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Harry Clor

Public Morality and Free Expression: The Judicial Search for Principles Of Reconciliation

By HARRY CLOR*

The decisions of the Supreme Court in *Miller v. California*[1] and *Paris Adult Theatre I v. Slaton*[2] represent a crucial effort to resolve basic issues in the difficult area of obscenity law, and the Court's general resolution of the competing interests involved seems to be a reasonable compromise. A great deal of governmental action is based upon improving the general quality of life in our society. This goal is certainly the basis, for example, of environmental regulation, and also seems to be at the heart of most social welfare legislation. There is no doubt that we accept a view of governmental power and the proper ends of governmental action that is considerably broader, and properly so, than that espoused by John Stuart Mill.[3] In *Paris*, the Court recognized that this interest in the quality of life would justify the legal regulation of obscenity,[4] for there is little doubt that a society without obscene publications and without obscene motion pictures is preferable to one in which obscenity provides a major source of pleasure for some

* B.A., 1951, Lawrence College; M.A., 1963, Ph.D., 1968, University of Chicago. Professor and Chairman, Department of Political Science, Kenyon College.

1. 413 U.S. 15 (1973).

2. 413 U.S. 49 (1973).

3. "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." J.S. Mill, *On Liberty*, in THE UTILITARIANS 483-84 (1961). An effective refutation of Mill's argument is found in J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1874). For a contemporary revival of the same basic controversy, *compare* H. HART, LAW, LIBERTY, AND MORALITY (1963), *with* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). The important point, however, is that Mill's theory is only one theory, and it is not a theory that the Constitution imposes on the legislative process. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973); Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

4. 413 U.S. 49 (1973).

segment of the population. And it should be clear to anyone who has visited a major city in the last few years that the increasing availability of such materials has a general effect on the quality of that city's environment, affecting equally those who have no interest in obscene materials.

This communal concern for the quality of life[5] is clearly held by the majority of the population, as is proved by the very existence of obscenity legislation. However, this communal concern is limited by the vital first amendment interests in the protection of serious literature and the communication of ideas. By limiting censorship to prurient and patently offensive depictions of "hard core sexual conduct" specifically defined by state law,[6] the Court has excluded from the definition of obscenity that which is serious literature and that which communicates ideas.[7] This test thus recognizes two important and somewhat competing public interests; the interest in the quality of life, and the interest in protection of literature and ideas. Although the first amendment represents an important value in our society, it is not the only value, and the recognition of these other values has been implicit in first amendment analysis since the original formulation of the "clear and present danger" test.[8] It is still present in the reduced protection available to commercial speech,[9] to "fighting words,"[10] and to libel,[11] and should be equally present in a reduced protection for obscenity.

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5. For fuller discussions of the concept of quality of life as it relates to pornography, see H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969); Kristol, *Pornography, Obscenity, and the Case for Censorship*, N.Y. Times, Mar. 28, 1971, § 6 (Magazine), at 24.

6. Miller v. California, 413 U.S. 15, 24 (1973).

7. Under *Miller*, obscenity is defined to exclude that which has "serious literary, artistic, political, or scientific value." *Id.* at 24. This is analagous to the law in the United Kingdom, where it is an affirmative defense to an obscenity prosecution that the publication is in the public good in that it is "in the interests of science, literature, art or learning, or of other objects of general concern." Obscene Publications Act of 1964, c. 74, *amending* Obscene Publications Act of 1959, 7 & 8 Eliz. 2, c. 66, § 4.

8. Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).

9. Commercial speech was at one time completely excluded from first amendment protection. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). It is now subject to a balancing process which gives considerably more weight to the state interests involved than would exist for other types of expression. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973).

10. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

11. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

The exclusion of obscenity from first amendment protection is not inconsistent with full protection of ideas and literature, as is indicated by the Court's decision in *Jenkins v. Georgia*,[12] in which the motion picture *Carnal Knowledge* was held to be clearly within the protection of the first amendment. This decision establishes beyond any doubt that, regardless of local community standards, a motion picture cannot be declared obscene merely because of its predominant sexual theme and scenes of nudity. *Jenkins* stands as evidence that the fears of the libertarians are groundless. The Supreme Court stands ready to prevent the suppression of that which is not grossly prurient and offensive.[13] The suppression of obscenity will not lead to the suppression of serious artistic endeavors, and it will not lead to the suppression of legitimate ideas. As long as this protection is available, the preservation of the quality of communal life can be accomplished without harming that which the first amendment was in reality designed to protect.

