Feminism, & Liberty*, N.Y. REVIEW OF BOOKS, Aug. 15, 1991, at 12.

Shortly after Reynolds's attack on Brennan's and Dworkin's jurisprudence, the Reagan

doms are essential to the enjoyment of all other civil and political rights, and for republican government itself, and that the Constitution's framers realized this, and accordingly expressed the free speech and press guarantees in absolute terms.[28] In any event, Brennan's work in this area turned out to be more effective than either Black's or Douglas's because Brennan was a genius at building coalitions among those brethren who joined his doctrinal solutions to first amendment problems, and coalitions of this sort are essential ingredients of the creative progress and growth of the law.[29]

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administration's Attorney General Edwin Meese attacked the Warren Court's landmark decision in Cooper v. Aaron, 358 U.S. 1 (1958), and the *per curiam* opinion that the Court had announced in that case, believed to have been drafted by Justice Brennan. It was, I believe, the only opinion in history that was *signed* by all nine members of the Court—to emphasize their unanimity. In it, the Court said that "the federal judiciary is supreme in the exposition of the law of the Constitution," and ruled that its landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954) (denouncing racially segregated public schools as unconstitutional) was binding on all state officials as "the supreme law of the land." *Cooper*, 358 U.S. at 18. The *Cooper* case had grown out of an effort by Arkansas Governor Orval Faubus to obstruct desegregation of the schools in Little Rock. After Faubus had sent the Arkansas National Guard to keep blacks from entering a white school, in disregard of the Supreme Court's ruling in *Brown*, President Eisenhower sent federal troops to Little Rock to enforce a lower court's desegregation order and the Supreme Court's interpretation of the Constitution in *Brown*. Meese assailed the Court's opinion in *Cooper* as involving "a flawed reading of our Constitution" and "an even more faulty syllogism of legal reasoning." Address by United States Attorney General Edwin Meese, Tulane University (Oct. 21, 1986). "The logic of *Cooper v. Aaron*," Meese charged, "was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law." *Id.* Meese implied that Faubus was constitutionally correct in taking the position that inasmuch as he was not a party to the case he was not bound by *Brown*'s declaration that segregated schools violated the Constitution, and that the Supreme Court's rulings were not binding on all persons nor even on state government officials, including judges. For a perspicacious analysis of the Meese speech, see Taylor, *Washington Talk; Meese and the Storm over the Court*, N.Y. Times, Oct. 27, 1986, at A20, col. 3. For an earlier neoconservative attack on Brennan's jurisprudence by University of Texas Law School Professor Lino A. Graglia, see Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1985, at 19-27. Former judge Robert H. Bork has usually been circumspect in his public criticism of Brennan. *See, e.g.*, R. BORK, THE TEMPTING OF AMERICA 127-28, 219-21, 238-39 (1989).

[28] U.S. CONST. amend. I. ("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.") None of the other amendments appear in this commanding form. The bar to Congressional enactments that abridge freedom of expression was made applicable to state laws by judicial interpretation of the fourteenth amendment. Gitlow v. New York, 268 U.S 652 (1925).

[29] Brennan found a middleground between the polarized doctrinal approaches advocated by Black ("no law means no law," New York Times Co. v. United States, 403 U.S. 713, 717 (1971)) and Douglas on the liberal left, and Justice Felix Frankfurter on the conservative right. Black and Frankfurter were struggling for Court leadership of the first amendment area when Brennan joined the Court. At first, Brennan "sided" with Frankfurter, as exemplified by Brennan's opinion in *Roth*, 354 U.S. at 479; then he constructed his own doctrinal approaches, which paved the way toward nearly absolute freedom of speech and press without, however,

Brennan was born in 1906 in Newark, New Jersey of parents who were Irish Catholic immigrants.

JUSTICE WILLIAM J. BRENNAN, JR.: My father came from Ireland because of the famine and then, later, the political unrest. He shoveled coal when he got over here, and became a union organizer. At that time, Newark was owned by one man, McArter. My father got involved in a strike of transportation workers and the police beat him and the others up. I was ten years old at the time. Later, my father was elected Commissioner, in Newark . . . .[30]

Brennan's origins help explain why he became such a humane and egalitarian justice. The reasons for his judicial effectiveness are of a different sort, having to do, I believe, with his extraordinary gift for relating affectionately and creatively with the men and women with whom he works.[31] Unlike Hugo Black, Brennan did not lose his appetite for first amendment freedom, for example, even where Negro sit-in demonstrators were involved.[32] Unlike Douglas, Brennan re-

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subscribing to Black's "absolutist" approach. Finally, in 1973, when Chief Justice Warren E. Burger took control of the Court's decisions in the obscenity area, Brennan went into dissent and adumbrated what might be deemed an absolutist approach to the solution of the "intractable" obscenity problem by arguing that obscenity was impossible to define in a constitutionally acceptable way (that was not both vague and overbroad) and therefore, that all obscenity laws involving consenting adults were invalid exercises of police power. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting) ("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." *Id.*, at 83. Brennan, noting the Court's long struggle to define obscenity, was "reluctantly forced to the conclusion that none of the available formulas . . . can reduce the vagueness to a tolerable level." *Id.* at 84.) It was Justice Harlan who first referred to the "intractable" problem of finding a definition for obscenity in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in one case and dissenting in two others). To the end of his days on the Court, Black continued to press for adoption of his views in this area; *see, e.g.* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1966) (Black, J., dissenting). In doing that he became one of the sharpest of the *friendly* critics of the Brennan doctrine's mode of incrementally claiming more and more freedom for allegedly obscene literary and artistic expression.

[30] Interview with Justice William J. Brennan, Jr., in Washington, D.C. (May 11, 1987).

[31] Brennan retired on July 20, 1990. President Bush named Judge David H. Souter to fill his seat.

[32] It seems pertinent to note here that although Black as well as Frankfurter, Douglas, Brennan and the rest of the Brethren supported the Court's controversial decisions that held public school segregation unconstitutional, thereby mandating desegregation (*see, e.g.*, Brown v. Board of Education, 374 U.S. 483 (1954)), Black consistently opposed the disposition of Warren, Douglas and Brennan to hold that "sit-ins" by blacks—not only at public places like libraries, but also in "public" places that were privately owned, such as lunch-counters and restaurants—were a form of expression protected by the first amendment. Warren took the position, supported by Brennan and Douglas, that the owners of places serving the public (to be called "public accommodations," in the Civil Rights Act of 1964, Pub. L. No. 88-352, 78

fused to lose patience with his brethren when they opposed him. And unlike Frankfurter, Brennan never discounted the views of individual brethren or disparaged court majorities as unprincipled, undisciplined, or unlearned. Such characteristics help to explain the remarkable ability Brennan possessed to carry, and speak for, the Court on controversial issues of utter importance.[33]

DEAN NORMAN REDLICH: Much has been written about Justice Brennan's Supreme Court career—how he joined the coalescing minority of Justices Black and Douglas and the Chief Justice (Warren) and how this minority expanded into a majority which made the Supreme Court, for a few short but exciting years, into a world-wide symbol of the furtherance of individual rights and liberties. I have always believed that it was a mistake for the partisans of any Supreme Court justice to describe any one of these remarkable jurists as the "leader of the Court." No one, except perhaps Earl Warren, leads the likes of Black, Douglas, Brennan, Goldberg and Fortas. But on many

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Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a et seq., 2000a et seq. (1982)) abandoned private choice and could not constitutionally call in the police to help throw out people they did not want to serve. Black contended the situation should be analyzed in accordance with how his "Pappy" had run a general store; he exercised the right to decide whom he would or would not serve. Here Douglas disagreed with Black's opposition to affirming the convictions of "sit-in" demonstrators because it "fastens apartheid tightly onto our society." B. SCHWARTZ & S. LESHER, INSIDE THE WARREN COURT (1953-1969) 220 (1983). For a while, the Court was dangerously and heatedly divided on the issue, and Black issued strident dissents to court decisions that overturned on first amendment grounds the trespass convictions of civil rights demonstrators attempting to pressure private places of public accommodation into serving members of all races. *See, e.g.*, Hamm v. City of Rock Hill, 379 U.S. 306, 318 (1964); Bell v. Maryland, 378 U.S. 226, 318 (1964). In a June 1963 case, Salter v. City of Jackson, 374 U.S. 818 (1963), involving a challenge brought by black demonstrators against a Jackson, Mississippi court injunction preventing blacks from "unlawfully" picketing or parading on the streets of Jackson, Black opposed the Court's issuing any stay of the injunction because: "the situation between the races was getting to be more and more acute" and, as Douglas summarized Black's perspective, "it was time to clamp down on the Negroes." *Memorandum for the Files by William O. Douglas*, June 18, 1963, published in W.O. DOUGLAS, THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 170 (M. Urofsky ed. 1987). *See also* B. SCHWARTZ & S. LESHER *supra*, at 217-27 (1983); and J. SIMON, THE ANTAGONISTS 256-58 (1989).

33 Even long after the demise of the Warren Court and the ascendencies of the Burger and Rehnquist Courts, Brennan was able to carry and speak for the Court in the first amendment area in the most controversial cases—the American flag desecration and burning cases. United States v. Eichman, 110 S. Ct. 2404 (1990); Texas v. Johnson, 491 U.S. 397 (1989). In these cases Brennan twice led the majority of a bench on which the liberals were outnumbered two-to-one to hold unconstitutional, as abridgements of first amendment freedom of speech, laws that sought to prevent persons from speaking against or criticizing the country, or its policies, by desecrating or burning the flag. The Court's initial decision was politically so unpopular that President Bush attempted to gain support for his administration by calling for a constitutional revision of the first amendment to overrule the Supreme Court's decision. The attempt failed and Brennan's view of first amendment freedom prevailed.

occasions, spanning the Warren and Burger courts, it was Justice Brennan who provided the formulation that was able to create a Court majority, around which different viewpoints would temporarily gather.[34]

ANTHONY LEWIS: He is not a judge who enjoys the role of passionate dissenter. He has "an instinct for accommodation," a former law clerk of his has said—a preference for helping to shape majorities.[35]

His ability to build consensus on the high bench helps explain Brennan's influence on the development of individual rights and why Warren assigned him so many opinions to write. Of 132 major decisions issued during the twenty-three Court terms between 1956 and 1978—between the time, that is, when Brennan joined the Court and the last year covered by a study made of the justices' work—Brennan wrote the Court's opinion in twenty-nine. No other justice came close; the closest to Brennan were the two chief justices during that period—Warren, who wrote thirteen opinions, and Burger, who wrote fourteen.[36] Until Brennan joined the Court, it was Frankfurter and his doctrine of "judicial restraint" that held sway over the Court's work in the first amendment field.[37] Most of Brennan's major opinions involved the expansion and extension of individual rights and liberties, especially those protected by the first amendment. It was for doing this that Brennan was attacked by the Reagan Justice Department for being an advocate of "a radically egalitarian jurisprudence" and of "unlimited judicial power."[38] The attack did Brennan no damage, as may be gauged from the fact that in 1989 and 1990 he marshalled majorities to join his bravura opinions for the Court striking down state and federal anti-flag desecration laws as violating free-

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[34] Redlich, *William J. Brennan, Jr.: New Honor for an Old Friend*, N.Y.U. L. SCH. ANN. SURV. AM. L. xxiv-xxvi (1981).

[35] Lewis, *Robust and Uninhibited*, N.Y. Times, Oct. 18, 1976, at 29, col. 1.

[36] It may be remembered that when the chief justice finds himself voting with a Court majority, it is his prerogative to assign the opinion-writing task to himself or to any other justice also voting with the majority. Had Brennan voted with the three-justice minority in *Roth* to reverse Roth's conviction, he would not have changed the Court's judgment. Instead he would have lost (probably to Frankfurter) the opportunity to write the Court's majority opinion—an opinion which proved crucial to the development of constitutional protection for literary and artistic expression.

[37] *See* J. SIMON, *supra* note 32, at 236.

[38] Reynolds Address, *supra* note 27.

dom of expression.[39]

Brennan responded to Reagan-era critics of "judicial activism" in a characteristically graceful exposition of his judicial philosophy:[40]

> JUSTICE WILLIAM J. BRENNAN, JR.: Lively, even acrimonious, debate about the proper role of judges in a democratic society is ever with us. The judge who believes that the judicial power should be made creative and vigorously effective is labeled "activist." The judge inclined to question the propriety of judicial intervention to redress even the most egregious failures of democracy is labeled "neutralist" or "liberal"; where yesterday's "activist" was pinned on "conservatives," today [1982] it's on "liberals." As often as not, however, such labels are used merely to express disapproval of particular decisions. If useful at all, the labels may be more serviceable to distinguish the judge who sees his role as guided by the principle that "justice or righteousness is the source, the substance and the ultimate end of the law," and the judge for whom the principle is that "courts do not sit to administer justice, but to administer the law." Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view.
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> . . . Holmes's imaginary Society of Jobbists is limited to judges who hold a tight rein on humanitarian impulse and compassionate action, stoically doing their best to discover and apply already existing rules. But judges acting on the former view believe that the judicial process demands a good deal more of them than that. Because Constitution, statute or precedent rarely speaks unambiguously, a just choice between competing alternatives has to be made to decide concrete cases. Notre Dame's former Dean O'Meara went to the heart of the problem in saying, "[T]he judge's role necessarily is a creative one—he must legislate, there is no help for it . . . . When the critical moment comes and he must say yea or nay, he is on his own; he has nothing to rely on but his own intellect, experience and conscience."[41]

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[39] *See supra* note 33.

[40] *See* E. DE GRAZIA, *supra* note 12, ch. 27.

[41] W. Brennan, Jr., *Abe Fortas*, 91 YALE L.J. 1049, 1050-51 (1982) (eulogy for Justice Abe Fortas (quoting O'Meara, *Natural Law and Everyday Law*, 5 NAT'L L.F. 83, 96-97)). In a speech Brennan made on Sept. 17, 1987, he used the term "passion" to designate "the range of emotional and intuitive responses to a given set of facts or arguments" that enters into the decision-making and opinion-writing processes of judges like himself. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 9 (1988). In a thoughtful rejoinder, Owen Fiss criticized Brennan's (and my) thesis that great judges use "passion" as well as "reason" in reaching and rationalizing their decisions. *See* de Grazia, *Humane Law and Humanistic Justice*, 10 CARDOZO L. REV. 25 (1988); Fiss, *The Legacy of Goldberg v. Kelly: A*

When Brennan was a boy in Newark, his father rose from being a boiler-stoker to being the city's Commissioner of Public Safety. Here, one of his duties was to issue licenses for movie and burlesque theaters. In those days, unlike the newspaper and book publishing press, "live" shows and movies were routinely licensed by town authorities who, under the influence of the progressive movement, used the police power to decide whether such shows were fit publicly to be shown. Like the judges who censored literature under the guise of suppressing the obscene, the licensors of movies and plays were not seen to be acting as *censors* until a few years after World War II. One reason was that, in the beginning, movies especially, but also plays, were thought of as "entertainments," not transmitters of thoughts, opinion, and ideas; the latter were long said to be all that the first amendment protected.[42]

In 1915, the Supreme Court analogized motion pictures to the "circus and all other shows and spectacles," forms of expression "not to be regarded . . . as part of the press of the country or as organs of public opinion."[43] With the development of the motion picture industry and film art, however, the Court grew increasingly uncomfortable with the cramped notion that the censorship of motion pictures had nothing to do with freedom of the press, and overruled itself. But that did not happen until 1952.[44]

Twenty-four years earlier, a ruling by William J. Brennan, Sr., as

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Twenty Year Perspective: Reason in All its Splendor, 56 BROOKLYN L. REV. 789, 795-804 (1990).

[42] Former Judge Robert H. Bork exemplifies the neoconservative disposition to deny to artists and the arts the freedom that politicians and other more traditional hawkers of opinions and ideas have. Even today, the constitutional law of speech and press does not clearly protect the art of entertainment against the imputation of obscenity. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), where the Court held that Indiana's enforcement of an anti-public-nudity statute as applied to barroom-type nude dancing did not violate the first-amendment-based freedom of expression. Under the Brennan doctrine, entertainment would be protected as expression not "utterly" without artistic or other social value or importance. But under Burger's 1973 revisionary opinions, entertainment might not be protected unless it had *serious* literary, artistic, scientific, or political value. *See* F. SCHAUER, THE LAW OF OBSCENITY 145 (1976).

The recent police and prosecutor attacks in Miami on the rap music group 2 Live Crew for creating, playing and singing obscene songs, is a fresh example of the American judiciary's stubborn reluctance to recognize constitutional freedom where it belongs, in the arts, popular as well as fine. *See* Skywalker Records, Inc. v. Navarro, 739 F.Supp. 578 (S.D. Fla. 1990).

[43] Mutual Film Corp. v. Industrial Comm'n 236 U.S. 230, 243-44 (1915). In *Mutual Film Corp.*, the Supreme Court decided that the content of movies could be regulated by the state in the exercise of its police powers both by prescribing criminal penalties for immoral exhibitions and by requiring censorship before exhibition.

[44] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

Newark's Commissioner of Public Safety, that a movie called *The Naked Truth* could not be shown in Newark except without charge and either in a Y.M.C.A., a school building, or a church was reversed by a Court of Chancery.[45] In 1953, another Newark license commissioner's refusal to permit a burlesque theater to open its doors was overturned by Bill, Jr., speaking for New Jersey's highest judicial bench.[46] Said young Brennan in that case: "The performance of a play or show, whether burlesque or other kind of theater, is a form of speech and *prima facie* expression protected by the State and Federal Constitutions . . . ."[47] A decade later, speaking from the bench of the United States Supreme Court, Brennan created a lasting precedent in favor of artistic freedom for movies and books by ruling that *any* form of expression "that has literary or scientific or artistic value or any other form of social importance," was entitled to the full protection of the constitutional guarantees.[48] As mentioned earlier, Brennan did this in Court decisions handed down in June 1964, freeing from obscenity charges the film, *The Lovers*,[49] and the novel, *Tropic of Cancer*.[50] If Brennan inherited his father's intelligence and fine political sense, he had not absorbed his father's puritanical attitude toward sex. In a conversation with me, Brennan likened his father's notions in that realm with those of Brennan's closest friend on the Court, "Super Chief" Earl Warren.[51]

After going to parochial and public schools in Newark, Brennan went to college at the University of Pennsylvania and then to Harvard Law School, on scholarship, where he developed a legal aid program for the poor. He entered labor law practice in Newark with a fancy firm, but deserted the transitory rewards of private law practice for the more enduring ones of working as a judge. From his initial service as a trial judge, Brennan clambered up the judicial ladder to a seat on the New Jersey Supreme Court, becoming a protégé of the powerful and prestigious Arthur Vanderbilt, then serving as chief justice of the New Jersey Supreme Court. The Vanderbilt connection would prove of signal importance to Brennan's career and to the development of civil and political rights in the United States. In a search for someone to replace retiring Justice Sherman Minton, Republican President Dwight D. Eisenhower consulted Attorney Gen-

[45] Public Welfare Pictures Corp. v. Brennan, 100 N.J. Eq. 132-33 (ch. 1926).
[46] Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953).
[47] *Id.* at 270, 96 A.2d at 520.
[48] Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).
[49] *Id.* at 186-87.
[50] Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964). *See supra* note 16.
[51] Interview with Justice William J. Brennan, Jr., in Washington, D.C. (Apr. 16, 1986).

eral Herbert Brownell, also a Republican, who recommended Brennan because Brownell knew he enjoyed Vanderbilt's highest regard; Vanderbilt himself was considered too old for the job. So in 1956 Ike picked Brennan. Brennan was a lifelong Democrat and a Catholic, and it was an election year; according to Brennan, in order to emphasize the nonpartisanship of his administration, Eisenhower wanted a Democrat from the Northeast.

