JUSTICE BRENNAN AND THE PROBLEM OF OBSCENITY

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During nearly thirty-four years on the Supreme Court, Justice William Brennan, Jr. had an enormous impact on constitutional jurisprudence. A powerful judicial activist appointed by a conservative president, Brennan was a consistent champion of freedom of expression, of strict separation of church and state, of the rights of criminal defendants, and of equality for the poor, racial minorities and women. He also wrote more opinions than any other justice on the problem of obscenity. Brennan was "the tribunal's foremost expert on . . . the vexatious line between freedom of artistic expression and proscribable obscenity . . . ."[1]

Few public policy problems proved as troublesome or judicially divisive as that of obscenity. This was especially evident during the Warren Court period, when Justice Brennan was the Court's chief spokesperson. Despite widespread agreement that most sexually oriented expression deserved constitutional protection, Brennan was unable to maintain majority support for the approach he authored in the landmark *Roth v. United States* and *Alberts v. California* (*Roth-Alberts*) opinion.[2] The result was confusion as obscenity cases became characterized by an absence of a majority position, the proliferation of concurring and dissenting opinions and an increasing reliance on summary per curiam

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1 HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 264 (2d ed. 1985).

2 354 U.S. 476 (1957). Both Roth v. United States and Alberts v. California were heard and decided together. In *Roth*, Roth operated an "adult" book store and solicited sales by mass mailing advertising circulars and other material. Roth was convicted under the federal obscenity statute, which precluded the mailing of "obscene, lewd, lascivious, or filthy" material. 18 U.S.C. § 1461 (1988). In *Alberts*, Alberts operated a mail order business for similar material and was convicted of a misdemeanor under a similar state statute. Justice Brennan, joined by Justices Frankfurter, Burton, Clark and Whittaker, held that the First Amendment's protection of speech and the press did not extend to obscenity. Based upon the facts before the Court, Chief Justice Warren concurred with the majority's holding, but cautioned against applying the decision too broadly. *Id.* at 494-95 (Warren, C.J., concurring).

Justice Harlan concurred in affirming Albert's conviction by applying a due process analysis, but dissented on Roth's conviction, arguing that the majority's "generalizations" were overly broad and could apply to much of the world's great literature. *Id.* at 507 (Harlan, J., concurring and dissenting).

judgments instead of formal written opinions.[3] As one critic observed, the law of obscenity turned "into a constitutional disaster area."[4]

Justice Brennan would not necessarily disagree with this assessment. In a 1986 interview, Brennan conceded that one of his major "disappointments" was the Court's inability to find "a solution to the definitional horror of obscenity" and that maybe "it has been my fault."[5] Recently, Brennan recounted that he "put sixteen years into that damn obscenity thing. . . . I tried and I tried, and I waffled back and forth, and I finally gave up."[6] Thus, beginning with the 1973 *Miller v. California*[7] and *Paris Adult Theatre I v. Slaton*[8] decisions of the more conservative Burger Court, Brennan stopped trying to formulate a definitional standard for obscenity. "If you can't define it," explained Brennan, "you can't prosecute people for it. And that's why . . . I finally abandoned the whole effort."[9]

With the appointment of four new and more conservative Justices, the Burger Court was able to achieve majority support

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[3] For a discussion of the Court's handling of post-*Roth-Alberts* obscenity cases, see Rodney A. Grunes, *Obscenity Law and the Justices: Reversing Policy on the Supreme Court*, 9 SETON HALL L. REV. 403 (1978).

[4] C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, *in* SUP. CT. REV. 59 (Philip B. Kurland ed., 1966).

[5] Jeffrey T. Leeds, *A Life on the Court*, N.Y. TIMES, Oct. 15, 1986, § 6 (magazine), at 25, 79.

[6] Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45, 56.

[7] Miller v. California, 413 U.S. 15 (1973). Miller was convicted under a state obscenity statute for mass-mailing advertisements for illustrated "adult" books that depicted a variety of sexual activities. Chief Justice Burger, in a five-four decision, articulated the obscenity test to be "whether (a) 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 24 (citations omitted).

Justice Brennan, in dissent, did not address the obscenity issue, finding the statute unconstitutional under the overbreadth doctrine. *Id.* at 47 (Brennan, J., dissenting).

[8] 413 U.S. 49 (1973). *Paris Adult Theatre I*, handed down with *Miller*, upheld a Georgia statute regulating adult films because the statute comported with the *Miller* standards. Justice Brennan, taking a "significant departure" from the *Roth* approach, dissented because of the inability to clearly delineate the line between protected and unprotected speech. *Id.* at 86-93 (Brennan, J., dissenting). Moreover, Brennan found that the vagueness of the various approaches promulgated by the Court raised problems of due process and overbreadth and created indecision in the lower courts.

[9] Hentoff, *supra* note 6, at 56.

for a new definitional approach to obscenity. Having determined that the crime of obscenity could not be defined with precision and that statutes seeking to punish this offense were thereby unconstitutionally vague, Justice Brennan now became the leader of the dissenters.

Justice Brennan would repeat this argument in numerous dissenting opinions during the Burger and Rehnquist Court periods, often quoting the precise language from his dissent in *Paris Adult Theatre I v. Slaton*.[10] He has written that dissents are an important part of the judicial process "not only by directing attention to perceived difficulties with the majority's opinion, but . . . also by contributing to the marketplace of competing ideas."[11] Moreover, at least one commentator has stated that Brennan's use of the repeated dissent "is a mark of judicial integrity."[12]

This article examines Justice Brennan's transformation from primary advocate to leading dissenter in obscenity cases decided during the Warren, Burger and Rehnquist Courts. It is suggested that Brennan's analysis of his contributions during the Warren Court period is basically correct. His reliance upon vague and imprecise constitutional standards undermined his own commitment to First Amendment freedoms. While Brennan never adhered to the position that the First Amendment absolutely prohibited Congress, and also the states through the Fourteenth Amendment, from enacting laws abridging freedom of expression, his balancing of individual and societal interests seemed to assume that First Amendment freedoms were in a preferred position. As he stated in *Roth v. United States*:

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. . . . The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[13]

This article examines and critiques the argument that the Burger Court's anti-libertarian approach to obscenity can be attributed, in part, to Justice Brennan's failure as a coalition builder during the

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[10] *See infra* notes 68-73 and accompanying text.

[11] William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986).

[12] Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307, 327 (1988).

[13] Roth v. United States, 354 U.S. 476, 488 (1957) (citations omitted).