Subsequent cases raise perplexing questions of a different order. In *Southeastern Promotions, Ltd. v. Conrad*,[14] the Supreme Court required the city of Chattanooga to make its Memorial Auditorium available for a production of the rock musical *Hair*, a performance characterized by nudity, simulated sex, and vulgar language. The court held that withholding the municipal facility amounted to a prior restraint and that the city failed to provide the procedural safeguards constitutionally imposed upon prior restraints.[15] But as Justice Rehnquist's dissent points out, the municipal theater, unlike streets and parks, "must of necessity schedule performances by a process of inclusion and exclusion."[16] In allocating limited theater availability among a great number of possible productions, the municipal board had to decide which productions would appeal to the broadest audience. Consequently, Rehnquist argued, the denial of the application should not have been held a prior restraint.[17] Certainly a municipal or state government may expend its resources to provide recreational and artistic facilities. These activities are one way of promoting the quality of life in a community. If a municipality is to have no control over the use of the facilities it

12. 418 U.S. 153 (1974).

13. It is significant that *Jenkins* was decided not on the basis of the existence of literary, artistic, political, or scientific value, but on the basis of the absence of prurient interest and patent offensiveness. *Id.* at 161. It is clear that the Supreme Court stands ready to review erroneous determinations of *any* of the elements of the *Miller* test.

14. 420 U.S. 546 (1975).

15. *Id.* at 560-62.

16. *Id.* at 570.

17. *Id.* at 573-74.

erects, the inevitable result will be that no such facilities are built, and public funds will be expended for other purposes. The net result of the decision, then, may be actually to reduce the availability of forums for expression, for there is certainly nothing in the Constitution that would require any city to build a municipal auditorium. When a performance is staged in a municipal facility, especially one which is not, like a park, traditionally reserved for the open expression of views, the city is lending a dignity of official approval to the performances that are staged there. There seems little reason why public facilities must be made available for the preachings of a fascist group on racial hatred, and there is similarly no reason why a city must sanction a performance like *Hair*. The very nature of an auditorium is such as to dedicate it to artistic or educational purposes. Therefore, it is not inconsistent for the city to make the artistic and educational judgments which follow naturally from the very nature of the facility.[18] While the first amendment should play a part in a judgment such as this, first amendment interests are not as compelling when a city denies a production the use of a municipal forum as when it affirmatively precludes the production from being presented anywhere. The recognition of a valid municipal interest in the quality of life in that municipality would allow more discretion to those who allocate the use of the city's facilities than it does to those who enforce the city's criminal laws.

Thus, recognition of a greater state interest where the government owns the facilities involved might lead to a different result in cases like *Southeastern Promotions*. But while this governmental interest seems valid, some governmental interests may be so tenuous as to preclude any content discrimination. Thus, there appears to be little problem with the Court's decision in *Erznoznik v. City of Jacksonville*,[19] where it invalidated an ordinance forbidding drive-in theaters from exhibiting films containing any nudity when the screen was visible from a public place. Mr. Justice Powell's majority opinion declared that "the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."[20] Nor could the ordinance be justified as a protection of children, since it indiscriminately encompasses all nudity, however innocent and regardless of content or context. The *Erznoznik* decision

18. *See generally* Advocates for the Arts v. Thomson, 532 F.2d 792, 795-98 (1st Cir. 1976); Avins v. Rutgers, 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

19. 422 U.S. 205 (1975).

20. *Id.* at 212.

quite properly supports freedom of expression against a heavy-handed restriction which overprotects the communal interests involved. Although the result in *Erznoznik* is correct, it is wrong to assume that the community's interest in regulating open sexuality is no greater than its interest in regulating sexuality in magazines and closed theaters. Although the quality of communal life is implicated and involved in both, the interests are even greater where the sexuality is publicly visible, and therefore the balance to be applied in these cases should reflect that greater interest.

This is exactly what the Court did, and properly so, in *Young v. American Mini Theatres, Inc.*[21] There the Court sanctioned Detroit's effort to preserve communal quality of life through a zoning ordinance requiring geographic dispersal of adult theaters and bookshops. Since the overall effect of these activities on our inner cities is obvious, and since no total suppression was involved, the compromise reached in *Young* seems promising. A city can protect its neighborhoods from moral and social decay without resort to the constant surveillance and repressive crackdowns which may have an even greater inhibiting effect on valuable expression.[22] *Young* is most encouraging because it recognizes the balancing process that is inevitable in this area and approves of efforts to improve the quality of life which are designed to minimize the amount of actual suppression involved.

The decisions in *Southeastern Promotions, Erznoznik*, and *Young* raise an issue which has now become central in the controversy over obscenity. In each of these cases there was some effort to regulate expression which is, arguably, within the area of protected speech. In each case, the regulation, while falling far short of actual suppression, would involve some degree of restriction based upon a judgment about the character or the content of the expression.[23] Is this legitimate, and can the Court consistently reject this kind of regulation in *Erznozik* and allow it in *Young*? Libertarians answer in the negative.

