Articles

Obscenity and Nationalism: Constitutional Freedom of Sexual Expression in Comparative Perspective

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This Article surveys the development of constitutional obscenity jurisprudence in the United States, Canada, India, and Japan. In the late nineteenth and early twentieth centuries, each of these jurisdictions imposed restrictive Victorian standards of sexual morality on literature and the arts. In the second half of the twentieth century, their constitutional courts began seriously considering free expression claims brought by artists and writers prosecuted for obscenity. These courts have all struggled with a central paradox. Obscenity law criminalizes speech because it is offensive, but freedom of speech is an empty concept if it does not include the freedom to offend. The United States Supreme Court repudiated Victorian standards after the middle of the twentieth century, but the current community standards test remains vague, doctrinally incoherent, and potentially repressive. The Supreme Court of Canada adopted a variant of the community standards test, purportedly based on harm rather than morality, which proved to be scarcely more coherent or less repressive. Courts in India and Japan have been especially slow to extend protection to sexual speech. Paradoxically, in both India and Japan, nationalist prosecutors and judges have embraced imported Victorian standards of propriety as an expres-

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sion of national identity, deploying them to suppress not just foreign but also indigenous works. Their narrow nationalist ideology depends on a sanitized and incomplete version of history, so some defendants have prevailed by appealing to more tolerant indigenous traditions. This Article concludes that while obscenity law evidently does little to protect public morality or prevent harm, it can be a dangerous weapon in the hands of groups seeking to enforce political, social, and cultural conformity.

INTRODUCTION

Does the freedom of speech protect sexually explicit expression? Does it limit the government's power to ban the dissemination among consenting adults of sexual writings, depictions, film, or other media? If so, is artistic merit a defense to a charge of obscenity? In the 1950s and 1960s, apex courts in the United States, Japan, and India, then the world's three largest democracies, began to take these questions seriously for the first time. Since then, they have elaborated the world's most substantial bodies of constitutional obscenity jurisprudence. Other courts also began reevaluating their obscenity doctrines around the same time. For example, the Supreme Court of Canada began grappling with the definition of obscenity in the 1960s, before the introduction of judicial review.

The U.S. Supreme Court first limited the scope of obscenity regulation in its 1957 decision in *Roth v. United States.*[1] Decided at the start of the American sexual revolution, *Roth* discarded the repressive Victorian *Hicklin* standard, which had criminalized important works of art and literature based on "the effect of an isolated excerpt on particularly susceptible persons."[2] *Roth* instead focused on the effect of "the material taken as a whole"[3] on "the average person, applying contemporary community standards."[4] This set in motion a period of doctrinal liberalization, but for a decade and a half the Court was unable to coalesce around a single test. Justice Brennan, the author of *Roth*, proposed that material should be protected unless it "is utterly without redeeming social value,"[5] but was unable

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

2. *Id*. at 489 (discussing R v. Hicklin [1868] 3 LRQB 360).

3. *Id*.

4. *Id*.

5. Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion).

to obtain a majority for that formulation. Only in 1973, after President Nixon's appointment of four new conservative Justices, did the Court establish the current test in *Miller v. California*.[6] The *Miller* test, like *Roth*, relied on the concept of "community standards" but was pointedly less speech-protective than Brennan's formulation, protecting only material with "*serious* literary, artistic, political or scientific value."[7]

In the same period, leading decisions in Japan and India took a more conservative approach, upholding obscenity convictions for the dissemination of D.H. Lawrence's novel *Lady Chatterley's Lover*. In *Oyama v. Japan*,[8] the Supreme Court of Japan accepted that Lawrence's novel was "truly a valid piece of art" but held that artistic value, "[n]o matter how supreme the quality," was no defense against a charge of obscenity. Indeed, artistic value may well be an aggravating factor, for "instead of nullifying the obscene quality in the work, it may even serve to intensify the degree of stimulation and excitement." In *Udeshi v. Maharashtra*,[9] the Supreme Court of India clung tenaciously to the old Victorian *Hicklin* standard.

While obscenity doctrine in the United States has remained essentially frozen since *Miller*, in Japan and India it has continued to evolve. Without expressly overruling *Oyama*, the Supreme Court of Japan gradually came to recognize a defense based on artistic value.[10] The Supreme Court of India took a step forward in 2014, abandoning the *Hicklin* standard.[11] One year later, it took a step back, sharply narrowing protection in obscenity cases involving historically respected personalities.[12] In the meantime, the Supreme Court of Canada has articulated an alternative approach to community standards grounded in concerns about harm rather than morality, which unfortunately has been applied in a discriminatory and heavy-handed

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

7. *Id*. at 24 (emphasis added).

8. Saikō Saibansho [Sup. Ct., G.B.] Mar. 13, 1957, 1953(A) no. 1713, 11(3) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997, *translated in* Supreme Court of Japan, http://www.courts.go.jp/app/hanrei_en/detail?id=11 [https://perma.cc/7Y3X-64YG]. The lead defendant's name in this case was Hisajirō Oyama, but the kanji spelling of his name can also be read Kyūjirō Koyama, which is how it appears in both available English translations.

9. Udeshi v. Maharashtra, (1965) 1 SCR 65.

10. *See infra* Part III.B.3–6.

11. *See* Sarkar v. West Bengal, (2014) 4 SCC 257 ¶ 24.

12. *See* Tuljapurkar v. West Bengal, (2015) 6 SCC 1, ¶ 105.

manner.[13]

Nationalism and cultural identity have played an important role in these developments. In articulating standards in obscenity cases, constitutional courts have cast themselves as guardians of national moral and cultural values. Prosecutors and defendants alike have sought to paint themselves as vindicators of important national traditions. In Japan and India, these arguments have often portrayed obscenity as a Western contagion that threatens the national identity, which is often conceived in a sanitized, monolithic, and deeply ahistorical manner.

Paradoxically, both the mechanism of suppression (obscenity law) and the protection invoked against it (the constitutional freedom of expression) were Western legal imports or impositions. In Japan, the obscenity provision of the Meiji penal code based on European models confronted the free expression provision of a U.S.-imposed constitution, while in India, a British-imposed obscenity provision in the 1860 penal code confronted the free speech guarantees in a constitution heavily modelled on Western predecessors. While the freedom of expression embodies universal human aspirations, obscenity law, in its current form in India and Japan, is clearly a Western legal borrowing. Nonetheless, Japanese and Indian courts have continued to defend imported or imposed Victorian values as "national" values long after their Western source nations have abandoned them.

This Article compares the development of these bodies of constitutional obscenity doctrine in their cultural contexts. It demonstrates that, when confronting entrenched social prejudices and puritan attitudes, constitutional courts have often failed to protect artistic and expressive freedom. The liberalization of obscenity law under the Warren Court in the period between *Roth* and *Miller* paralleled a similar liberalization in countries without judicial review, such as the United Kingdom, Australia, New Zealand, and many countries of Europe. The courts have tended to follow society rather than to lead, and it is not clear that judicial review has made much of a difference.

Part II begins by tracing English obscenity doctrine from its emergence in the early eighteenth century to its crystallization in the *Hicklin* test, which was eventually imposed throughout the common-law world. It then sketches U.S. and Canadian doctrine[14] as a prelude to a detailed examination of Indian obscenity doctrine. Part III

13. *See infra* Part II.B.

14. For a fuller examination of U.S. and Canadian doctrine, see Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299 (2008).

turns to Japan. It first outlines the development of censorship under the Tokugawa shogunate and then under the Meiji Constitution. It then examines obscenity decisions of the Supreme Court of Japan over the past half-century. Part IV reviews the global landscape and concludes that courts have often failed to protect artistic and expressive freedom. Obscenity prosecutions are unpredictable and politicized. While obscenity law may be ineffective in protecting public morality, it is a dangerous bludgeon in the hands of groups seeking to enforce political, social, and cultural conformity.

Note that this Article focuses on the constitutional aspects of obscenity law, as such, and not on time, place, and manner restrictions designed to protect juveniles or unwilling adults from exposure to sexually explicit materials. Such measures fall outside the scope of obscenity law. Likewise, this Article does not discuss the legitimate measures that must be taken to protect children or unwilling adults from exploitation and abuse, which raise completely different issues and are addressed by a separate body of doctrine.[15]

I. COMMON-LAW JURISDICTIONS

A. The English Background

The English crime of obscenity emerged out of the law of blasphemy in the eighteenth century. Before then, sexually explicit expression was prosecuted only when tantamount to sedition, blasphemy, or breach of the peace. As late as 1708, common-law courts held that obscene matter was not indictable unless it was also blasphemous.[16] This changed with the 1727 prosecution of Edmund Curll for publishing *Venus in the Cloister*, a French fiction in the form of sexually explicit dialogues between nuns. In *Curll's Case*, the Court of King's Bench held that a libel against morality was a criminal offense at common law. The court reasoned that "religion was part of the common law; and therefore whatever is an offence against that, is evidently an offence against the common law. Now morality is the fundamental part of religion, and therefore whatever strikes against that, must be an offence at common law."[17] *Curll's Case* in effect recognized obscenity as a fourth species of criminal

15. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (recognizing child pornography as a distinct category of unprotected speech).

16. The Queen v. Reed (1708) 88 Eng. Rep. 953, 11 Mod. 142 (QB).

17. Rex v. Curl (1727) 93 Eng. Rep. 849, 2 Strange 788 (KB).

libel alongside defamation, sedition, and blasphemy.

Obscenity prosecutions throughout the eighteenth century typically had political or religious overtones.[18] Leniency was shown toward material that was merely sexually explicit, such as John Cleland's 1748 novel *Memoirs of a Woman of Pleasure* (better known as *Fanny Hill*), "the most successful pornographic work of the eighteenth century."[19] According to one account, when Cleland was prosecuted before the Privy Council, the Lord President, Earl Granville, moved by the author's plea that poverty had driven him to write pornography, "resolved the prosecution by awarding Cleland a pension of £100 a year on condition that he not repeat the offense."[20]

The democratic upheavals of the late eighteenth and early nineteenth centuries decoupled obscenity from sedition and blasphemy. Before the American and French Revolutions, criminal prosecutions focused on "obscene" matter only when it seemed to threaten the state or the established church. With the spread of literacy and political participation, concern over mass access to sexually explicit material led to wider efforts to ban it. As Lynn Hunt has put it, "pornography as a regulatory category was invented in response to the perceived menace of the democratization of culture."[21] These same democratic trends led to a depoliticization of pornographic materials being produced, as more and more space opened up for direct expression of political views. Thus, while a vast amount of political pornography, especially related to Marie Antoinette, continued to circulate through the French Revolution,[22] thereafter explicitly political or anticlerical pornography was rare.[23]

Nowhere was concern over the need to control sexually explicit expression more acute than in Victorian England. During a de-

18. The most famous eighteenth-century English obscenity prosecution, of the radical member of Parliament John Wilkes for his scabrous and sacrilegious *Essay on Woman*, was also the most political. *See* Rex v. Wilkes (1770) 98 Eng. Rep. 327 (KB); ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 121–48, 151–53 (2006).

19. GEOFFREY R. STONE, SEX AND THE CONSTITUTION 63 (2017).

20. *Id*. *But see* HAL GLADFELDER, FANNY HILL IN BOMBAY: THE MAKING AND UNMAKING OF JOHN CLELAND 240 (2012) (noting discrepant accounts and arguing that the pension story is implausible).

21. Lynn Hunt, *Pornography and the French Revolution*, *in* THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY 1500–1800, at 301 (Lynn Hunt ed., 1993).

22. *See* SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 210–11, 221–26 (1989).

23. *See* Hunt, *supra* note 21, at 339.

bate in the House of Lords on poison control, Lord Campbell rose to inform his peers that "he had learned with horror and alarm that a sale of poison more deadly than prussic acid, strychnine or arsenic—the sale of obscene publications and indecent books—was going on."[24] To control this poison and remedy the perceived deficiencies in the common law, Parliament enacted the Obscene Publications Act 1857,[25] establishing summary procedures for the seizure and destruction of obscene materials.

The Obscene Publications Act 1857 did not undertake to define obscenity. That task was left to the courts, which in *Regina v. Hicklin*[26] established the test that would dominate obscenity law throughout the English-speaking world until the second half of the twentieth century, and in India until the second decade of the twenty-first century. The pamphlet seized in *Hicklin* recounted the "impure and filthy acts, words and ideas" purportedly discussed by Catholic ladies with their confessors.[27] The pamphlet's distributor, a Protestant zealot, argued that his purpose was to advance the true religion, but the Court of Queen's Bench held that purity of motive would not excuse the distribution of obscenity. According to the court, "the test of obscenity is . . . whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences."[28] Under this test, the pamphlet was clearly obscene. Its "filthy and unnatural and disgusting description[s]" most certainly "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."[29]

Hicklin's focus on the impugned work's effect on the most impressionable and immature minds empowered the State to assume a paternalistic and infantilizing tutelage over public discourse. It was deployed to suppress important works of literature by many of the most important writers of the nineteenth and twentieth centuries: Gustave Flaubert, Émile Zola, Guy de Maupassant, and James Joyce, as well as scientific discussions of contraception and human sexuali-

24. 145 Parl Deb HC (3d ser.) (1857) col. 103.

25. Obscene Publications Act 1857, 20 & 21 Vict., c. 83 (repealed by Obscene Publications Act 1959, 7 & 8 Eliz. 2, c. 66, § 3(8)).

26. *Hicklin*, 3 LRQB 360.

27. *Id*. at 362–63.

28. *Id*. at 371.

29. *Id*.

ty.[30] By the end of World War I, many English-language writers and publishers fleeing the Victorian censorship regime that had spread throughout the British Empire and the United States had taken refuge in Paris, where the Third Republic had established broad protections for the freedom of the press.[31] Parisian presses churned out pornography, but also many of the most important works of modernist literature in the English language, from Joyce's *Ulysses* (1922) to works by Hemingway, Pound, Faulkner, Stein, Lawrence, and Beckett.[32] In Britain, *Hicklin* remained in force until 1959, when Parliament finally replaced it with a statute providing for a "public good" defense for works shown to be "in the interests of science, literature, art or learning, or other objects of general concern."[33]

B. The United States

1. Early Cases

In colonial America, obscenity prosecutions were unknown, and in the eighteenth century sexually explicit material circulated widely.[34] Even in Massachusetts, once the bastion of Puritanism,[35] prosecutions for sexual offenses dropped precipitously after the Revolution.[36] But the Enlightenment values of secularism and tolerance gave way to a religious backlash as the Second Great Awakening gathered steam.[37] Blasphemy prosecutions, which had largely disappeared, were suddenly revived in the early nineteenth century, and prosecutions as well as state statutes targeting obscenity emerged for the first time.[38]

30. *See* ALEC CRAIG, SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY 44–70, 75–82 (1963); EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 48 (1992).