Warren Court period.[14]

Finally, the article argues that Justice Brennan's dissenting position during the Burger and Rehnquist Court periods was essentially correct: it is not possible to provide a definition or test that enables a judge or other decision maker to clearly distinguish between sexually explicit material that is entitled to First Amendment protection and sexually explicit material that is subject to government regulation or suppression because it is obscene.

I. THE WARREN COURT LEGACY

Justice Brennan's 1957 *Roth-Alberts* opinion is the first major obscenity decision of the Warren Court and the last instance where a majority of the Justices subscribed to his definitional approach for obscenity. While Brennan's approach proved to be imprecise and confusing, he is not entirely to blame for the Court's inability to agree on a common approach to resolving disputes in this policy area. One problem, as Justice Harlan noted, is that obscenity is an "exquisitely vague crime."[15] The federal obscenity statute, for example, prohibits the mailing of "obscene, lewd, lascivious, or filthy" material.[16] Moreover, as is evident in the numerous concurring and dissenting opinions of the Warren Court, what is obscene for one justice might be perceived as important artistic expression by another. Finally, one commentator suggests that "[m]uch of the confusion resulted from the fact that . . . Chief Justice [Warren] did not play his usual leadership role. Warren was ambivalent in obscenity cases."[17]

Brennan also was ambivalent. Unwilling to support Justices Black and Douglas, the literalists on the Court, Brennan maintained in *Roth-Alberts* that obscenity could be distinguished from other categories of speech and that only the latter were protected under the First Amendment.[18] Having adopted this "two-tier"

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[14] "[T]here is evidence that Brennan failed unnecessarily to build majority opinion coalitions. By giving short shrift to the views of such justices as Harlan and Chief Justice Warren, Brennan may have overlooked opportunities for a flexible, yet essentially libertarian, compromise position." Edward V. Heck, *Justice Brennan and the Development of Obscenity Policy by the Supreme Court*, 18 CAL. W. L. REV. 410, 425 (1982).

[15] *See* Stanley Fleishman, *Obscenity: The Exquisitely Vague Crime*, LAW IN TRANSITION QUARTERLY II (Spring 1965) 97-110.

[16] 18 U.S.C. § 1461 (1988).

[17] BERNARD SCHWARTZ, SUPER CHIEF 221 (1983).

[18] 354 U.S. 476, 481 (1957).

approach,[19] Brennan argued that "[a]ll ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are protected against governmental restraint.[20] On the other hand, Brennan contended, obscene ideas were subject to federal and state regulation because they were, by definition, "utterly without redeeming social importance."[21]

In addition, Brennan provided mixed signals in *Roth-Alberts* by appearing to say one thing while doing another. Using very permissive and libertarian rhetoric, Brennan wrote that "sex and obscenity are not synonymous," and that "the portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[22] Yet, the Brennan-led majority articulated a standard for determining obscenity that resulted in the affirmation of convictions under state and federal obscenity statutes.

Finding none of the older First Amendment tests applicable in *Roth-Alberts*, Justice Brennan's task was to develop a standard that would enable others to clearly distinguish unprotected obscene material from constitutionally protected sexual expression. Joined by conservative Justices Frankfurter, Burton, Clark and Whittaker, Brennan proposed the following test: "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[23]

Ironically, this test was intended to be more permissive than the popularly used *Regina v. Hicklin*[24] test, which judged obscenity by the tendency of isolated passages of the material to corrupt the minds of those who are susceptible to such influences, especially young people. While the substitution of "dominant" effect for "isolated passages" and adult values for juvenile values were improvements, Justice Brennan seemed wedded to the underlying premise of *Hicklin* that government could regulate the sexu-

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19 Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV., 1, 10.

20 Roth v. United States, 354 U.S. 476, 484 (1957).

21 *Id.*

22 *Id.* at 487.

23 *Id.* at 489.

24 Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). Hicklin was accused of selling pamphlets containing theological extracts on the practices of the Roman Catholic Church, which extracts the court found to be obscene. While the reported case focused on whether Hicklin had the *mens rea* required under the statute, the *Hicklin* definition of obscenity became the standard.

ally impure thoughts of its citizens. After all, Brennan defined expression that appealed to the prurient interest as "material having a tendency to excite lustful thoughts."[25]

Moreover, Brennan's reliance on such vague and generally undefined terms as "average person" and "contemporary community standards" seemed to lack the precision necessary for the protection of non-obscene or "borderline" sexual material. Yet, Chief Justice Warren, who as part of the majority voting coalition selected Brennan to write the opinion, is reported to have said that "[i]t's the best we could do with what we had."[26]

Despite considerable criticism from the scholarly community,[27] it was not until the 1964 case of *Jacobellis v. Ohio*[28] that Justice Brennan was willing to re-examine the *Roth-Alberts* standard. Two years earlier, Brennan had refused to join Justice Harlan's attempt to refine *Roth-Alberts* by requiring both "patent offensiveness" and appeal to the "prurient interest" for a determination of obscenity.[29] Brennan found "patent offensiveness" to be similar to "hard-core" pornography, which he found impossible to define with precision. In a note to Harlan before the opinion was published, Brennan stated that "we ought let the widespread ferment continue a bit longer in legal periodicals and courts over the soundness and meaning of the *Roth* test before we re-examine it."[30]

There was no "opinion of the Court" in *Jacobellis*.[31] Perhaps

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25 Roth v. United States, 354 U.S. 476, 487 n.20.

26 SCHWARTZ, *supra* note 17, at 220.

27 *See* Simon Roberts, Comment, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677, 679 (1989) (contending that *Roth* resulted from, *inter alia*, "a faulty theory of constitutional interpretation"); C.L. Gaylord, *The Writing on the Wall*, 89 CASE & COM., July-Aug. 1984, at 48 (The *Roth* obscenity test failed to protect "the young, the immature, and the otherwise susceptible."); Robert E. Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 B.Y.U. L. REV. 247, 249 (*Roth* did not result in suppression of obscenity but, instead, stimulated production of sexually explicit material); William B. Lockhart and Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 49-50 (1960) (questioning the degree of causal relationship required between the obscene material and the prurient interest, the "average person" standard and the geographical bounds of the "community" whose standards are to be evaluated).

28 378 U.S. 184 (1964).

29 Manual Enter., Inc. v. Day, 370 U.S. 478 (1962). Justice Harlan defined "patent offensiveness" to mean a quality that "affront[s] current community standards of decency." *Id.* at 482. Justice Brennan concurred with the majority decision that reversed a conviction based upon 18 U.S.C. § 1461, but argued in his concurrence that the Post Office lacked the censorship power to decide what was obscene material. 370 U.S. at 519 (Brennan, J., concurring).