The position is that selective regulation based on content may extend only to outright pornography determined to be legally obscene in a judicial proceeding; all other materials or expressive activity,

21. 427 U.S. 50 (1976).

22. It is not unlikely that most of the magazines, books, or films distributed or shown by the establishments covered by the *Young* ordinance were legally obscene under the *Miller* standards, and therefore could have been completely banned if prosecutorial resources had been available.

23. On the issue of content regulation, see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

however borderline, must be totally free of any legal control whatsoever. Thus, the argument is: that which meets the stringent legal tests for obscenity may be censored; that which does not is subject to no restraints whatever except for wholly content-neutral "time, place and manner"[24] regulations. If this principle is taken literally, then public authority is impotent to protect the community from salacious pictorial materials or other expression (falling just short of the legally obscene) located outside theaters or on bill boards or in the public parks. Thus, advocates of this "strict dichotomy" approach may incorporate a modification of the principle which allows for the protection of captive audiences from the most coercively obstrusive kinds of public display.[25] But if this is a valid exception to the equality principle, then why cannot we have equally valid exceptions which relate to the use of municipal facilities, as in *Southeastern Promotions*, or nonsuppressive zoning restrictions designed to prevent urban deterioration, as in *Young*? Surely the interests there represented are as valid as the interest in protecting the captive audience. Moreover, even with exceptions the equality argument seems too rigid to accommodate the variety of circumstances and competing values. The public interest in freedom for deviant forms of expression is heavily favored at the expense of public interests in moral and aesthetic standards, tranquility, and dignity in communal life. Thus, rejection of the *Young* result strongly favors those who would like to see more of the Times Square phenomenon without regard to the fact that there are many who would like to see less of it. It is true that the first amendment commands that the balance must be weighted heavily on the side of expression,[26] but the first amendment does not mandate that there can be no other interests thrown into the balance.[27]

24. *See generally* N. DORSEN, P. BENDER & B. NEUBORNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 438-58 (4th ed. 1976).

25. *See, e.g.*, Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677-81 (1963). A similar exception is advocated by those who would remove any restrictions as to consenting adults. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (Brennan, J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964).

26. *See* Speiser v. Randall, 357 U.S. 513, 526 (1958), indicating that procedures must take account of the fact that freedom of speech is a "transcedent value" entitled to more weight in the balance than other values.

27. The absolute position of Justices Black and Douglas has never been adopted by a majority of the Court. N. DORSEN, P. BENDER & B. NEUBORNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 59 (4th ed. 1976); *see* United States v. O'Brien, 391 U.S. 367 (1968); Pickering v. Board of Educ., 391 U.S. 563 (1968); Konigsberg v. State Bar, 366 U.S. 36 (1961). *See generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

In this borderline area between protected speech and unprotected obscenity, it seems reasonable to strike the balance a bit more evenly.

The difficult problem, however, is the formulation of an adequate principle to recognize these competing values. Can rational lines be drawn in this twilight zone? The rulings both in *Erznoznik* and *Young* accord with common sense. Perhaps they can be saved from the contradiction suggested by critics through a common sense consideration of the communal interests at stake in each case. There is no doubt that the protection of juveniles is a valid interest.[28] But that hardly justifies the sweeping provisions of the *Erznoznik* ordinance. Rather, the *Erznoznik* ordinance looks to its justification primarily in the privacy interests of persons in the streets. These interests, however, are still weak, since the first amendment seems to require us to see and hear much which may offend us.[29]

In *Young*, however, the concern of the Detroit ordinance is the preservation of neighborhoods from deterioration. The ordinance was designed to protect against the congregation of prostitutes and their associates, drug traffic, and a general decline in the moral and aesthetic attractiveness of the city with the consequent departure of legitimate businesses and residents. The public interest at stake is arguably much more substantial in *Young* than it was in *Erznoznik*. The preservation of communities (and communal bonds and communal spirit) should be given considerable weight at a time when this vital ingredient of human well-being is undermined by so many forces of modern life, commercial, technological, and pluralistic. The atomistic view of man represented by the philosophy of John Stuart Mill was probably erroneous even when *On Liberty* was written.[30] It is certainly erroneous now. While individual freedom is an important value, there are other values which are no less important, and the concept of community must be considered to be one of them. And there can be little doubt that one of the major elements contributing to or detracting from the sense of community is the moral and aesthetic atmosphere which prevails in public places. If we did not think that this were important, we would not spend so much effort and money on urban and public beautification. If we acknowledge that there are things which can make our

28. Ginsberg v. New York, 390 U.S. 629 (1968). *See generally* Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 S. CAL. L. REV. 345 (1966).

29. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974); Cohen v. California, 403 U.S. 15 (1971).

30. M. LERNER, *Preface to On Liberty*, in ESSENTIAL WORKS OF JOHN STUART MILL 249-52 (1961). *See generally* M. COWLING, MILL AND LIBERALISM (1963).

cities more livable, then we must acknowledge that there are things which make our cities less livable. It is true that these considerations are not susceptible of scientific proof, but that does not mean that they can be ignored. It can be argued that the crucial problem of contemporary America is more a declining sense of community than a decreasing amount of free speech. What I am suggesting, then, is that we recognize this communal interest as a valid interest, just as even the most vigorous opponents of obscenity laws have recognized valid interests in protection of children and protection of personal privacy. The interest in community is no less valid. In fact, I find the interests that Detroit is trying to protect considerably more important than the interest in preventing a fleeting glance at nudity which was the source of the ordinance in *Erznoznik*.

It cannot be denied that some suppression is inevitable in the economic results of the Detroit ordinance.[31] And it is not suggested that there are no interests that would tend to weigh on the other side of community interests.[32] But, as Mr. Justice Stevens points out in *Young*, "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ."[33] This is content discrimination, but content discrimination is inherent in the general settlement of the obscenity problem represented by *Miller* and *Paris Adult Theatre*. It is inherent in the general settlement of the problems of libel and commercial speech as well.[34] All that Mr. Justice Stevens has done is to make explicit what is implicit in the *Miller* interpretation of the first amendment— that its essential concern is to protect the communication of ideas and works of "serious literary, artistic, political, or scientific value."[35] This interpretation is thoroughly consistent with American constitutional and political tradition[36] and more logical than an interpre-

31. Thus, it is possible that the dispersal mandated by the ordinance would make it economically unfeasible for some businesses to continue in operation. If there were, as a result, fewer adult bookstores and adult theatres, it is thus conceivable that some materials will not be available which would be available if there were more businesses to promulgate them.

32. I am not suggesting that the first amendment interests have no part to play in the balance, but rather that they are not the only factor.

33. 427 U.S. at 61.

34. See notes 9-11 *supra*. In these areas the Court must weigh the truth, the value, and the effect of the material. This is surely a form of content regulation.

35. 413 U.S. at 24.

36. Roth v. United States, 354 U.S. 476 (1957). It is instructive that obscenity regulation in the United States existed for generations before there was even any suggestion that the first amendment was involved at all. *See generally* F. SCHAUER, THE LAW

tation that would protect all words and all pictures at the expense of every other value in society.[37] The concept of absolute equality is a simple but unrealistic and unworkable solution to the complexity of interests represented by modern life.

Essential to a proper balance among the interests involved is that diminished protection is not the same as absolute suppression. Freedom for serious literature and serious discussion requires a rather large zone of security. I do not deny the concept of the "chilling effect."[38] Therefore, it seems inadvisable to completely suppress the worthless vulgarities purveyed by many adult establishments. But protection from suppression and protection of the purveyors from criminal penalties need not entail protection from all secondary regulations which may take account of the character and content of the materials.[39] Such a secondary regulation cannot, of course, be permitted if it is covertly aimed at total suppression[40] or if it would have the effect of actual suppression of protected speech or inhibition of the public's access to protected speech. Moreover, these secondary regulations ought to be permitted only if they promote a substantial public interest, something more than the mere rational basis accepted in other areas of constitutional adjudication.[41] But none of these invalidating factors seem present in *Young*. Adult erotic establishments have been flourishing in our cities, and it is quite predictable that they will continue to flourish in Detroit and other cities which choose to adopt Detroit's strategy. Since there is little likelihood of any actual suppression, Detroit's rather mild and moderate approach promotes the interests in community without sacrificing those represented by the first amendment.

We do not abandon the vital interests in free speech by giving this modest degree of recognition to another interest—the quality of communal life. Liberal democracy needs to recognize a basic proposition of political philosophy that communities, as well as individuals, have some right to maintain a way of life.

OF OBSCENITY 8-29 (1976).

37. See note 27 *supra*.

38. New York Times Co. v. Sullivan, 376 U.S. 254, 277-83 (1964); *cf.* Smith v. California, 361 U.S. 147, 150-54 (1959). *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

39. The Supreme Court has wisely left the method of control of obscenity to legislative discretion. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

40. For example, a heavy tax on sexually explicit materials might have this effect.

41. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). A possibility would be the "substantial governmental interest" test of United States v. O'Brien, 391 U.S. 367 (1968) (upholding regulation which only incidentally affected expression).