During the fifties America suffered from McCarthyism, a right-wing, ideological-political movement that Brennan had the nerve to speak out against, even while he was on the New Jersey Supreme Court—once at a Rotary Club dinner and, then again, at a banquet of the Charitable Irish Society.[52] The main targets of Brennan's speeches were the congressional committee witch-hunts that were the bane of the existences of so many liberals at that time—especially teachers, writers, artists, and other intellectuals. Although Brennan was a Catholic, his conscience refused to conform to the preachings of Catholic religious leaders like Francis Cardinal Spellman, the powerful Catholic Archbishop of New York, who was also one of Joseph McCarthy's staunchest supporters. The cardinal liked to rant against communism and rave about Americanism as much as he liked to rail against obscenity and plump for the censorship of movies, plays and books.[53] His power grew mainly out of his position as leader of the Archdiocese of New York, but his views also influenced some kinds of official actions taken by Catholic policemen, judges, and even postal workers.[54] Several million New York area Catholics (including Catholic public officials and government employees) listened to what Spellman said about moral and social issues; many followed his ideas

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[52] 103 CONG. REC. S3938-42 (1957) (citing addresses by William Brennan, Jr., at a Charitable Irish Society banquet (Mar. 17, 1954), and at a Monmouth Rotary Club banquet (Feb. 23, 1955)).

[53] One of the country's most powerful unofficial agencies of censorship, the Catholic Church's National Office for Decent Literature (NODL), was organized shortly after the federal courts acted to free James Joyce's *Ulysses* from obscenity censorship by the United States Customs Service. D. DEMAC, LIBERTY DENIED: THE CURRENT RISE OF CENSORSHIP IN AMERICA 40 (1988).

[54] Undiscouraged by the constitutional doctrine "separating" church and state, New York policemen permitted themselves to be used as one of Cardinal Spellman's weapons against literary and artistic sins. The day after Spellman condemned a Broadway theater piece called *Wine, Women and Song* before a gathering at the New York City Police Department's Anchor Club—it was described as "a relatively tame burlesque show featuring a fan dancer and a clown"—the police crashed the gates of the Ambassador Theatre and served summonses on the show's manager and producer. Later, Lenny Bruce, who frequently lampooned the Cardinal and other Catholic figures, from the Pope to Saint Paul, was silenced by the police, reputedly after Spellman complained about him to city officials. *See* E. DE GRAZIA, *supra* note 12, ch. 24.

implicitly.[55] Brennan's philosophy on morality, religion and the law, however, was different from that of many Catholics,[56] and on the Supreme Court this difference would eventually show up, and stun Catholic leaders.

Spellman preached against sexually immoral books, plays, and films, even when they treated sex lightly; characteristically, for a moral censor, he did not need to read or see what he knew ought to be condemned. Justice Stewart once said about pornography: "I know

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[55] Spellman used the pulpit to attack "obscene" motion pictures like *Baby Doll*, starring Carroll Baker and directed by Elia Kazan. The film was not officially censored or denied a license, but the Catholic boycott which Spellman launched was respected by the Catholic movie chain exhibitor Joseph P. Kennedy (JFK's father) and others; this seriously impaired the film's box office returns. *See* E. DE GRAZIA & R. NEWMAN, *supra* note 17, at 243-44. *See also* the discussion, *infra* note 61, regarding *The Miracle* controversy.

Today, Protestant evangelical church leaders like the Rev. Donald Wildmon are exerting political pressure and influence on Congress, federal, state, and local prosecutors, and the heads of agencies such as the Federal Communications Commission and (most recently) the National Endowment for the Arts, to purge the media and the arts of ideas, values and programs that appear to these leaders to be obscene, indecent, blasphemous, or merely ideologically controversial.

More recently, New York's Catholic prelate, John Cardinal O'Connor, aggressively sought publicly to use his powers within the Church to "coerce" the consciences and the private and public positions taken by public officials in New York, including Governor Mario Cuomo, with regard to abortion. He had even alluded to using the priesthood's grave excommunication powers to bring Cuomo's official acts into line with official Catholic teaching. *See* Greeley, *This Canon Shoots Blanks*, Newsday, June 25, 1990, at 44. Cuomo, who has more than once seriously considered running to become the President of the United States, has (to date) successfully fended off such church interference with his public statements and acts.

[56] In an interview with Jeffrey T. Leeds, Brennan said he realized he was "a disappointment to some Roman Catholics." Leeds, *A Life On The Court*, N.Y. Times, Oct. 5, 1986, § 6 (Magazine), at 25, col. 1. Brennan recounted that, before his confirmation hearing in 1956, the Senate Judiciary Committee

> unanimously said it was most inappropriate to ask me whether, as a Catholic, I would follow the Constitution. But then they did ask me. And I had settled in my mind that I had an obligation under the Constitution which could not be influenced by any of my religious principles. As a Roman Catholic I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.

Id. at 79. From other remarks made by Brennan in this interview, it is clear that what his religious beliefs had to "give way to" was his individual "conscience"; it was the law, not his religion, that instructed him how to vote and what to ground his opinions on.

The "most difficult" decisions Brennan had to make, given his "lifelong experience as a Roman Catholic," involved not obscenity or even abortion, but the school prayer cases. "[T]o say that prayer was not an appropriate thing in public schools, that gave me quite a hard time. I struggled." *Id.*

Governor Cuomo's Catholicism similarly did not dissuade him from discharging his official duties regarding the laws of abortion in conformity with his conscience, notwithstanding attacks on his 'political' behavior by O'Connor and others. A New York Times/WCBS-TV News poll of 1047 adults indicated that seventy percent of New York's Catholics disapproved of the excommunication threat. N.Y. Times, June 23, 1990, § 1, at 26, col.3.

it when I see it."[57] Spellman knew it even when he did not see it. Early in his reign over New York City's Catholic diocese—after the United States went to war against the Axis powers in Europe—Spellman became convinced that sex and the war had their common source in Satan. Later, in August 1964, after the Supreme Court announced its decision in the *Tropic of Cancer* case,[58] Spellman would accuse the brethren of "an acceptance of degeneracy and the beatnik mentality as the standard way of American life."[59]

In 1950, Spellman managed to get the license that had been issued to exhibit Roberto Rossellini's movie *The Miracle* revoked by the Board of Regents in New York, until lawyer Ephraim London, representing the movie's American distributor, Joseph Burstyn, persuaded the Supreme Court to review and reverse the censorship.[60] As a result, Spellman's authority was undermined, the regents suffered a stunning defeat, and the cause of movie censorship in America was irrevocably set back.[61]

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

58 *See supra* note 16.

59 *See Spellman Assails Court Rulings on Pornography*, N.Y. Times, Aug. 7, 1964, § 2, at 31, col. 4.

60 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

61 Cardinal Spellman had been alarmed by what he heard about the Italian movie *The Miracle*'s plot, its theme, and certain things that actors Anna Magnani and Federico Fellini did and said on the screen. So he rose in St. Patrick's Cathedral to condemn the film and those associated with it. He also saw to it that the movie was condemned by the 400-odd Catholic priests working in his archdiocese, because of the clear and present danger presented by it to the souls of the two million Catholics living in New York. Next, Catholic War Veterans and members of the Holy Name Society paraded in front of Manhattan's Paris Theatre where *The Miracle* was playing, exercising their constitutional right to carry signs which read, for example: "This Picture is an Insult to Every Decent Woman and Her Mother" and "This Picture is Blasphemous." *See Spellman Urges 'Miracle' Boycott*, N.Y. Times, Jan. 8, 1951, at 1, col. 2. It was immaterial to Spellman that the New York film critics had named *The Miracle* the best foreign film of 1950; much more significant was the fact that the movie was a segment of a film trilogy called *Ways of Love*. The other two segments were French films entitled *A Day in the Country* and *Jofroi*; all three had English subtitles. The censorship and the film are described in E. DE GRAZIA & R. NEWMAN, *supra* note 17, at 77-83, 231-32.

The New York Fire Commissioner charged the owner of the Paris Theatre with violations and the City's License Commissioner tried to shut the movie house down. Finally, the State's motion picture licensing agency, the New York Board of Regents—which had innocently issued a license for the film's exhibition at the Paris Theatre—summoned Joseph Burstyn, the film's distributor, to a hearing to show cause why the film's license should not be revoked because the film was in violation of state law; it was charged with being sacrilegious. Spellman had other grievances:

> *The Miracle* is a vicious insult to Italian womanhood. It presents the Italian woman as moronic, and neurotic and, in matters of religion, fanatical. Only a perverted mind could so misrepresent so noble a race as women. . . . To those who perpetrate such a crime as *The Miracle* within the law, all that we can say is: How long will enemies of decency tear at the heart of America? . . . Divide and conquer is the technique of the greatest enemy of civilization, atheistic communism. God

During the fifties, Francis Cardinal Spellman's influence reached into the White House. Before the 1956 election, he arranged for a private audience with President Eisenhower to let him know how he felt about the religio-ideological make-up of the Supreme Court. The prelate had two grievances. First, no Catholic had sat on the Court since Justice Frank Murphy retired in 1949. Second, although he had expected Eisenhower to use his appointment power to steer the Court away from New Deal liberalism, the President had named Earl Warren and Harlan to the high bench. Spellman could tell that Harlan

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> forbid that the producers of racial and religious mockeries should divide and demoralize Americans so that the minions of Moscow might enslave this land of liberty.

See Spellman Urges 'Miracle' Boycott, *supra*. Frankfurter, in his concurrence in *Burstyn*, cites to the same speech in which Spellman also declared that "we, as the guardians of the moral law, must summon you and all people with a sense of decency to refrain from seeing it and supporting the venal purveyors of such pictures. . . ." *Burstyn*, 343 U.S. at 513 (citing *Spellman Urges 'Miracle' Boycott*, *supra*, at 14.)

Spellman spoke like a Catholic counterpart to secular McCarthyism, but he was far less influential. Before the Catholic boycott, *The Miracle* had done poorly at the box office; afterwards the lines for each show stretched around the block. The film's distributor, Burstyn, was one of a small breed of freedom-loving, non-Hollywood-bred, independents who, using foreign films, fought almost single-handedly against motion picture censorship in the United States. Burstyn fought doggedly for the film's freedom, up a hierarchy of New York administrative and judicial bodies all the way up to the Supreme Court of the United States, where he was rewarded with a holding that the New York ban violated the constitutional guarantees of freedom of speech and press. Said Justice Tom Clark: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Burstyn*, 343 U.S. at 505. With this single stroke the Supreme Court pulled down the Regents' statutory authority to bar the public showing of "sacrilegious" movies and, with it, the fabric of the ancient common law offense of "blasphemous libel." In England, the law of blasphemy has been used: in 1822, to ban Shelley's poem *Queen Mab*; in 1978, to imprison the editor of a homosexually-oriented newspaper, *Gay News*, for publishing a poem called "The Love that Dares to Speak its Name." The poem depicted the adulatory fellation of Jesus Christ while hanging on the cross. The case was Regina v. Lemon, 3 W.L.R. 404 (C.A. 1978). Recently, in England, there was banned the exhibition in movie houses anywhere, or by video tapes at home, an 18-minute film called *Visions of Ecstasy* that "depicts St. Theresa caressing and kissing Christ and being erotically touched by a female character meant to represent her psyche." *See Ban on Film for Blasphemy Is Upheld in Britain*, N.Y. Times, Dec. 16, 1989, at 15, col. 3.

In the United States, there were no reported modern cases. However, in striking down New York's ban of *The Miracle*, the Supreme Court had to overturn its own forty-year-old precedent, *Mutual Film Corp. v. Ohio*, 236 U.S. 230 (1915), in which it had held that motion pictures were not a part of the nation's press and so not entitled to Constitutional freedom. Still, the Court's action in the *Burstyn* case was not as bold as one might have wished: in closing, Justice Clark made it clear that the Court was not striking down motion picture censorship *in toto*. Wrote Justice Clark:

> Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one before us.

Burstyn, 343 U.S. at 505-06.

was no red-white-and-blue conservative,[62] and Warren, in the Cardinal's eyes, was fast becoming as liberal as any Justice FDR ever appointed. These developments were not to his eminence's liking.

According to Spellman biographer John Cooney, when the White House meeting took place, Spellman said: "Mr. President, it isn't that I want a Catholic on the Supreme Court, but I want someone who will represent the interests and views of the Catholic Church."[63] Eisenhower reacted by telling Bernard Shanley, a White House special counsel and a Catholic as well, "Remind me about what the Cardinal wants when the time comes."[64]

In 1956, with the retirement of the conservative Justice Sherman Minton, Eisenhower told Shanley that he and Attorney General Herbert Brownell had come up with "someone who will suit the Cardinal,"[65] but did not tell him who he was thinking of—until it was too late. He was thinking of Brennan. Said Ike: "Brennan is the Cardinal's kind of man."[66] So Spellman was not consulted beforehand. When told by Shanley of Brennan's appointment, Spellman said: "I don't know him. Who is his parish priest?"[67] After Spellman checked Brennan out, he berated Shanley for failing to persuade the President to put on the Court the right kind of Catholic.

New Jerseyites knew that Brennan was independent of mind, and that he did not agree with some of the things that Spellman cherished, such as McCarthyism. It was only a matter of time before Brennan's attitudes became known to McCarthy himself: The Senator took a full day to investigate Brennan's thinking, when the Justice came before the Senate Judiciary Committee for his confirmation hearings.[68] McCarthy badgered Brennan mostly for having expressed disapproval of the ways in which congressional committees and subcommittees, including McCarthy's, conducted hearings: harassing witnesses and

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[62] Harlan, like Frankfurter, was an apostle for "judicial restraint," but he was less squeamish. Despite his deteriorating eyesight, he enjoyed watching the dirty movies the Court was obliged to review; and he wrote a subtle and stunning first amendment opinion for the Court in *Cohen v. California*, in which the Court reversed the defendant's conviction for "disturbing the peace" by having worn in the corridors of a courthouse, a jacket on which the slogan "Fuck the Draft" was plainly visible. 403 U.S. 15 (1971). Harry Kalven recognized Harlan's opinion in *Cohen* as exemplifying "the best of the judicial tradition as to the First Amendment." H. KALVEN, *supra* note 25, at 15.

[63] J. COONEY, THE AMERICAN POPE 237 (1984).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 238.

[68] Eisenhower appointed Brennan to the Supreme Court during a Congressional recess. This meant that Brennan had begun to participate in the Court's work by the time his appointment was examined by the Judiciary Committee and acted upon by the Senate.

causing them the loss of their livelihoods, their reputations, their friends, and, in some cases, even their lives. Although Brennan was unable to lay to rest McCarthy's concerns, his appointment to the Court was almost unanimously consented to by the Senate in a voice vote. McCarthy's was the only vote opposed: at that moment the Senator's powers were dropping to their nadir.[69]

Brennan and Warren shared the same view on most issues of concern to the Court although, in the beginning, this was not true of obscenity. For example, although Warren gave the opinion-writing assignment in *Roth* to Brennan,[70] he filed a separate opinion of his own in that case, concurring in the result (which was to affirm Roth's conviction) but disagreeing with Brennan's reasons for doing so.[71] Then, in 1964, when the freedom of Henry Miller's novel *Tropic of Cancer* was being fought over in some fifty cases around the country, and an Ohio movie theatre manager named Nico Jacobellis was convicted for exhibiting Louis Malle's innovative film, *The Lovers*,[72] Brennan distanced himself from Warren's puritanical reaction to nudity and sexually-explicit images in literature and films; he went quietly to work with the less finicky humanistic liberals among the brethren to lift the country's institutions of literary and artistic expression to a solid position of freedom. By then Frankfurter had retired.

In the otherwise conservative opinion Brennan wrote in *Roth*, for the first time in the Supreme Court's history, literature and art were linked to that freedom of the press which the Constitution's framers had in mind when they drew up and adopted the first amendment.[73] Brennan has said to me that he "always" felt that artistic expression

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[69] *See* Huston, *Senate Confirms 2 for High Court: Whittaker Vote Unanimous—McCarthy Voices the Only 'No' on Brennan*, N.Y. Times, Mar. 20, 1957, at 38, col. 4.

[70] Warren probably chose Brennan over Frankfurter to write the Court's opinion in *Roth* because Brennan, like Warren, and unlike Frankfurter, was no lover of the doctrine of "judicial restraint." However, Brennan's opinion in *Roth* was, in fact, a fairly good example of the exercise of that doctrine.

[71] 354 U.S. at 494.

[72] *See supra* note 16.

[73] *See* E. DE GRAZIA, *supra* note 12, ch. 16. The principal historical evidence is the Letter to the Inhabitants of the Province of Quebec sent on October 20, 1774, by the Continental Congress.

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.

1 LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789 at 105, 108 (1904).

was encompassed by the amendment's guarantees. In 1957, the problem for him must have been how to reconcile that feeling with the seemingly universal modern opinion that obscenity—whatever it was—was worthless and deserved only to be condemned; and with two hundred years of failure on the part of American scholars and judges to recognize and build upon the idea that *artistic* expression—even when charged with being obscene—presented as full a claim as did political expression, to constitutional protection.

Before 1960, even the approach to freedom of speech taken by Alexander Meiklejohn, the civil libertarian American philosopher, seemed to justify censorship of the theater, and literary and artistic works.[74] Meiklejohn later corrected that impression, as an aspect of a published academic dialogue he engaged in with Professor Kalven.[75] But it would be only in the crucible of Supreme Court litigation during the turbulent sixties—and this under Brennan's guidance—that literature and arts would be recognized as entitled to full constitutional protection. During the same period, the influential jurist Robert H. Bork taught and wrote against the correctness of Brennan's and the Supreme Court's view, while a professor of law at Yale;[76] Bork insisted that the framers intended that only political expression be protected.[77] According to Bork, literature and the arts were entitled to no more constitutional protection than indulgences by the people in any other form of "self-gratification."[78] This cramped reading of a Constitutional text by Bork was one of the reasons why in 1988 he would dramatically forfeit his appointment to the Supreme Court.[79]

On September 22, 1987, the novelist William Styron made a statement on behalf of 2,000 writer-members of the PEN American Center, at the Senate Judiciary Committee hearings,[80] in opposition to

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[74] Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16.

[75] Meiklejohn, *The First Amendment is an Absolute*, in FREE SPEECH AND ASSOCIATION 18-20 (P. Kurland, ed. 1975).

[76] Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971).

[77] *Id.* at 20-35. Bork is an old friend and University of Chicago classmate of mine whose personal and professional views moved from the left-liberal side of the ideological spectrum to the conservative right under the influence first of University of Chicago Law School Professor Aaron Director, and later, Yale Law School's neo-conservative Professor Alexander Bickel.

[78] *Id.* at 25.

[79] The Senate defeated the Bork nomination on October 23, 1987 by a vote of 58-42. 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987).

[80] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 1992 (1987) (Statement of novelist William Styron) [hereinafter *Bork Hearing*].

Painter Robert Rauschenberg also testified: "to express the unanimous fears that the art world has toward the nomination of Bork." *Id.* at 1988.

the appointment of Judge Bork as associate justice of the Supreme Court.