30 SCHWARTZ, *supra* note 17, at 436.

31 Justice Brennan was joined in the opinion only by Justice Goldberg. Justices

this should have been expected because three of the conservative Justices who had supported Brennan in *Roth-Alberts* (Frankfurter, Burton and Whittaker) had been replaced by the more liberal Arthur Goldberg, Potter Stewart and Byron White.[32] Because Justice Brennan had applied *Roth-Alberts* in an increasingly permissive manner since 1957,[33] however, the building of a new majority coalition for the protection of sexually oriented expression seemed possible.

Although six Justices agreed that Ohio courts had erred in finding the critically acclaimed motion picture *Les Amants* obscene, only Justice Goldberg accepted Justice Brennan's interpretation that a national community, rather than a state or local community, should be used in applying the "contemporary community standards" element of the *Roth-Alberts* test.[34] Two dissenters, Chief Justice Warren and Justice Clark were especially unhelpful. While willing to support *Roth-Alberts* "until a more satisfactory definition evolved,"[35] the dissenters argued for the use of a local standard instead of a national standard. The dissenters viewed a national standard to be unprovable. Also, it was unclear whether they accepted Justice Brennan's newly stated view that the test for obscenity should be applied only after material had been found to be "utterly without redeeming social importance" and went "substantially beyond customary limits of candor."[36]

By *Jacobellis*, it was clear that the Justices of the Warren Court were hopelessly divided on how to determine obscenity. While Justice Brennan was now willing to use *Roth-Alberts* as a tool for promoting libertarian outcomes, he was unable to win much support from either liberal or conservative Justices. Justices Douglas and Black, for example, rejected Brennan's "two-tier" approach. As absolutists, they argued that virtually all sexually oriented ex-

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Black and Douglas concurred in the result and Justices Stewart and Goldberg each concurred separately. Chief Justice Warren and Justice Clark joined in a dissenting opinion and Justice Harlan dissented separately.

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

[33] *See, e.g.*, Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964) (one paragraph per curiam opinion reversing obscenity conviction in 156 So. 2d 537 (Fla. Dist. Ct. App. 1963)); One, Inc. v. Olesen, 355 U.S. 371 (1958) (one paragraph per curiam opinion reversing obscenity conviction in 241 F.2d 772 (9th Cir. 1957)); *and* Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958) (one paragraph per curiam opinion reversing obscenity conviction in 249 F.2d 114 (D.C. Cir. 1957)).

[34] Jacobellis v. Ohio, 378 U.S. 184, 198 (1963) (Goldberg, J., concurring).

[35] *Id.* at 200 (Warren, C.J., dissenting).

[36] *Id.* at 191.

pression should be granted First Amendment protection.[37] Justice Stewart, on the other hand, found vagueness and ambiguity in the *Roth-Alberts* obscenity test. He contended that only "hard-core" pornography was not protected, a standard similar to the one Justice Harlan applied in federal, but not state, obscenity cases.[38] With Justice White preferring the original *Roth-Alberts* test[39] and Chief Justice Warren and Justice Harlan disagreeing with the disposition in *Jacobellis*, it does not appear that Justice Brennan had any real opportunity to build a majority coalition.

Justice Brennan's final attempt to win majority support for *Roth-Alberts* came in 1966 in *Memoirs v. Massachusetts*.[40] In what amounted to a major reformulation, Justice Brennan, joined by Justices Fortas and Chief Justice Warren, stated that each of the following elements had to "coalesce" for expression to be suppressed as obscene: "(a) the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex; (b) the material [must affront] contemporary community standards relating to the description or representation of sexual matters; and (c) the material [must be] utterly without redeeming social value."[41]

The elevation of "redeeming social value" to co-equal status is the most significant aspect of Brennan's reformulation. Because virtually all expression has at least some minimal "social value," it would appear that this test was designed to be far more protective of sexually oriented material than was the original *Roth-Alberts* formula. Thus, while the Massachusetts courts in *Memoirs* may have correctly found John Cleland's book, *Fanny Hill*, obscene under the *Roth-Alberts* analysis, it would now be constitutionally protected under the *Memoirs* reformulation.

Like *Jacobellis*, the *Memoirs* decision produced no majority viewpoint. At the conference stage, however, Brennan, Warren, Clark, Harlan and White voted to affirm the finding of obscenity. Justice Fortas' impassioned appeal that such a ruling would lead to a new wave of "bookburning," however, convinced Brennan to change sides and write an opinion to reverse. While Brennan was able to persuade Chief Justice Warren to join his reversal,

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37 *Jacobellis*, 378 U.S. at 198 (Douglas and Black, J.J., concurring).

38 *Id.* at 197 (Stewart, J., concurring). Justice Stewart declined to define "hard-core pornography," instead stating that "I know it when I see it." *Id.*

39 *See* Memoirs v. Massachusetts, 383 U.S. 413, 462 (1966) (White, J., dissenting).

40 Memoirs v. Massachusetts, 383 U.S. 413 (1966).

41 *Id.* at 418.

Brennan's switch cost him the support of Clark, Harlan and White.[42]

THE VARIABLE OBSCENITY APPROACH

Following his inability to secure majority support in *Memoirs*, Justice Brennan abandoned his efforts to reformulate *Roth-Alberts* to mobilize a new consensus. Instead, he joined a series of summary per curiam judgments that enabled the generally liberal Justices to provide protection for sexual expression under each of their separate tests for determining obscenity.[43] In addition, Brennan became the Court's spokesperson for a "variable" approach under which the obscenity of material could be determined by the particular circumstances surrounding its dissemination and by the material's effect upon the audience that the material was designed to reach.

Although Chief Justice Warren had suggested a "variable" approach since *Roth-Alberts*,[44] it was not until the *Memoirs* decision that Justice Brennan accepted the view that "the circumstances of production, sale, and publicity" of the material are relevant to the determination of obscenity.[45] A majority of the Warren Court adopted the "variable" approach in two highly controversial decisions decided on the same day as *Memoirs*. In *Ginzburg v. United States*,[46] Justice Brennan, joined by Chief Justice Warren

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42 SCHWARTZ, *supra* note 17, at 619.

43 Most of the opinions simply cited the Court's per curiam opinion in Redrup v. New York, 386 U.S. 767 (1967), in which the different views of the Justices had been summarized. *See* Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Cain v. Kentucky, 397 U.S. 319 (1970); Carlos v. New York, 396 U.S. 119 (1969); Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968).

44 Chief Justice Warren first proposed a "variable" approach in *Roth-Alberts*. In *Roth-Alberts*, Warren limited his concurrence to the facts before the Court, arguing that "[t]he line dividing the salacious or pornographic from literature or science is not straight and unwavering. . . . [T]he same object may have a different impact, varying according to the part of the community it reached." *Roth-Alberts*, 354 U.S. at 495 (Warren, C.J., concurring).