31. *See* Louis Menand, *People of the Book: Two Faces of American Publishing*, NEW YORKER, Dec. 12, 2016, at 78–79.

32. *See id*. at 78.

33. Obscene Publications Act 1959, 7 & 8 Eliz. 2, c. 66, § 4.

34. *See* STONE, *supra* note 19, at 83.

35. *See generally* M. MICHELLE JARRETT MORRIS, UNDER HOUSEHOLD GOVERNMENT: SEX AND FAMILY IN PURITAN MASSACHUSETTS (2013).

36. *See* STONE, *supra* note 19, at 124.

37. *See id*. at 90–152.

38. *See id*. at 141–42, 146; Commonwealth v. Sharpless, 2 Serg. & Rawle. 91 (Pa. 1815); Commonwealth v. Holmes, 17 Mass. 336 (1821).

Nevertheless, obscenity prosecutions in the United States were fairly infrequent until 1873, when the moral crusader Anthony Comstock, outraged at the proliferation of smut, feminism, and sexual radicalism in New York, persuaded Congress to pass sweeping new legislation criminalizing the mailing of "obscene, lewd, or lascivious" matter as well as information on contraception or abortion.[39] The "Comstock Act" also created a position of special agent in the Postal Service, with powers of confiscation and arrest, which Comstock himself held for more than four decades. At the same time, the state of New York gave Comstock's Society for the Suppression of Vice a charter entitling it to half the fines collected in successful prosecutions.[40]

Comstock seized not just pornography and "articles made of rubber for immoral purposes."[41] He targeted serious works on sexual liberation and reproductive rights by such authors as Emma Goldman, Margaret Sanger, Victoria Woodhull, and Ezra Heywood.[42] Such "indecent creatures calling themselves reformers" were "more offensive to decency" and "more revolting to good morals" than pornographers.[43] At the end of his long career, Comstock boasted that he had convicted thousands and driven at least fifteen people to suicide.[44]

Because the Comstock Act and state laws criminalized obscenity without defining it, federal and state courts simply adopted the *Hicklin* test.[45] For decades in the nineteenth and twentieth centuries, American courts applying this test upheld obscenity convictions of now-famous works of literature by leading English and American

39. Act of Mar. 3, 1873, ch. 258, 17 Stat. 598, *amended by* Act of July 12, 1876, ch. 186, 19 Stat. 90 (codified as amended in 18 U.S.C. § 1461 (2000)).

40. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 28 (1997).

41. *See id*.

42. *See id*. at 23–44, 57–69. Even a letter suggesting that the law ought to recognize the possibility of rape within marriage drew a conviction for obscenity. *See* United States v. Harmon, 45 F. 414 (D. Kan. 1891); STONE, *supra* note 19, at 163–64.

43. ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 158 (Robert Bremner ed., 1967) (1883).

44. Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and His Adversaries: The Mixed Legacy of this Battle for Free Speech*, 11 COMM. L. & POL'Y 317, 361, 363 (2006).

45. *See*, *e.g*., United States v. Bennett, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879); People v. Muller, 96 N.Y. 408, 411, 413 (1884); Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917).

authors, such as D. H. Lawrence,[46] Edmund Wilson[47] and Theodore Dreiser.[48]

The U.S. Supreme Court did not seriously enforce the First Amendment until the mid-twentieth century, and early decisions gave short shrift to free speech arguments. Just a few years after the passage of the Comstock Act, in *Ex Parte Jackson*,[49] the Court upheld Congress's broad power "to refuse its facilities for the distribution of matter deemed injurious to public morals,"[50] whether pornography or lottery tickets. In these early decisions, the Court took a narrowly Blackstonian view of the freedom of the press, holding that it prohibited only prior restraints on publications but not "the subsequent punishment of such as may be deemed contrary to the public welfare."[51] As late as 1942, the Court breezily declared that the punishment of certain "classes of speech," including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'" had "never been thought to raise any Constitutional problem."[52]

2. The Warren Court Liberalization

Notwithstanding such pronouncements, lower courts and eventually the Supreme Court recognized that regulating obscenity has serious implications for the freedom of expression. By the 1930s, federal courts had begun to undermine the *Hicklin* doctrine.[53] In 1957, the Supreme Court, in *Roth v. United States*,[54] formally repudiated it. Samuel Roth had been convicted for publishing and mailing *American Aphrodite*, a hardcover quarterly magazine con-

46. *See* Commonwealth v. Delacey, 171 N.E. 455 (Mass. 1930) (*Lady Chatterley's Lover*).

47. *See* Doubleday & Co. v. New York, 335 U.S. 848 (1948) (*Memoirs of Hecate County*).

48. *See* Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930) (*An American Tragedy*).

49. Ex Parte Jackson, 96 U.S. 727 (1877).

50. *Id*. at 736. Such a power dealt no "fatal blow . . . to freedom of the press" because, under the restrictive Commerce Clause doctrine of the time, Congress did not have "the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. *Id*. at 735.

51. Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.).

52. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

53. *See* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

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

taining literary and graphic erotica. Justice Brennan, writing for the majority, upheld Roth's conviction but stated that the *Hicklin* test's focus on "the effect of isolated passages on the most susceptible persons" unconstitutionally restricted legitimate discussion of sex.[55] The Court conceptualized freedom of speech primarily as a means of ensuring democratic self-government and held that obscene speech is unprotected because it is "utterly without redeeming social importance."[56] The new standard was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[57]

Justice Douglas, joined in dissent by Justice Black, would have gone further and prohibited government regulation in this area altogether.[58] In no other context did the Constitution permit restrictions on speech when offensive to community standards. Douglas could see no justification for distinguishing speech relating to sex. The community standards test, he suggested, set the stage for a cultural battle "which the Philistines are certain to win."[59]

Despite its flaws, *Roth* liberalized obscenity law. The Court set constitutional limits on the criminalization of sexual speech, and the *Roth* test, which focused on the effect of the work as a whole on the average person, was an improvement over *Hicklin*'s focus on the effect of isolated passages on particularly susceptible persons. *Roth* set in motion a decade and a half of doctrinal evolution, during which the Court repeatedly overturned obscenity convictions but was unable to coalesce around a single standard.[60]

3. *Miller*: Doctrinal Crystallization and Ossification

A conservative backlash against *Roth* and its progeny had materialized by the late 1960s. In 1968, Senator Strom Thurmond of South Carolina, seeking to undermine President Johnson's nomination of Justice Fortas to be Chief Justice, arranged a screening on Capitol Hill of the film *Flaming Creatures*. In *Jacobs v. New York*, Fortas had voted that *Flaming Creatures*, which depicts a "transves-

55. *Id*. at 488–89.

56. *Id*. at 484.

57. *Id*. at 489.

58. *See id*. at 508 (Douglas, J., dissenting).

59. *Id*. at 512.

60. *See* Boyce, *supra* note 14, at 317–18.

tite orgy," could not be criminally obscene, as a matter of law.[61] Senators were horrified by the screening,[62] and Thurmond's gambit undermined the Fortas nomination.[63] President Nixon, then, got to appoint Justice Burger as the new Chief Justice along with three new Associate Justices. In his appointments, Nixon was eager to pander to a conservative and Southern base tired of smut and desegregation. Famously, Nixon instructed his attorney general: "Be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is."[64] The Burger Court put an end to the liberal drift in obscenity law.

With its 1973 *Miller v. California* decision,[65] the Court's new conservative majority adopted the three-pronged obscenity test that governs today. Under this test, courts consider:

> (a) whether "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.[66]

Because of its third prong, the *Miller* test was significantly less speech-protective than its prototype, found in Justice Brennan's plurality opinion in *Memoirs of a Woman of Pleasure v. Massachusetts*.[67] While Brennan's test would have protected all material that

61. Bryan L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 229–30 (2011). Unlike Justice Fortas, Justices Brennan and White voted to affirm the convictions on the merits, even though the film satisfied the unwritten "limp dick" test that both followed at the time. *See id.* at 254. As Frye observes, "*Flaming Creatures* is replete with limp dicks and conspicuously lacks erections and intercourse," so Brennan's and White's votes must probably be attributed to the film's "unfamiliar form and homosexual content." *Id*.

62. *Id*. at 237 (quoting SAMUEL SHAFFER, ON AND OFF THE FLOOR: THIRTY YEARS AS A CORRESPONDENT ON CAPITOL HILL 92 (1980)) (reporting that one senator viewing the film was so sickened he "couldn't even get aroused").

63. *See id*. at 274.

64. Eric A. Posner, *Casual with the Court*, NEW REPUBLIC (Oct. 24, 2011), https://newrepublic.com/article/94516/nixons-court-kevin-mcmahon [https://perma.cc/T7JE-NY7K].

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

66. *Id*. at 24 (citations omitted).

67. Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966).

had *some* "redeeming social value,"[68] *Miller* protected only material with *serious* value. Chief Justice Burger treated the third prong as almost unnecessary, astonishingly insisting that the Comstock-era persecutions of artists, feminists, and contraception advocates had no effect whatsoever on *serious* expression: "There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution of material relating to sex . . . in any way limited or affected expression of serious literary, artistic, political or scientific ideas."[69]

The Court did not explain in *Miller* why obscene speech is constitutionally unprotected. But in a companion case, *Paris Adult Theatre I v. Slaton*,[70] the Court said the government may prohibit dissemination of obscene material to further "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[71] Criminalization of obscenity is permitted to further these interests even if "there is no conclusive evidence or empirical data"[72] that it actually does so.

Justice Brennan strongly dissented and repudiated his own prior decisions in this area from *Roth* to *Memoirs*.[73] After sixteen years of experimentation with various standards, he concluded that he had underestimated the difficulty of formulating a standard of obscenity that was not fatally vague, intolerably burdening both the freedom of speech and the resources of the courts.[74] Belatedly, Brennan joined the other dissenters to hold that the Constitution protects the access of consenting adults to sexually explicit materials.[75]

U.S. constitutional obscenity doctrine, which has remained frozen since 1973, rests on anomalous foundations. The Supreme Court has repeatedly held that speech may not be suppressed because of its offensive content,[76] yet obscene speech is said to be unprotect-

68. *Id*. at 418.

69. *Miller*, 413 U.S. at 35.

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

71. *Id*. at 58.

72. *Id*. at 63.

73. *Id*. at 73–114 (Brennan, J., dissenting).

74. *See id*. at 86–88, 91–92.

75. *See id*. at 113.

76. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 408-09 (1989); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Terminiello v. Chicago, 377 U.S. 1, 4 (1949).

ed because its "content is so offensive to community standards."[77] The Court has rejected the notion "that the State has a right to control the content of a person's thoughts,"[78] so it may not criminalize the *possession* of obscene material. Yet such materials are believed to "have a tendency to exert a corrupting and debasing impact leading to antisocial behavior,"[79] so the state may criminalize the *transmission* of obscene material. Obscenity law, both as legislation and as implemented by juries applying community standards, is an application of majoritarian morality, yet the Court has said that the "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for a law prohibiting the practice."[80] Thus the state may not criminalize sexual activity among consenting adults, but it may criminalize *descriptions* or *depictions* of such activity.

The *Miller* Court, in determining which community would have its standards applied, insisted that "our Nation is simply too big and too diverse" for a single national standard; requiring states to follow one would be "an exercise in futility."[81] Although the Court recognized that fundamental rights under the national Constitution "do not vary from community to community," it rejected the notion that free speech claims in obscenity cases must be judged by "fixed, uniform national standards."[82] In *Miller*, the Court upheld a conviction based on application of the "contemporary standards of the state of California."[83] The Court did not explain why the nation was too big and diverse for a single standard but California was not.

Though *Miller* held that application of a national standard would be impossible, subsequent decisions, without overruling *Miller*, have endorsed the application of a national standard.[84] But it is also perfectly permissible to apply a local standard even in a federal

77. FCC v. Pacifica Found., 483 U.S. 726, 745 (1978).

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

79. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

80. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting)); *see also id.* at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

81. *Miller*, 413 U.S. at 30.

82. *Id.* As Justice Brennan noted, "[c]ommunities vary . . . in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution." Jacobellis v. Ohio, 378 U.S. 184, 194 (1964).

83. *Miller*, 413 U.S. at 33–34.

84. *See* Hamling v. United States, 418 U.S. 87, 104–05 (1974).

prosecution.[85] In *Ashcroft v. ACLU*,[86] applying statutory language tracking the *Miller* test, six of the Justices on a sharply fragmented Court indicated in various separate opinions that the application of local community standards to the internet would be deeply problematic if not flatly unconstitutional.[87] Because no full opinion garnered more than three votes, however, no clear holding emerges from that case. Gleaning from the scattered oracles of that decision, the Ninth Circuit has held that "a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email."[88] The Eleventh Circuit, in an unpublished opinion, rejected that view.[89] With the lower courts in disarray, the Supreme Court has provided no clear guidance, failing to address the growing incongruities among *Miller*'s localism, a uniform national Constitution, and increasingly globalized speech communities.

The interplay of *Miller*'s prurient interest and patent offensiveness prongs empowers the police, courts, and juries to discriminate against sexual minorities. As Kathleen Sullivan once put it, material is obscene under *Miller* if it both "turns you on" and "grosses you out," but it is consumers who are turned on and censors who are grossed out.[90] U.S. case law makes this division of the audience explicit in the case of "deviant" materials: the prurient interest of depictions of "such deviations as sado-masochism, fetishism, and homosexuality" is judged from the perspective of a "deviant," but their "patent offensiveness" is judged by the standards of the entire community.[91]

Federal obscenity prosecutions have been favored by Republican administrations eager to cater to religious conservatives and largely eschewed by Democrats. Prosecutions of material involving consenting adults continued under Reagan and George H.W. Bush but virtually came to a halt under Clinton.[92] The George W. Bush

85. *See id*.