WILLIAM STYRON: We're a group of writers who value deeply our freedom to write as we wish, to express ourselves in prose and poetry on whatever subject and in whatever way we choose, free of every sort of governmental constraint. We are able to enjoy this freedom because we live and write in a country whose highest law, the Constitution, guarantees it, and whose highest judicial organ, the Supreme Court, enforces it.[81]

WILLIAM STYRON QUOTING ROBERT BORK: Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.[82]

WILLIAM STYRON QUOTING ROBERT BORK: It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.[83]

WILLIAM STYRON QUOTING ROBERT BORK: There comes a point at which the speech no longer has any relation to those processes. When it reaches that level, speech is really no different from any other human activity which produces self gratification. . . . Clearly as you get into art and literature, particularly as you get into forms of art—and if you want to call it literature and art—which are pornography and things approaching it—you are dealing with something now that is [not] in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that.[84]

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[81] *Id.* at 1992. As a member of PEN American Center's Freedom-To-Write Committee, I helped draft this preamble to Styron's statement on behalf of PEN.

[82] *Id.* at 1993 (quoting Bork, *supra* note 76, at 20).

[83] *Bork Hearing*, *supra* note 80, at 1994 (quoting Robert Bork in a Michigan speech of 1979).

[84] *Id.* (quoting Robert Bork in a Worldnet interview of June 1987).

WILLIAM STYRON: As I and my colleagues reread these views and as we considered and reconsidered them in the context of Judge Bork's statements here last week we found ourselves troubled on two accounts. The first is as elemental as it is solemn. Judge Bork . . . for the last sixteen years—has either explicitly placed literature outside First Amendment protection or has failed to recognize the necessity of such protection. Can we fully trust and believe that this man henceforth will be a staunch defender of First Amendment freedom for literary expression? . . . Both as individual writers and as members of PEN, we maintain that a full and absolutely unwavering protection of all literatures [sic] must be a matter not of passing opinion but of conviction and faith. We are not persuaded that Judge Bork has that conviction and faith. . . . The presence of an undefined category of non-obscene but possibly unprotected work in Judge Bork's scheme of things is dangerous to free literary expression in the United States. Everyday, books considered to 'approach pornography' are removed from classrooms and library shelves. I am personally quite sensitive to this issue because as recently as last spring one of my own books, namely *The Confessions of Nat Turner,* was removed from a school library in Iowa at the insistence of a mother who objected to her adolescent son's reading the book and finding in the book certain sexually explicit passages. To the best of my knowledge, this book, which was banned by a majority vote of the school board, remains banned. It is extremely disturbing to any writer to know that his or her work can be in effect sequestered and ultimately condemned at the whim of a school board. Many of my fellow writers have in the recent past suffered this kind of censorship.

I want to take the liberty of recalling for the members of this Committee the centrality to our country of a free literature and art. No person should be elevated to the country's highest judicial office who has not persuasively demonstrated that he believes unreservedly in that freedom.[85]

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[85] *Bork Hearing, supra* note 80, at 1995-97.

Public school library censorship presents special problems of first amendment analysis, that may be analogized to those presented by the prospect that the National Endowment for the Arts may be instructed by Congress to not fund, or to de-fund, obscene, indecent, blasphemous, and otherwise offensive art. The problems were first discussed by the Supreme Court in the 1982 case of Board of Educ. v. Pico, 457 U.S. 853 (1982), which held that the removal by a public school board from the school's library of any book—*because of ideas presented in the book*—violated the first amendment. *Pico*, 457 U.S. at 870-71. (The removal action took place after the board saw the titles listed on a sheet of objectionable books circulated by a local moral vigilante group called Parents of New York United. *Id.* at 857). The Court's lead (plurality of four) opinion was written by Brennan, who asserted that free expression guarantees protected

The concurring opinion that Judge Jerome Frank wrote in the Second Circuit case involving Sam Roth seems to have marked the first judicial attention given to the historical likelihood that the arts in general were meant by the nation's founders to be protected by the first amendment.[86] Frank also wryly noted that the men who fought the war for the country's independence and who had drawn up the documents spelling out its basic law—the Constitution and the Bill of Rights—were not as puritanical as were later legislators who passed the country's first obscenity laws, or later state judges who received the common law of "obscene libel" into the nation's legal fabric[87]—without concern for the first amendment's prohibition on abridgments of speech and press. Another observation by Frank, that "the 'found-

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a public school student's " 'right to receive information and ideas.' " *Pico*, 457 U.S. at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

Burger dissented, claiming that Brennan's opinion "demeans our function of constitutional adjudication." *Pico*, 457 U.S. at 893 (Burger, C.J., dissenting). Justice Powell (a former public school board trustee) also dissented, expressing "genuine dismay," *Pico*, 457 U.S. at 894 (Powell, J., dissenting), at the Court's limiting school board powers in this way; and Powell appended seven pages of excerpts from the nine books that had been removed from the Island Trees school library: *Slaughterhouse-Five*, by Kurt Vonnegut, Jr.; *The Fixer*, by Bernard Malamud; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress; *Soul on Ice*, by Eldrige Cleaver; *A Reader for Writers*, edited by Jerome Archer; and *Go Ask Alice*, by an anonymous author. *Pico*, 457 U.S. at 897-904. A school board press release decried these books as "anti-American, anti-Christian, anti-Sem[i]tic and just plain filthy," *Pico*, 457 U.S. at 857 (quoting trial court, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)); the Board also claimed that it was discharging its duty to protect schoolchildren from "this moral danger." *Pico*, 457 U.S. at 857.

Judith Krug, Director of the American Library Association's Office of Intellectual Freedom, told me that given her belief that libraries are the only "pure first amendment institutions in the country" and the Supreme Court's unwillingness (to date) to abolish "obscenity" censorship—librarians as a group may have to go into court and ask for a first amendment *exemption* from obscenity laws. Interview with Judith Krug, Director of the Office for Intellectual Freedom, American Library Assoc., in Chicago (Apr. 8, 1985). According to Krug, librarians, "have to serve the fringes" because regardless of whether her colleagues or the rest of the world likes them, they "are still part of our constituency. . . . And so our collections, if they're really good collections, and if we as professional librarians are really doing our jobs, are really going to have some materials that are totally anathema to a lot of the population, and that's where the problem comes in." *Id.*

A few days earlier in the Bork hearings, in response to friendly questions from Senator Strom Thurmond, Bork had recanted his sixteen-year-long view that literary and artistic expression was not protected by the guarantees of freedom of speech and press. *Bork Hearing supra* note 80, at 130-31.

[86] Roth v. United States, 237 F.2d 796, 806-07 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957). Frank referred to the Letter to the Inhabitants of the Province of Quebec, *supra*, note 73. Frank cited Zechariah Chafee's *Government and Mass Communications* 53 (1947). Justice Brennan in *Roth* also cited the *Letter* to Quebec as evidence that the arts were meant to be included in the protection afforded "freedom of the press."

[87] *Roth*, 237 F.2d at 806, 808.

ing fathers' did not accept the common law concerning freedom of expression,"[88] would not make its way into a Supreme Court decision until Brennan used it to criticize the common law of "seditious libel," and the action in damages which most states allowed to public officials, as being in violation of the freedom of the press.[89] It was in the same opinion that Brennan loosed those evangelical words—"robust," "wide-open" and "uninhibited"—to depict the type of discourse and "discussion" that the Constitution's framers intended to encourage and protect when they adopted the first amendment.[90]

Brennan could not seriously begin the work of freeing literary and artistic expression under American constitutional law without divorcing his own thinking on the subject from Chief Justice Earl Warren's obsession with living in "a decent society," and ridding himself of Felix Frankfurter's influence; he also had to distance himself from Frankfurter's anxiety about the deleterious effects of unrestrained expression, visible in Frankfurter's earlier opinions in this area.[91] The process began when Warren assigned Brennan to write the Court's opinion in *Roth*, notwithstanding that it was Brennan's first year on the high bench and that it was Frankfurter who at the time held sway as the Court exponent on first amendment problems, and who was its leading advocate of judicial restraint in the first amendment area.

Frankfurter certainly was not insensitive to the values of free expression, but his appreciation of them was often overpowered by his fear of excess. He was one of the strongest Court advocates that a "balancing" test be used when the value of free expression and any police interest of the state collided.[92] That is a test that makes it incumbent upon judges to sacrifice free speech on the altar of state interest, whenever they feel fearful of the effects of the uncurtailed expression involved.[93]

While at Harvard, Frankfurter defended radicals during the

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[88] *Id.* at 809-10.

[89] New York Times Co. v. Sullivan, 376 U.S. 254, 265-280 (1964).

[90] *Id.* at 270.

[91] *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957) (affirming constitutionality of statute granting state injunctive remedy against sale of obscene material).

[92] *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 490 (Frankfurter, J., dissenting).

[93] A newer, more quantitative, but equally insidious doctrine for the judicial parceling out of freedom according to the judiciary's (especially the Supreme Court's) sense of the relative social values possessed by differing sorts of speech, is advocated by the University of Chicago Law School's Cass R. Sunstein, in Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. Sunstein contends that "pornography is 'low-value' speech, entitled to less protection from government control than most forms of speech." *Id.* at 591. Sunstein here commits the same first amendment jurisprudential sin that Harry Kalven rightly criticized Justice Brennan for committing in *Roth*. (Brennan purged himself of that sin in the 1964

post-World War I Red Scare, helped organize the defense of Sacco and Vanzetti in the 1920s, and spoke out time and again for civil liberties.[94] However, Frankfurter's two greatest heroes, Justice Oliver Wendell Holmes and Justice Louis D. Brandeis—he counted himself their "disciple"—both advocated "judicial restraint," and at Harvard Frankfurter became a leading academic exponent of that doctrine. But the "judicial restraint" proposed by Holmes and Brandeis was directed not to the safeguarding of legislation trenching upon the liberties of speech and press, but that which, seeking social reforms, abrogated laissez faire prerogatives of property owners and business entrepreneurs.

Once Frankfurter reached the Court, he abandoned his liberal activism and campaigned instead for the doctrine that the Court should never superintend the wisdom of legislative policies by striking down state or federal laws—except where the legislature had plainly acted irrationally—and this regardless of whether the legislation affected rights of speech, press, or property.[95] Frankfurter did not share, but opposed, the belief first advanced by Justice Harlan Stone and honored by a long line of liberal justices, that under the Constitution freedom of expression held a "preferred position."[96]

JUSTICE WILLIAM J. BRENNAN, JR.: Everyone thought Felix Frankfurter would be a flaming liberal when he came, and there was a lot of reason to think he would. And yet, when he got here, his conscience wouldn't let him, because of his conviction that the judiciary should not be resolving many issues that, in his view, should be decided by the legislative or executive branch. Talk about disappointing a President—certainly Felix disillusioned F.D.R.[97]

During a quarter of a century of teaching at Harvard, Frankfurter set an example to young reformers like William O. Douglas of how to translate commitments into action. While Douglas was at Yale, teaching, and later while at the SEC, he looked up to Frank-

obscenity decisions by his creation of the Brennan doctrine. *See infra* notes 165-88 and accompanying text.) Kalven's criticism appears in Kalven, *supra* note 74, at 8-17.

The Rehnquist court is treading noisily down the same garden path; *see, e.g.*, Barnes v. Glen Theatre, Inc. 111 S. Ct. 2456 (1991), where a plurality held that the nude dancing was a sort of marginal class of expression, entitled to only slight constitutional protection. *See supra* note 42.

[94] *See generally* M.E. PARRISH, FELIX FRANFURTER AND HIS TIMES: THE REFORM YEARS (1982); F. FRANKFURTER, LAW AND POLITICS (1939).

[95] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

[96] *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1942).

[97] Leeds, *supra* note 56, at 77-78.

furter and sought his approval. Now, on the Court, Douglas soon found himself grappling with his former mentor for leadership in the area of civil liberties. At first Frankfurter saw Douglas, as most Court newcomers were seen by him, as a potential disciple and ally in his effort to assert doctrinal hegemony over the Court. But when Douglas found that judicial restraint in Frankfurter's hands was used not to permit legislative reform of entrepreneurial property law, but as an instrument of judicial inflexibility in the civil liberties field, he left Frankfurter's side to work with Black and the other Court liberals for the expansion of civil and political rights.[98]

At Harvard Law School, Brennan had both Felix Frankfurter and Zechariah Chafee as his teachers. Chafee, he says, was his favorite. After Brennan joined Frankfurter on the Court, Frankfurter is supposed to have quipped: "I taught my students to think for themselves but sometimes I think Bill Brennan carries it too far."

Shortly before Brennan took his seat on the Court, Frankfurter "lost" Chief Justice Warren to the Black-Douglas wing of the Court; he was distraught over the possibility that Brennan might become a fourth vote for "judicial activism." So the elder Justice worked on Brennan. At first, according to New York Law School Dean James Simon, the justice's relationship with Brennan was smooth enough both professionally and personally.[99]

JUSTICE WILLIAM J. BRENNAN, JR.: I looked to Felix to help a novice get his feet wet. And Felix went out of his way, but he did that for everybody. After a while, I realized it was not just out of kindness.[100]

In an interview published in the *New York Times Magazine*[101] Brennan also spoke about the elder justice's methods of wooing freshman justices to his side.

JUSTICE WILLIAM J. BRENNAN, JR.: Felix . . . was absolutely superb in [winning a young justice over as an ideological ally] without your being conscious of it. His chambers were next to mine, and he used to come in with some frequency, and he would tell me much about the great giants that he had known and worked with and what brilliant contributions they had made. He made conversation, he flat-

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[98] *See generally* W.O. DOUGLAS, GO EAST, YOUNG MAN (1974).

[99] J. SIMON, *supra* note 32, at 236.

[100] Leeds, *supra* note 56, at 77-78.

[101] *Id.*

tered you, he made you feel that it would be an honor to be associated with him and his crowd of giants.

Felix also worked socially. I recall he had a dinner at his home for me, and the guests were Dean Acheson and John Lord O'Brian, and I heard much in the discussion after dinner over brandy about the role of the Court and the role of the Justices. . . . We always were good friends. He never stopped or gave up trying to persuade me in individual cases, but he knew that I would not, could not, accept his approach across the board.[102]

The Frankfurter-Brennan honeymoon ended not long after *Roth* when Brennan voted with Black and Douglas to swing the Court away from Frankfurter's views in other civil liberties cases. Frankfurter alienated himself from Brennan and Warren by his judicial behavior in the Little Rock School Board case, *Cooper v. Aaron*,[103] in which Arkansas Governor Orval Faubus challenged the Court's authority to desegregate the Little Rock public schools, and Frankfurter filed the only separate opinion in the case.[104] Frankfurter would have better luck with Harlan, who adopted a view of the Supreme Court's judicial review function that resembled Frankfurter's, particularly where civil liberties were at stake.[105] After Frankfurter's retirement, it would be Harlan who picked up the conservative cudgels called *judicial restraint.*

In *Roth*, it was in fact because Brennan voted with the Warren- and Frankfurter-led conservative majority that he had the opportunity—unusual for a freshman justice—to write for the Court in a problem area that soon became one of the most important, if vexatious, of any it had encountered.[106] What was at stake, of course, was not merely, or really, obscenity, but the country's system of cultural freedom—the system by which images, information and ideas are dispersed to the people through literature, art, and science, for the most

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[102] *Id.*

Frankfurter probably invited O'Brian when Learned Hand "politely declined" to dine with him and meet the freshman Justice Brennan. *See* J. SIMON, *supra* note 32, at 235.

[103] 358 U.S. 1 (1958).

[104] *Id.* at 20 (Frankfurter, J., concurring). Dean Simon discussed this dramatic incident in J. SIMON, *supra* note 32, at 227-32. *See also supra* note 27 (final paragraph).

[105] *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

[106] Justices and chief justices will sometimes vote with a majority of justices with whom they disagree in order to secure an opportunity that would otherwise be foreclosed to them to write the Court's (majority) opinion. Chief Justice Marshall did this regularly. *See supra*, note 36 and accompanying text. The writing of an opinion of the Court offers vast opportunities to make law, limited mainly by what the other justices in the majority are willing to join.

part by private persons and privately owned institutions free of government control or influence.[107] Had Frankfurter and not Brennan written the Court's opinion in *Roth*, it almost certainly would not have embodied the opening to freedom from obscenity law constraints that I have described.

In 1960, three years after *Roth* was decided, Brennan and Frankfurter found themselves on opposite sides of a first amendment issue of great moment. In a ground-breaking case, Frankfurter cast the swing vote upholding the constitutionality of a Chicago ordinance that required all motion pictures to be approved and licensed by the police in advance of any exhibition—in order that any immoral, obscene, or otherwise objectionable films might be kept from being shown. The case was *Times Film Corp. v. Chicago*.[108] It presented the Court with an opportunity to answer positively a profound speech question left open by Justice Tom C. Clark in the *Miracle* case[109]—whether *all* prior licensing of motion picture exhibitions violated the first amendment—even licensing directed at blocking obscenity. A passionate argument that it *did* was unsuccessfully urged upon the brethren by a brilliant young Chicago lawyer, Abner J. Mikva, who later became a U.S. Congressman (Democratic) from Illinois and now sits as the chief judge of the powerful United States Court of Appeals for the District of Columbia.[110] Writing for a conservative majority that included Frankfurter, Clark distinguished motion pictures from other forms of communication by holding that the Chicago ordinance was not invalid on its face.[111] The Court's liberal bloc of Brennan, Black and Douglas—now dubbed by Frankfurter as "BB&D"—joined the eloquent dissenting opinion by Warren which discussed the history of "unfreedom" of motion pictures in America and which asserted that the Court should instead have struck down the licensing system—for being an unconstitutional prior restraint on the freedom of the press.[112] To the dissenters, such a movie licensing system was

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[107] An exception to this system, of course, is the funding activities of the National Endowments for the Arts and Humanities, which have recently stirred great controversy. The government's role in promoting literary and artistic expression has run into trouble with politicians on the right. *See, e.g.*, Tolchin, *Senate Passes Compromise on Arts Endowment*, N.Y. Times, Oct. 25, 1990, at C19, col. 1. The incidents and character of the new NEA "censorship" are described in E. DE GRAZIA, *supra* note 12.

[108] 365 U.S. 43 (1961).

[109] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). *See supra* notes 60-61 and accompanying text.

[110] Renowned for his liberal and humanistic viewpoint, Mikva is an excellent prospect for appointment to the Supreme Court by the next Democratic President having that opportunity.

[111] *Times Film Corp.*, 365 U.S. at 49-50.

[112] *Id.* at 50.

as patently unconstitutional, and as great an infringement on press freedom, as would be any prior licensing system, including one based on obscenity applied to the distribution of newspapers or the publication of books.[113] Although this would prove to be the last occasion on which Frankfurter's views of judicial restraint would swing a free press decision in favor of censorship, the precedents established under his sway have never been overturned.[114]

After *Times Film Corp.*, two important obscenity cases, *Manual Enterprises v. Day*[115] and *Marcus v. Search Warrants of Property at 104 East 10th Street*,[116] were decided by the Court prior to Frankfurter's retirement in 1962. The aging and ill justice did not participate in *Manual*—in which a second prong known as patent offensiveness[117] was added to the "prurient interest" definition of *obscene*[118]—but in *Marcus* he deserted dissenting Justice Clark to join a far-reaching majority opinion written by Brennan that struck down as unconstitutional a Missouri system under which mass seizures of books and magazines were allowed to take place without a prior adversarial judicial hearing. *Marcus* gave Brennan the opportunity to lay down a "first amendment due process" framework that would thereafter repeatedly be relied upon to foil police and prosecutorial censorship through seizure of published materials and films. Then, after Frankfurter retired and Justice Arthur Goldberg took his place, Brennan found himself in a position to fully open his campaign to see literary and artistic expression in America—notably books, magazines and movies—blanketed with full first amendment protection.