45 Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966).

46 Ginzburg v. United States, 383 U.S. 463 (1966). Justice Black dissented on the grounds that *all* expression was protected by the First Amendment and, that notwithstanding, the majority's "vague and meaningless" criterion subjected defendants to the unbridled discretion of the courts. *Id.* at 476-78 (Black, J., dissenting). Justice Douglas dissented because of his belief that all expression was constitutionally protected. *Id.* at 491 (Douglas, J., dissenting).

Justice Harlan rejected the majority's conclusions, finding that intent had no relation to the issue of whether particular material was obscene. *Ginzburg*, 383 U.S.

and Justices Fortas, Clark and White, held that publisher intent to appeal to prurient interests, as revealed by advertising and marketing techniques, was a relevant factor in determining whether material was legally obscene. As a result, material that was not obscene under *Roth-Alberts* or some other test could still be found obscene if "commercial exploitation," i.e., "pandering," was evident in the advertising or distribution practices of the publisher. Thus, by mailing the materials from Intercourse and Blue Ball, Pennsylvania, and Middlesex, New Jersey, Ginzburg was representing his sexual expression as pornographic; the "leer of the sensualist" had permeated his advertising.[47]

This same five-Justice majority held, in *Mishkin v. New York*,[48] that the "average person" part of *Roth-Alberts* did not apply when material was designed to appeal to the prurient interest of deviant groups.[49] Writing for the majority, Justice Brennan maintained that "the [*Roth-Alberts*] prurient-appeal requirement . . . is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."[50] Thus, by 1966, Brennan had marshalled majority support for placing limitations on the commercial exploitation of sex and material which appealed to the prurient interest of nonconforming sexual groups.

Apparently, Justice Brennan and Chief Justice Warren worked hard to win majority support in *Ginzburg* and *Mishkin*. Justices White and Clark, for example, were persuaded by Brennan to join his majority opinion in both cases after Brennan agreed, at the draft stage, to move his reformulated definition of obscenity from the *Ginzburg* to the *Memoirs* opinion. Justice Fortas succumbed to Warren's lobbying to join the majority in *Ginzburg* on the basis of Brennan's pandering rationale instead of the new *Memoirs* test.[51] The Chief Justice was especially pleased with Brennan's coalition-building. Following Brennan's delivery of the *Memoirs*, *Ginzburg* and *Mishkin* opinions, Warren is reported to have passed him the following note: "You have made a great

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at 497 (Harlan, J., dissenting). Justice Stewart agreed with the dissenters and found that the Court lacked the constitutional power to arbitrarily choose what works qualified as obscene because "the First Amendment protects us all with an even hand." *Id.* at 501 (Stewart, J., dissenting).

47 *Id.* at 468.

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

49 The allegedly obscene material in question focused on sado-masochism, fetishism and homosexuality. *Id.* at 505.

50 *Id.* at 508.

51 SCHWARTZ, *supra* note 17, at 619-22.

contribution to the jurisprudence of our Court and your announcement was superb."[52]

Justice Brennan made one additional contribution to the Court's development of a "variable" approach to obscenity when, in *Ginsberg v. New York*,[53] he recognized the special governmental interest in protecting children. Writing for a six-Justice majority,[54] Brennan stated that, with respect to sexual material, it was constitutionally permissible to place greater restrictions on young people's rights than those placed on adults' rights.[55] Moreover, it was entirely "rational" for a state to conclude, even without empirical evidence of causation, that exposure to obscenity has a detrimental effect on the moral development of minors. Thus, Brennan extended the *Mishkin* logic to juveniles. Material that appealed to the prurient interest of the average minor could be regulated, even though it failed to appeal to the prurient interest of the average adult.

Somewhat surprisingly, Justice Brennan did not reach the First Amendment issues in *Stanley v. Georgia*,[56] the last major obscenity decision of the Warren Court.[57] Stanley was convicted under a state statute for possessing three pornographic films in his home for his own personal use. In establishing "privacy" as another special context under the "variable obscenity" jurisprudence, Justice Marshall spoke for a five-Justice majority when he stated that "the mere private possession of obscene matter cannot be made a crime."[58]

Justice Marshall's opinion seemed to undermine the underlying assumption of *Roth-Alberts* that obscenity could be regulated because of the harm caused by exposure to material that appealed to the "prurient interest." For Marshall, there were no

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52 *Id.* at 623.

53 Ginsberg v. New York, 390 U.S. 629 (1968). Ginsberg and his wife were convicted of selling allegedly obscene material to a 16-year old boy in violation of a state statute preventing the sale of material containing nudity to minors under the age of 17.

54 Justice Brennan was joined by Chief Justice Warren and Justices White and Clark. Justices Harlan and Stewart each concurred separately. Justices Douglas, Black and Fortas dissented.

55 390 U.S. at 638.

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

57 The material was found during a search of Stanley's home after a search warrant was issued based on Stanley's alleged gambling activities.

58 *Id.* at 559. Justices Stewart, Brennan and White concurred in the result, arguing that the material had been obtained in violation of Stanley's Fourth Amendment rights. Justice Black concurred separately on the grounds that mere possession of obscene material could not be a crime.

First Amendment grounds for protecting and preserving individual and public morals by trying to control the content of a person's thoughts.[59] The only legitimate government concerns were the protection of non-consenting adults from forced exposure to obscenity and the protection of juveniles.[60] While Brennan agreed on the importance of protecting the well-being of juveniles, he was unwilling to abandon the rationale of *Roth-Alberts*. To Brennan, obscene material was not protected under the First Amendment even though possession and use by consenting adults in the privacy of their homes was protected.[61]

II. BRENNAN AS DISSENTER I: THE BURGER COURT PERIOD

On June 21, 1973, sixteen years after the landmark *Roth-Alberts* decision, Chief Justice Warren Burger announced that a majority of the Court had agreed on a new and more restrictive approach to defining obscenity. The new policy was set forth in five opinions,[62] all decided by a five-Justice majority consisting of the four Nixon appointees (the Chief Justice, Justices Harry Blackmun, Lewis Powell and William Rehnquist) and Warren Court holdover Byron White. There were three main elements to the Burger Court's approach: the abandonment of the permissive standards and rationales developed during the Warren Court period, the establishment of a freedom-restricting test for determining obscenity, and a commitment to defer to federal and state legislatures in their regulation of obscenity.

The reversal of Warren Court policy and the establishment of a more restrictive approach to obscenity regulation was first announced in *Miller v. California*.[63] Although the Chief Justice praised the original *Roth-Alberts* formula, he argued that the Court had "veered sharply away" from this policy in *Memoirs* by requiring an independent and affirmative determination that the

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59 *Stanley*, 394 U.S. at 565-66.