86. Ashcroft v. ACLU, 535 U.S. 564 (2002).

87. *See id*. at 589 (O'Connor, J., concurring in part); *id*. at 590 (Breyer, J., concurring in part); *id*. at 594–96 (Kennedy, J., joined by Souter & Ginsburg, JJ., concurring in the judgment); *id*. at 602–03 (Stevens, J. dissenting).

88. United States v. Kilbride, 584 F.3d 1240, 1245 (9th Cir. 2009).

89. United States v. Little, No. 08-15964 (11th Cir. Feb. 2, 2010).

90. Jeffrey Rosen, *Miller Time*, NEW REPUBLIC (Oct. 1, 1990), at 17.

91. Mishkin v. New York, 383 U.S. 502, 505, 508 (1966); *see* Hamling v. United States, 418 U.S. 87, 128–29 (1974); *Miller*, 413 U.S. at 33.

92. *See* Boyce, *supra* note 14, at 324.

administration resumed prosecutions, establishing an Obscenity Prosecution Task Force (OPTF) within the Justice Department, and even enlisted a private right-wing religious group called Morality in Media to investigate claims, although to seemingly little effect.[93] The Obama administration dismantled the OPTF and brought no new prosecutions, although it concluded those already underway when it took office.[94] Trump, who has himself appeared in several soft-core pornographic films, promised a crackdown on pornography.[95] State prosecutions, especially in states dominated by religious conservatives, are more scattershot than their federal counterparts and often target material that is "only marginally eligible for obscenity classification."[96] However, such prosecutions seem to have little effect on the availability of sexually explicit material: the main effect is simply to "driv[e] consumer traffic away from brick and mortar stores and onto the Internet."[97]

C. Canada

The earliest obscenity decisions of the Supreme Court of Canada antedate the adoption of constitutional judicial review and are thus framed as exercises in statutory interpretation. A 1959 act of Parliament defined obscene material as "any publication the dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence."[98] In its first obscenity decision, the Canadian Supreme Court was sharply split over the applicable test, but Justice Judson's influential opinion held that the statutory definition was exclusive and therefore displaced the "vague, difficult and unsatisfactory" *Hicklin* test.[99] Drawing on Australian case law, Justice Judson

93. *See id*. at 325.

94. *See* Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENT. L.J. 607, 639 (2015).

95. *See* Jeremy Stahl, *Jeff Sessions Just Said He'd Prosecute Porn. President-Elect Trump Appeared in Multiple Porns*, SLATE (Jan. 10, 2017), http://www.slate.com/blogs/the_slatest/2017/01/10/jeff_sessions_says_he_d_prosecute_porn_trump_appeared_in_multiple_porns.html [https://perma.cc/922J-925R].

96. Kinsley, *supra* note 94, at 641.

97. *Id*. at 641–42.

98. Offences Tending to Corrupt Morals, R.S.C. 1985, c C 46, § 163(8) (Can.).

99. Brodie v. The Queen, [1962] S.C.R. 681, 702 (Can.) (Judson, J.) (holding that *Lady Chatterley's Lover* was not obscene).

also held that the statutory undue exploitation standard must be judged by the "standards of acceptance prevailing in the community."[100] He determined that when sexual material in a work serves a genuine artistic purpose, it is not obscene under the undue exploitation test.[101]

In a subsequent decision, the Supreme Court of Canada unanimously endorsed the community standards test.[102] The relevant community standard, the Court held, is national and contemporary.[103] Thus, the Court avoided at least one problem of the U.S. approach, with its patchwork of different standards. Moreover, the Canadian standard is a standard of "*tolerance*, not taste."[104] The Court held that "[w]hat matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."[105] It is not clear that this standard based on intolerance is an improvement over the U.S. standard based on offensiveness. Canadian commentators have argued that it simply masks judicial application of subjective moral values.[106]

In 1982, the enactment of the Charter of Rights and Freedoms established a constitutional bill of rights protected by judicial review. Section 2(b) of the Charter guarantees the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[107] In contrast to the U.S. First Amendment with its absolute language, the Canadian guarantee, like other rights guarantees in the Charter, is subject under Section 1 "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[108] To determine whether an in-

100. *Id*. at 705.

101. *See id*. at 702–05.

102. Dominion News & Gifts Ltd. v. The Queen, [1964] S.C.R. 251 (Can.).

103. *See id*. at 513–14 (Dickson, C.J.C.).

104. *Id*. at 508.

105. *Id*.

106. *See, e.g*., L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 113–14 (2004) (arguing that Canadian decisions purporting to apply community standards "reflect little more than the subjective moral views of judges); RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 111 (2000) (arguing that in *Butler* "[j]udicial subjectivity . . . is simply dressed up in the objective garb of community standards").

107. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), ch. 11, § 2(b) (Can.).

108. *Id*. § 1.

fringement of the freedom of expression is justified, the Supreme Court of Canada asks whether the government's purpose is "pressing and substantial," whether the measure is rationally connected to the government's purpose, impairs the right no more than necessary, and does not disproportionately impact those whose rights are infringed.[109]

In *Regina v. Butler*,[110] the Supreme Court of Canada upheld the 1959 obscenity statute against a freedom of expression claim under the Charter. In doing so, it extensively reformulated the community standards test. According to the Court, sexually explicit material may violate community standards when it depicts violence or "treatment that is degrading or dehumanizing."[111] The consent of the participants in the production of "degrading or dehumanizing" material cannot save distributors from prosecution: "Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."[112] Such material may be suppressed "not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women."[113]

Thus, the Court sought to ground obscenity law in concerns about concrete harms, following an approach advocated by both social conservatives and pro-censorship feminists. But the Court did not require proof that the material criminalized is harmful to society. Indeed, it recognized that "a direct link between obscenity and harm to society may be difficult, if not impossible, to establish" but nevertheless held that it was "reasonable to presume" such a link. Obscenity law would be applied to suppress "bad" pornography, in which women "are depicted as sexual playthings,"[114] but not "good" pornography, which "validates women's will to pleasure."[115] The Court expressed no concerns that police, prosecutors, and judges would have trouble distinguishing the two.[116]

109. R. v. Oakes, [1986] 1 S.C.R. 103, 138–39 (Can.).

110. R. v. Butler, [1992] 1 S.C.R. 452 (Can.).

111. *Id*. at 484.

112. *Id*. at 479.

113. *Id*.

114. *Butler*, 1 S.C.R. at 500 (Can.).

115. *Id*.

116. A recent decision of the Taiwanese Constitutional Court has limited obscenity bans to violent pornography, which is clearer and less sweeping than the Canadian approach. *See* Taiwan Constitutional Court, Judicial Yuan Interpretation Number 617 (Oct. 26, 2006), *translated at* http://www.lawschool.cornell.edu/womenandjustice/Legal-and-Other-

Butler's rejection of the need for empirical proof was essential to its harm-based approach. There is no scholarly or scientific consensus that pornography causes violence.[117] Indeed, in several studies, greater availability of pornography was correlated with lower rates of violence.[118] Moreover, the implementation of *Butler* proved discriminatory and repressive. Up to seventy-five percent of the material seized was directed to gay and lesbian readers; gay and feminist bookstores were broadly targeted.[119] Customs authorities confiscated as obscene works by famous authors including Oscar Wilde, Langston Hughes, Jean Genet, Marguerite Duras, Audrey Lorde and Anne Rice.[120] In a subsequent decision, the Court disclaimed responsibility for these abuses and denied injunctive relief, accepting the government's assurances that the "administrative problems" had been corrected.[121] In the wake of that decision, Customs continued to detain a high percentage of gay and lesbian material.[122]

In its 2005 *Regina v. Labaye* decision,[123] the Supreme Court of Canada appeared to jettison *Butler*'s willingness to forego empirical proof of harm. The defendant in *Labaye*, who ran a Montreal sex club, had been charged with the crime of operating a "common bawdy house."[124] The case was thus a prosecution for indecency ra-

Resources/DisplayCountry.cfm?CountryID=62. In that decision, the Court limited bans on material available to consenting adults to material "whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value." *Id*.

117. Many studies (experimental, longitudinal, and comparative) devoted to this question simply do not show a significant causal relationship between pornography and violence. *See* Boyce, *supra* note 14, at 363-65. *But see* Emily Rothman, *Domestic Violence—What's Porn Got to Do With It?,* BOS. U. VIEWPOINT (Oct. 20, 2015), https://www.bu.edu/sph/2015/10/20/viewpoint-domestic-violence-whats-porn-got-to-do-with-it/ [https://perma.cc/6ZKE-6C6Z] (citing studies finding positive effects of pornography, but also others showing correlations to sexual aggression).

118. *See* RICHARD POSNER, SEX AND REASON 368–70 (1992); SUMNER, *supra* note 106, at 134 (2004); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 255–56 (2d ed. 2000). Of course, correlation is not causation, and one should not necessarily conclude that increased availability pornography caused the decrease in rapes or sexist conduct. But these studies do at least cast doubt on the opposite claim, that pornography causes violence against women.

119. *See* Little Sisters Book & Art Emporium v. Canada, [2000] 2 S.C.R. 1120, 1137–39, 1184 (Can.); STROSSEN, *supra* note 118, at 231.

120. *See Little Sisters*, 2 S.C.R. at 1139, STROSSEN, *supra* note 118, at 238–39.

121. *Little Sisters*, 2 S.C.R. at 1203.

122. *See* Boyce, *supra* note 14, at 334 & n.271.

123. R. v. Labaye, [2005] 3 S.C.R. 728 (Can.).

124. *Id*. at 733.

ther than obscenity, but the Court decided it largely by applying obscenity doctrine.[125] The trial court had convicted the defendant, stating that "Canadian society does not tolerate orgies."[126] The Supreme Court quashed the conviction, chiding the trial court for applying "the community standard of tolerance test," which, it claimed, "ha[d] been replaced . . . by the harm-based test developed in *Butler*."[127] The Court then stated that harm must be "objectively shown beyond a reasonable doubt" and must be severe enough "to interfere with the proper functioning of society."[128] Specifically, "[t]he causal link between images of sexuality and anti-social behaviour cannot be assumed," but "must be proved."[129] Given the absence of such objective proof (let alone proof "beyond a reasonable doubt"), the new standard, if taken seriously, would seem to spell the end of the criminalization of obscenity.

However, it is not clear that this standard has been taken seriously, or even that it was intended to be. The *Labaye* Court did not expressly overrule *Butler*, presenting its apparently radical departures from that decision as nothing more than a faithful application. Disturbingly, the *Labaye* Court continued to assert that people have a right "to live in a zone that is free from conduct that deeply offends them."[130] *Labaye* may have demolished the logical foundations of Canadian obscenity jurisprudence, but the façade remains. The current scope of Canadian constitutional obscenity doctrine is unclear,[131] yet the Supreme Court seems disinclined to address its inconsisten-

125. *See id*. at 737–40.

126. *Id*. at 756.

127. *Id*.

128. *Labaye*, 3 S.C.R. at 750. In fact, the *Butler* Court had called "the 'community standard of tolerance' test" "the most important test of obscenity," and stated that "degrading or dehumanizing . . . material would, apparently, fail the community standards test . . . because it is perceived by public opinion to be harmful to society." R. v. Butler, [1992] 1 S.C.R. 452, 479.

129. *Labaye*, 3 S.C.R. at 751-52. In contrast, the *Butler* Court said that the public perception that material is harmful is sufficient to criminalize it and no proof that it causes harm is required, because that proposition "is not susceptible to proof in the traditional way." *Butler*, 1 S.C.R. at 484.

130. *Butler*, 1 S.C.R. at 497.

131. In a recent prosecution, a jury acquitted on grounds of artistic freedom a film depicting the torture, sexual abuse and murder of young female victims so graphically and realistically that a pathologist initially thought it might have recorded an actual murder. *See Quebec special effect artist acquitted in morals case*, Canadian Press, Dec. 22, 2012, http://www.cbc.ca/news/canada/montreal/quebec-special-effects-artist-acquitted-in-morals-case-1.1214084 [https://perma.cc/TKE8-B93F].

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D. India

1. Before Independence

It would be hazardous to generalize about attitudes toward sexuality and sexual expression in a civilization as ancient and diverse as India's. Nevertheless, it is clear that the candor of sexual descriptions and depictions in traditional Indian culture shocked the country's Victorian British overlords. The *Kāmasūtra* of Vatsyāyana (most likely dating to the third century C.E.), with its frank and encyclopedic accounts of sexual organs and positions, was neither first nor last in a long series of explicit Indian erotic treatises, which continued to be composed right up to the period of substantial contact with European powers.[132] When confronted in 1873 with the first English translation of one of these treatises, "the printer allegedly panicked upon reading the proofs and refused to go on," delaying its appearance for a decade.[133] To avoid punishment under the Obscene Publications Act 1857, the translators eventually had it printed by a fictitious "Kama Shastra Society" (of which they were the only members) "for private circulation only."[134] The exuberant sculptures on the temples of Khajurāho, universally regarded today as among the great masterpieces of Indian art, depict couples and groups engaged in sexual intercourse with unparalleled frankness.[135] Despite certain puritanical strains, erotic art also flourished under many of India's Muslim dynasties and continued to be produced under the Mughals right up until the final consolidation of British power in the nineteenth century.

Early British colonial administrators in the late eighteenth and early nineteenth centuries often manifested a genuine interest in Indian culture and a desire to govern the country in accordance with its indigenous traditions.[136] But to maintain British power, later admin-

132. *See* Wendy Doniger & Sudhir Kakar, *Introduction* to VATSYAYANA, KAMASUTRA xi, xi–xii (Wendy Doniger & Sudhir Kakar trans., 2002).

133. *Id*. at lii.

134. Ben Grant, *Translating/'The'* Kama Sutra, 26 THIRD WORLD Q. 509, 509 (2005).

135. *See, e.g.*, GEORGE MITCHELL, HINDU ART AND ARCHITECTURE 92 (2000); BENJAMIN ROWLAND, THE PELICAN HISTORY OF ART: THE ART AND ARCHITECTURE OF INDIA: BUDDHIST / HINDU / JAIN (3d ed. 1967).