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113 *Id.* at 75-77.

114 Frankfurter's precedents almost certainly would have been overturned in the early seventies had President Johnson's late term bid to make Justice Abe Fortas chief justice in Warren's place not been defeated, allowing the next President, Richard Nixon, to replace Warren with the conservative Judge Warren E. Burger. *Times Film Corp.* is discussed in E. DE GRAZIA & R. NEWMAN, *supra* note 17, at 102, 261-63. Most, but not all, types of movie licensing systems have now been either declared unconstitutional by the Supreme Court or repealed by the legislatures. *See, e.g.*, Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1964). However, the *principle* of licensing obscene movies has never been condemned by the Court as unconstitutional. At the federal level, legislation authorizing customs officials and the courts to prevent entry into the United States—another type of prior restraint—of obscene books, papers, prints, motion picture films, etc., also has never been struck down. As a result, the contents of all suspect books, magazines, and films are still liable to be screened before entry, by customs officials. Some cities, including Chicago, have retained police systems for supervising the content of movies, limited, in form at least, to concerns for the welfare of minors.

115 370 U.S. 478 (1962).

116 367 U.S. 717 (1961).

117 370 U.S. at 486.

118 *Id.* at 482.

Brennan's opinion in *Roth* had gathered together a coalition of five other justices who joined what one jurist spoke of as a "balancing approach"—but which is more aptly described as a "layered" or "two-level" approach—to freedom of expression.[119] This approach had been introduced in Justice Murphy's opinion for the Court in the landmark case of *Chaplinsky v. New Hampshire*.[120] Adopting the "two-level" metaphor discussed by Harry Kalven,[121] on the upper level are situated traditionally "protected" sorts of speech—mainly political speech of the soapbox and leaflet type, and political and religious ideas—supposed to be fully protected by the guarantees; while on the lower level are located the traditionally unprotected denigrated sorts of speech—mainly libelous, profane, or obscene speech, and "fighting words." That was the approach that Frankfurter successfully advanced, before and throughout the World War II period; after the war Brennan's exposition of Frankfurter's approach in *Roth* was inspired, as well as joined, by Frankfurter. But when Arthur Goldberg took Frankfurter's seat on the Court, Brennan began to take a much more radical stance.[122] In effect—but, characteristically, not in so many words—he began a campaign to move several lower-level sorts of nonspeech—including not only obscenity, but libel and fighting words as well—onto the upper level of constitutionally protected speech—and in this way overruled *sub silentio* and *seriatim* the freedom-depreciating dictum of *Chaplinsky* that Frankfurter had so long cherished.[123]

"Because We Never Could Agree On A Definition"

During the winter of 1963, Barney Rosset gave me the chance to take a *Tropic of Cancer* case to the Supreme Court when he learned that a case from Dade County, Florida had been lost.[124] The ACLU lawyers who represented Grove Press below thought the Supreme Court might review the decision. The prospect was intriguing because I had been working for some time—mainly through the writing of *amici* briefs—to free *Tropic of Cancer*, and I wanted to get Harry Kalven's idea for turning *Roth*[125] into a literature-liberating doctrine

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[119] Kalven, *supra* note 74, at 10.

[120] 315 U.S. 568 (1942).

[121] Kalven, *supra* note 74, at 10.

[122] Attorney and former Kennedy administration Secretary of Labor Arthur Goldberg took Frankfurter's seat on the Court on October 1, 1962.

[123] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Jacobellis v. Ohio, 378 U.S. 184 (1964) (obscenity).

[124] Grove Press, Inc. v. Gerstein, 156 So. 2d 537 (Fla. Dist. Ct. App. (1963)).

[125] Roth v. United States, 354 U.S. 476 (1957).

before the brethren. Here was a chance to do so directly. The idea entailed redefining obscenity as expression that was "utterly without social importance," or "worthless." At the University of Chicago Law School, Kalven had been my favorite teacher; from a seminar of his on civil liberties I found out that American prosecutors and judges were using the obscenity law as justification to engage in literary and artistic censorship.

No Grove Press or ACLU lawyer had previously succeeded in getting the Supreme Court to rule on *Tropic of Cancer*, even though by then cases involving the book had reached the highest courts of at least six other states: California, Massachusetts, Wisconsin, Maryland, New York and Illinois. In California[126] and Massachusetts,[127] the book had been set free; in New York[128] *Tropic of Cancer* had been found obscene. Only in the California case had the highest court of any state adopted Harry Kalven's suggested gloss on *Roth*—the state legislature there had gone so far as to incorporate it into a new obscenity statute—and I proposed the same revision of *Roth* in the certiorari petition that I filed in the Supreme Court in the Florida case.[129] I stated that "this case thus presents this Court with both the possibility and the need to clarify *Roth's* bearing upon literature, as distinguished from obscenity."[130] Citing Kalven and *Roth* I argued that *Roth* should be reinterpreted to mean that "the door barring federal and state intrusion upon freedom of expression was to be left open 'only the slightest crack' necessary to permit the policing of *worthless* obscenity."[131]

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126 Zeitlin v. Arnebergh, 59 Cal.2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963).

127 Attorney Gen. v. The Book Named "Tropic of Cancer," 345 Mass 11; 184 N.E.2d 328 (1962).

128 People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).

129 Petition for a Writ of Certiorari to the District Court of Appeal, Third District, State of Florida, at 13, Grove Press, Inc. v. Gerstein, 377 U.S. 577 (1964) (No. 62-812).

130 *Id.*

131 In the briefs I had previously filed in the Supreme Court case of Smith v. California, 373 U.S. 901 (1963), I had argued that the Court should revise *Roth* and make a candid rejection of the thesis that recognizable literature may be found obscene and on that basis banned. Citing Kalven, I said, "The dissemination of worthless material, from which class would be excluded every recognizable piece of literature, every literature having importance for anyone, might be left punishable under the 'prurient interest' and 'patently offensive' tests." Brief of Gay Wilson Allen et al., On Petition for Writ of Certiorari, at 4, Smith v. California, 373 U.S. 901 (1963) (No. 62-812). I also argued against adoption of any *hard-core pornography* test, saying it would "also fail to frustrate those dedicated to finding even important literature obscene and to maintaining the censorship over books," *id.* at 8-9, and again quoted Kalven's declaration that " 'the obscene can include only that which is worthless.' " *Id.* at 8 n.25. Finally, I pointed out that Brennan's dictum in *Roth* that the first amendment forbids a state "from suppress[ing] the public circulation of any work expressing ideas which may have the slightest social importance" leads inexorably to the proposition that "a work which has liter-

I was not alone in recommending Kalven's *condemn only the worthless* doctrine to the Court at that moment. New York lawyer Ephraim London, representing Nico Jacobellis, who had been convicted for exhibiting Louis Malle's film *The Lovers*[132] in Ohio, also recommended Kalven's doctrine in the jurisdictional statement that he filed, and in his brief on the merits—citing both *Roth* and Kalven for the point that a work having *any* artistic merit or social value could not properly be found obscene.[133] Perhaps most importantly, in the two state cases that had resulted in decisions favorable to *Tropic of Cancer*,[134] according it constitutional protection, the states' highest courts had also adopted Kalven's approach. In Massachusetts, the book's lawyer had been Charles Rembar; in California, two ACLU-affiliated lawyers, Al Wirin and Fred Okrand, helped bring the Kalven approach to fruition in the opinion written by Justice Matthew Tobriner.[135] Both cases would be prominently cited by Brennan in the opinion he wrote freeing *Tropic of Cancer* and *The Lovers*.

The ideas and arguments that inspire, influence, or nourish the reasoning of a particular judicial decision, or the establishment of an influential jurisprudential doctrine, are difficult to trace and impossible to catalogue. The ideas and arguments presented by the lawyers who brief and argue a particular case are obvious candidates. Even more important, often, are the unpublished and often unrecorded ideas and arguments of the other justices deliberating on the case. The ideas concerning the same issue contained in opinions previously written by the justices themselves are of great significance. Of lesser importance usually are the opinions written by judges in the courts that have considered the same case below, and by other federal and state courts in related cases. Sometimes the points made in the law reviews are also utilized as sources of the ideas and authorities that a justice brings to bear in his formulation of a line of reasoning or a legal doctrine. Less obvious, but sometimes controlling, are ideas taken from friends, relatives, and acquaintances of the deciding judge. Even stories in the newspapers, magazines, and books the justices read, and chance encounters of every sort with ideas coming from

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ary or artistic importance cannot be deemed to be empty of social importance." Brief of Gay Wilson Allen et al., at 2, 3, Smith v. California, 373 U.S. 901 (1963) (No. 62-812). For, as Kalven observed, "[obscenity] is banned not because it is dangerous but because it is worthless." Kalven, *supra* note 74, at 15.

[132] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[133] Jurisdictional Statement at 16, Jacobellis v. Ohio, 378 U.S. 184 (1964) (No. 61-164); Brief for Appellant at 40, Jacobellis v. Ohio, 378 U.S. 184 (1964) (No. 62-164).

[134] Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963); Attorney Gen. v. The Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962).

[135] Tobriner was one of the great state supreme court judges of this century.

inside and outside the courthouse, may enter into a decision or written opinion.

One myth that judicial Realists debunked was that a judge's decision and opinion are controlled only (or even mainly) by what is officially reported and presented on the record by the parties, and *amici curiae*, and by off the record sources obtained by judges and their clerks' own research and contemplation.[136] Faith in this myth mainly serves the belief that the law and the legal profession operate objectively, rationally, and with a substantial measure of certainty and predictability, based on the rule of law, rather than the unpredictable, subjective rule of men.

There is a protocol that clerks to the justices learn to employ: they write memoranda for their own justices as if writing memoranda by their justice to the brethren.[137] In preparation for the lead opinion that Brennan was slated to write for the Court in *Jacobellis/Tropic of Cancer*, one of Brennan's law clerks at the time, Richard Posner,[138] wrote a 218-page memorandum that energetically supported Brennan's disposition to use the pending obscenity cases to award constitutional status to literary and artistic expression. Posner—now himself an influential judge on the Seventh Circuit Court of Appeals in Illinois—characterized this memorandum to Brennan as: *Memorandum of Mr. Justice Brennan in Re: The Obscenity Cases.*[139] There is no

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[136] It is in any event plainly impossible for a judge's thoughts about a case to be self-restricted, or restricted by any other means, to those thoughts reflected in the record. No rule or practice of law can that far control a thinking being's thoughts. A computer's thoughts would be a different matter.

[137] This may be as good a place as any to apologize, in a day when for the first time in history a woman sits on the Supreme Court, for using the term *the brethren* to denote the collectivity of the justices sitting on the Court at any one time. During practically the entire period when the cases with which this article is concerned were being deliberated and decided, the justices themselves used this term; so, of course, did the legal profession generally and journalists like Bob Woodward and Scott Armstrong: viz, their interesting, informative and popular book, B. WOODWARD & S. ARMSTRONG, *supra* note 18.

[138] Posner is the author of R. POSNER, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS (1974); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); R. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); R. POSNER, ECONOMIC ANALYSIS OF LAW (1972); R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979); R. POSNER, ECONOMICS OF CORPORATION LAW AND SECURITIES (1980); R. POSNER, THE ECONOMICS OF JUSTICE (1981); R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); R. POSNER, A FEDERAL COURTS CRISIS AND REFORM (1985); R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); R. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS (1982); R. POSNER, THE WORKLOAD OF THE SUPREME COURT (1976). He is also a senior lecturer at the University of Chicago Law School, and has been seriously considered for nomination to the Supreme Court.

[139] Posner, Memorandum of Mr. Justice Brennan In Re: The Obscenity Cases (copy on file in *Cardozo Law Review* office) [hereinafter Posner Memorandum]. The Supreme Court tradition of addressing individual justices as *Mr. Justice so-and-so* was replaced by the practice of

way to tell whether this 218-page document (which includes 132 footnotes) *decided* Brennan; but it cannot be read without coming away convinced that its arguments and ideas, and the movement toward freedom that it describes, did not significantly reinforce Brennan's disposition to rule that artistic expression was entitled to be constitutionally protected by the Court, and that its freedom should not be left hostage to the weighing of its artistic value against its prurience or indecency.[140] The memorandum contained the following conclusion:

> RICHARD POSNER: It remains only to be observed that the law of obscenity, in the years since *Roth* and *Smith*, has been in a state of ferment, and mostly in the direction of greater recognition of the preeminent claims of the First Amendment liberties in this area. If I have in the course of this memorandum emphasized points of differences with courts and commentators on the obscenity problem, I should like now to redress the balance somewhat by suggesting the solid and important core of agreement among virtually all concerned. *The basic point of this memorandum is that no bona fide work of art or information may be suppressed in the name of obscenity, even if it is deeply repulsive to the dominant current thought of the [line illegible]*. . . I believe has in recent years won the adherence of most of the state courts, state legislatures, and lower federal courts, which have had occasion to pass upon it.[141]

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addressing him or her as *Justice so-and-so* once Sandra Day O'Connor, the first woman to become a justice, was appointed by President Reagan to the high bench in 1981.

[140] When I asked Brennan whether the 218-page Posner memorandum that I found among the Justice's private court papers had influenced his decision, he did not specifically remember it; but he did remark that as his clerk, as afterwards, Posner was "a prodigious worker." Interview with Justice William J. Brennan, Jr. In his memorandum, Posner also argued forcefully against the Court's discriminating among media of expression with regard to constitutional freedom—by, for example, awarding greater freedom to books than to movies. Posner Memorandum at 138-39. In fact, but not in law, just such a discrimination has developed in the practices of police and prosecutors. A majority of the Attorney General's ("Meese") Commission seems to have recommended that the printed word not be prosecuted no matter how pornographic it may be, but that graphic, sexually oriented expression be aggressively targeted and suppressed. In this way, apparently, the battle for censorship of the printed word gives way for the sake, evidently, of fighting all the harder to suppress obscene and pornographic visual materials.

[141] Posner, *supra* note 139, at 140-41 (emphasis added). Another portion of the Posner memorandum is reprinted in E. DE GRAZIA, *supra* note 12, ch. 22 endnotes. Smith v. California, 361 U.S. 147 (1959), was a case decided in December 1959, in which Brennan delivered the opinion of the Court. *Smith* held it unconstitutional for the California legislature to punish (with imprisonment) a bookseller for selling Mark Tryon's book *Sweeter Than Life*, found by a judge to be obscene without proof that the bookseller knew of the (sexually-oriented) content of the book. The definition of the crime was "construed as imposing a 'strict' or 'absolute' criminal liability (on booksellers)." *Smith*, 361 U.S. at 149. This was held to amount to an unconstitutional deprivation of liberty without due process of law. California had argued that there was ample precedent for the strict liability imposed, particularly in the many food and

Posner's memorandum pointed the way for Brennan to move; and although it also called Brennan's attention to Kalven's proposal that *Roth*'s doctrine be made more protective of literature and art, the memorandum did not otherwise advance any cogent legal doctrine for freeing "bona fide" literary and artistic expression from government censorship while at the same time remaining faithful to precedent.[142] The desirability of transforming the *even the slightest redeeming social importance* dictum that Brennan had adumbrated in *Roth* into a speech-protective doctrine, and the idea of providing a specific jurisprudential technique for doing that, originated, as I have suggested, with Kalven. In the insightful piece called *The Metaphysics of the Law of Obscenity*, this brilliant first amendment scholar showed how "the intractable problem of obscenity"[143] could be solved in a way that resulted in an expansion of literary freedom of expression.[144] Kalven proposed that Brennan's *Roth* explanation of why obscenity was not constitutionally protected expression be turned into a condition precedent to the banning of expressive material alleged to be obscene. "If," Kalven observed, "the obscene is constitutionally subject to ban because it is worthless [*i.e., utterly without redeeming social importance*[145]] it must follow that the obscene can include only that which is worthless."[146] Or, as Brennan would say later on in *Memoirs*, rearticulating his doctrine two years after the *Tropic of Can-*

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drug protection and labeling laws regularly upheld by the courts that dispense with the need to prove knowledge on the part of persons charged. Brennan dismissed this argument as merely an example "of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting freedom of expression, by making the individual the more reluctant to exercise it." *Id.* at 150-51. Brennan continued, "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Id.* at 154.

142 Note Posner's use of "bona fide" as a definitional qualification of the "art" (or "information") that ought to be free of governmental restraint. Compare it with Kalven's idea of the non-worthless, Kalven, *supra* note 74, at 43; with Brennan's principle of freedom for material not "utterly without artistic importance," *(A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,* 383 U.S. 413, 442 (1966) [hereinafter *Memoirs*]; and with Burger's later revision looking to the protection only of material having "serious literary, artistic, political, or scientific value," Miller v. California, 413 U.S. 15, 24 (1973).

143 Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in one case and dissenting in two others).

144 *Kalven, supra* note 74.

145 *Roth*, 354 U.S. at 484.

146 Kalven, *supra* note 74, at 13. Clark called this conclusion a "non-sequitur" when Brennan said much the same thing in *Jacobellis*, 378 U.S. at 191 (1964), and *Memoirs*, 383 U.S. at 419.

cer decision—even "a modicum of value" is enough to entitle a book or a movie to constitutional protection and save it from being branded obscene.[147] For Kalven the only candidate for classification as worthless expression is hard-core pornography. He predicted that the Court's gradual development of a workable standard for separating obscene from constitutionally protected expression could "restrict obscenity to the worthless and hence to something akin to hard-core pornography."[148]

Like good judges, whose servants and advisors they frequently are, good law professors and practicing lawyers develop doctrinal approaches to the first amendment that are based upon preferred free speech ideas, philosophies, doctrines, and Supreme Court opinions; and they fight for the adoption or survival of these doctrines in the cases whose strategies they control, and in the causes that they comment upon in literary and lay journals, and in books. In the famous *New York Times Co. v. Sullivan*[149] case involving an alleged libel of a Montgomery, Alabama police commissioner, Professor Herbert Wechsler of Columbia put across his doctrinal first amendment views with consummate success, in the course of his representation of the victorious *New York Times*. Brennan's historic opinion in the case reverberated with Wechsler's ideas. Professor Alexander Bickel of Yale did almost as well in the *Pentagon Papers* case.[150] In the Illinois Supreme Court, Harry Kalven successfully advanced his doctrinal approach to a solution of the obscenity problem, as the main reason why the Chicago conviction of comedian Lenny Bruce should be reversed.[151] I pressed for Kalven's suppression-only-of-the-worthless approach: in the several *Tropic of Cancer* cases, including Florida, that I was involved in as lawyer for both Grove Press and interested *amici curiae*; in the Massachusetts Supreme Judicial Court *Naked*

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147 Brennan also stated that "a book need . . . be 'unqualifiedly worthless before it can be deemed obscene.'" 383 U.S. at 419 (quoting Attorney Gen. v. A. Book Named "John Cleland's Memoirs of A Women of Pleasure," 349 Mass. 69, 73 (1965)). Kalven's ideas seem to have reached Brennan, presumably, not directly through Brennan's having read the 1960 *Supreme Court Review* article, see Kalven, *supra* note 74 (for he did not cite it in *Jacobellis*, 378 U.S. 184 (1964) or *Memoirs*), but through the transmission of the article's ideas to Brennan in briefs by lawyers who had read it—including Los Angeles civil liberties lawyer Al Wirin, New York lawyer Ephraim London, and me; by Justice Tobriner in the opinion he wrote in the *Tropic of Cancer* case Zeitlin v. California, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963); and by Richard Posner in his "Memorandum" to Brennan. *See supra* note 139 and accompanying text. Later, in his brief to the Court in the *Fanny Hill* case, Charles Rembar also advanced Kalven's idea and cited Kalven's *Supreme Court Review* piece.