60 *Id.* at 567.

61 *See* United States v. Reidel, 402 U.S. 351 (1971) (Brennan joining in the opinion) *and* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (Brennan joining in the opinion).

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

63 413 U.S. 15 (1973). Miller was convicted under a California statute, that incorporated the *Memoirs* obscenity test, for mass mailing advertisements for "adult" illustrated books.

material was "*utterly* without redeeming social value."[64] This requirement, reasoned Chief Justice Burger, made it "virtually impossible" to prove obscenity.[65]

In place of Brennan's *Memoirs* standard, the *Miller* majority proposed the following new test for determining obscenity:

> (a) whether "the average person applying contemporary standards" would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[66]

All three parts of this test must be satisfied to find obscenity. Thus, explained the Chief Justice, a work that appears to be patently offensive and prurient, such as a medical textbook with graphic descriptions and illustrations of the human anatomy, could still qualify for First Amendment protection if one of the "serious" values was present.

In addition to narrowing the boundaries surrounding constitutionally protected sexual material, Chief Justice Burger claimed that, by emphasizing sexual conduct and substituting "serious value" for the "utterly without redeeming social importance" part of *Memoirs*, the *Miller* majority brought greater certainty to the law. Finally, Burger claimed that greater clarity would be achieved by allowing the use of state and local community standards instead of national standards. "It is neither realistic nor constitutionally sound . . .," stated Burger, "[to require] that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[67]

The rationale for the Burger Court's more restrictive obscenity policy was provided in *Paris Adult Theatre I v. Slaton*[68] in which the defendant showed pornographic films in public theaters and restricted access to adults over the age of twenty-one. Here, the same five-Justice majority "categorically" rejected the view that material could acquire constitutional protection by limiting the intended audience to consenting adults. According to Chief Justice Burger,

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64 *Id.* at 21-22 (emphasis in original).

65 *Id.* at 22.

66 *Id.* at 24 (citations omitted). Chief Justice Burger expressly rejected the "utterly without redeeming social value" factor, noting that no more than three Justices had ever subscribed to that test.

67 *Id.* at 32.

68 413 U.S. 49 (1973).

"the social interest in order and morality," the good health of society as a whole and "protect[ing] the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition" are legitimate governmental interests that are furthered by regulating obscenity.[69] Finally, the Chief Justice posited that legislatures could reasonably conclude that exposure to "obscene" materials may produce antisocial behavior.[70]

Joined by Justices Marshall and Stewart, Justice Brennan dissented from these pronouncements. Although he maintained that there was a class of expression that was obscene and thus not entitled to First Amendment protection, Brennan now acknowledged the futility of his sixteen-year attempt to formulate a precise test or definition for obscenity. In what was to become his standard response in future obscenity cases, Justice Brennan summarized the undesirable consequences of failing to provide a satisfactory obscenity test when he stated:

> I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms.[71]

Therefore, still unable to subscribe to the absolutist jurisprudence of Justice Douglas, Brennan abandoned his own reformulations of *Roth-Alberts* and rejected what he described as the Burger Court's "restatement" of his original test. All of the tests, including his own, Brennan asserted, were unacceptable under the "void for vagueness" doctrine.[72]

Justice Brennan also disagreed with the Burger Court's expansive justifications for government limitations on sexual expression and indicated support, albeit belated, to the limited state interest policy advanced by Justice Marshall in *Stanley*. Explaining his conversion, Brennan stated:

> In short, while I cannot say that the interests of the [s]tates — apart from the question of juveniles and unconsenting adults — are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even

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69 Paris Adult Theatre I v. Slaton, 413 U.S. at 61-64 (citations omitted).

70 *Id.* at 61, 63.

71 *Paris Adult Theatre I*, 413 U.S. at 103 (Brennan, J., dissenting).

72 *Id.* at 83-84 (Brennan, J., dissenting).

> of unprotected material to consenting adults. . . . I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the [s]tate and [f]ederal [g]overnments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscène" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.[73]

These ideas formed the basis of Brennan's disagreement with the Burger Court's resolution of the three obscenity cases decided with *Miller* and *Paris Adult Theatre I*. Specifically, Brennan rejected the extension of the *Miller* test to non-illustrated sexually explicit books,[74] the interstate transportation by common carrier of obscene material for use in the privacy of the home[75] and the importation of obscene matter designed for personal use and possession.[76]

As Justice Brennan predicted, the new *Miller* formula did not end what he called "institutional harms" — the Court's continuing involvement with the obscenity issue and the difficulties encountered by other courts in comprehending and applying Supreme Court guidelines. In *Hamling v. United States*,[77] for example, the Burger Court held that the lack of specificity in the federal obscenity statute with respect to prohibited sexual conduct was acceptable under *Miller* and that "local" community standards should be used in applying *Miller* to federal obscenity disputes.

Speaking for Justices Stewart and Marshall, Justice Brennan argued that while the government possessed the authority to "regulate" the distribution of sexual expression, it lacked the power to "suppress" such material. Because the federal obscenity statute sought to prevent the mailing of sexually oriented materials, Brennan found the statute unconstitutionally overbroad and facially invalid. Further, Brennan strongly disagreed with the Court's holding that jurors in federal obscenity cases should determine "contemporary community standards" based upon their own views of what the "average person" in their community might think. Under such a policy, explained Brennan, national distributors would have to con-

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73 *Id.* at 112-13 (Brennan, J., dissenting) (citations omitted).

74 Kaplan v. California, 413 U.S. 115, 122 (1973) (Brennan, J., dissenting).

75 United States v. Orito, 413 U.S. 139, 147 (1973) (Brennan, J., dissenting).

76 United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 138 (1973) (Brennan, J., dissenting).

77 Hamling v. United States, 418 U.S. 87 (1974).

tend "with the community standards of every hamlet into which their goods may wander."[78]

Justice Brennan's warning that *Miller* would not relieve the Court of the time-consuming and distasteful task of making independent judgments on the question of obscenity was further demonstrated in *Jenkins v. Georgia*.[79] After viewing the critically acclaimed motion picture *Carnal Knowledge*, the Burger Court unanimously reversed the state court determination that the film was obscene, finding the film to be protected under either the *Memoirs* or *Miller* decisions. As Justice Brennan, joined by Justices Stewart and Marshall, observed in a concurring opinion, "it is clear that as long as the *Miller* test remains in effect 'one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' "[80]

Problems with applying *Miller* were evident in several later cases. In *Marks v. United States*,[81] Justice Brennan agreed with the majority that the Due Process Clause of the Fifth Amendment precluded the retroactive application of *Miller* for conduct that occurred before *Miller* was decided. But because he found the federal law, which prohibited the interstate transportation of obscene materials, to be "overbroad and facially unconstitutional," Brennan disagreed with the Powell-led majority when it remanded the case for a new trial using *Memoirs* and any "benefits" afforded by *Miller*.[82] Brennan, joined by Justices Stewart and Marshall, would have simply reversed the conviction.