136. *See* JOHN KEAY, INDIA: A HISTORY 426 (rev. ed. 2010).

istrators resorted to repression of nationalist sentiment, enacting a series of licensing measures beginning in the 1820s that established a comprehensive system of prepublication censorship of the press.[137] By the Victorian era, under the influence of Christian evangelists like William Wilberforce and utilitarian social theorists like James and John Stuart Mill, British authorities had resolved to eradicate native Indian cultural and legal traditions and replace them with British ones.[138] No one was more convinced of the superiority of European and especially British culture than Thomas Babington Macaulay. Appointed first chairman of the colonial Law Commission in 1834, Macaulay undertook to put utilitarian ideas into practice in India by codifying English criminal law. Although Macaulay knew neither Sanskrit nor Arabic, he had no doubt "that a single shelf of a good European library was worth the whole native literature of India and Arabia."[139]

Macaulay's Indian Penal Code, drafted in the 1830s and adopted in 1860, is, to its admirers, a jewel in the British colonial legacy.[140] This codification of English law for British India imposed Victorian modes of cultural regulation in several obscenity provisions that remain on the books today. The most important of these is Section 292, which prohibits the production, possession, exhibition, sale, and distribution of obscene books, paintings, representations, or objects.[141] In applying this provision, which like its English counterpart did not define obscenity, the colonial courts and their successors in independent India naturally adopted the Victorian *Hicklin* standard.[142]

137. *See* GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 46-47 (2016).

138. *See id*. at 428–432.

139. THOMAS BABINGTON MACAULAY, *Minute of 2 February 1835 on Indian Education*, *in* MACAULAY, PROSE AND POETRY 721, 722 (G.M. Young ed., 1957).

140. *See, e.g*., *IPC's endurance lauded*, NEW INDIAN EXPRESS (May 4, 2011), www.newindianexpress.com/states/odisha/2011/may/04/ipcs-endurance-lauded-250178.html (reporting remarks of Lord Nicholas Addison Phillips, President of the Supreme Court of the United Kingdom).

141. *See* Pen. Code § 292 (India). Also of interest is section 294, which prohibits the doing of an obscene act in public or the singing of "any obscene song, ballad or words, in or near any public place." Id. §294. In 2007 a court in Jaipur made international headlines when it invoked this section to issue arrest warrants for Richard Gere and Shilpa Shetty over a kiss on the cheek at an AIDS awareness event; the Supreme Court eventually quashed the charges. *See Richard Gere cleared of obscenity*, BBC (Mar. 14, 2008), http://news.bbc.co.uk/2/hi/7295797.stm [https://perma.cc/3A3T-GLUS].

142. *See* Udeshi v. Maharashtra, (1965) 1 SCR 65, 74; BHATIA, *supra* note 137, at 106.

2. The Constitution of 1950

The Constitution of India, in force since 1950, is the world's longest. Its framers drew upon preexisting colonial and independence-era legal structures but also undertook an extensive comparative examination of contemporary constitutional systems. Under the direction of its principal draftsman B.R. Ambedkar, they sought nothing less than a social revolution in which untouchability, economic inequality, and all other forms of legal, social, and economic discrimination would be abolished.[143] The Constitution combined a British-style parliamentary system of government with a federal structure drawing on elements of the U.S., Canadian, and Australian systems.[144] As a check on the Westminster-style political structure with its strong national government, the framers adopted a set of Fundamental Rights[145] and a U.S.-style system of judicial review of legislative and executive action.[146] In its interpretation of fundamental rights, the Supreme Court of India resorts frequently to foreign authority, especially decisions of English and other Commonwealth courts as well as the U.S. Supreme Court.

Article 19 of the Constitution guarantees the "freedom of speech and expression."[147] A reservations clause permits "reasonable restrictions on the exercise" of those freedoms "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."[148] These restrictions were demanded by the nationalist leadership including Ambedkar, Jawaharlal Nehru, and Vallabhbhai Patel over considerable liberal opposition.[149] Congress Party leaders, shocked by the atrocities of the Partition, abandoned their commit-

For example, prosecutions were brought in the late colonial period against the Urdu writers Saadat Hasan Manto and Ismat Chughtai. In a 1945 trial, the court found that Manto's use of the word "bosom" and Chughtai's hints suggesting a lesbian relationship were not obscene under *Hicklin*. *See* BHATIA, *supra* note 137, at 105–06; Ismat Chughtai, *An Excerpt from* Kaghazi Hai Pairahan (*The "Lihaf" Trial)*, 15 ANN. URDU STUD. 429 (2000).

143. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 26–46 (1999).

144. INDIA CONST. pt. V–VI.

145. *Id*. pt. III.

146. *See id*. arts. 13, 32, 226.

147. INDIA CONST. art. 19(1)(a).

148. *Id*. art. 19(2).

149. *See* BHATIA, *supra* note 137, at 47–48.

ment to unrestricted freedom of speech and began to assert some of the same regulatory powers exercised by their British colonial predecessors.[150] The reservations for "public order, decency or morality" are of greatest importance for the obscenity cases.

The Indian Supreme Court has expanded in size from eight judges in 1950 to thirty-one (including the Chief Justice) today, but nowadays it never sits as a full bench. Under the Constitution, important constitutional cases are supposed to be decided by a Constitution Bench of five or more judges while routine cases are handled by a Division Bench of two or three judges.[151] In current practice, however, only a tiny fraction of cases are heard by Constitution Benches. The vast majority (even many presenting seemingly important constitutional issues) are handled by two-judge benches, as the Court struggles with massive caseloads.[152] In theory, Division Benches are bound by prior Division Bench and Constitution Bench decisions.

3. *Udeshi v. Maharashtra*: Lady Chatterley in New Delhi

In 1964, the Supreme Court of India first considered the free speech implications of obscenity law in *Udeshi v. Maharashtra*.[153] By this time, courts in the United States, United Kingdom, and various Commonwealth countries were moving away from *Hicklin* toward a community-standards approach. Still, the Indian Court declined to repudiate *Hicklin*.

Udeshi concerned *Lady Chatterley's Lover*, which had been cleared of obscenity charges in recent American,[154] British,[155] and Canadian[156] decisions but which continued to be banned in Australia and in Japan. Judge Hidayatullah, the son of an Urdu poet who had instilled in him an appreciation of literature, wrote for a unanimous Court, displaying an awareness of recent developments in English and American law. The U.S. Supreme Court, which had failed since *Roth* to coalesce around a single standard, provided no clear guidance. Ultimately, Hidayatullah not only retained *Hicklin* but refor-

150. *See id*. at 48.

151. *See id.* art. 145(3).

152. *See* Nick Robinson, *Judicial Architecture and Capacity*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 330, 338–41 (Sujit Choudhry et al. eds. 2016).

153. Udeshi v. Maharashtra, (1965) 1 SCR 65.

154. Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959).

155. R. v. Penguin Books Ltd. [1961] Crim L.R. 176.

156. Brody, Dansky, Rubin v. The Queen, [1962] S.C.R. 681 (Can.).

mulated its obscenity test in ways that were even more repressive.

The *Hicklin* test, the Court held, had "been uniformly applied in India" and should not be discarded.[157] Retention of the Victorian standard identifying obscenity as matter that "tends to corrupt or deprave those whose minds are open to such immoral influences, and into whose hands [it] may fall"[158] was necessary, the Court maintained, to protect the national and regional vernacular literatures of India, which were just "strengthening themselves by new literary standards after a deadening period under the impact of English," from being swamped by pornography.[159] Freedom for sexual depictions would be "likely to pervert our entire literature because obscenity pays and true art finds little support."[160] Perhaps subconsciously echoing colonial stereotypes about excitable natives, the Court insisted that Indian readers would embrace "true art" only if they could find no obscenity to occupy their "lascivious, prurient or sexually precocious minds."[161]

While claiming to adhere to *Hicklin*, the *Udeshi* Court propounded an even more sweeping and potentially repressive reformulation of the obscenity test. The Indian test, "(regard being had to community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency."[162] The Court's definition of obscenity as matter "treating with sex in a manner appealing to the carnal side of human nature, or having that tendency" is even more sweeping than the *Hicklin* definition, with its focus on depravity. Moreover, the Court mandated case-by-case balancing to determine whether a "social purpose" *preponderates*, not merely whether some social value exists (as under *Roth*) or even whether it is "serious" (as it would be under *Miller*).

Applying this standard, the Court found that no social purpose in *Lady's Chatterley's Lover* could redeem it from a charge of obscenity. "Lawrence," the Court held, "had a dual purpose in writing the book. The first was to shock the genteel society of the country of his birth which had hounded him and the second was to portray his

157. *Udeshi*, 1 SCR at 74.

158. *Id*.

159. *Id*. at 76.

160. *Id*.

161. *Id*. at 77.

162. *Id*.

ideal of sexual relations."[163] The Court conceded that Lawrence had a social purpose: he wished to explode "the taboo on sex in art and literature," which "seemed to him to corrode domestic and social life."[164] Moreover, the Court admitted that Lawrence was an artist who had found "some poetry even in the ugliness of sex."[165] But ultimately "[t]he poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing."[166] Any social message or philosophy of life in the novel "are unfolded in his other books also," so banning this particular book caused "no loss to society."[167] Ultimately, the Court held, Lawrence "went too far."[168] He wrote "a flowering book with pistil and stamens standing," in his own words "a phallic novel, a shocking novel."[169] As there was "no social gain to us which could be said to preponderate,"[170] *Lady Chatterley's Lover* could be prohibited.

Following *Udeshi*, Parliament codified the *Hicklin* definition into law in 1969. It amended Section 292 of the Indian Penal Code to specify that material is obscene "if it is lascivious or appeals to the prurient interest or if its effect . . . is, if taken as a whole, such as to tend to deprave or corrupt persons who are likely . . . to read, see, or hear [it]."[171] The amendment included an exception for religious matter, as well as matter "the publication of which is proved to be justified as being for the public good on the ground that [it] is in the interest of science, literature, art or learning or other objects of general concern."[172] Obscenity, like other crimes in India, is tried by a judge without a jury.[173]

For several decades, the Court adhered to *Hicklin* and *Udeshi*, but overturned a few obscenity convictions for vernacular novels that

163. *Id*. at 78.

164. *Id*. at 79.

165. *Id*. at 80.

166. *Id*.

167. *Id*. at 81.

168. *Id*. at 79.

169. *Id*. at 79–80.

170. *Id*. at 81.

171. INDIA PEN. CODE § 292.

172. *Id*. There is also an exception for archaeological monuments. *See id*.

173. Trial by jury, which had applied in colonial times principally in trials of British or other European defendants, never took wide root and was gradually abolished during the 1960s.

were not very sexually explicit.[174] In a 1970 decision, the Supreme Court upheld prior censorship of films.[175] Carrying forward a practice begun in 1918 by the British colonial regime, the Indian Parliament in 1952 established a government Board of Film Censors to review all films before release.[176] Chief Justice Hidayatullah, as he was by then, writing for a unanimous Constitution Bench, rejected a challenge to this system. Film, the Court held, "is able to stir up emotions more deeply than any other product of art," especially in "children and adolescents" who "try to emulate or imitate what they have seen"[177]; it therefore called for tighter controls than did other media, but self-censorship by an industry-run film board such as the Motion Picture Association of America was impractical in India, where the industry was much less oligopolistic[178] Moreover, the Indian Constitution, unlike the U.S. Constitution, specifically reserved the power to restrict expression in the interests of decency or morality.[179] The Court therefore held that effective regulation of film in India required prior government censorship.

4. Towards Community Standards

In its 2010 *Khushboo v. Kanniammal* decision,[180] the Court began to distance itself from the *Hicklin-Udeshi* standard. Khushboo, a famous film actress, faced twenty-three separate criminal complaints arising out of her statement to the press that premarital sex is not necessarily wrong, provided precautions are taken against disease and pregnancy. Scandalized political figures instigated a host of criminal charges including obscenity, indecent representation of women, promotion of group hatred, and group defamation.[181] The Court quashed all charges.[182]

174. *See*, *e.g.*, Kakodar v. Maharashtra, 1970 SCR (2) 80 (reversing conviction of Bengali novelist who had neither described a sex act nor used vulgar language); Bose v. Mitra, 1985 SCR Supp. (3) 17 (reversing conviction of Marathi novelist who obliquely alluded to sex acts and used some vulgar language).

175. Abbas v. Union of India, (1971) SCR (2) 446.

176. *See id*. at 454.

177. *See id*. at 458–59.

178. *See id*. at 453.

179. *See id*. at 467.

180. Khushboo v. Kanniammal, (2010) SCALE 467.

181. *Id*. ¶ 7.

182. *See id*. ¶ 34.

On obscenity, the Court took note of *Udeshi* but also alluded to "numerous other" Indian and foreign decisions mandating the application of "contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person."[183] The Court did not discuss or even cite those decisions, finding that Khushboo's case could be disposed of without revisiting the constitutional standard. Nevertheless, the Court seemed to signal that it was time to move beyond *Hicklin* and *Udeshi*.

Khushboo had simply said that society ought to accept premarital sex. Nothing she said "could arouse sexual desires in the mind of a reasonable and prudent reader."[184] And even if her "statements could encourage some people to engage in premarital sex," that was "not an offence."[185] The Court especially emphasized the need "to protect unpopular views in the socio-cultural space."[186] Freedom of speech protects "open dialogue" not just on narrowly political issues but also on "societal attitudes."[187] Khushboo's views on marriage and sexuality might have been held only by a minority in India, but "[n]otions of individual morality are inherently subjective and the criminal law cannot be used to unduly interfere with the domain of personal autonomy."[188]

In its 2014 *Sarkar v. West Bengal* decision,[189] the Court explicitly repudiated the *Hicklin* test. The allegedly obscene matter was a photograph of German tennis player Boris Becker with his black German-American fiancée Barbara Feltus, which had originally appeared on the cover of the German magazine *Stern* in 1992.[190] Becker and Feltus, shot from the waist up, were nude, but Becker's arms were wrapped around Feltus' breast.[191] The accompanying article discussed the couple's engagement and future plans, as well as their commitment to racial equality.[192]

The article and photo were reproduced in two Indian publica-

183. *Id.* ¶ 18.

184. *Id.*

185. *Id.* ¶ 19.

186. *Id.* ¶ 29.

187. *Id.*

188. *Id.*

189. Sarkar v. West Bengal, (2014) 4 SCC 257.

190. *Id.* ¶ 1.

191. *See id.* ¶ 27.

192. *See id.* ¶¶ 1, 28.

tions in 1993. An offended lawyer filed a criminal complaint. "[A]s an experienced Advocate and elderly person," he averred, "he could vouchsafe that the nude photograph . . . would corrupt young minds, both children and youth of this country, and is against the cultural and moral values of our society." [193] Unless such pictures were banned and their publishers punished, "the dignity and honour of our womanhood would be in jeopardy."[194] The case went forward and dragged on for two decades.