148 Kalven, *supra* note 74, at 43.

149 376 U.S. 254 (1964).

150 New York Times Co. v. United States, 403 U.S. 713 (1971).

151 People v. Bruce, 31 Ill. 2d 459 (1964), 202 N.E.2d 497 (1964).

Lunch case;[152] and in more than a score of motion picture censorship cases involving *I Am Curious-Yellow*, including one in the Second Circuit Court of Appeals[153] and one in the Supreme Court.[154]

In *Jacobellis*, which was decided along with the Florida *Tropic of Cancer* case,[155] Ephraim London not only advanced Kalven's thesis, he also pressed the Court to abandon *Roth*'s definition of obscenity and adopt in its stead a hard-core pornography test—which, however, London failed in any way to define or describe—but which a number of respected academic commentators on the Court's work had been recommending for years, including the political scientist from Brown University, C. Peter McGrath.[156] As is well known, in the concurring opinion that Justice Stewart wrote in *Jacobellis*, Stewart adopted a jurisprudentially amusing, skeptical sort of shorthand test for hard-core pornography—the "I know it when I see it" test.[157] But the Brennan opinion in *Jacobellis*, wisely I think, rejected every temptation to substitute any pornography test for the *Roth* test of the obscene.[158] The significance of Kalven's proposed gloss on *Roth* is that it permitted Brennan to retain *Roth*'s basic holding but structure dicta contained in it into a principle offering artistic expression a new, and potentially absolute, measure of freedom.[159] Adoption of

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[152] Attorney Gen. v. A Book Named "Naked Lunch," 351 Mass. 298, 218 N.E.2d 571 (1966).

[153] United States v. A Motion Picture Film Entitled "I am Curious Yellow," 404 F.2d 196 (2d Cir. 1968).

[154] Byrne v. Karalexis, 401 U.S. 216 (1971).

[155] Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964).

[156] *See*, McGrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7. Another approach, called "variable obscenity," had been developed by Dean William Lockhart and Professor Robert McClure in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68-70 (1960). This approach was advocated by Warren and was put to disastrous use in Ginzburg v. United States, 383 U.S. 463 (1966).

[157] *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

[158] In *Roth*, the test for obscenity was whether material "deals with sex in a manner appealing to prurient interest." *Roth*, 354 U.S. at 487.

[159] Brennan had wrestled with himself and his brethren continually, from the days of *Roth*, to find a doctrinal solution to the obscenity problem superior to *Roth*'s. The first such solution Brennan came up with was, as I have suggested, the approach that Kalven proposed. Later, in 1973, after the Court's ideological composition had been drastically changed, Brennan finally abandoned that approach for an approach so close to the Black-Douglas absolutist solution, that Douglas was moved to applaud Brennan. Paris Adult Theatre I v. Slaton 413 U.S. 49, 70 (1973) (Douglas, J., dissenting). By then Black was dead. The approach taken by Brennan in 1973, which would be joined by Justices Thurgood Marshall and Potter Stewart, was that obscenity had proved impossible to define congruently with the guarantees of freedom of speech and of press, and that the Court should therefore decline to enforce all obscenity laws that interfered with the circulation of sexually-oriented materials among adults. *Id.* at 83-113 (Brennan, J., dissenting). Later, in a published interview, Brennan ruefully remarked: "I do wish we had found a solution to the definitional horror of obscenity." Leeds, *supra* note 56, at 79.

Kalven's gloss could hardly work otherwise than to free more literary materials from censorship; a hard-core pornography test by contrast might have led to greater censorship. For example, the New York Court of Appeals had found *Tropic of Cancer* obscene because it met that Court's shorthand test for hard-core pornography: "dirt for dirt's sake, . . . dirt for money's sake."[160] It would be difficult to come up with a more specious test; there is nothing about it that reflects the rule of law.

I suggested earlier that Brennan's *Jacobellis/Tropic of Cancer* opinion may have been influenced by Anthony Lewis's writings on obscenity law developments.[161] I found a copy of Lewis's June 1963 *Esquire* article[162] among the private court papers that Brennan had deposited in the Library of Congress's archives, together with Posner's extraordinary memorandum, written while he served as law clerk to Justice Brennan during the same period.[163] Lewis's piece had appeared the year before the Court had, under Brennan's leadership, acted to free *Tropic of Cancer* and *The Lovers*. Although neither document was cited by Justice Brennan in his groundbreaking opinion justifying the Court's actions in both cases, I think that he was moved to create the "Brennan doctrine"—as expressed in his opinion—in some indefinite measure as a result of Lewis's jubilant appraisal of the Court's movement to liberate literary expression in America from the grip of the censor, as well as by Posner's enthusiastic advice.[164]

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[160] People v. Fritch, 13 N.Y.2d 119, 124, 192 N.E.2d 713, 717, 243 N.Y.S.2d 1 (1963).

[161] *See supra* notes 1-3 and accompanying text. Lewis, as of this writing a syndicated *New York Times* columnist on law and foreign affairs, is also the author of a Pulitzer Prize-winning account of how the Supreme Court was moved to recognize that indigent persons charged with crimes were constitutionally entitled, free of charge, to have legal counsel. A. LEWIS, GIDEON'S TRUMPET (1964). Lewis teaches a course on freedom of the press at Harvard Law School and is the author of Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COL. L. REV. 603 (1983) (analysis of the constitutionalized law of press libel and documenting the contributions made by Wechsler, Kalven, and Brennan). See Lewis's tribute to twenty years of Brennan's work in helping to establish political equality, free expression, and fair procedure for American civilization, in Lewis, *Robust and Uninhibited*, N.Y. Times, Oct. 18, 1976, at 29, col.1, which concludes with the words: "Twenty years after taking his seat on the Supreme Court, Justice Brennan remains robust and uninhibited in his commitment to freedom. His anniversary reminds us how Americans uniquely depend on judges to refresh our freedom."

[162] Lewis, *supra* note 1.

[163] See Posner Memorandum *supra* note 139.

[164] The piece Lewis published in *Esquire* also contained a trenchant analysis of the social and legal significance of the Court's previous decisions in the field of sexual expression. These included the 1948 decision involving the book *Memoirs of Hecate County* in Doubleday & Co. v. New York, 335 U.S. 848 (1948) (about which Lewis wrote: "It is impossible to believe that a single Justice would sit still today for a ban on *Hecate County*," Lewis, *supra* note 1, at 82); an even earlier decision, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (requiring the Postmaster General to restore *Esquire* magazine's second-class mailing privileges on the ground that the

The Supreme Court had heard argument twice in *Jacobellis*. This was because of the difficult and complicated questions presented by movie and book obscenity law censorship; because so much pressure had built up since *Roth* for the Court to abandon or amend its two-tiered holding in *Roth* (that most expression was *inside*, but obscene expression was *outside*, the protection of the constitutional guarantees); and because Felix Frankfurter had retired from the Court following the first set of arguments, and the man who took his seat, Arthur J. Goldberg, had not heard argument. It was not until the end of the term, in June 1964, that the decision finally came down, and the results—the freeing of *Tropic of Cancer* and *The Lovers* for anyone in the country to read and see—stunned just about everyone.

In the *Grove Press/Tropic of Cancer* case, the Court granted my petition for certiorari and, on the basis of the petitioner's representations and arguments—without further briefing on the merits or any hearing of oral arguments—summarily reversed the Florida court's decision that the book was obscene.[165] Each justice in the majority voted for reversal for the reasons given by him that same day for voting in *Jacobellis* to reverse the Ohio Supreme Court's decision that

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Postmaster General had been given no authority under law "to prescribe standards for the literature or the art which a mailable periodical disseminates," *id.* at 158); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), concerning the film *The Miracle*, (recognizing for the first time that the motion picture industry was entitled to first amendment freedom; *see also supra* notes 63-64 and accompanying text); and Brennan's opinion of 1957 in *Roth*, as to which Lewis, having read Kalven, perspicaciously observed: "The Court . . . held that the truly obscene—'utterly without redeeming social importance'—was outside the free speech and press guarantees." *Id.* at 83. Lewis observed: "That sounds like a gain for the censors, but in fact the opposite was true." *Id.* Lewis also noted several post-*Roth* decisions, three of which amounted to silent "progeny" of *Roth*, in which the Court "said the public was entitled to read the magazines *One* [One, Inc. v. Oleson, 355 U.S. 371 (1958)] (devoted to discussions of homosexuality), and *Sunshine and Health* [Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958)] about nudism, and to see the French movie, *The Game of Love*," (Times Film Corp. v. Chicago, 365 U.S. 43 (1961) (in which the Court decided that the advocacy of "immoral" ideas, as in a movie version of *Le Blé en Herbe*, was constitutionally protected)). He cited as well the 1959 decision freeing the movie version of *Lady Chatterley's Lover*, Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959), and the 1961 decision in Marcus v. Search Warrant of Property at 104 East 10th Street, 367 U.S. 717 (1961) (in which the Court "struck down as too sweeping a Missouri seizure of thousands of publications under a search warrant issued on a single policeman's statement that they were obscene." Lewis, *supra* note 1, at 83. Lewis also referred to Harlan's "fascinating opinion" in Manual Enterprises v. Day, 370 U.S. 478 (1962) (in which Harlan had said that "nothing could be termed 'obscene' constitutionally, unless in addition to appealing to someone's prurient interest it was 'patently offensive,'" Lewis, *supra* note 1, at 83 (quoting *Manual Enters. v. Day*, 370 U.S. 478, 486 (1962))), thus calling attention to Harlan's contribution of a second prong to what became, and remains thought of as, a three-pronged test of obscenity. This prong was, in fact, added to the formal test for obscenity suggested by Brennan in his opinion in *Jacobellis/Tropic of Cancer*. Jacobellis v. Ohio, 378 U.S. 184 (1964).

165 *Grove Press*, 378 U.S. 577 (1964).

The Lovers was obscene. However, in freeing *Tropic of Cancer* the Court divided more closely—five to four—than it did in freeing *The Lovers*—six to three—because White voted together with Warren, Harlan, and Clark *against* the Court's granting certiorari in *Grove Press*.[166] I presume White did this because the scenes of sexual encounters in Miller's novel were so much more explicit and, to him, offensive than the love scenes in the film. The latter were—as Goldberg noted in his separate opinion in *Jacobellis*—"so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed."[167] White's move to the side of the justices favoring censorship was not enough, however, to affect the Brennan-led majority's decision to free Miller's novel from censorship throughout the nation.

Before reaching the words that Brennan actually used to launch the doctrine that I have suggested broke the grip on literary and artistic expression held by American censors, several subsidiary principles that were laid out in the opinion need to be discussed, in part because of subsequent retrenchment on these principles that occurred with the conservative takeover of the Warren Court that began with President Richard Nixon's appointment of Chief Justice Warren E. Burger in 1969, an appointment that FBI director J. Edgar Hoover is reported to have successfully pressed upon Nixon.[168]

In freeing *Tropic of Cancer* and *The Lovers*, Brennan went out of his way to establish that the Court's decision and the reasoning of his opinion were to be followed by lower state and federal courts throughout the country—regardless of varying local community standards.[169] Making local community standards relevant to decisions about freedom of expression generates uncertainty and disuniformity in the law and doubt and conflict in the minds of creators and disseminators of expressive materials nationally. Most books and movies are not local produce, for example, like fruits and vegetables. Most books and movies are made to be distributed nationally to people everywhere in the land; and if they are protected from censorship by the Constitution, this protection can hardly differ state to state or city to city, or region to region. The local standards that Burger later would posit as vital to identifying the obscene, of course, embody nothing less than whatever varying, not to say volcanic, notions of decency may be bur-

[166] White, in other words, voted against reviewing the suppression of Miller's novel, notwithstanding that he voted with the majority to free Malle's film.

[167] *Jacobellis*, 378 U.S. at 197-98 (Goldberg, J., concurring).

[168] *See* C. GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 626-27 (1991).

[169] *Jacobellis*, 378 U.S. at 192-95.

ied in the breasts of local policemen, local judges, local prosecutors, and local jurors. Brennan knew this, and he knew that unless the law and the Court's rulings in this area were fashioned in such a way as to transcend county and state lines, Americans, as a nation of people, could not really be free to read books like *Tropic of Cancer* or see movies like *The Lovers*. Such a situation would predictably impel national publishers and distributors of books and movies to self-censorship, to a curtailment of the freedom of book and movie creators by refusing to bring out or handle works thought likely to offend policemen, prosecutors, judges, or juries in the country's more sexually inhibited and repressed communities, or thought likely to anger the militant quasi-religious "decency organizations" that, from time to time, dominate the sexual politics (including the behavior of policemen, prosecutors and judges) of even larger cities and states,[170] and nationwide federal agencies too.[171] This would mean such works might never be created at all. There would be a lowest common denominator effect on movies, books and art; the politicized "decency" agenda of cities like Cincinnati (where a museum and its director recently were prosecuted for exhibiting homoerotic and sadomasochistic photographs by Robert Mapplethorpe),[172] counties like Broward, Florida (where the rap music group 2 Live Crew and a record store owner who sold their album, *As Nasty as They Wanna Be,*[173] recently were charged on obscenity grounds) and states like Georgia (where a movie exhibitor was convicted for obscenity in 1972 for showing the movie *Carnal Knowledge*),[174] would determine what the rest of the nation could read, listen to, and see. So, in *Jacobellis/Tropic of Cancer*, Brennan insisted that expressive materials found constitutionally protected and not obscene by the Supreme Court, in cases arising out of Ohio and Florida, were to be deemed constitutionally protected and not obscene throughout the United States.

JUSTICE WILLIAM J. BRENNAN, JR.: It has been suggested that the "contemporary community standards" aspect of the *Roth* test implies a determination of the constitutional question of obscenity in

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170. As, for example, today in Cincinnati, Ohio. *See, e.g.*, Harrison and Parachini, *Jurors Clear Gallery Director of Obscenity*, L.A. Times, Oct. 6, 1990, at A1, col. 3.

171. For example, the United States Postal Service, which for generations was particularly sensitive and responsive to Catholic pressures; and the Federal Communications Commission which, in recent years, has been acting responsively (though not responsibly) to extralegal "moral" pressures from Protestant, and especially southern-based evangelical, organizations.

172. Contemporary Arts Center v. Ney, 735 F. Supp. 743 (S.D. Ohio 1990).

173. Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990).

174. The Supreme Court held the movie not obscene and overturned the conviction in Jenkins v. Georgia, 418 U.S. 153 (1974).

each case by the standards of the particular local community from which the case arises. This is an incorrect reading of *Roth*. . . . It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. . . . The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines" . . . ; we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.[175]

Unless the Florida *Tropic of Cancer* decision was to have such a national effect, Grove Press would have won in Florida but still have been forced to resume fighting for the novel's freedom in each of the cities, counties and states where attempts to suppress the book were still pending—an unenviable and almost certainly insupportable task. Brennan's new doctrine—embodying Kalven's proposed gloss on *Roth*—was clear and unambiguous on this point.[176] After the June 1964 cases were decided, lawyers defending the publishers or distributors of books, magazines and movies charged with being obscene had a powerful new lever for freeing such expression from censorship: if a

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[175] *Jacobellis*, 378 U.S. 184, 192-95 (1964) (quoting, in part, Pennekamp v. Florida, 328 U.S. 331, 335 (1946)). In *Roth*, Brennan did not discuss the "contemporary community standards" issue; in *Jacobellis/Tropic of Cancer*, he looked to language that Judge Learned Hand had used in his famous opinion in *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (quoted in *Jacobellis*, 378 U.S. at 192-95). Judge Hand "was referring not to state and local 'communities,' but rather to 'the community' in the sense of 'society at large; . . . the public, or people in general.'" *Kennerley*, 209 F. at 121.

[176] It would become tainted, nine years later, by Chief Justice Warren E. Burger's insistence, in his opinion in *Miller v. California*, 413 U.S. 15 (1973), that local rather than national standards should be controlling in the field of obscenity law; this again exposed the nation's communications and entertainment producers to a myriad of standards. Fortunately, unlike the question of community standards of decency and prurience, the question of the existence of saving literary, artistic, scientific, or political importance logically and legally can be determined only on the basis of a national standard. Even the Burger Court was obliged to discount the local standards of a Georgia jury that found the film *Carnal Knowledge* obscene. Jenkins v. Georgia, 418 U.S. 153 (1974). The Court's reversal meant that its own (surely "national") standards of decency and aesthetic values were decisive. *See* E. DE GRAZIA & R. NEWMAN, *supra* note 17, at 139-40, 351-54.

publisher or distributor of a challenged work could lay claim to any value of any kind whatsoever in a work,[177] and a lower court nevertheless were to brand it obscene, that court's decision predictably would be reversed on appeal by the Supreme Court,[178] and the decision would be binding throughout the land.

For this to occur, however, Brennan's new doctrine of freedom for literary and artistic expression would have to be *enforced*—in the first instance by state and federal trial judges; in the last instance, by the Supreme Court of the United States itself. Necessary to the exercise of the Court's power to void any state or federal law violating the Constitution, are the powers the Court has to reverse and vacate constitutionally erroneous decisions reached by lower federal and state court judges. In this respect the American judiciary is like a hierarchichal pyramid with a single Supreme Court at its head, and thousands of special and trial courts, appellate courts, administrative agencies, policemen, and prosecutors' offices running along and making up its extensive base.

Brennan has said to me that during the sixties, no book could be suppressed in the United States without the approval of the Supreme Court. He believed that while the Warren Court sat no censorship of literature having even the slightest social importance would be permitted to take place anywhere in the United States. And this was true because of the obedience lower courts owe to the decisions of the nation's highest bench, and because, in his *Jacobellis/Tropic of Cancer* opinion, Brennan emphasized that in carrying out its duties the Court was bound to consider and decide for itself—was constitutionally required to make an independent judgement in every case—whether a particular work of literature was constitutionally protected or obscene. If its judgment on this question—applying *national*, not local, community standards—differed from that of the lower tribunal, whether state or federal, trial or appellate, its judgment would prevail,

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177 Subsequently, lawyers (myself included) could and did present evidence that material challenged as obscene not only contained literary or artistic importance, but moral, religious, scientific, psychiatric and educational values. All such, of course, arguably were "social" values. It is significant that when Burger acquired enough power on the Court to cut back on the constitutional freedom officially granted to the country's literary press, he eliminated the term "social" from the "third prong" of the prevailing test for "obscenity," substituting "political."

178 This should have occurred in Lenny Bruce's case, had he perfected an appeal from his New York conviction. *See* Roth, *Lenny Bruce Act is Ruled Obscene*, N.Y. Times, Nov. 5, 1964, § 2, at 47, col. 8.

In a Chicago case also involving the social satirist, the Illinois Supreme Court reversed its own earlier upholding of Bruce's obscenity conviction, after the *Jacobellis* and *Grove Press* decisions were announced, because "some of the topics commented upon by [Bruce] are of social importance." *People v. Bruce*, 202 N.E.2d 497, 498 (1964).

would be impressed on the courts, the case, the litigants, and the literature below.

JUSTICE WILLIAM J. BRENNAN, JR.: We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection [this as a result of *Roth*], the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."

In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. . . . And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression. . . .