In *Smith v. United States*,[83] the Court again considered the obscenity issue in deciding whether a state legislature could decide what the "contemporary community standards" should be in an action brought under the federal obscenity statute. Writing for the same majority that decided *Miller*, Justice Blackmun held that Iowa's permissive policy of not proscribing the dissemination of obscenity to consenting adults could not support a legislative determination of the "contemporary community standards" to be used in obscenity cases. Nonetheless, the majority affirmed Smith's conviction, reasoning that the state statute, while not controlling, provided a relevant indication of the community's mores and standards. Justice

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78 *Id.* at 144 (Brennan, J., dissenting).

79 Jenkins v. Georgia, 418 U.S. 153 (1974).

80 *Id.* at 164-65 (Brennan, J., concurring) (quoting his dissent in *Paris Adult Theatre I*, 413 U.S. at 92 (Brennan, J., dissenting)).

81 Marks v. United States, 430 U.S. 188 (1977).

82 430 U.S. at 197 (Brennan, J., dissenting in part).

83 Smith v. United States, 431 U.S. 291 (1977).

Brennan, joined by Justices Stewart and Marshall, dissented. Brennan would have reversed based on his post-*Miller* view that the federal obscenity statute was overbroad and thus unconstitutional.

The meaning of "contemporary community standards" was not the only problem the Burger Court faced with the *Miller* test. In *Ward v. Illinois*,[84] the Court all but abandoned its commitment to provide certainty through specificity. In *Ward*, the Court upheld a conviction for the sale of sado-masochistic material under an Illinois law that did not identify prohibited conduct, but which the Illinois courts construed as incorporating the first two elements of *Miller*. Once again, Brennan dissented, finding the state statute overbroad and unconstitutional on its face.[85] In addition, Brennan agreed with Justice Stevens' dissenting argument that, because of its inherent vagueness, obscenity should no longer be regulated through criminal law.[86]

Justice Brennan's view that most obscenity regulations were overbroad and unconstitutionally vague remained unchanged during the Burger Court period. In 1985, for example, in *Brockett v. Spokane Arcades, Inc.*,[87] the Burger Court upheld a state nuisance statute which included "lust" in its definition of "prurient." The court of appeals had found the statute overbroad because it reached constitutionally protected material that merely stimulated healthy sexual responses. Justice Brennan dissented from the Court's decision, reiterating his now-standard argument that the statute was "unconstitutionally overbroad and therefore invalid on its face."[88]

THE EXPANSION OF THE BURGER COURT'S ANTI-PORNOGRAPHY POLICY

In addition to establishing a new obscenity standard, the Burger Court sought to advance its anti-pornography policy by identifying special "contexts" that allowed greater regulation of sexual expression, whether obscene or not. While Justice Brennan had been the chief spokesperson for "variable" obscenity during the Warren Court period, Brennan resisted this intrusion into protected expression.

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84 Ward v. Illinois, 431 U.S. 767 (1977).

85 *Id.* at 775 (Brennan, J., dissenting).

86 *Id.* at 779 (Stevens, J., dissenting).

87 Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

88 *Brockett*, 472 U.S. at 510 (Brennan, J., dissenting).

A. *Pandering*

In *Splawn v. California*,[89] the Burger Court expanded upon the Warren Court's *Ginzburg* policy and held that a jury could find a seller of films guilty of obscenity based upon the commercial exploitation of others involved in the distribution process. In a dissent joined by Justices Stewart and Marshall, Brennan reiterated his view that the California obscenity statute was unconstitutionally overbroad and hence void on its face.[90]

B. *Alcoholic Beverage Control*

Justice Brennan also dissented in *California v. LaRue*,[91] where a six-Justice majority held that the Twenty-first Amendment empowered the states to prohibit live, non-obscene, sexually explicit entertainment in establishments licensed to sell liquor by the drink. Brennan, joined by Justice Marshall in a separate dissenting opinion, argued that "[n]othing in the language or history of the Twenty-first Amendment authorizes the [s]tates to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."[92]

C. *Nonconsenting Adults and Juveniles*

Although he wrote no opinion, Justice Brennan was part of a six-Justice majority which invalidated a city ordinance prohibiting a drive-in movie theater from showing films containing nudity on a screen that was visible from a public street.[93] The Court rejected the city's argument that the ordinance was a valid traffic safety regulation and a valid police power exercise to protect the morals of minors. The overbreadth of the ordinance, the majority found, unconstitutionally extended into the realm of protected speech.

Justice Brennan did not join with the majority, however, in *New York v. Ferber*,[94] which evaluated the constitutionality of a state statute prohibiting the dissemination of obscene and non-obscene depictions of minors engaged in sexual conduct. The

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89 Splawn v. California, 431 U.S. 595 (1977).

90 431 U.S. at 601 (Brennan, J., dissenting). Justice Brennan also joined in a dissenting opinion by Justice Stevens that Splawn's conviction violated the Ex Post Facto Clause because his conduct occurred prior to the inclusion of pandering in the California statute. *Id.* at 604 n.4 (Stevens, J., dissenting).

91 California v. LaRue, 409 U.S. 109 (1972).

92 *Id.* at 123 (Brennan, J., dissenting).

93 Erznozik v. City of Jacksonville, 422 U.S. 205 (1975).

94 New York v. Ferber, 458 U.S. 747 (1982).

Court held that because of the state's compelling interest in protecting children, the prohibition did not violate the First Amendment. Justice Brennan refused to go this far. Although he recognized that the state had greater leeway in protecting minors from the harm caused by pornographic material, Brennan was unwilling to deny First Amendment protection to those depictions of children that have "serious literary, artistic, scientific, or medical value."[95] Moreover, Brennan asserted that, absent "particular harm" to minors, the state lacked the power to suppress non-obscene sexually oriented materials.

D. Zoning

Until 1986, Justice Brennan seemed content to join with other Justices in cases where the local government sought to preserve urban neighborhoods by limiting the location and number of adult entertainment establishments. Thus, in *Young v. American Mini Theatres, Inc.*,[96] Brennan joined dissents by Justices Blackmun and Stewart, protesting Detroit's attempt to limit the number and location of adult theatres. As Stewart wrote, the majority's validation of the zoning ordinance was "a drastic departure from established principles of First Amendment law" by legitimizing "a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit non-obscene but sexually oriented films."[97] And, in *Schad v. Mt. Ephraim*,[98] Brennan joined Justice White's majority opinion that struck down, as constitutionally overbroad, an ordinance that prohibited all live entertainment, including nude dancing.