After twenty-one years, the Supreme Court finally quashed the proceedings. The Court reviewed its own precedents, emphasizing liberal dicta.[195] Giving short shrift to *Udeshi*, it quoted extensively from the jury instructions in the English case that had rejected obscenity charges against *Lady Chatterley's Lover*.[196] It noted that the U.S. Supreme Court, in *Roth*, had rejected *Hicklin* in favor of a community standards test.[197] Likewise, the Supreme Court of Canada, in *Towne Cinema* and later in *Butler*, rejected *Hicklin*.[198] Without much real analysis of these decisions, the Court peremptorily concluded that "*Hicklin* is not the correct test."[199] Rather, "obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."[200]

This language paraphrases part of the *Roth* test,[201] and the *Sarkar* decision has been read as having adopted the *Roth* standard, although that is hardly clear.[202] Curiously, the *Sarkar* Court did not cite *Miller* or any other U.S. case after *Roth*. It is not clear from the Court's opinion whether it considered any developments in U.S. obscenity law that occurred after *Udeshi*. Similarly, while the Court cited the Canadian decisions with apparent approval, it did not explore or even acknowledge the discrepancies between the U.S. and

193. *Id*. ¶ 4.

194. *Id*.

195. *See id*. ¶¶ 12–16.

196. *See id*. ¶ 17.

197. *See id*. ¶ 21.

198. *See id*. ¶ 23.

199. *Id*. ¶ 24.

200. *Id*.

201. *Roth*, 354 U.S. at 489 ("whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest").

202. *See* BHATIA, *supra* note 137, at ix.

Canadian approaches.[203]

The application of a community-standards approach in India is especially fraught, as India is a larger and in many respects a more diverse society than the United States or Canada.[204] If the standard varies from one locality to the next, as *Miller* suggests it should in the United States, the result would be an incoherent patchwork of varying levels of protection, rather than the uniform protection of a constitutional right, and all the harder to justify since obscenity cases are tried in India without juries. If the standard is to be a single national one, as in Canada, how is it to be constructed out of India's thousands of multifarious and overlapping communities? As a Canadian judge once observed, in societies as diverse as Canada or the United States, a national "community standard is a will-o'-the-wisp, an unknown, and perhaps even an unknowable quantity."[205] Even more so, perhaps, in India.

Doctrinally, then, the *Sarkar* Court left uncertain the contours of the new community standards test. Its perfunctory application of that test to the facts of the case sheds little further light:

> Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave [sic] minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend on the particular posture in which the woman [sic] is shown. Breast of Barbara Fultus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people into whose hands the magazine . . . would fall.[206]

The conclusory final sentence is a reminder of the awkward fact that while the Court has just purportedly rejected *Hicklin*, *Hicklin*'s implacable ghost still hovers over Indian obscenity jurisprudence because the statute incorporates its language.

The *Sarkar* Court focused more on the social message of the *Stern* photograph than on the application of community standards. The Court emphasized that the intent of the nude photo, as explained

203. *See Sarkar*, 4 SCC ¶ 23.

204. *See* BHATIA, *supra* note 137, at 125.

205. R. v. Cameron, [1966] 2 O.R. 777, 805 (Can.) (Laskin, J., dissenting).

206. *See Sarkar*, 4 SCC ¶ 27.

by Boris Becker, was "to shock," but also to convey the idea "that an inter-racial relationship is okay."[207] Thus, the Court held, "[w]e should . . . appreciate the photograph and the article in light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between [a] white skinned man and a black skinned woman."[208] By focusing on the positive social message of the photograph in the context of the article, the Court's opinion suggests that it has not really repudiated the case-by-case balancing approach established in *Udeshi*.[209]

The impact of the *Sarkar* decision is uncertain not only because of its muddled treatment of community standards and *Udeshi* balancing but also because of the nature of the judicial panel—a two-judge Division Bench of the Supreme Court. In theory, a two-judge Division Bench of the Supreme Court cannot overrule a precedent—like *Udeshi*—set by a five-judge Constitution Bench. However, the use of large benches has dwindled,[210] and two-judge benches have increasingly led the evolution, if not fragmentation, of doctrine. Though *Udeshi* established ostensibly binding precedent, the insubordinate decision in *Sarkar* is a more recent and unchecked judgment of the Court, also binding on future two-judge benches. That is, unless a subsequent panel ignores *Sarkar* the way *Sarkar* ignored *Udeshi*.

5. *Tuljapurkar*: The Cult of Personality

In its 2015 *Tuljapurkar v. Maharashtra* decision,[211] the Court invented a novel obscenity doctrine that criminalizes sexual references to any "historically respected personality."[212] The accused work was a long Marathi poem entitled "Gandhi Mala Bhetala" ("I met Gandhi"), published in 1994 in a bank union magazine.[213] A member of a Hindu nationalist group complained, and obscenity charges were filed.[214] After two decades, the case reached the Supreme Court, which ruled that the trial must go forward. The poet,

207. *Id.* ¶ 28.

208. *Id.* ¶ 30.

209. *See id.*

210. *See* Robinson, *supra* note 152, at 340.

211. *See* Tuljapurkar v. West Bengal, (2015) 6 SCC 1.

212. *Id.* ¶ 1.

213. *See id.*

214. *See id.* ¶ 7.

by then seventy-two years old, would be compelled to travel the 500 kilometers from Mumbai to Latur for trial.[215]

The poem[216] depicts a large number of imaginary and historically impossible encounters with "Gandhi," who pops up "[a]t a drive-in theatre in Karl Marx's Toyota," at Mao's Long March, accepting a Nobel Peace Prize from Brezhnev, and activating the neutron bomb with Ronald Reagan.[217] It satirizes various religious and political figures of Indian society, including, toward the end, Indira Gandhi and her pliant Chief Justice Ajit Nath Ray. Gurjar's poem, written three years after Indira returned to power in 1980, satirically portrays the Mahatma being kicked out of Indira's bungalow and placed on trial before Chief Justice Ray "for endangering the nation by performing experiments with truth."[218]

The poem, which places "Gandhi" in various chronologically impossible situations, cannot be read simply as a statement about the historical Mahatma. Rather, it is a satire on those who wrap themselves in his legacy. Still, counsel for the government doggedly insisted that "the poem refers singularly and exclusively to Mahatma Gandhi in every stanza."[219] The Court struck an agnostic pose on this question, leaving it to be resolved on remand by the trial court.[220] The poet himself has denied that his poem is about the historical Gandhi: "My poem is not at all about Mahatma Gandhiji, it is about our society and what we have done to Gandhiji's values. It is, in fact, an unending poem, because we have not stopped destroying the Mahatma's values."[221]

The 145-pages of the Court's opinion convey almost nothing about the poem's subject or content. The Court quoted only three short passages from the poem, with the allegedly obscene words left

215. *See* Alka Dhupkar, *My Poem Talks About How We Have Destroyed Gandhi's Values*, MUMBAI MIRROR (May 16, 2015), mumbaimirror.indiatimes.com/Mumbai/cover-story/My-poem-talks-about-how-we-have-destroyed-Gandhis-values/amp_articleshow/473042.cms [https://perma.cc/SUV5-BNQ6].

216. Fortunately, the Marathi original and an English translation are available on the internet. *See Translation of Vasant Dattatreya Gurjar's poem Gandhi Mala Bhetla (Gandhi Met Me)*, KRACTIVISM (June 10, 2015) [hereinafter Gurjar Translation], http://www.kractivist.org/translation-of-vasant-dattatreya-gurjars-poem-gandhi-mala-bhetla-gandhi-met-me/ [https://perma.cc/WY2L-NCRJ].

217. *Id*.

218. *Id*.

219. *Tuljapurkar*, 6 SCC ¶ 101.

220. *See id*.

221. Dhupkar, *supra* note 215.

out, presumably so as not to compound the crime by repeating them.[222] By comparing these brief censored passages with the full poem, it is possible to discover what most offended the Court. The purportedly obscene passages describe "Gandhi masturbating in the memory of Hema Malini [a film actress and Member of Parliament born after Mahatma Gandhi was assassinated] on a public street;" "writing a poem on Golpitha" [Mumbai's red-light district]; and "playing the game of husband and wife" "[o]n the common man's earth [w]ith abandoned kids" and saying "[f]orget chastity, fuck all of them."[223]

Though the Court's opinion summarizes numerous obscenity decisions, it barely focuses on the existing obscenity standard. Indeed, the Court's first formulation of the question presented does not even mention obscenity: "whether in a write-up or poem . . . use [of] the name of a historically respected personality by way of symbol or allusion is permissible."[224] After a hundred and forty pages we finally get the answer: "When the name of Mahatma Gandhi is alluded [sic] . . . the 'contemporary community standards test' becomes applicable with more vigour, in a greater degree and in an accentuated manner."[225] References to sexual conduct or expressions that might be acceptable if applied to ordinary people are not acceptable when applied to the Mahatma. In other words, the Court announced a new, more stringent and speech-repressive test applicable to discussions or depictions of historically respected persons,[226] a class that the Court coyly declined to define, but that certainly includes Mahatma Gandhi.[227]

The Court's opinion, with over a hundred pages of quotations and case summaries and citations,[228] uncovered no precedent justifying its novel doctrine protecting historically respected persons, which it cryptically and somewhat hastily trotted out in the last few pag-

222. *See Tuljapurkar*, 6 SCC ¶ 101.

223. Gurjar Translation, *supra* note 216.

224. *Tuljapurkar*, 6 SCC ¶ 1.

225. *Id*. ¶ 105.

226. *See id*. ¶ 104.

227. *See id*. ¶ 2.

228. *See id*. ¶¶ 8–72. On *Tuljapurkar*'s failure to synthesize the material surveyed, *see* Gautam Bhatia, *Free speech, Obscenity and 'Respected Historical Personalities': A Troubling New Doctrine*, LIVELAW (May 14, 2015), http://www.livelaw.in/free-speech-obscenity-and-respected-historical-personalities-a-troubling-new-doctrine/ [https://perma.cc/D2FA-BQLW].

es.[229] The closest support the Court could muster for this new doctrine came from dicta in dissents and a concurrence from two decisions of the European Court of Human Rights.[230]

In the first decision, *Vereinigung Bildender Künstler v. Austria*,[231] the European Court overturned a ban on a painting that depicted with cartoonish crudity Mother Theresa, the right-wing political leader Jörg Haider, and other Austrian public figures engaged in various sex acts. Because the majority's decision did not support its doctrinal project, the *Tuljapurkar* Court focused instead on a dissenting opinion suggesting that the freedom of artistic expression does not protect "insulting pictures that undermine the reputation or dignity of others, especially if they are devoid of any meaningful message and contain nothing more than senseless, repugnant and disgusting images,"[232] and another holding that "human dignity" trumps "artistic freedom (*Kunstfreiheit*)."[233] While these dissents privilege "human dignity" over freedom of speech, they do not actually endorse special treatment of historically respected personalities.

The other European decision, *Wingrove v. United Kingdom*,[234] upheld a ban on a film depicting a sexual encounter between the crucified Christ and Saint Theresa of Avila. But the film had been banned for blasphemy, not obscenity. The Court upheld the ban (7-2), citing the "high threshold of profanation" under British blasphemy law and "the State's margin of appreciation in this area."[235] The *Tuljapurkar* Court focused mainly on the concurring opinion of Judge Pettiti, relied on heavily by the government.[236] Judge Pettiti found "particularly shocking . . . the combination of an ostensibly philosophical message and wholly irrelevant obscene or pornographic images" and speculated that "the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante, or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought may, in some cases,

229. *Id*. ¶ 104.

230. *See id*. ¶¶ 29, 32.

231. Vereinigung Bildender Künsler v. Austria, App. No. 68354/2001 Eur. Ct. H.R. (2007).

232. *Tuljapurkar*, 6 SCC ¶ 29 (quoting dissenting opinion of Judge Loucaides).

233. *Id*. (quoting dissenting opinion of Judges Spielmann and Jebens).

234. Wingrove v. United Kingdom, App. No. 17419/90, Eur. Ct. H.R. (1997).

235. *Id*. ¶ 61.

236. *Tuljapurkar*, 6 SCC ¶ 32. The court consistently misspells the judge's name as "Pettit." *See id*.

justify judicial supervision."[237]

The *Tuljapurkar* Court denied that it was engaging in judicial legislation in decreeing a new standard for historically respected personalities. Rather, it insisted, it was simply interpreting the meaning of the legislative term "obscene,"[238] just as past decisions had done in adopting the community standards test. The significance of the Court's reliance on *Wingrove*, a blasphemy decision, in this obscenity case becomes clear as the opinion expounds, at length, Gandhi's commitment to equality, nonviolence, humanism, and secularism.[239] In a stunning apotheosis at the climax of this extravagant panegyric, the Court elevated the secular humanist Mahatma to the same level as the greatest religious figures in history, whether in a pan-Indian Jain-Buddhist-Hindu trinity consisting of "Mahavir, Gautam Buddha and Mahatma Gandhi,"[240] or in a global Hindu-Buddhist-Christian trinity "along with the Buddha and Christ."[241]

In adopting its new standard, the Court rejected the "opinion that freedom of speech gives liberty to offend."[242] Attribution of offensive words to historically respected personalities makes them more offensive and therefore worthier of punishment.[243] For example, the Court asked, would it be permissible to depict great men like Gandhi, Rabindranath Tagore, and Vallabhbhai Patel abusing each other in heaven with obscene language? Of course not: such a foul-mouthed *sacra conversazione* among a trinity of national saints would have "travelled into the field of perversity."[244]

Despite the *Tuljapurkar* Court's protestations, its decision is an extraordinary feat of judicial lawmaking. Without any legislative authorization, the Court widened the scope of the crime of obscenity to cover an entirely new category of speech: the attribution of offensive words or actions to historically respected personalities. None of the precedents cited by the Court support such a move. Even the musings of the dissenting and concurring Justices in the European decisions at most support the idea that the *legislature* could criminalize such speech without violating the freedom of expression. They

237. *Wingrove*, App. No. 17419/90, Eur. Ct. H.R. ¶ (Pettiti, J. concurring)

238. *Tuljapurkar*, 6 SCC ¶ 73.

239. *See id*. ¶ 76–88.

240. *Id*. ¶ 89.