We cannot understand why the Court's duty should be any different in the present case . . . . Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as "censor" or "super-censor." In judging alleged obscenity the Court is no more "censoring" expression than it has in other cases "censored" criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we affirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitu-

tionally protected.[179]

Although review of lower court judgments regarding specific expressive material was *necessary*, in the absence of absolute freedom, to ensure effective freedom of literary expression, it was not *sufficient* to bring such freedom about. Lest the Court be forced to review a countless multitude of lower court decisions, it was necessary as well that the test of obscenity that Brennan designed for lower court use be as definite and certain (and followable) as possible. To accomplish this Brennan adopted two tactical devices: he forbade lower court tribunals applying the expanded test to materials before them from weighing their putative social value against their putative prurient appeal and patent offensiveness, and he instructed those tribunals to free everything that was not *utterly* without value—regardless of how great the prurient appeal and patent offensiveness might be.[180] This, as I will explain, reduced to a minimum the discretion that lower court judges would have to refer to their feelings about a work's obscenity. Brennan wove these tactical devices into the fabric of the new test for obscenity that he adumbrated in *Jacobellis/Tropic of Cancer*, and derived the whole from what he had said, seven years earlier, in *Roth*. This was pointed out by Kalven in his book, *A Worthy Tradition*.[181]

PROFESSOR HARRY KALVEN, JR.: In . . . *Jacobellis v. Ohio* . . . Brennan made two further additions to the [constitutional definition of "obscenity"]. First, he made it clear that "the contemporary community standards" by which obscenity was to be judged under the *Roth* test were *national*, not local, standards; otherwise, he said, "the

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[179] *Jacobellis*, 378 U.S. at 187-90.

The limited review argument was not only advanced by lawyers for the government in our cases but, more significantly, by Warren. *See* Warren's *Jacobellis* dissent, 378 U.S. at 199.

The "no 'substitute for facing up to the tough individual problems' " quote is from *Roth*, 354 U.S. at 498.

Brennan constitutionalized the issues presented by every obscenity case, and set the foundation for the practice of the Supreme Court reviewing every obscenity case *de novo*, and for the effective substitution of *its* judgments on obscenity for those of lower federal and state courts. Warren had joined Black in opposing this practice, with Warren arguing that the Court should not second-guess lower court judgments except where they appeared clearly erroneous, *Jacobellis*, 378 U.S. at 203 (Warren, C.J., dissenting), while Black argued that the practice turned the Court into a "Supreme Board of Censors," *Jacobellis*, 378 U.S. at 196 (Black, J., dissenting), which was a way of viewing what was going on that had first been criticized by Justice Jackson in the *Memoirs of Hecate County* case, Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[180] *Jacobellis*, 378 U.S. 191.

[181] H. KALVEN, *supra* note 25, at 38.

constitutional limits of free expression in the Nation would vary with state lines." Second, he stated that the rationale he had offered in *Roth* for excluding obscenity from First Amendment protection—that it was "utterly without social importance"—was also an element of the constitutional definition . . . . [B]oth patency and lack of social significance were, arguably, implicit in the original *Roth* formula. Thus, the Court, responding to the dialectic of subsequent cases, can be said to have developed its central idea, and in the process to have narrowed the scope of [governmental] regulation.[182]

JUSTICE WILLIAM J. BRENNAN, JR.: The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that the test for obscenity enunciated there—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"—is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance," and that "(t)he portrayal of sex, for example, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. It follows that material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" without social importance.[183]

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[182] The substance of Brennan's ideas concerning a constitutional standard for obscenity were derived from his opinions in *Jacobellis* and *Roth*. The "constitutional limits of free expression" quote is from *Jacobellis*, 378 U.S. at 194-95 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)). The "utterly without . . ." language is from *Roth*, 354 U.S. at 484, and repeated in *Jacobellis*, 378 U.S. at 191.

[183] *Jacobellis*, 378 U.S. at 191 (quoting *Roth*, 354 U.S. at 484). Brennan cited in support the California Supreme Court's decision in Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963), also involving *Tropic of Cancer*, in which the weighing or balancing process was denounced. Twice, in the pivotal paragraph which advanced the doctrine, Brennan dropped out the concept of *redeeming*, almost certainly to show that the correct application of his rule should involve no weighing of ("redeeming") social importance against the work's obscene characteristics. Brennan concluded this passage exposing his doctrine with language that incorporated the second prong (introduced by Harlan in Manual Enterprises v. Day, 370 U.S. 478 (1962)) of the expanded test, saying: "It should also be recognized that the

In writing *Roth*, Brennan had stressed that "obscenity" and "sex" were not the same thing, that *sex* was a problem of great public concern that needed freely to be discussed in literary, artistic and scientific works,[184] and that *obscenity* was expression that was not constitutionally protected only because it was "utterly without redeeming social importance."[185] By building on these propositions, and ignoring others, Brennan converted *Roth* into a potentially irresistible defense against a charge of obscenity. To now free a book, magazine, or movie from an obscenity charge, one had simply to show that it was not, in Kalven's terms, worthless.[186] Following Brennan's opinion in *Jacobellis/Tropic of Cancer*, any work of literature, science, or art, as well as any expression having any other sort of social importance, threatened with censorship in the United States, could be worked free.[187] And not only was the testimony of literary experts and critics

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Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.'" *Jacobellis*, 378 U.S. at 191.

[184] *Roth*, 354 U.S. at 487.

[185] *Id.* at 484.

[186] A somewhat similar but not as strong defense was provided under English obscenity law by act of Parliament in 1959. Section 4 of the Obscene Publications Act of 1959 provides a defense to an obscenity prosecution where it is proved that "publication of the article is justified as being for the public good in the interests of science, literature, art or learning, or other object of public concern." Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 4. This change revolutionized the law of obscenity in England because until then, evidence of literary or other merit was not only not a defense, it was inadmissible in obscene literature cases.

[187] Although working it free might require going all the way to the Supreme Court with the case. And the definitional problem of what qualified as literature, art, or science needed still to be resolved. Lawyer Charles Rembar made the same point as to "literature" in his book C. REMBAR, THE END OF OBSCENITY (1968), although he attributed the end of obscenity censorship to Brennan's opinion in *Memoirs* (the *Fanny Hill* case that he argued before the Court), not *Grove Press*. REMBAR, *supra* at 480, 489. In any event, much depends upon how you define *literature*, or *literary* or *artistic value*. Chief Justice Burger, speaking for a majority of the Court, once held "obscene" a book resembling a novel, called *Suite 69*, bearing a plain cover and no pictures. Kaplan v. California, 413 U.S. 115 (1973). Burger said it had a "most tenuous plot." *Id.* at 116. According to him, it was entirely composed of "repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous." *Id.* Although the protection provided by the first amendment to speech and press probably was designed to foster progress in literature, art, science, and morality, as values of American civilization and culture, the American way of doing this is by *laissez faire*—by forbidding government officials from intervening in the *definition* of cultural artifacts like literature, art, science, and morality as well as in their evaluation or circulation.

Are comic books literature or art? Some? All? None? What about Robert Mapplethorpe's photographs of a black man being fist-fucked? Or Andres Serrano's photograph of a plastic crucifix submerged in a container said to be full of Serrano's urine? Or Karen Finley's staged solo performance—nude, coating her body with chocolate, and protesting verbally the degradation of women at the hands of American men? *See* E. DE GRAZIA, *supra* note 12, ch. 30. Who is to say? If Senator Jesse Helms—exercising pressure on the National Endowment

admissible as a constitutional requirement in any obscenity case, such evidence would now be decisive because of Brennan's prohibition against weighing a work's prurient appeal against its social importance. Brennan's opinion in *Jacobellis* registered the most important gain for cultural freedom in the Court's history, notwithstanding revisions that would be made in the law in 1973 by the Burger Court.

JUSTICE WILLIAM J. BRENNAN, JR.: I did not know what it was that Roth put in the mails. I would have wanted to look at the stuff. We only saw what the Government brought in that box . . . . By the time of the *Tropic of Cancer* case, I felt that the only possible protection for it, the only way we could protect the publishers of books, was by looking at the stuff ourselves. Because we never could agree on a definition.[188]

The Court's lead opinion in *Jacobellis*—issued under Brennan's name—was *officially* joined only by Goldberg. This fact, little noticed at the time,[189] would have small importance for the next four years,

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for the Arts—or if NEA Chairpersons like the incumbent, John Frohnmayer, were to have the power to determine what constitutes art, as Helms proposed in 1989, then clearly we will have government censorship of the arts. *See* Richard, *Witnesses' Testimony to the Power of an Age-Old Taboo*, Wash. Post, Nov. 17, 1989, at D1, col. 1; Glueck, *Border Skirmish: Art and Politics*, N.Y. Times, Nov. 19, 1989, at B2, col. 2. Rembar set out a kind of definition of literary value in a colloquy he had with Brennan in the *Memoirs/Fanny Hill* argument before the court. A good definition of "art" is offered by philosopher George Dickie, *see infra* notes 262-64 and accompanying text (reinforcing the approach to free speech in literary and artistic contexts taken here).

188 Interview with Justice William J. Brennan, Jr., in Washington, D.C. (Apr. 16, 1986). The box Brennan referred to was a carton of "hard-core pornography" that the Solicitor General of the United States deposited with the Court in the *Roth* case. Its significance is described in E. DE GRAZIA, *supra* note 12, chapter 16.

189 Kalven, for instance, referred to the Brennan opinion as the Court's. H. KALVEN, *supra* note 25, at 38. However, in his 1973 obscenity case opinions, Miller v. California, 413 U.S. 15 (1973) and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Chief Justice Burger made a large point of the fact that (notwithstanding its faithful following by the judiciary) Brennan's *utterly without* doctrine was never subscribed to by more than three justices. (In *Memoirs*, both Warren and Fortas subscribed to Brennan's doctrine. *Memoirs*, 383 U.S. at 413.) White and Clark did not seem to realize what had happened until they protested what Brennan had done, in the dissenting opinions they wrote in *Memoirs*. In fact Brennan had gathered a majority of the Court to join in holding that *Tropic of Cancer* and *The Lovers* were constitutionally protected and not obscene, but only a plurality of two joined *his reasoning* in these cases: that such expression should be free because all recognizable literary or artistic works ought to have constitutional protection—even if, but for their literary or artistic attributes, they could be deemed obscene. Brennan's opinion was also the "lead" or "prevailing" opinion in these cases, taken to express the law as best as it can be expressed, under circumstances of a lack of any greater consensus on the judicial reasoning involved in reaching and justifying the decisions. Such opinions are correctly "followed" by lower state and federal courts wishing to

conform their own judgments to those reached by the Supreme Court, and to correctly predict the high Court's future behavior.

A note in the *Harvard Law Review* criticizes the contemporary Supreme Court for the frequency of plurality decisions, which the note's author regards as "pathological decisionmaking." Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981). The author is, I believe, misguided, writing no doubt under pressure from the myth or fiction that the law is normally (in its healthy condition) *certain*. The law is *ideally* certain, but inasmuch as it can never be other than what its interpreters say it is, the law's certainty can never transcend disagreements among its interpreters. Expression of such disagreements may be suppressed by agreement, for example, that despite disagreements in the minds of the justices, only a single opinion will be issued. This gives a *false* impression of certainty. For unless the disagreements themselves are eliminated, they will inevitably be excited to rise again in the next case that a litigant believes the argument should be made. Doubtless, the suppression of any expression of disagreement existing among the justices will discourage some litigants from raising the suppressed points, and this may slow down the process of change in the law, and give an impression of stability. But stability is only one of the law's virtues and can hardly be praised as a virtue superior to the justice that gets denied when the law fails to accord with the constitutive community's sense of *justice*.

Justice Brennan has indicated to me that notwithstanding the several official explanations that are given regarding the occurrence of plurality and lead opinions and the varied interpretations of their significance that are made, a minority opinion written by a justice may acquire the lead position in the reports because *initially*, at conference, the particular view presented by the justice receiving the assignment to write the opinion was, or seemed to be, shared by a majority of the justices present and voting. During the course of further deliberations and recasting, the view might lose its majority status and become the view merely of a plurality. If, however, no other opinion gains a majority, the final opinion written by the author of the originally majoritarian opinion will retain its lead position. Interview with Justice William Brennan, Jr., in Washington, D.C. (Apr. 16, 1986). Something like this probably happened in *Jacobellis/Tropic of Cancer* and Manual Enterprises v. Day, 370 U.S. 478 (1962), where the lead opinion as reported was an opinion of Harlan, joined only by Stewart, while an opinion written by Brennan, "concurring in the reversal," was joined by Douglas and Warren. The ground for the Brennan-Douglas-Warren concurring judgment in *Manual Enterprises* to reverse was, however, much broader than that stated by Justice Harlan and, for this reason, presumably was less likely than Harlan's to win a Court majority on the next case raising the issue.

The style of law declaration represented by plurality opinions is similar to the *seriatim* style which the Supreme Court used before 1801, and to the traditional *seriatim* practice of the English law lords. From 1801 until 1955, shortly after the beginning of the Warren Court (that is to say, over a period of 154 years), there were only 45 plurality decisions. From 1955 to the end of the Warren Court (say, in 1970) there were 42 plurality decisions. By 1981 there had issued from the Burger Court alone 88 plurality decisions, more than in the entire previous history of the Court.

In her unpublished monograph *Study of the Records of Supreme Court Justices*, (March 1977) (copy on file in *Cardozo Law Review* office), Alexandra K. Wigdor says that "Jefferson applauded the system of *seriatim* opinion-giving because it threw greater light on difficult subjects, it was more educative, and it showed whether the judges were unanimous or divided, thus giving more or less weight to the decision as a precedent." *Id.* at 10. Chief Justice John Marshall stopped the *seriatim* practice when he took his place on the Court in 1801; at that time the Court was "by far the least prestigious branch of the federal government." *Id.* at 4. The Court was regarded as "of so little consequence that it had to meet in a Senate committee room on the main floor of the Capitol, "the architects having forgotten [the Court] entirely when designing the Capit[a]l City." *Id.* at 4-5. During his tenure, Marshall aimed to increase the Court's prestige, and to establish the supremacy of the national government and the authority of law. He worked at this not only through the famous opinions that he wrote, such as

during which most (if not all)[190] lower federal and state courts obediently put the Brennan doctrine to work in reversing obscenity findings in book, film, and magazine censorship cases throughout the country.

After the Florida *Tropic of Cancer* case was won in the Supreme Court in 1964, a *Newsweek* editor phoned Henry Miller and asked him for his reaction to the decision. This Miller "willingly gave them," emphasizing "the valiant fight" that lawyer Elmer Gertz, in Chicago, and publisher Barney Rosset, in New York, had waged.[191] Miller also mentioned the international success his book was experiencing, and the financial success its author was (finally) enjoying.

HENRY MILLER: [T]he book is now printed in twelve languages, and distributed without trouble even in such Catholic strongholds as Argentina and Brazil. The only country at present where the book was suppressed immediately upon appearing is Finland. Poland and [Y]ugoslavia are now about to publish some of my books, not the Tropics yet, of course. In Germany the sale . . . of Cancer has reached the 100,000 mark—very big for Germany, where books are expensive. Capricorn has an *advance* sale there of over 20,000 already. England gives no trouble on either book—and of course Cancer there has sold well over 100,000 and next year, I believe, goes into a paperback edition.[192]

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which helped establish the basis of our federal constitutional system, but through the practices that he engendered for judicial decisionmaking immediately upon assuming leadership of the Court:

> Marshall convinced his brethren on the bench of the novel proposition that the Court should speak with a single voice, contrary to the traditional practice of delivering opinions *seriatim*, each judge stating in turn the reasons for his judgment. Whatever differences might exist in conference, the Court, he urged, should face the outside world with a united front in the form of a single opinion, preferably written by the Chief Justice.

Wigdor, *supra* at 5. Thus, in the first five years of Marshall's tenure, Marshall personally delivered the opinion of the Court in *every* case, thereby greatly augmenting the secrecy of the Court's processes and effectively monopolizing the process whereby the Court provided definitive principled statements of the law. Although Marshall has been viewed by some scholars to have manipulated his fellow judges "like putty," Wigdor observes that "his seems to have been a pleasant domination, based on camaraderie, force of argument, great energy, and the ability to generate respect in those who worked closely with him." *Id.* at 6-7, (citing V. PARRINGTON, THE ROMANTIC REVOLUTION IN AMERICA, 1800-1860 22 (1927); D. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER 288 (1954), and A. BEVERIDGE, THE LIFE OF JOHN MARSHALL, IV, 59-89 (1919)). In these respects, of the justices who made up the second most "activist" bench in the Court's history, the Warren Court, only Brennan's work bears comparison with Marshall's.

[190] *See* the judicial resistance to the Brennan doctrine encountered by Lenny Bruce in New York, described in E. DE GRAZIA, *supra* note 12, ch. 24.

[191] E. GERTZ, HENRY MILLER: YEARS OF TRIAL AND TRIUMPH 1962-1964 317 (1978).

[192] *Id.* at 317-18.

After the *Newsweek* interview, Henry Miller wrote to his friend Elmer Gertz about the significance of the *Tropic of Cancer* victory. He also wondered whether there might be repercussions on the Supreme Court.[193]

HENRY MILLER: So, as always, America ends up last! If the U.S.S.C. had not given its OK it would indeed have been disgraceful. I wouldn't be surprised if the enemies of progress in this country make an attempt to impeach the members of the Supreme Court—or isn't that possible under our Constitution?[194]

JUSTICE WILLIAM J. BRENNAN, JR.: Sure, they made Fortas resign and after that they tried unsuccessfully to impeach Bill Douglas. Well, Bill sent me a note saying I was going to be next.[195]

ANTHONY LEWIS: The United States has moved from one of the most timid countries in dealing with sex in the arts to what many believe is now by far the most liberated in the Western world. Applying steady pressure, nine calm men are dragging the censor, kicking and screaming, into the twentieth century.[196]

"IF ALL MANKIND MINUS ONE . . ."

Religious and quasi-religious court-watchers did not hide the chagrin they felt at what Brennan had done on June 22, 1964, the date *Jacobellis* and *Grove Press* were decided.

THE CATHOLIC STANDARD AND TIMES: Many Catholics winced

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193. *Id.*

194. *Id.* at 318.

195. Interview with Justice William Brennan, Jr., in Washington D.C. (Oct. 21, 1987). The Reagan Justice Department sniped harmlessly at Brennan during the eighties. *See supra* note 27 and accompanying text.

As to the Fortas resignation, see E. DE GRAZIA, *supra* note 12, ch. 27.

Concerning the Douglas impeachment attempt, see HOUSE JUDIC. COMM., FINAL REPORT, SPECIAL SUBCOMM ON H. RES. 920, 91st Cong., 2nd Sess. (1970). H. Res. 920 was "a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States, of high crimes and misdemeanors in office." *Id.* "The subcommittee [considering the resolution] declared by a 3-1 vote that it had found no evidence to support any impeachment charges." Graham, *Douglas Announces Intention to Remain on Court*, N.Y. Times, Dec. 17, 1970, at C43, col. 1. *See also* W.O. DOUGLAS, *supra* note 32, at 413.

196. Lewis, *supra* note 1, at 82, 83.

when they read that Justice William Brennan of their faith had written the majority opinion. What Justice Brennan might consider to be obscene we cannot imagine.[197]

OPERATION YORKVILLE: [R]eligious leaders of all faiths in all communities stand together vociferously decrying the fact that the Court has presumed to recast the moral law. . . . These decisions cannot be accepted quietly by the American people if this nation is to survive. Giving free rein to the vile depiction of violence, perversion, illicit sex and, in consequence, to their performance, is an unerring sign of progressive decay and decline.[198]

I have previously referred to an attack mounted by Francis Cardinal Spellman after the June 1964 decisions in which Spellman put beatniks in place of Communists as sources of the trouble with the Court's decision and American life.[199]

FRANCIS CARDINAL SPELLMAN: [I]n my opinion, freedom of the press was never intended to afford protection to the shameless, profiteering, degraded merchants of filth. . . . I would ask you to join with me in a plea to those judges who have weakened America's efforts to protect its youth to reconsider their responsibilities to Almighty God

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197 The Catholic Standard and Times, July 3, 1964. (Copy on file with author).