In *City of Renton v. Playtime Theatres, Inc.*,[99] however, Justice Brennan presented his own views on the use of the zoning power to regulate non-obscene sexual expression. Joined by Justice Marshall, Brennan disagreed with a seven-Justice majority that upheld a city zoning ordinance that prohibited adult motion picture theatres within 1,000 feet of residential zones, single or multiple family dwellings, churches, parks or schools. While the location of theatres showing "adult" motion pictures was regulated, other motion picture theatres and other forms of "adult

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95 *Id.* at 776 (Brennan, J., concurring).
96 427 U.S. 50 (1976).
97 *Id.* at 84 (Stewart, J., dissenting).
98 Schad v. Mt. Ephraim, 452 U.S. 61 (1981).
99 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

entertainment" were not subject to similar restrictions. Although the majority argued the zoning ordinance was a "content neutral" time, place and manner regulation, Brennan maintained that the ordinance imposed limitations on the location of theatres "exclusively on the content of the films shown there."[100] Moreover, Brennan found that the city council had no evidence that its ordinance would preserve the quality of urban life or neighborhoods. "In sum," concluded Brennan, "the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction."[101]

III. BRENNAN AS DISSENTER II: THE REHNQUIST COURT PERIOD

During the Rehnquist Court period, Brennan continued to develop his obscenity jurisprudence in dissenting opinions. Yet, he was able to join parts of the majority opinion in two of five cases and spoke for the Court in one.

Justice Brennan's final statement on the difficulties in defining obscenity came in *Pope v. Illinois*.[102] In this 1987 case, the majority[103] reiterated its view that the "serious value" prong of *Miller* was not to be determined on the basis of community standards. The jury, which convicted the defendants of selling obscene magazines, was instructed to apply a state-wide, versus local-community, standard in determining whether the material was obscene. While the majority conceded that the jury had been given contrary instructions, it was unwilling to reverse the obscenity convictions and found the erroneous instruction to be harmless. "The proper inquiry," explained Justice White, "is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[104]

Brennan's response was two-fold. First, he joined Justice Stevens' dissent to indicate his agreement that it was unconstitutional to criminalize the possession or sale of obscene materials

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100 *Id.* at 55 (Brennan, J., dissenting).

101 *Id.* at 62 (Brennan, J., dissenting).

102 Pope v. Illinois, 481 U.S. 497 (1987).

103 The majority consisted of Justice White, author of the opinion, Chief Justice Rehnquist and Justices Powell, O'Connor and Scalia.

104 Pope, 481 U.S. at 501.

to consenting adults.[105] Second, Brennan dissented separately to reiterate his position, advanced since 1973, that obscenity could not be defined with sufficient precision "to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[106]

Surprisingly, in *Fort Wayne Books, Inc. v. Indiana*,[107] Justice Brennan did not offer his own views on the constitutionality of Indiana's Racketeer Influenced and Corrupt Organization (RICO) statute, which allowed Indiana to seize inventory and close any business that had twice sold allegedly obscene material. Rather, Brennan again joined the dissent of Justice Stevens, who found First Amendment violations in a state scheme which subjected repeat obscenity violators to RICO's massive forfeiture provisions. "The most realistic interpretation of the Indiana [l]egislature's intent in making obscenity a RICO predicate offense," explained Stevens, "is to expand beyond traditional prosecution of legally obscene materials into restriction of materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene."[108]

Justice Brennan did, however, question the constitutionality of a federal statute that imposed an outright ban on indecent and obscene interstate commercial telephone messages.[109] In *Sable Communications of California, Inc. v. F.C.C.*,[110] involving pre-recorded sexually-oriented telephone messages, Brennan agreed with the Court that a total ban on "indecent" telephone messages violated the First Amendment by exceeding the means necessary to serve the government's compelling interest in preventing the exposure of minors to such messages.[111] Brennan disagreed, however, that the First Amendment permitted the imposition of criminal penalties for "obscene" speech. Citing his

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105 *Id.* at 507 (Stevens, J., dissenting). As Stevens asserted: (1) the erroneous jury instructions were not "harmless;" (2) the *Miller* test violated the First Amendment; and (3) Illinois could not criminalize the sale of magazines to consenting adults who possessed the constitutional right to read and possess them.

106 481 U.S. at 507 (Brennan, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting)).

107 Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).

108 *Id.* at 83 (Stevens, J., dissenting).

109 47 U.S.C. § 223(b) (1988).

110 Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115 (1989).

111 *Id.* at 134 (Brennan, J., concurring in part).

standard *Paris Adult Theatre I* dissent, Brennan argued that the complete ban on obscene telephonic messages for profit was unconstitutionally overbroad and facially invalid.[112] He suggested that a program involving access codes, scrambling and credit card payments would be a constitutional, feasible and effective way of serving the government's compelling interest in safeguarding children.

Protecting juveniles was also at issue in *Virginia v. American Booksellers Association*,[113] Justice Brennan's last majority opinion in an obscenity case. At issue was the constitutionality of a Virginia statute that limited the commercial display of sexually explicit materials if juveniles had access to the materials. Several bookstores and bookseller organizations claimed that the statute was facially invalid because it placed unnecessary burdens on the rights of adults and because its implementation would have a devastating economic impact. They also claimed that the statute was constitutionally overbroad because it restricted the access of mature juveniles to works that might be harmful only to the youngest children. Finally, they claimed that the statute was impermissibly vague because it was impossible to determine what standard should be used to decide whether material was appropriate for minors of different ages and stages of maturity.

Uncharacteristically, Justice Brennan's opinion was very narrowly drawn. Although agreeing that the plaintiffs had standing to make a pre-enforcement facial challenge, Brennan declined to decide the constitutional issues until the state supreme court interpreted key provisions of the statute.[114]

In *Massachusetts v. Oakes*,[115] however, Justice Brennan, unlike the plurality, was willing to reach the overbreadth issue. In *Oakes*, the defendant was convicted under a state statute that prohibited the use of nude minors in photographs, books and magazines. Oakes had been charged with taking "sexually provocative" photographs of his "physically mature" fourteen-year-old stepdaughter. The Court vacated the Massachusetts Supreme Court's decision that the statute was unconstitutionally overbroad, rea-

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112 *Id.*

113 Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988).