241. *Id.* ¶ 90.

242. *Id*. ¶ 104.

243. *See id*.

244. *Id*.

did not maintain that *courts* should undertake the task of criminalization. Indian courts have no power to create new classes of criminal offenses. Underlying Macaulay's project of codification was the idea that the common law of crimes was unsuitable for India, just as it has been rejected as inconsistent with the principle of legality in most other common-law jurisdictions.[245]

The Court's lowering of constitutional protection for speech concerning historically respected personalities seems perverse. Historically respected personalities, precisely because of the prestige they enjoy, should scarcely need the protection of the criminal law to preserve their reputations. It is hard to see how the attribution of salacious words or conduct to the poem's character "Gandhi" in any way lessens the Mahatma's stature as a world-historical figure.

On such questions, the U.S. Supreme Court has taken roughly the opposite approach, holding that speech concerning public officials or other prominent figures is entitled to *heightened* constitutional protection.[246] The Court reasoned that prominent figures had voluntarily "thrust themselves to the forefront of particular public controversies," thereby "invit[ing] attention and comment,"[247] while obscure private individuals are "more vulnerable to injury."[248] In 1994 the Supreme Court of India appeared to adopt this standard.[249] However, the whole logic of *Tuljapurkar* is at odds with this approach. No one had thrust himself more to the forefront of public controversies than Gandhi, and there are few historical figures whose reputation seems more secure. Yet under *Tuljapurkar*'s nationalist theology, offensive depictions of Gandhi are a quasi-blasphemous affront to the nation and thus enjoy *less* constitutional protection than offensive depictions of ordinary mortals.

6. Recent Developments

Tamilselvan v. Tamil Nadu, a recent decision by the Madras High Court, had a more liberal outcome.[250] Still, the case illustrates

245. *See*, *e.g.*, United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

246. *See*, *e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

247. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

248. *Id*.

249. *See* Rajagopal v. Tamil Nadu, (1994) 6 SCC 632 (adopting the *New York Times v. Sullivan* standard).

250. *See* Tamilselvan v. Tamil Nadu, Writ Petition 1215 of 2015 (Madras H.C. May 7, 2016).

how Indian obscenity law contributes to the repressive climate confronting writers facing mob intimidation from religious nationalists. The allegedly-obscene work was *Madhurobagan*,[251] a novel published in 2010 by Perumal Murugan, a professor of Tamil language and literature and a native of Tiruchengode in Tamil Nadu.

The novel tells the story of a childless rural couple living in Tiruchengode in the 1940s, Ponna and her husband Kali. Ponna and Kali are very much in love but face relentless mockery and humiliation because of their failure to produce children. Succumbing to this pressure, they decide that Ponna must avail herself of a tradition under which childless women are permitted to have sex with strangers during the annual "chariot festival" in order to produce offspring. By the end of the novel, readers sense that their marriage is collapsing, as Kali drinks to drown his feelings of anger, jealousy and despair. The couple's marital relations and the chariot festival scene are described in frank terms, but the effect is candid and poignant rather than prurient or pornographic.

Conservative religious nationalist groups organized a campaign of vilification, threats, and mob actions against Murugan.[252] In Tiruchengode, protestors circulated handbills, put up posters, organized a strike and demonstrations, and burned copies of the book in front of the police station. They demanded an apology, a ban on the novel, and criminal prosecution of Murugan.[253] Public authorities organized "peace talks," at which the exhausted author, frightened by threats against himself and his family, agreed to issue an unconditional apology and withdraw unsold copies of the book.[254] Murugan posted his own obituary on Facebook, announcing his death as a writer, retracting all of his novels, stories, and poems from publication. He offered monetary compensation to his publishers and any offended readers, who were free, he added, to burn his books if they liked.[255] He then removed himself from social media and canceled all public appearances.[256]

Murugan's supporters filed petitions in the Madras High Court, seeking relief for the author. Murugan's opponents filed peti-

251. An English translation has been published under the title *One Part Woman*. PERUMAL MURUGAN, ONE PART WOMAN (Aniruddhan Vasudevan tr., 2014).

252. *See Tamilselvan*, paras. 63, 90, 143.

253. *See id*. ¶¶ 64–65.

254. *See id*. ¶¶ 65–66.

255. *See id*. ¶ 21 (setting out text of Facebook obituary).

256. *See id*.

tions demanding criminal punishment for obscenity, group defamation, and injury to religious feelings.[257] The tone of these complaints was virulently religious and nationalist. Because the novel had been translated into English, "foreigner[s]" would "get a wrong notion that Tamil culture is lascivious" and that "a sexual orgy festival" like the one in the novel actually takes place in Tiruchengode today.[258] He had "undermined the reputation of womenfolk of the Kongu Region as immoral and promiscuous in nature, as if children born in that region in the 1940s are bastards."[259] Under the principles just laid down by the Supreme Court in *Tuljapurkar*, the complainants argued, the novel was clearly obscene.[260]

Murugan's supporters countered this narrow and distorted nationalist narrative by appealing to a broader Indian national tradition of tolerance and openness on sexual matters. They cited accounts in Tamil ethnography and folklore of traditional festivals, like the one described in the novel, in which ordinary sexual strictures were relaxed and men and women freely engaged in sexual relations outside of wedlock.[261] They pointed to the acceptance and celebration of eroticism in Sanskrit and Tamil texts going back thousands of years, before the Mughals and especially the British imposed more puritanical values on the country.[262] The court evidently sympathized with such arguments, lamenting that elements of Indian society still cling to a colonial "Victorian philosophy rather than draw inspiration from our own literature and scriptures."[263] The court declined the invitation of Murugan's opponents to extend the rule announced in *Tuljapurkar* and held that the novel was clearly not obscene under the contemporary community standards test enunciated in *Sarkar*.[264] Denouncing societal intolerance and the orchestrated campaign of intimidation against Murugan, the court ordered the authorities to protect him and encouraged him to resume his creative work: "Let the author be resurrected . . . . Write."[265]

257. *See id*. ¶ 50.

258. *Id*. ¶ 56.

259. *Id*. ¶ 48.

260. *See id*. ¶ 53.

261. *See id*. ¶ 83.

262. *See id*. ¶¶ 113–15.

263. *Id*. ¶ 149.

264. *Id*. ¶151.

265. *Id*. ¶ 196 (emphasis deleted).

II. JAPAN

A. Prewar Censorship Systems

1. The Tokugawa Era

Under the Tokugawa shogunate (1603–1868), the government persistently suppressed news and information about current events but allowed considerable space for the creative arts. The Tokugawa shoguns reunified the nation after a period of civil strife, ushering in a period of isolation, peace, and prosperity. Rising demand from a growing literate urban population of merchants and demobilized samurai fueled an outpouring of art, poetry, drama, and fiction.[266] The haiku master Matsuo Bashō, the classic dramatist Chikamatsu Monzaemon, and the popular poet and novelist Ihara Saikaku all flourished during the early Tokugawa era. Saikaku was noteworthy not just for his haikai poetry but for his often erotically charged fictions of the "floating world" that so appealed to the seventeenth-century bourgeoisie (*chōnin*), such as *The Life of an Amorous Man* (1682), *The Life of an Amorous Woman* (1686), and his homoerotic story collection, *The Great Mirror of Male Love* (1687).

In response to the literary ferment, the government in Edo entirely prohibited the circulation of newspapers by 1684, and the prohibition was repeatedly renewed thereafter.[267] The main mechanism of enforcement was a guild system that employed feudal techniques of group punishment to encourage publishers to police themselves.[268] The Tiger Year Edict of 1722 made these guilds responsible for the enforcement of censorship. It prohibited not just publications that disparaged samurai or dared to mention the Tokugawa family, but also "[e]rotic books (*kōshokubon*) of the kind that flourished since Saikaku wrote the first one in 1682 were to be investigated and allowed to go out of print, 'because they are not good for public morality.'"[269] Supplementary edicts prohibited dramatizations of love suicides, which had been the theme of Chikamatsu's most popular

266. *See* R.H.P. MASON & J.G. CAIGER, A HISTORY OF JAPAN 220–44 (rev. ed. 1997).

267. *See* JAY RUBIN, INJURIOUS TO PUBLIC MORALS: WRITERS AND THE MEIJI STATE 17 (1984). Despite such prohibitions, perhaps three thousand illegal single-issue news broadsheets (*yomiuri*) managed to be published over more than two centuries. *See id*.

268. *See id*. at 16–17.

269. *Id*. at 18.

plays.[270]

The long Japanese tradition of erotic prints and paintings, known euphemistically as *shunga* ("spring pictures"), reached its "creative peak" in the Tokugawa era.[271] These works graphically depict couples, often with exaggerated genitalia, engaging in sexual intercourse. Such depictions might fit Western definitions of pornography but seemingly "carried very little stigma" in Tokugawa Japan,[272] which lacked any "strict demarcation" or "firewall" between "art" and "pornography."[273] *Shunga* represented perhaps thirty percent of the total output of *ukiyo-e* artists in this period and are often of very high artistic quality; most of the great painters, including Utamaro and Hokusai, produced them at some point.[274] Such pictures were prized for their aesthetic qualities and enjoyed by couples and individuals for sexual edification and stimulation, but they were also believed to have magical apotropaic powers.[275] They were passed down from mother to daughter as bridal presents, and there is substantial evidence that they were widely enjoyed by women as well as men.[276] With the "reopening" of Japan in the nineteenth century, prominent European and American visitors were shocked to receive official gifts of *shunga* as a sign of hospitality and were especially horrified that not only their male Japanese hosts but also their wives would proudly display such "vile pictures" to their guests without the slightest sense of shame.[277]

Later Tokugawa policy was characterized by "broad swings between periods of relative openness and Confucian reform."[278] The episodes of "reform" typically combined fiscal austerity with a reac-

270. *See id*.

271. FREDERICK HARRIS, UKIYO-E: THE ART OF THE JAPANESE PRINT 119 (2010).

272. *Id*. at 121.

273. Timothy Clark & C. Andrew Gerstle, *What Was Shunga?*, *in* SHUNGA: SEX AND PLEASURE IN JAPANESE ART 17, 24 (Timothy Clark et al. eds., 2013) [hereinafter SHUNGA].

274. *See* HARRIS, *supra* note 271, at 128; Clark & Gerstle, supra note 273, at 21. The term *ukiyo-e* (literally "pictures of the floating world") refers to a genre of paintings and prints typically depicting scenes of city life, but also landscapes and historical scenes. HARRIS, *supra* note 271, at 9.

275. *See* HARRIS, *supra* note 271, at 124; Yamamoto Yukari, *Traditional Uses of Shunga*, *in* SHUNGA, *supra* note 273, at 296–99.

276. *See* Clark & Gerstle, *supra* note 273, at 29–30; Hayakawa Monta, *Who Were the Audiences for Shunga?*, *in* SHUNGA, *supra* note 273, at 34, 36–42; HARRIS, *supra* note 271, at 128.

277. *See* Clark & Gerstle, *supra* note 273, at 31; Hayakawa, *supra* note 276, at 41-42.

278. RUBIN, *supra* note 267, at 17.

tionary cultural policy in which physical force was employed where necessary to control recalcitrant writers and artists, a number of whom were placed in manacles for extended periods.[279] Sporadic and increasingly ineffective episodes of censorship under the Kyōhō (1722), Kansei (1790), and Tenpō (1841) reforms seem to have been directed more at covert political messages and depictions of the mixing of social classes than at sexual content.[280] After each bout of suppression, *shunga* artists were soon back at work and by the mid-1800s some were even comfortable enough to discreetly sign their works.[281]

Meanwhile, the mounting challenge to neo-Confucian orthodoxy by new scientific ideas infiltrating from the West, the shocking visit of Commodore Perry in 1853, and unrest among displaced peasants and workers all undermined the government. In 1866–68, riots and uprisings swept the country. Shouting "*Ee ja nai ka*" ("Isn't it great!"), crowds of people in the cities caroused, "cross-dressed, wore masks, and danced in the streets."[282] The Confucian order of the Tokugawa shogunate was collapsing.

2. The Meiji Constitution

Initially the Meiji Restoration of 1868 was a simple military coup in which disgruntled samurai lords from outer domains toppled the Tokugawa regime. But it set in motion a process of rapid Westernization and modernization of government and society. The administration of the country was centralized, the samurai class was expropriated, the caste system was abolished, and European-style systems of mass conscription and public education were introduced. After a careful study of European constitutions and with the assistance of many European (especially German) legal scholars, an authoritarian Prussian-style constitution was adopted in 1889 and entered into force the following year.[283] The Meiji Constitution

279. *See id*. at 19.

280. *See* Jennifer Preston, Shunga *and Censorship in the Edo Period (1600-1868), in* SHUNGA, *supra* note 273, at 246, 246-259; *see also* ANDREW GORDON, A MODERN HISTORY OF JAPAN 43 (3d ed. 2014) (observing that "[n]one" of these fitful bouts of reform "had enduring impact.")

281. *See* HARRIS, *supra* note 271, at 125.

282. BRETT L. WALKER, A CONCISE HISTORY OF JAPAN 145 (2015); *see also* GORDON, *supra* note 280, at 58.

283. *See* JOHANNES SIEMES, HERMANN ROESLER AND THE MAKING OF THE MEIJI STATE (1968).

established a parliamentary system of government in which only the lower house of the Diet was elected by a very limited franchise (initially less than one percent of the population).[284]

Under the Meiji Constitution, sovereignty rested not with the people but with the Emperor, the latest descendant of the Sun Goddess in "a line of Emperors unbroken for ages eternal."[285] The Constitution was thus not a social contract but rather the Emperor's gift to the people, graciously granted to further their welfare and moral development.[286] It guaranteed "the liberty of speech, writing, publication, public meetings and associations," but only "within the limits of law."[287] There was no provision for judicial review and thus no institutional check on the government's power of censorship.

An extensive new system of censorship had already been put in place before the Constitution was promulgated. The Meiji government began issuing edicts restricting publications as soon as it seized power in 1868.[288] By 1876, as tensions were building toward a major rebellion, the Home Ministry was empowered to suspend any publication deemed "disruptive to national peace."[289] Jay Rubin, in his history of Meiji censorship, calls that ordinance "the cornerstone of all subsequent press laws through the end of the Pacific War;" thus "[i]n essence, the entire prewar Japanese system of publication control was the extended application of an emergency wartime measure."[290] In 1883 the Home Minister's suspension power was extended to cover material "injurious to public morals."[291] The capstone was the Press and Publication Regulations of 1887, which established an extensive system of licensing and censorship.[292] The Home Ministry had "absolute and unlimited" power to suppress material, applying secret standards, and its actions were not subject to review in any court.[293] These regulations, safely promulgated before the new constitution took effect and before the new legislature had met, were

284. *See* GORDON, *supra* note 280, at 92.