As previously explained, Brennan's opinion was the Court's lead, plurality, or prevailing opinion; it was given essentially the effect of a majority opinion. *See supra* note 189.

198 Statement of Operation Yorkville, an interdenominational group of American clergymen, and the New York Board of Trade, as quoted in *Nine Clergymen Score High Court: They Decry Voiding of Ban on 'Tropic of Cancer' and Movie 'The Lovers.'* N.Y. Times, Sept. 1, 1964, § 2, at 37, col. 8. The clergymen charged that the Supreme Court had "virtually promulgated degeneracy as the standard way of American life." *Id.* Members of Operation Yorkville who signed the statement included: Bishops Lloyd C. Wicke, Leo A. Pursley, Aloysius J. Wallinger, and John King Mussio, Reverends Wilburn C. West and W. Scott Morton, Rabbis Chaim U. Lipschutz and Julius G. Neumann. *Id.*

President Johnson later created a National Commission on Obscenity and Pornography, chaired by Dean William Lockhart of the University of Minnesota Law School. This Commission, however, also rode on the crest of the social and sexual revolutions of the sixties; its 1970 Report recommended the repeal of all obscenity laws applicable to "consenting" adults. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF COMMISSION ON OBSCENITY AND PORNOGRAPHY 51 (1970), *reprinted in* COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 57 (1970).

199 *See Spellman Assails Court Rulings on Pornography*, N.Y. Times, Aug. 7, 1964, § 2, at 31, col. 4.

Anthony Lewis inferred that "the Beat movement, with its calculated rejection of the social norm," was spearheading the breakdown of conventional literary morals regarding sex. Lewis, *supra* note 1, at 82. Neither Henry Miller nor Louis Malle was a Beatnik, although Miller certainly was *beat*.

and to our country.[200]

Brennan told me he received "hundreds of letters from Catholics" criticizing his position. The Justice's "dear friend," Dean O'Meara, of Notre Dame Law school, also "wrote me constantly, hoping to change my mind" about *Jacobellis*. Two years later, in 1966, in their dissents to the continuing force of the doctrine represented by the freeing of *Fanny Hill* in *Memoirs,* two of Brennan's more conservative brethren bitterly complained of what Brennan had done—as though the Court, or at least they, had been led down a garden path by *Roth*'s author.

JUSTICE BYRON S. WHITE: If "social importance" is to be used as [Brennan's] prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way.[201]

JUSTICE TOM CLARK: I agree with my brother White that [the "*utterly* without redeeming social value"] condition rejects the basic holding of *Roth* and gives the smut artist free rein to carry on his dirty business.[202]

The full implications of what I have termed the Brennan doctrine as first announced in *Jacobellis/Tropic of Cancer* were surely not appreciated by all concerned, possibly not even by Brennan himself. Such implications require the dialectical push and shove of actual case encounters, and of disputed and contested applications and commentary before they clearly emerge. The passage of time helps. No doubt, Holmes did not foresee all the implications of the language he used in *Schenck v. United States*, eventually renowned as *the clear and present danger doctrine.*[203] In some cases the implications of Brennan's words in *Jacobellis/Tropic of Cancer* would come stubbornly to be resisted even where they were recognized—as I believe to have been the case in New York when, shortly after the Supreme Court's

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[200] *Id.*

[201] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 461 (1966) (White, J., dissenting).

[202] *Id.* at 441 (Clark, J., dissenting).

[203] 249 U.S. 47, 52 (1919).

June 1964 decisions were announced, Lenny Bruce's prosecutors and judges persisted in their successful efforts to silence the satirist by finding his monologue performances "lacking in 'redeeming social importance' " and with "little or no literary or artistic merit."[204] In Massachusetts, a year or so later, the state's Supreme Judicial Court (perhaps inadvertently) misapplied the Brennan opinion when it declined to free the Putnam edition of *Fanny Hill* even though the Eighteenth Century erotic novel was conceded by the court's majority not to be "unqualifiedly worthless" but to possess at least *some* social value.[205] For making that mistake they would be reversed by the Supreme Court, once again in an opinion written by Justice Brennan.[206]

But in Illinois, where by that time the state's Supreme Court had held both Henry Miller's *Tropic of Cancer* and Lenny Bruce's monologues unprotected and obscene, the thrust of Brennan's opinion was promptly acknowledged by the judges sitting on the high bench who reversed both earlier decisions.[207]

In 1966, two years after he wrote the *Jacobellis/Tropic of Cancer* opinion,[208] Brennan went on to write the lead opinions for the Court in three new obscenity cases, involving: the Putnam edition of John Cleland's *Fanny Hill*;[209] three publications of Ralph Ginzburg's, including the slick hard-bound magazine *Eros*;[210] and a group of bondage and *S & M* booklets commissioned and published by a man named Samuel Mishkin.[211] The first two of these cases implicated marginal claims that the publications possessed redeeming literary, artistic, or other social value, and so placed pressure on the Brennan doctrine. In the end, Brennan used the *Memoirs/Fanny Hill* case mainly to reaffirm his *Jacobellis/Tropic of Cancer* doctrine, and to make his doctrine expressly into a three-pronged test. Brennan used the *Ginzburg* case for the less noble purpose of introducing a (merci-

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204 People v. Lenny Bruce, (unreported, undated decision and opinion; copy on file in *Cardozo Law Review* office). *See also Supreme Court Refuses Hearing for Lenny Bruce*, N.Y. Times, Jun. 2, 1965, § 1 at 41, col. 4, and *see* E. DE GRAZIA, *supra* note 12, ch. 24.

205 Attorney Gen. v. a Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 73, 206 N.E.2d 403, 406 (1965).

206 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966).

207 People v. Lenny Bruce, 31 Ill.2d 459, 202 N.E.2d 497 (1964). One of Lenny Bruce's Chicago lawyers was Professor Harry Kalven, Jr., who should have rejoiced to see his proposed revision of Roth v. United States, 354 U.S. 476 (1957), adopted by Brennan, in *Jacobellis/Tropic of Cancer*, and who promptly applied it to free Bruce's speech in Chicago.

208 Jacobellis v. Ohio, 378 U.S. 184 (1964).

209 *Memoirs*, 383 U.S. 413 (1966).

210 Ginzburg v. United States, 383 U.S. 463 (1966).

211 Mishkin v. New York, 383 U.S. 502 (1966).

fully short-lived) *pandering* doctrine (actually a *variable obscenity* doctrine) that probably was meant to defuse and deflect the enormous amount of hostility being directed at the Court by some critics—for "opening the floodgates" of the nation to pornography.

Memoirs holds interest for the light thrown upon the outer limits of Brennan's "utterly without redeeming social importance"[212] or "utterly without redeeming social value"[213] doctrine. Brennan, in this case, rephrased his doctrine.

JUSTICE WILLIAM J. BRENNAN, JR.: [T]hree 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.[214]

This drew the following comment from Kalven:

PROFESSOR HARRY KALVEN, JR.: The terms of this test suggest a metaphysics of their own. It is possible apparently to have valuable, patently offensive pruriency. More important it is possible to have all sorts of materials which are utterly without redeeming social importance or are patently offensive but are nevertheless beyond the reach of the law because they do not deal with sex. The upshot is that . . . because all these criteria must be met independently in order to satisfy the test, the concession to censorship is minimal and very little material is left within the reach of the law.[215]

In *Memoirs*, Charles Rembar tried at trial to make a credible case for *Fanny Hill*'s possession of "literary merit," "historical significance," and "psychological values" through the testimony of experts.[216] That done, it was by no means certain that the brethren—upon their independent perusal of the old book in its new G.P. Putnam's Sons covers, would agree that there was some such value. And, were they to fail exactly to apply Brennan's formula in *Jacobellis* they

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212 *Roth*, 354 U.S. at 484; *Jacobellis*, 378 U.S. at 191.

213 *Memoirs*, 383 U.S. at 418.

214 *Id.*

215 H. KALVEN, *supra* note 25, at 38.

216 *See* C. REMBAR, *supra* note 187, at 314-35 (1968); Attorney Gen. v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass 69, 206 N.E.2d 403 (1965) (Whittemore, J., dissenting), *rev'd* 383 U.S. 413 (1966).

might, instead, respond to *Fanny*'s "prurient appeal,"[217] her "patent offensiveness,"[218] and her arguably *de minimus* social value by concluding that John Cleland's 18th Century novel was nothing more than old, if well-written, "pornography." This was a conclusion that Justice Tom Clark could not escape, except that he was unable to find it even well-written—as he at length and in detail explained in his dissenting opinion.[219] Brennan initially seemed also to share the view that Cleland's novel failed to pass the *not utterly without social value* test.[220] Given that *Fanny Hill* appeared likely to strike even sympathetic readers as merely well-written pornography, it became Rembar's task to persuade Brennan and others among the brethren that there was no such thing as well-written pornography; if something was well-written, it could not be considered pornography. This eventually led to Rembar's adumbration of the meaning of "literary value," as a kind of gloss on the Brennan doctrine.

JUSTICE WILLIAM J. BRENNAN, JR.: I would like to follow this up. . . .[W]here there is testimony directed to the issue of redeeming social value, and there is critical testimony of acknowledged experts in the field, that ends any obscenity case without our ever reading the material?

CHARLES REMBAR: Yes, Your Honor. . . .

JUSTICE WILLIAM J. BRENNAN, JR.: And, that is, well-written pornography is [not] outside [the protection of the free press guarantees]?

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217 *Memoirs*, 383 U.S. at 418-19.

218 *Id.* at 419.

219 *Id.* at 441 (Clark, J., dissenting).

220 Brennan at first appeared to think that *Fanny Hill* was obscene—for flunking the *utterly without any social value* test and being otherwise patently offensive, and designed "as a whole" to arouse sexual feelings in "appeal to the prurient interests," of the reader. Initially, he voted at conference to affirm the Massachusetts Supreme Judicial Court's ruling that the 18th century English novel was not constitutionally protected but "obscene." At the Court's final conference on *Fanny Hill*, however, he voted to free the book, having apparently been talked by Fortas into voting the other way. *See* Memorandum from Fortas to Douglas dated April 15, 1966 in Private Court Papers of Justice Fortas, (filed under *Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*—Box 2, 1965 cases, in Sterling Memorial Library of Yale University):

> Ap 15, '66
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> Dear Bill:
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> . . . I think I was wrong in *Ginzburg*. I was alarmed by Brennan's vote at conf. to affirm the ban on F. H. So contrary to my principles, I went to work, suggesting the "pandering" formula to Bill (which I still think is as good as any for this cess-pool problem) and came out against Ginzburg . . . but if I had it to do over again, I'd vote to reverse as to all except his publication "Liaison." Well, live and learn . . .

CHARLES REMBAR: Your Honor, the word pornography . . .

JUSTICE WILLIAM J. BRENNAN, JR.: Doesn't it mean that? We are dealing with, I guess, by hypothesis, with what is pornographic material as to which, however, a number of acknowledged literary critics are willing to say it has some literary and therefore social value, because it is well-written.

CHARLES REMBAR: If by pornographic Your Honor means sexually arousing, or "lustful" in the terms of the decisions, the answer is yes. I think it has been clear for some time that material whose effect is to stimulate a sexual response in the normal person is not for that reason to be denounced. . . .[221]

Not for "that reason" alone—if the Brennan doctrine were to have any meaning at all. But *Fanny Hill* was, as Justice Tom Clark pointed out, *virtually* "nothing but a series of minutely and vividly described sexual episodes."[222] It certainly seemed to have no literary or artistic value approaching that, say, of *Tropic of Cancer*, or *Naked Lunch*. Such "value" as it possessed was not plainly evident upon reading the book.

Assistant Attorney General William I. Cowin (who had handled the Boston *Naked Lunch* case for the State of Massachusetts[223]) later in the argument pointed out to the Court the reason that *Fanny Hill* was arguably devoid of anything but "pornographic" value:

WILLIAM I. COWIN: [U]nlike a book such as *Tropic of Cancer*, where the reader was forced to do quite a bit of searching for what he might have felt were more interesting scenes, [*Fanny Hill*] is ideal for skimming—absolutely no searching is necessary at all. The book can be opened at any point and the so-called prurient reader will find what he is looking for.[224]

But for the expert testimony introduced by Rembar at trial, some of it rather strained,[225] it would have been understandable had the

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221 OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES 247-48. (L. Friedman ed. 1983) [hereinafter ORAL ARGUMENTS].

222 383 U.S. at 445 (Clark, J., dissenting).

223 Attorney Gen. v. A Book Named "Naked Lunch," 351 Mass. 298, 218 N.E.2d 571 (1966).

224 ORAL ARGUMENTS, *supra* note 221, at 254.

225 As, for example, the statement by one expert that Fanny was "what I call an intellectual . . . someone who is extremely curious about life and who seeks . . . to record with accuracy the

justices who read Fanny Hill[226] arrived at the conclusion that it was "utterly without social importance"[227]—in Kalven's term "worthless,"[228] which was to say, mere pornography. Rembar, during oral argument, felt obliged to contend that *Fanny Hill* had been recognized as having value by a "substantial body of expert opinion,"[229] and thereby easily met the "even the slightest"[230] or not "utterly without"[231] value test.

JUSTICE WILLIAM J. BRENNAN, JR.: But the literary value is not because it has some special moral to purvey; it is only in that it is well written, well-expressed, whatever the story may be that it tells?

CHARLES REMBAR: There are, as elements of literary value, good writing, wit, observation of human nature, the drawing of character, psychological insight, the impression on the reader that there are real people involved in this. All these things are . . .

JUSTICE WILLIAM J. BRENNAN, JR.: Doesn't that add up to something well and purposefully written? Does it add up to any more?

CHARLES REMBAR: It does, Your Honor. I would like to return to Mr. Justice Stewart's question. If there is a substantial body of expert opinion that finds value, then I say the book is entitled to the First Amendment protection.[232]

By positing first amendment protection on the presentation of a substantial body of expert opinion, however, Rembar had backed off somewhat from the argument that a modicum of value would suffice, and from a strong reading of the Brennan doctrine that to claim constitutional protection a work need only be not "utterly" without social

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details of the external world, physical sensations, psychological responses . . . an empiricist." 383 U.S. at 447 (Clark, J., dissenting).

226 Rembar, at oral argument, told the brethren they did not need to read the book, in order to reverse, but could reverse on the basis of the record below, which showed that the court had found *Fanny Hill* obscene despite its concession that the novel had "a modicum" of social value. This ultimately was the way in which Brennan disposed of the case, awarding *Fanny Hill* freedom. 383 U.S. at 420.

227 *Roth* 354 U.S. at 484; and *Jacobellis*, 378 U.S. at 191.

228 Kalven, *supra* note 74, at 15.

229 ORAL ARGUMENTS, *supra* note 221, at 249.

230 *Roth*, 354 U.S. at 484. *See also*, ORAL ARGUMENTS, *supra* note 221, at 248-49.

Jacobellis, 378 U.S. at 191.

232 ORAL ARGUMENTS, *supra* note 221, at 249.

In other words, a book ought to be found constitutionally protected and not "obscene" either if a judge (reading it) finds that it has even the slightest social importance, or if the record shows that "a substantial body of experts" assigned such value, or more, to it.

importance.[233]

JUSTICE POTTER STEWART: Because the Court as a matter of law could not hold it was utterly without social value?

CHARLES REMBAR: Yes, Your Honor, but I am not saying that if one witness comes in and says that it is a good book, that that automatically answers the question.[234]

Why not?[235] If even one credible person testified that reading *Fanny Hill* had value for him, should this not be treated as passing the requisite threshold for constitutional protection? This would be the clearest, most definite line, and the strongest reading of the Brennan doctrine; it would also be the most democratic or egalitarian way of applying the free speech principle. I had put forward such a reading in a widely distributed amicus brief that I wrote and filed on behalf of the American and Maryland Civil Liberties Unions in the Maryland *Tropic of Cancer* case,[236] and such a reading was also suggested by Douglas, dissenting in *Ginzburg v. United States*[237]—decided March 21, 1966, on the same day as *Memoirs*—in one of the most harshly criticized of Brennan's Warren Court obscenity opinions.

As was noted earlier, except to the extent that his doctrine was embedded in *Roth*—where Brennan spoke for a majority—he was never able to join more than two other justices to his *utterly without redeeming social value doctrine*,[238] which nevertheless spoke for the Court in the cases that are being discussed, being its lead opinion.[239] In *Ginzburg*, however, Brennan delivered, and five other justices signed, an opinion which seems likely to have been drafted by Warren; it made use of a doctrinal approach to the solution of obscenity

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233 *Roth*, 354 U.S. at 484; *Jacobellis*, 378 U.S. at 191.

234 ORAL ARGUMENTS, *supra* note 221, at 249.

235 I suppose the real reason why not is surely that no competent and responsible lawyer concerned with freeing from censorship a book like *Fanny Hill* is going to bank everything on the credibility of a single witness at a time when the law does not unequivocally state that one witness is enough. Books like *Fanny Hill* or *Tropic of Cancer* do not require a *one witness is enough* rule to rescue them from censorship; a book like *The Housewife's Handbook* might. So might a book like *Naked Lunch* or even *Lolita*, if the threat of censorship to them were to arise prior to or at the moment of their publication, when the work has not had a chance yet to be read and reviewed. Barney Rosset was prepared to publish *Naked Lunch* only after two reputable witnesses—Mary McCarthy and Norman Mailer—had read and praised it. E. DE GRAZIA, *supra* note 12, ch. 25.

236 Yudkin v. State, 229 Md. 223, 182 A. 2d 798 (1962). The ACLU distributed copies of this brief to all its state and local chapters and affiliated lawyers.

237 383 U.S. 463, 482 (1966) (Douglas, J., dissenting).

238 *Memoirs*, 383 U.S. at 419.

239 *See supra* note 189.

problems that is sometimes called *variable obscenity*. This looks more to the conduct of the disseminator of alleged "obscenity" and the circumstances surrounding the particular distribution than to the allegedly obscene expression itself, to determine whether the dissemination involved ought to be suppressed or punished.[240] The doctrine thus avoids any finding that a work is or is not obscene per se, and leaves open the possibility that the same work might be distributed freely, as constitutionally protected expression, under other (non-pandering) circumstances. The approach was first mentioned by Warren in his 1957 concurring opinion in *Roth*;[241] it never enjoyed plurality, or majority, status on the Court until Brennan adopted it to dispose of the issues in *Ginzburg*.[242] In fact, the criticism leveled by thoughtful critics of the Court for its action in *Ginzburg* was directed not so much against the substance of the pandering doctrine itself—although this was the basis of Douglas's dissent—as against the Court's application of the doctrine *for the first time* to Ginzburg—without notice to him through any prior decision that here was a rule of law that the publisher was bound not to violate in conducting his business—at the cost otherwise of imprisonment. The criticism, then, was in the nature of a charge that the Court had engaged in *ex post facto* lawmaking—an activity that American legislatures constitutionally are expressly forbidden from exercising, and that the courts—in obedience to the unwritten rule of law or principle of legality—ought not to engage in. On the other hand, the English common law, and our own, were created by just such retroactive judicial lawmaking, and much of our own appellate law-making process also is retroactive to a degree.