114 108 S. Ct. at 643. The Virginia Supreme Court of Appeals subsequently decided that the statute would not reach virtually any of the books stocked by the distributors and bookstores. *See* 372 S.E.2d 618 (1988), *cert. denied*, 110 S. Ct. 1525 (1990).

115 Massachusetts v. Oakes, 109 S. Ct. 2633 (1989).

soning that the repeal of the statute after Oake's conviction rendered the overbreadth issue moot.

As Justice Brennan noted in a dissent joined by Justices Marshall and Stevens, an overbreadth challenge could not be mooted when the narrowing of the statute occurred after a conviction was made under the statute. Justice Brennan conceded that a statute would not be invalidated simply because a few conceivable applications would violate the First Amendment. The statute at issue, however, Brennan found substantially overbroad because its prohibition extended beyond live or simulated sexual conduct to encompass everyday occurrences such as family photographs of babies and children, the work of artists and filmmakers and nudist family pictures. "The possibility of a substantial number of realistic applications in contravention of the First Amendment," explained Brennan, "suffices to overturn a statute on its face."[116]

Justice Brennan's last pronouncement on the overbreadth doctrine and obscenity was in *Osborne v. Ohio*,[117] a child pornography case decided during his final term. In *Osborne*, the Court, relying on *New York v. Ferber*,[118] upheld a state law which made the mere private possession of child pornography a crime. Although the statute prohibited the possession of "nude" photographs of children, the Court rejected an overbreadth challenge to the Ohio law. In reaching its decision, the Court relied on the Ohio Supreme Court's narrow construction of the state statute, which limited the reach of the law to "lewd exhibitions of nudity" or "graphic focus on genitals."

Joined by Justices Marshall and Stevens, Brennan contested the Court's holdings. For Brennan, the Ohio statute, as written, was "plainly overbroad" because simple nudity was used to define child pornography.[119] Moreover, Brennan found that the Ohio Supreme Court's narrow construction was still overbroad because pictures of topless bathers, teenagers in revealing dresses, a child playing in a bathtub and even a "well-known commercial advertisement for a suntan lotion show[ing] a dog pulling down the bottom half of a young girl's bikini" might be prohibited.[120]

Even if the Ohio law was not overbroad, explained Brennan,

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116 *Id.* at 2644 (Brennan, J., dissenting).

117 Osborne v. Ohio, 110 S. Ct. 1691 (1990).

118 458 U.S. 747 (1982). *See supra* notes 94-95 and accompanying text.

119 101 S. Ct. 1691, 1705 (Brennan, J., dissenting).

120 *Osborne*, 101 S. Ct. at 1708 n.5 (Brennan, J., dissenting).

the Court erred by misreading *Ferber* and by failing to extend the controlling principle of *Stanley v. Georgia*[121] to child pornography. Thus, while the production and distribution of child pornography may be subjected to governmental restraint, Brennan reasoned that the First Amendment protected the possession of child pornography in the privacy of the home. "Mr. Osborne's pictures may be distasteful," concluded Brennan, "but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law."[122]

IV. CONCLUSION

Following the retirement of Justice Brennan at the conclusion of the October 1989 term, Professor Mark Tushnet wrote: "People call it the Warren Court, but in many ways it was the Brennan Court. On all the key issues, he put together the coalitions and persuaded the others."[123] Whatever the merits of this assessment, it clearly did not apply to the problem of obscenity.

Although Brennan wrote for the Court's majority in *Roth-Alberts*, his support came largely from conservative justices who wanted to sustain the validity of federal and state obscenity statutes. Thus, the disposition of *Roth* and *Alberts* proved to be more significant than the libertarian language that permeated Brennan's opinion. In affirming the convictions in these cases and placing obscenity beyond the protection of the First Amendment, Brennan had developed an approach that was contrary to his generally libertarian jurisprudence.[124]

After the *Roth-Alberts* decision, the majority coalition disintegrated. By 1964, Justices Frankfurter, Burton and Whittaker, Brennan's conservative supporters in *Roth-Alberts*, were no longer on the Court. While Brennan eventually produced a more permissive obscenity test in *Memoirs* and gained the support of Chief Justice Warren, this development came too late for many of the Justices who had already delineated their own positions for determining obscenity. Moreover, two of the most permissive Justices, Hugo Black and William O. Douglas, refused to join any opinion that did not recognize an absolutist interpretation of the

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121 *See supra* notes 56-60 and accompanying text.

122 101 S. Ct. at 1717 (Brennan, J., dissenting).

123 Linda Greenhouse, *An Activist's Legacy*, N.Y. TIMES, July 22, 1990, at A1.

124 For a discussion of Justice Brennan's jurisprudence, see Elizabeth F. Defeis, *Justice William J. Brennan, Jr.*, 16 SETON HALL L. REV. 429 (1986); *Tribute to Justice Brennan*, 74 JUDICATURE, Feb.-Mar. 1991, at 238.

First Amendment. In short, there is little convincing evidence that the Warren Court's failure to agree on a definitional approach after *Roth-Alberts* was the result, as some critics have suggested, of Brennan being a poor coalition builder.[125]

But could Justice Brennan have done better? Perhaps. It was not until the Burger Court, for example, that Brennan embraced the position, suggested by his own opinion in *Ginsberg v. New York*[126] and Justice Marshall's in *Stanley v. Georgia*,[127] that, short of the legitimate governmental interests in protecting the well-being of juveniles and the sensibilities of unconsenting adults, the First Amendment barred governmental suppression of sexually oriented materials on the basis of their allegedly obscene content.

While Brennan might be criticized for taking too long to articulate a position on obscenity that was consistent with his overall judicial philosophy, his position on obscenity, albeit mostly in dissenting opinions, was consistent during the Burger and Rehnquist Court periods. As one commentator explained, Brennan's approach gave "clear precedence to the exercise of [F]irst [A]mendment rights by discarding any program for distinguishing among suspect materials. It also . . . [took] into account the special needs of certain vulnerable subgroups . . ., [and] acknowledge[d] legitimate government interests by permitting content neutral regulation of distribution."[128]

In the final analysis, Justice Brennan was correct when he stated that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity . . . ."[129] He understood this at least as early as 1962 when, in responding to a draft opinion by Justice Harlan that sought to limit obscenity to "hard core" pornography, Brennan wrote: "I have trouble defining 'hard core', although no trouble at all recognizing it when I see it . . . ."[130]

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125 *See* Heck, *supra* note 14, at 417-25.
126 *See supra* notes 52-53 and accompanying text.
127 *See supra* notes 56-57 and accompanying text.
128 Ray, *supra* note 11, at 327.
129 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (Brennan, J., dissenting).
130 SCHWARTZ, *supra* note 17, at 436.