285. MEIJI KENPŌ, art. 1.

286. *See id*. at preamble.

287. *Id*. art. 29.

288. *See* RUBIN, *supra* note 267, at 20.

289. *Id*. at 21.

290. *Id*.

291. *Id*. at 22.

292. *See id*. at 23–27.

293. *Id*.

subsequently codified "virtually unchanged" into statutory law.[294] Thus, as Rubin puts it, when the Meiji Constitution's guarantee of freedom of speech "within the limits of the law" was promulgated, "those limits had been clearly set."[295]

The authorities' primary targets were initially political and ideological, particularly the twin bugbears of "socialism and individualism, which, incredibly enough, were thought to be nearly synonymous with each other."[296] At first, the targeting of sexually explicit material was far from systematic.[297] Despite official bans on pornography, the government continued "to supply erotic materials to the soldiers going to the front" in the Sino-Japanese War of 1894–95.[298] As late as the Russo-Japanese War of 1904–05, sexually explicit images that would then scarcely have been tolerated in the West continued to circulate, such as a propagandistic print depicting a Japanese infantryman sodomizing an enemy soldier.[299] The Japanese victory in 1905, the first major modern defeat of a European power by non-Europeans, marked a decisive turning-point. Anxious to transform Japan into a modern nation that was fully the equal of the Western powers, the government embarked on a "campaign of wholesale suppression" of sexually explicit material.[300] In the war's aftermath, a panic set in over literary naturalism, and works by French novelists such as Flaubert, Zola, and Maupassant, the Russian novelists Gorky and Tolstoy, and leading Japanese writers such as Jun'ichiro Tanizaki and Kafū Nagai were suppressed.[301] Often the reasons behind censorship decisions were hard to fathom. When the collected works of Molière were banned, the critic Roan Uchida wrote that it was a mercy the censors could not "understand Shakespeare and Schopenhauer well enough to realize that they would want to suppress them" as well.[302]

In this paradoxical climate of steady Westernization and in-

294. *Id*. at 15.

295. *Id*. at 23.

296. *Id*.

297. *See* Ishigami Aki, *The Censorship of* Shunga *in the Modern Era*, *in* SHUNGA, *supra* note 273, at 278, 278–80.

298. Rosina Buckland, *Erotic Art of the Meiji Era (1868-1912)*, *in* SHUNGA, *supra* note 273, at 454, 459.

299. *Id*. at 477.

300. Ishigami, *supra* note 297, at 281.

301. For a chronological list of major literary works banned, *see id*. at 279–83.

302. *Id*. at 107.

creasing anxiety over the corruption of national traditions by imported Western values, Japan adopted its 1907 criminal code, with its Western-style prohibition of obscenity in Article 175.[303] To the Meiji reformers, traditional Japanese practices such as public nursing and mixed bathing, as well as the ubiquitous explicit sexual depictions of the Tokugawa period were an embarrassment. Therefore, they outlawed them, imposing then-current Western conceptions of sexual morality.[304] While censorship thus served to bring Japan into line with Western norms, it was also invoked to protect Japan from Western influence, as demonstrated by the campaign against naturalism.[305]

In 1908,Tokyo District Court Judge Kyōtarō Imamura, who had just presided over an important literary obscenity trial at the height of the anti-naturalist hysteria, published two interviews proposing a standard for obscenity.[306] The proper standard, he argued, was neither too coarse nor too fastidious, but rather drew the line at "that which would naturally seem to arouse a sense of defilement when viewed in the light of the moral concepts of the general populace."[307] Judge Imamura's invocation of "generally held contemporary moral concepts"[308] prefigured Learned Hand's similar invocation of "the average conscience of the time"[309]—the ancestor of *Roth*'s "contemporary community standards." However, if this was the standard, Judge Imamura applied it rather puritanically, convicting a defendant whose work plausibly could have referred to an act of adultery, and in which vulgar language was alluded to but not directly used.[310]

The brief "Taishō Democracy" of the 1920s featured an increase in political party activity culminating in the adoption of universal male suffrage in 1925. The notorious Peace Preservation Law adopted that same year made it a crime punishable by death to question the imperial system (*kokutai*) or the institution of private proper-

303. KEIHŌ, art. 175.

304. *See* ANNE ALLISON, PERMITTED AND PROHIBITED DESIRES: MOTHERS, COMICS AND CENSORSHIP IN JAPAN 154 (1996).

305. *Id*. at 164.

306. *See* RUBIN, *supra* note 267, at 88–89.

307. *Id*. at 88.

308. *Id*. at 89. Rubin says "seven years," *id*., but Judge Imamura's interview came out five years before Judge Hand's decision.

309. United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913).

310. *See* RUBIN, *supra* note 273, at 87. The work was the story "The City" by Kizan Ikuta.

ty.[311] Three years later, the death penalty was introduced for infractions of this law and mass roundups began.[312] Beginning in 1936, under the auspices of the military, newspaper and magazine writers were invited to "friendly get-togethers" with the authorities once or twice a month to receive guidance.[313] Regional supervision centers were set up around the country at which ideological offenders could be treated for their improper attitudes; it is not surprising that many chose to repent rather than face criminal punishment.[314] With the outbreak of the war, as the shadow of totalitarianism darkened over Japan, it was no longer enough to avoid sedition or outrages to public morals; all writers were expected to contribute to the glorious military cause. Only a few famous writers such as Tanizaki and Kafū could afford to maintain their integrity by silence.[315]

B. Modern Constitutional Jurisprudence

1. The 1947 Constitution

In the 1945 Potsdam Declaration, the United States, Britain, and China called for Japan to surrender and submit to occupation until it had revived democracy and established "[f]reedom of speech, of religion, and of thought, as well as respect for fundamental human rights."[316] Following the atomic bombings and Truman's promise of a "rain of death never equaled in history,"[317] the Emperor accepted the Declaration's terms unconditionally.

As U.S. occupation authorities dismantled the Meiji state system, General MacArthur called for a complete constitutional overhaul. Rejecting various gradualist proposals by Japanese politicians, the Americans scrapped the Meiji Constitution entirely and drafted the new constitution themselves.[318] The American draft was translated from English into colloquial Japanese and submitted by imperial rescript to the Diet, which adopted it with few changes. A foreign

311. *See id*. at 228–29; MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN 506–07 (2000).

312. *See* JANSEN, *supra* note 311, at 507.

313. *See* RUBIN, *supra* note 267, at 256.

314. *See id*. at 228–29.

315. *See id*. at 273; JANSEN, *supra* note 311, at 643.

316. *See* JANSEN, *supra* note 311, at 658 (quoting Potsdam Declaration).

317. *Id*.

318. *See id*. at 670–71.

imposition cloaked in the niceties of indigenous legal continuity, the 1947 Constitution nonetheless won the people's acceptance and eventually affection.[319] It has thus far not been amended.[320]

The political theory underlying this "Peace Constitution" broke radically from that of its Meiji predecessor. Like its U.S. model, the 1947 Constitution declares itself the act of a sovereign people,[321] not the gift of a sovereign emperor. It enshrines individualism[322] and guarantees fundamental rights. Article 21 guarantees "[f]reedom of speech, press and all other forms of expression" and provides that "[n]o censorship shall be maintained."[323] Like the U.S. First Amendment, its rights guarantees are framed in absolute language, without the qualifying clauses that had made their Meiji predecessors precatory nullities. As an enforcement mechanism, it expressly adopted U.S.-style judicial review of all legislative, executive, or administrative action.[324]

2. Oyama v. Japan: *Lady Chatterley in Tokyo*

In 1950, after Hisajirō Oyama published Sei Itō's translation of *Lady Chatterley's Lover*, the chief public prosecutor brought obscenity charges under Article 175 against Oyama and Itō. The district court convicted Oyama but acquitted Itō. On appeal, the Tokyo High Court upheld Oyama's conviction and reversed Itō's acquittal. The Supreme Court affirmed the High Court's judgment.[325]

As Kirsten Cather has shown, this case became an ideological battleground between resurgent conservative nationalists and Westernizing leftist pacifists as the United States relaxed its occupation of Japan.[326] The struggle over Japan's future was a struggle over its his-

319. *See id*. at 686.

320. The efforts of the current government to amend the constitution for the first time have thus far not borne fruit. *See, e.g*., Adam Taylor, *Changing Japan's pacifist constitution won't be easy for Abe*, WASH. POST (Oct. 24, 2017).

321. KENPŌ, preamble ("We, the Japanese people . . .) (Japan).

322. *See id*. art. 13 ("All of the people shall be respected as individuals.").

323. *Id*. art. 21.

324. *See id*. art. 81.

325. Saikō Saibansho [Sup. Ct., G.B.] Mar. 13, 1957, 1953(A) no. 1713, 11(3) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997, http://www.courts.go.jp/english/judgments /text/1957.03.13-1953-A-No.1713-112004.html [https://perma.cc/7Y3X-64YG] [herinafter Court's Translation].

326. *See* KIRSTEN CATHER, THE ART OF CENSORSHIP IN POSTWAR JAPAN 37–51 (2012).

tory: the defendants aligned with progressives who "denounce[ed] the Meiji Restoration of 1868 as containing the seeds of militarism and ultranationalism," while the prosecution sided with conservatives who "celebrated Meiji as a desirable first step toward modernization."[327] At issue in the trial was not just the role of censorship in a democratic society but the meaning of modernity and Japanese identity.

The translator Itō was wracked with "a kind of survivor guilt" over what he perceived as his own failure to resist the authoritarian prewar regime and his complicity in the war effort.[328] By challenging censorship in this case, he hoped somehow to atone for his past "cowardice"[329] and finally take his stand alongside those "authors and philosophers exiled, burned alive, handcuffed, banned and imprisoned because of their writings."[330] Itō prized *Lady Chatterley's Lover* above all else because it portrayed "sex as the only way to save man from being doomed to the isolation of hell by egoism."[331] He contrasted Lawrence's high-minded treatment of sex with the prurience of Joyce (whom he also translated), saying that he "felt cleansed of dust, as if purified by water after contact with Lawrence, whereas with Joyce, he felt like garbage had been poured on his head."[332] His counsel echoed this philosophical defense, offering the novel's lofty humanistic conception of the role of sex as an antidote for the dehumanizing "scorn for life, body, and sex"[333] that had launched militaristic wartime Japan into a violent spiral of destruction.

Unfortunately, the defense also took a quasi-scientific approach to the case, introducing survey evidence, dubious "psychological prose analysis," and even the results of experiments with galvanometers, in an effort somehow to quantify the level of obscenity empirically or mathematically.[334] The survey evidence showed that

327. *Id*. at 48.

328. *Id*. at 46.

329. *Id*. at 45.

330. *Id*. at 46.

331. *Id*. at 53.

332. *Id*.

333. *Id*. at 50.

334. *Id*. at 54. The "psychological prose analysis" involved such metrics as counting the number of sexual encounters per chapter, measuring the length of descriptions of those encounters, taxonomizing the representations of cries of passion, and so forth. *See id*. at 54–55. The galvanometer evidence, introduced for the first time ever in a Japanese trial, purported to show a much lower response to *Lady Chatterley's Lover* than to lowbrow pulp fiction or pornography. *Id.* at 56–57.

88.5 percent of reader-respondents considered the novel's sexual passages "beautiful;" only 5.4 percent considered them "obscene."[335] But the survey evidence backfired horribly, as the trial judges noted with concern that almost 80 percent of respondents found the novel sexually exciting and that 16 percent would, if in a marriage like Lady Chatterley's, take a lover as she had.[336] The judges were inclined to agree with the prosecution that the story of Lady Chatterley, "who seeks sexual satisfaction from other men when her husband loses sexual functioning in a war injury,"[337] set a bad example for Japanese women, many of whom might have been experiencing similar marital problems in the aftermath of World War II. In the end, however, the trial court based its conviction of Oyama on a pandering analysis. Although the novel was not intrinsically obscene, the publisher incurred criminal liability for his salacious marketing tactics, which highlighted the work's theme of illicit sexuality.[338]

The Supreme Court did not follow the trial court's pandering analysis but squarely held the novel itself obscene.[339] Obscene works, the Court held, are those that "cause the arousal and stimulation of sexual desire, [and] offend the sense of shame, [and] run counter to proper concepts of social morality."[340] This definition bears some resemblance to the *Miller* test, adopted a decade and a half later. "[C]ause the arousal and stimulation of sexual desire" corresponds with *Miller*'s prurient interest prong, and "offend the sense of shame" corresponds with *Miller*'s patent offensiveness prong. But the most notable aspects of the decision are its focus on "shame" and its articulation of "proper concepts of social morality," also referred to as "prevailing social ideas in respect of sex."[341]

The *Oyama* Court constructed an entire moral theory out of

335. *Id*. at 53–54.

336. *Id*. at 58, 62.

337. *Id*. at 30 (quoting the prosecution's summary of the novel).

338. *See id*. at 23–24, 30, 59.

339. Saikō Saibansho [Sup. Ct., G.B.] Mar. 13, 1957, 1953(A) no. 1713, 11(3) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997, *translated in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948–60, at 3, 11 (Ikeda Masaaki et al. trans., 1964) [hereinafter MAKI].

340. *Id*. at 7. I have substituted "and" where the Maki translation has "or," because "and" is more consistent with the Japanese text, as well as with the translation on the website of the Supreme Court of Japan and subsequent decisions quoting this test. *See* Court's Translation, *supra* note 325. It is useful to consult both versions for a full understanding of this decision.