Ralph Ginzburg was deemed culpable not for disseminating obscene materials but for disseminating materials (which in the abstract probably were constitutionally protected) in a manner that was intended to arouse the interest of readers in the prurient elements they contained—to the exclusion even of their literary or artistic elements. The approach seems first to have been advanced by the American Law Institute (ALI), authors of the Model Penal Code, especially by Professor Louis Schwartz of the University of Pennsylvania Law School, and by Dean William Lockhart and Professor Robert McClure in their seminal article on the constitutional law of obscenity.[243] Professor Schwartz also seems to have been responsible for the somewhat anomalous retention by the drafters of the Model Penal Code of

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[240] *Ginzburg*, 383 U.S. at 470-76.

[241] 354 U.S. at 495-96 (Warren, C.J., concurring).

[242] 383 U.S. at 470.

[243] *See* Lockhart & McClure, *supra* note 156.

a crime of consensual (commercial) dissemination of obscene *expression*, although the crimes of consensual (non-commercial) sexual *behavior*, including homosexual sodomy, were proposed to be abandoned, as moral crimes not deserving the sanctions of the law.[244] For Schwartz and the ALI, it appears to have been chiefly the commercial aspect of moral crimes, including prostitution, that warranted their being retained in the criminal law. This, it may be remembered, also was the aspect that Warren focused on, in his obscenity opinions;[245] it also did Ginzburg in.

With five other justices joining him in *Ginzburg*, Brennan introduced what became known as the pandering doctrine, as a kind of slumbering exception to his own doctrine.[246] He held that even if a publication such as *Eros* was not utterly without redeeming social importance (and therefore presumptively protected from suppression, by the Brennan doctrine), if its publisher marketed it in ways that pandered to the prurient interests of readers, "deliberately emphasiz[ing] the sexually provocative aspects of the work, in order to catch the salaciously disposed," then a court could constitutionally take the publisher's "own evaluation at its face value" and declare the work "obscene."[247]

In a ringing dissent,[248] Douglas was concerned to show that application of the Brennan doctrine should have resulted in freedom for Ginzburg. Douglas, who concurred in the freeing of *Fanny Hill*, began by construing the pandering doctrine relied upon in Brennan's majority opinion as essentially criminalizing Ginzburg's "sexy" mail-order advertising and promotional techniques.[249]

JUSTICE WILLIAM O. DOUGLAS: Today's condemnation of the use of sex symbols to sell literature, engrafts another exception on First Amendment rights that is as unwarranted as a judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to or detracts one whit from the quality of the merchandise being offered for sale. And I do not see how it adds to or

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[244] MODEL PENAL CODE §§ 251.4(2) (commercial dissemination), 213.2 note on status of section (consensual sexual behavior) (Proposed Official Draft 1962).

[245] *See Roth* 354 U.S. at 494-96 (Warren, C.J., concurring).

[246] *Ginzburg*, 383 U.S. at 471.

[247] *Id.*, at 472.

[248] *Id.* at 482 (Douglas, J., dissenting).

[249] *Id.* at 482.

detracts one whit from the legality of the book being distributed.[250]

Next Douglas reviewed the contents of Ginzburg's publications—*Eros*, *Liaison* and *The Housewife's Handbook on Selective Promiscuity*—and pointed out why none of them could be said to fail to meet the Brennan doctrine, to be utterly without redeeming social importance—if that condition were interpreted, as Douglas thought it ought to be, as excluding the situation where even a single credible witness testified to the expression's "social importance."[251] For example, with respect to *The Housewife's Handbook*, a Baptist minister had testified at Ginzburg's trial that he found the book valuable "in my pastoral counseling and in my informal psychological counseling."[252]

REVEREND GEORGE VON HILSHEIMER III: The book is a history; a very unhappy history, of a series of sexual and psychological misadventures and the encounter of a quite typical and average American woman with quite typical and average American men. The fact that the book itself is the history of a woman who has had sexual adventures outside the normally accepted bounds of marriage . . . gives the women to whom I give the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual, and that they themselves should not be guilty because they are, what they say, sexual failures.[253]

JUSTICE WILLIAM O. DOUGLAS: I would think the Baptist minister's evaluation would be enough to satisfy the Court's test, unless the censor's word is to be final or unless the experts are to be weighed in the censor's scales, in which event one Anthony Comstock would too often prove more weighty than a dozen more detached scholars, or unless we, the ultimate Board of Censors, are to lay down standards for review that give the censor the benefit of the "any evidence" rule or the "substantial evidence" rule as in the administrative law field. . . . Since the test is whether the publication is "utterly without redeeming social importance," then I think we should honor the opinion of the Baptist minister who testified as an expert in the field of counselling.[254]

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250. *Id.*
251. *Id.* at 470.
252. *Id.* at 484-85.
253. *Id.* at 485.
254. *Id.* at 485-86 (citations omitted). Here it may be noticed that Douglas treated the two-

The Douglas position seems to me correct: a single witness to the value or importance of expression *ought* to be enough to remove it from the category of the *worthless*, to show that it is not utterly without redeeming social value.[255] In the area of speech and press, as I have earlier suggested, such a reading would reduce the room for censorship by the judiciary—as by subjudicial administrative officials including police, prosecutors and motion picture license board members—to near zero.[256]

One of the strengths of Brennan's *utterly without any* doctrine as a defense against censorship lay in its potential to eliminate the largest part of the vagueness—and therefore the potential judgmental discretion—that inheres in most legal generalization, but especially in such statutory conceptualizations as the obscene. It possessed this value because any judge purporting to apply the doctrine would be disabled to interpose his personal judgment of whether particular expressive material should be branded obscene, and denied constitutional protection—in the teeth of an assertion by *any* credible witness to the contrary. Thus, a strong view of the Brennan doctrine would postulate that even if only one person came to court to testify that *Fanny Hill* (or *Tropic of Cancer* or *The Housewife's Handbook*) was a good (*i.e.*, a *worthwhile*, not a *worthless*) book, that would put the issue of constitutional protection to rest. This would be so not simply because it would show that a book is not worthless, but because under the classical tradition of free expression, entertainment by even one person of an opinion is a necessary reason for the government to be precluded from denying or suppressing it.[257] To suppress a book which someone believes valuable to read[258] is to interfere with that person's belief in the goodness of the book, and with her or his right to express that

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justice "plurality" (*Jacobellis*) and the three-justice plurality (*Memoirs*) doctrine as the Court's doctrine.

255 *Ginzburg*, 383 U.S. at 485.

256 Equally important, perhaps, it would bring the organization of the marketplace for sexual images and ideas into conformity with that of other marketplaces, where conservatives and liberals alike agree that government should have no role to play in decisions relating to value.

257 *See, e.g.*, J.S. MILL, ON LIBERTY (D. Spitz ed. 1975).

258 However, the result in *Ginzburg*, 383 U.S. at 470-71, as Brennan pointed out, was not the suppression of any of Ginzburg's publications per se; these were constitutionally entitled—by virtue of their inherent value or importance—however minimal—to be disseminated by anyone, including Ginzburg, *on the basis of those values*. Had the Court interpreted the *utterly without any* doctrine in the "strong" way I have suggested, the testimony by anyone that any of the publications distributed had for her the value or importance of stimulating her sexual imagination, and feelings, would also satisfy the test and qualify the distribution for constitutional protection. I would argue that my strong reading of the Brennan doctrine does not reduce it to absurdity, but to conformity with the rule of law as well as elemental first amendment principles.

belief, and share it with the book's other readers. The adoption of this strong reading of the Brennan doctrine implicates a full democratization of the first amendment principle that Americans have a right to read the books and see the movies of their choice. This reading would also bring the Brennan doctrine into line with the remarkable 1969 opinion written for the Court by Justice Thurgood Marshall in *Stanley v. Georgia*.[259]

In a *Tropic of Cancer* case in Maryland, *Yudkin v. State*,[260] the amicus brief I submitted on behalf of the American Civil Liberties Union and its Maryland chapter proposed that the Brennan doctrine (as it was to that point expressed in *Roth*) be construed in this way. I also asked that the courts look to the principle adumbrated by John Stuart Mill in *On Liberty* to resolve the utterly-without-any line-drawing problem.

JOHN STUART MILL: If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[261]

The contemporary American philosopher George Dickie defines art in a similar way.[262] Dickie says a thing is art if a member of the

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[259] 394 U.S. 557 (1969). The strength, as a legal rule, of the "*utterly* without any value" doctrine, as I have glossed it, may be stressed by comparing it with the doctrine that Burger later substituted for it in Miller v. California, 413 U.S. 15 (1973)—the "without any *serious* value" doctrine. The Brennan doctrine sharply confines the adjudicative discretion of a lower court judge or other official, and rules out any weighing or balancing of a work's prurient appeal against its social value, however slight. *Serious* value, on the other hand, invites a return to the weighing or balancing act from the judge. It thereby weakens or loosens the binding quality of the legal rule embodied in the doctrine and undermines the rule of law. This presumably was Burger's intention: to give local judges, juries and other censors much more play. It would be far easier for a judge to brand as obscene a work like *Lolita*, *Fanny Hill*, *Tropic of Cancer*, *Naked Lunch*, or *The Story of O* if the judge were invited to balance such a work's supposed, or felt, prurient appeal against her own sense of the seriousness of whatever is shown at trial bearing on value. The use of a modifier like "serious" (Burger) or "substantial" (Rembar at argument) invites judicial balancing or weighing of the sort that Justice Felix Frankfurter long advocated—but it implicates judicial activity of the sort that engenders juridical rulelessness. That is what the Brennan doctrine, as interpreted here, would preclude.

[260] 229 Md. 223, 182 A.2d 798 (1962). *Yudkin* involved the reversal on appeal of the obscenity conviction of bookseller Samuel Yudkin for selling *Tropic of Cancer*. Yudkin, who lost his bookstore franchise at Washington, D.C.'s National Airport as a result of his prosecution in suburban Maryland, is one of the unsung fallen heroes of the struggle for literary freedom.

[261] J.S. MILL, *supra* note 257, at 18.

[262] G. DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS 34 (1974). Dickie's approach has been criticized by neoconservative Edward C. Banfield in his provocative book, E. BANFIELD, THE DEMOCRATIC MUSE 24-25 (1984).

Dickie's thesis should become germane to the resolution of current questions of whether

art world confers upon it "the status of candidate for appreciation."[263] Members of the art world include not only artists themselves (self-defined), but art historians, art theorists, museum and gallery directors, museum- and gallery-goers, and all others "who keep the machinery of the art world working."[264]

Applied to the machinery, or system, of freedom of literary expression more generally, the principle would be this: expression should be deemed to possess literary value sufficient to precipitate constitutional protection for a work *if* some member of the system, or component of the machinery—including not only an author (even one self-defined), but a literary critic, a literary historian, a literary theorist, a book publisher, a book seller, a book buyer, a library-goer, or anyone else who helps the machinery of freedom of literary expression going—confers upon the expression the status of a candidate for constitutional protection.

In my *Tropic of Cancer* Supreme Court briefs I had also put the doctrine forward in its "strongest" ("radical egalitarian") form; I argued that the question of whether a literary work was to be accorded constitutional protection because it was not shown to be "utterly without social importance," or worthless, could "not turn on *who* may find a work important or *where* it may be so found, but simply on *whether* anyone, anywhere, finds it to have a worth."[265] The brief continues:

> Whenever a challenged work is shown either to have secured critical attention in newspapers or journals concerned with such things, or to have been examined and found unsuppressable as obscene in any other locale or jurisdiction in the nation, or to have literary, artistic, scientific, political or other importance for persons pre-

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governmentally attacked artistic works are constitutionally protected or obscene. *See, e.g., supra* notes 170-74, 187; Tolchin, *Senate Passes Compromise on Arts Endowment*, N.Y. Times, Oct. 25, 1990, at C19, col. 1.

After the newly installed head of the National Endowment for the Arts, John E. Frohnmayer, rejected grant applications from four performance artists (declining to specify on what grounds but attributed by the art community to the performers' sexual, political and/or religious orientations, as expressed in their works), journalists raised with the artists the question of whether their work was really art. Span and Hall, *Rejected! Portraits of the Performers the NEA Refused to Fund*, Wash. Post, July 8, 1990 at G1, col 1. One rejected artist, Tim Miller, said that his work was art "because I say it is," and "because newspapers do." *Id.* Performance artist John Fleck (who urinates in a toilet and mimes vomiting into it as aspects of a performance), when asked "Why is it art?", mused, "Because art professionsals say it is . . . . I've got a pile of reviews saying how wonderful I am. It isn't for everybody. Not everybody's going to understand it, but not everybody understands modern art." *Id.*

263 G. DICKIE, *supra* note 262, at 34.

264 *Id.* at 34-35.

265 Brief of Gay Wilson Allen et. al., On Petition for Writ of Certiorari, at 13, Smith v. California, 373 U.S. 901 (1963) (No. 62-812).

> pared so to declare in open court, then it should be the plain duty of a prosecutor or judge to dismiss the criminal proceedings—at least in the absence of a charge of intent to engender specific harm. For no [judicial] findings of worthlessness can survive where persons have publicly declared or are prepared in court to declare that a worth exists for them.[266]

The conclusions that I suggested might be drawn from this analysis were that:

> [c]riminal prosecutions for obscenity are poor forums for debates over the importance of a work of literature o[r] art. Once a recognizable work is involved, every attempt by judge or jury, with or without the assistance of experts, to measure the work's obscenity or its social importance, simply mocks the constitutional tradition . . . . The permissible juridical suppression of obscenity must begin and end with the worthless.[267]

And I cited Kalven's *The Metaphysics of the Law of Obscenity*[268] in the conviction that the concept of the worthless, by which Kalven meant to elucidate the Brennan doctrine—from *Roth* to *Jacobellis* to *Fanny Hill*—provided the best assurance that the obscenity cases would not become occasions for the exercise of uncontrollable balancing acts in which administrative censors, policemen, prosecutors, lower court judges, and jurors, would have *carte blanche* to decide

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[266] *Id.* at 14. This was not to suggest that civil *in rem* proceedings, in which the book is the "defendant"—as was the case with the Massachusetts *Fanny Hill* case, *Attorney Gen. v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 206 N.E.2d 403 (1965), *rev'd* 383 U.S. 413 (1966); and the Florida *Tropic of Cancer* case, *Grove Press, Inc. v. State*, 156 So. 2d 537 (Fla. Dist. Ct. App. 1963), *rev'd sub nom. Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964)—contribute any more to "debates" over a work's importance, as I noted in the Brief of Gay Wilson Allen, et al., On Petition for Writ of Certiorari, at 15, n. 40, Smith v. California, 373 U.S. 901 (1963) (No. 62-812), pointing out that they too "invite censorship." *Id.*

Were my suggested strong reading of the Brennan doctrine to be used with the Burger revision of that doctrine in Miller v. California, 413 U.S. 15 (1973) (*i.e.*, once a recognizable *serious* work of literature or art is involved), prosecutions such as those directed against the Contemporary Arts Center and the museum's director, and against 2 Live Crew, would be thrown out of court by the judge before any trial. Both the Contemporary Arts Center and its director, as well as the members of 2 Live Crew, were acquitted of obscenity charges. *See, supra* notes 172-73; *see also* Harrison & Parachini, *Jurors Clear Gallery Director of Obscenity*, L.A. Times, Oct. 6, 1990, at A1, col. 3; Rimer, *Rap Band Members Found Not Guilty In Obscenity Trial*, N.Y. Times, Oct. 20, 1990, at § 1; Part 1, p.1, col. 1. The owner of a Florida record store, however, was convicted (on obscenity charges) for *selling* 2 Live Crew's album. *See, e.g.*, Pareles, *Store Owner Convicted of Obscenity in Album Sale*, N.Y. Times, Oct. 4, 1990, at A18, col. 4. These matters are discussed in E. DE GRAZIA, *supra* note 12, ch. 30.

[267] Brief of Gay Wilson Allen et al., On Petition for Writ of Certiorari, at 15, Smith v. California, 373 U.S. 901 (1963) (No. 62-812).

[268] Kalven, *supra* note 74.

whether particular literary or artistic works were constitutionally protected, or obscene.

Whatever was in Brennan's mind at the time of the oral arguments in *Fanny Hill*, by the time he wrote his final draft of the majority opinion for the case, he had adopted both what I have termed a strong reading of his own doctrine and the argument laid out in Rembar's briefs, that if *Fanny Hill* were not unqualifiedly worthless—if it had even a modicum of social value, as the Massachusetts Supreme Court conceded—this was sufficient to end the case in *Fanny Hill*'s favor. Thus, when Brennan concluded in *Memoirs* that under the law the book was entitled to be free, he did not do so—as he had in *Jacobellis/Tropic of Cancer*—on the basis of his own conclusion that the 18th-century Cleland novel wasn't obscene because it was not utterly without social value. Rather, Brennan ruled in the *Fanny Hill* petitioners' favor because the Supreme Judicial Court of Massachusetts itself (in its written opinion) had found that the book had a modicum of value. This, in Brennan's mind, was all that was required to end the case in *Fanny Hill*'s favor. Brennan, repudiating the Massachusetts court's determination that having minimal literary value did not necessarily mean the work had social importance, took the opportunity to reemphasize that his utterly-without-any formulation was meant to rule out *any* judicial juggling of prurient appeal and social importance; it allowed him to give the Brennan doctrine a strong reading. A weak reading had been given the Brennan doctrine by the Massachusetts Supreme Judicial Court in *Memoirs*, where the court said: "We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene."[269]

JUSTICE WILLIAM J. BRENNAN, JR.: The Supreme Judicial Court of Massachusetts erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. Hence, *even on the view of the court below* that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an errone-

[269] *Memoirs*, 349 Mass. at 73, 206 N.E.2d at 406.

ous interpretation of a federal constitutional standard.[270]

PROFESSOR HARRY KALVEN, JR.: There is a sense in which this ringing declaration displays high diplomacy. The Court carefully avoided expressing its own opinion on the status of *Fanny Hill*; it is enough that the court below found it had a modicum of value. Nevertheless, the fact remains that the Court braved public displeasure to announce to the world that *Fanny Hill* was not obscene.[271]

PAUL BENDER: You have to applaud Brennan for trying so hard to fit within the traditional values. With *Times v. Sullivan*, he tried to explain what it was about the First Amendment that led to this dramatic change; and in *Roth* he tried to explain it also; and that was very, very commendable. And those opinions were the very beginnings of very large developments. So Brennan is *the* major figure on the Court today, without any doubt, and one of the most major figures over the last twenty-five years.[272]

Others went further in their estimates of the social importance of Justice Brennan's work:

JUDGE JOHN J. GIBBONS: As I look back over . . . the [then] twenty-eight years of [Brennan's] service as a Supreme Court Justice, he appears to me far more humane than Holmes, broader in outlook than Brandeis, more practical and flexible than Black, a finer scholar than Warren, more eloquent than Hughes, more painstaking than Douglas, and more gracious than any of them.[273]

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[270] *Memoirs*, 383 U.S. at 419-20 (footnote omitted, emphasis added). This marked, I believe, the first time that Brennan incorporated Kalven's concept of the "worthless" in refining his "utterly without any" doctrine.

[271] H. KALVEN, *supra* note 25, at 40.

[272] Interview with Paul Bender, professor, and at the time dean, at Arizona State University, in Philadelphia (Mar. 16, 1985).

[273] Gibbons, *Tribute to Justice Brennan*, 36 RUTGERS L. REV. 729, 739 (1984).