341. MAKI, *supra* note 339, at 10.

shame. Shame "is a fundamental characteristic that sets man apart from the beasts."[342] Sexual desire is an animal instinct, and man's higher "spirituality," "his nobility, is conscious of a feeling of revulsion toward it."[343] Shame, together with compassion and reverence, "constitute the foundation of universal morality."[344] The *Oyama* Court further stated, "[t]he custom of the complete exposure of the sexual organs is extremely rare and, again, there is no such thing as the public performance of the sex act."[345] The principle of "the nonpublic nature of the sex act" is thus a universal "natural manifestation of the sense of shame that has its origin in human nature," a kind of universally valid principle of natural law.[346]

The danger of obscenity, the Court held, is that it "paralyzes conscience in respect to matters of human sex; it ignores the restraint of reason; it comports itself wildly and without restraint; and it contains the danger of inducing a disregard for sexual morality and order."[347] The role of law, and of the courts, is to maintain a "minimum morality" necessary to preserve social order.[348] This minimum standard is based on "the prevailing ideas of society," but these are "not the sum of the understanding[s] of separate individuals [nor] a mean value of such understanding[s]; [but] a collective understanding that transcends both."[349] The Court did recognize that "prevailing social ideas in respect to sex generally differ according to time and place" even within the same society.[350] However, the Court treated the principle of "the nonpublic nature of the sexual act" as a fixed component of the minimum standard, rooted in human nature.[351] No change in public sentiment could possibly alter that. Even if "the ethical sense of a substantial majority of the people were paralyzed and truly obscene matters were not recognized as obscene, the courts

342. *Id*. at 7.

343. *Id*.

344. *Id*.

345. *Id*. The Court's translation is more pointed: "even in an uncivilized community, the custom of completely exposing the sex organ is rarely found, and there is no society in which sex acts are openly performed in public." Court's Translation, *supra* note 325.

346. MAKI, *supra* note 339, at 7–8.

347. *Id*. at 8.

348. *Id*.

349. *Id*. at 9.

350. *Id*. at 10.

351. *Id*.

would have to guard society against moral degeneration."[352] If necessary, the law and the courts must defend the "prevailing ideas of society" against society itself: "neither the courts nor the law must always and necessarily affirm social realities, they must confront evil and corruption with a critical attitude and must play a clinical role."[353]

From this perspective, *Lady Chatterley's Lover* was clearly obscene. Whatever their literary qualities, the passages in the novel describing sex acts were too "bold, detailed and realistic" and ran "counter to the principle of the nonpublic nature of the sex act."[354] These passages excited sexual desire and ran counter to good moral concepts regarding sex; they "offended the sense of shame to the extent that one would be reluctant to read them aloud in a public meeting, to say nothing of a family gathering."[355]

No level of artistic value, the Court held, is a defense against obscenity: "even though from the standpoint of art it is an outstanding composition," a work could still be obscene "from the legal and moral standpoints."[356] This is because "artistry and obscenity are concepts that have different dimensions; they can exist side by side" in the same work.[357] The Court reasoned, "[t]hough it be art, it has no right to present obscene matters publicly."[358] Indeed, the artistic presentation of obscene matter may even be an aggravating factor. Because artistic works "appeal strongly to the senses or emotions," their obscenity is not necessarily "dissipated;" rather, "the arousal or stimulation arising from them" may well be "strengthened."[359]

In his incisive dissent, Justice Tsuyoshi Mano criticized the Court's dubious anthropology and its crude attempt to ground ob-

352. *Id*.

353. *Id*. The Court's translation has "law and the judiciary . . . must approach social pathological phenomena with a critical attitude and perform the role of a clinical doctor." Court's Translation, *supra* note 325.

354. MAKI, *supra* note 339, at 10.

355. *Id*. at 11.

356. *Id*.

357. *Id*. The Court's translation has "art and obscenity are concepts which belong to two separate, distinct dimensions; and it cannot be said that they cannot exist side by side." Court's Translation, *supra* note 325.

358. MAKI, *supra* note 339, at 12.

359. *Id*. The Court's translation is clearer: art "strongly appeals to the sense and emotion; and, consequently, it may even serve to intensify the degree of stimulation and excitement." Court's Translation, *supra* note 325.

scenity doctrine in universal natural law. The Court's theory that the non-public nature of the sexual act establishes universal "absolute limits for obscenity," Justice Mano pointed out, flies in the face of "historical fact."[360] He cited numerous old Japanese chronicles describing:

> the ancient custom of *kagai*, in which large groups of young men and women . . . would climb mountains commonly believed to be holy, and after great merry-making—eating, drinking, singing, and dancing—would perform the sexual act publicly or even *en masse* and enter into a state of ecstasy.[361]

It is obvious from such examples, Justice Mano argued, that a standard of obscenity can be "neither absolute nor immutable nor constant;" it "is a shifting, flowing concept that varies according to time and place."[362]

Justice Mano exposed the sleight-of-hand underlying the Court's principle of the private nature of the sex act. That phrase "has a really grand ring to it"[363] but was utterly irrelevant to this case. To violate the principle would mean to have sex in the open. *Lady Chatterley's Lover*, being a book, "cannot perform the sex act, either publicly or privately."[364] The Court's opinion confused sex with the representation of sex.[365] The sex acts described in the book all take place in private, so the book does not even *represent* violations of the principle of the private nature of sex acts.[366] Furthermore, the Court's insistence that *Lady Chatterley's Lover* somehow violated a universal standard of morality was absurd: the book was freely published in France, Germany, and Italy.[367]

Justice Mano reserved his harshest words for the Court's arrogation of the role of ultimate arbiter of social morality. When judges depart from their proper role, which is "to interpret and apply the law honestly, dispassionately, and impartially," and instead adopt

360. MAKI, *supra* note 339, at 18 (Mano, J., dissenting in part).

361. *Id*. at 17–18. This custom is remarkably similar to those described in Tamil accounts drawn on by Perumal Murugan discussed above. *See supra* Part II.D.6.

362. *Id*. at 17.

363. *Id*. at 19–20.

364. *Id*. at 20.

365. *See id*.

366. *See id*.

367. *See id*. at 20–21.

the role of moral guardians, they have taken a wrong turn.[368] In doing so, rather than being "bound by the law," as the Constitution demands, they tend inevitably to fall prey to "pure subjectivity" and improper considerations such as "intuition" or "prejudice" in deciding cases.[369] Especially in a criminal case, such an approach undermines the very "principle of legality."[370]

Unlike the majority, Justice Mano recognized artistic value as a mitigating factor by which "obscenity can be reduced, purged, purified, or swept away."[371] Ultimately, however, Justice Mano concurred in the Court's judgment against the publisher (although not the translator) of *Lady Chatterley's Lover*. The sexual passages in the "so-called hot part[s]" of the novel, he held, were excessively explicit and Japanese society was not yet liberal enough to accept them.[372]

The result in *Oyama v. Japan* was overdetermined. The Supreme Court of Japan was then and perhaps remains today "the most conservative constitutional court in the world." [373] At the time of the decision, the recently established Court, steeped in in a national civil law tradition with no history of judicial review, had never struck down any legislation. No constitutional apex court anywhere in the world had yet placed limits on prosecutions for obscenity. It was hardly likely that the Japanese Court would be the first to do so.

Oyama set a pattern for a Court that has generally "failed to strike resounding blows in favor of freedom of speech,"[374] which it tends to conceptualize as protecting a narrowly communitarian vision of democratic self-government rather than an individualistic search for truth or self-expression.[375] In *Oyama* and other early cases, the Court routinely invoked the nebulous doctrine of public welfare to trump freedom of expression claims.[376] Subsequent decisions have

368. *Id*. at 23–24.

369. *Id*.

370. *Id*. at 24.

371. *Id*. at 19.

372. *Id*.

373. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009); *see also* HIROSHI ITOH, THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN 277–79 (2010).

374. Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV.905, 910 (1998).

375. *See id*. at 911.

376. *See* Robert Trager & Yuri Obata, *Obscenity Decisions in the Japanese and United*

never fundamentally reexamined *Oyama*'s paternalistic assumptions. They have, however, eroded its puritanical standards to the point that the unexpurgated text of *Lady Chatterley's Lover* has now been freely published in Japan for over two decades.[377]

3. The Marquis de Sade: Artistry and Cruelty as Mitigating Factors

The 1969 prosecution of a publisher and translator of *Juliette* by the Marquis de Sade[378] followed the pattern laid down in *Oyama*. Again, a Western literary classic was attacked as polluting traditional Japanese society. Sade's work was undeniably pornographic, but by the middle of the twentieth century he was being taken very seriously in Europe as a writer and even (at least by Marxists and feminists) as a philosopher.[379]

At trial, the defendants emphasized the literary qualities of the work, as well as the translation's scholarly deployment of obscure Edo-era poetic terms "such as 'chrysanthemum seat' for anus." Witnesses testified that these terms would be incomprehensible to high-school students and send the average reader scurrying to a dictionary.[380] The district court acquitted on the ground that "the brutality and unreality of the work" precluded "appeal to the sexual passion," but the Tokyo High Court reversed. The Grand Bench of the Supreme Court affirmed the convictions by a vote of eight to five.[381]

The Court reiterated the holding of *Oyama* that "there is no obstacle to holding obscene a literary work with artistic and intellec-

States Supreme Courts: Cultural Values in Interpreting Free Speech, 10 U.C. DAVIS J. INT'L L. & POL'Y 247, 266-67 (2004).

377. *See Japanese to See More of Lady Chatterley*, WASH. POST. (Nov. 12, 1996), https://www.washingtonpost.com/archive/lifestyle/1996/11/12/japanese-to-see-more-of-lady-chatterley/72892aa3-0fa2-47e4-b5f6-61f24cf1c615/?utm_term=.005736aafbf4 [https://perma.cc/S5ZQ-WRTL].

378. The novel's nymphomaniac protagonist is an articulate enemy of the Catholic religion, who embarks on a series of murders, rapes, tortures, and orgies, interspersed with turgid philosophical disquisitions.

379. *See* MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 74–89 (Guzelin Schmid Noerr ed., Edmund Jephcott trans., 2002) (1947); SIMONE DE BEAUVOIR, FAUT-IL BRÛLER SADE ? (1972) (first published 1951–52).

380. CATHER, *supra* note 326, at 164–65.

381. Saikō Saibansho [Sup. Ct.] Oct. 15, 1969, 23 no. 10, SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1239, *translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–1970, at 183, 183 (1978).

tual value."[382] Freedom of the press can be limited when it conflicts with "the public welfare."[383] The Court offered a nationalist justification for the suppression of obscene works of art as a form of social hygiene: "[w]hen writings of artistic and intellectual merit are obscene, then to make them the object of penalties in order to uphold order and healthy customs in sexual life is of benefit to the life of the whole nation."[384] It was the Court's function to "judge the presence or absence of obscenity in a written work and not to pass judgment on [its] artistic and intellectual merits."[385]

The Court did recognize, however, that artistic treatment of the subject might sometimes mitigate, rather than enhance, a work's lubricity and hence its obscenity.[386] The Court suggested that the "brutality and ugliness" of Sade's depictions of sex made them perhaps less stimulating than ordinary pornography, but found them sufficiently graphic "to stimulate and arouse sexual passion in the ordinary person" and hence obscene.[387]

Each of the four dissenting opinions would have recognized a defense based on literary or artistic merit. Justice Yokota argued that *Juliette* deserved constitutional protection as "an intellectual novel" whose "revolutionary . . . and . . . utopian ideas" greatly influenced psychology, social thought, and "intellectual and artistic movements . . . such as surrealism and existentialism."[388] Justice Irokawa, while deploring the novel's "unnecessarily explicit" portrayals of sex, was relieved that the translator had used incomprehensible Edoera language to refer to sexual organs and activities.[389] The novel's "grotesque" descriptions, he continued, were "almost sufficiently filthy to make one vomit. The ordinary person cannot but find it basically something of a pain to read through the whole book."[390] Ultimately, he argued, the book was not titillating, stimulating, or arousing, and thus certainly not obscene.[391]

382. *Id*. at 184.

383. *Id*. at 186.

384. *Id*.

385. *Id*. at 185.

386. *See id*. at 184.

387. *Id*. at 186.

388. *Id*. at 196, 200 (Yokota, J., dissenting).

389. *Id*. at 211, 216 (Irokawa, J., dissenting).

390. *Id*. at 217.

391. *See id*.

4. Kafū's *Yojōhan*: The Five-Prong Test

In the 1980 "*Yojōhan*" decision the Supreme Court significantly revised its definition of obscenity.[392] *Yojōhan fusuma no shitabari* ("Underneath the Papering of the Four-and-a-Half Mat Room"), a 1916 short story by Kafū Nagai,[393] recounted a man's relationship with a geisha. Kafū published a very short, expurgated version of the story in 1917. After World War II, a privately-published long version appeared under a pseudonym. Six pages of new material in this ten-page version recount a single sexual encounter in which the lovers reach orgasm thirty-six times..[394] In 1950, the story's publisher was convicted of obscenity.[395] At the time, Kafū denied authorship and thereby escaped indictment.[396] More than a decade after Kafū's death, a literary journal republished the full story, alongside extracts from Kafū's diaries acknowledging that he was in fact the author.[397] The journal's editor and publisher were convicted of obscenity in 1976, and the Supreme Court affirmed the convictions in 1980.[398]

Unlike the previous prosecutions of European works, this case involved a Japanese work. The defendants attempted to capitalize on this by portraying the work as an embodiment of "Japan's traditional culture that had been buried in the throes of frantic efforts to modernize and enrich the country and strengthen the army."[399] The defendants argued that Article 175, the obscenity provision in the Criminal Code, was an alien Victorian import imposed on Japan by its Meiji rulers "to create an appearance of a Western modern state in our country."[400] *Yojōhan* was cast as a literary repudiation of the militarism and Westernization of the Meiji Restoration and a return

392. Saikō Saibansho [Sup. Ct.] Nov. 28, 1980, 34 no. 6, SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 433, *translated in* LAWRENCE WARD BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970–1990, at 468–71 (1996).

393. Kafū was the pen name of Nagai Sōchiki (1879-1959).

394. *See* CATHER, *supra* note 326, at 169.

395. *See id*. at 155–56.

396. *Id*. at 173. At the time, Kafū slyly remarked that whoever "forged" the episode was "an impeccably good writer." *Id.*

397. *See id*. at 189.

398. *See* Saikō Saibansho [Sup. Ct.] Nov. 28, 1980, 34 no. 6, SAIKŌ SAIBANSHO KEIJI HANREISHU [KEISHU] 433, *translated in* LAWRENCE WARD BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970–1990, at 470 (1996).

399. CATHER, *supra* note 326, at 177 (quoting testimony of defendant editor).

400. *Id*. at 77 (quoting closing argument of defense lawyer Mikio Akiyama).

to authentic national traditions.[401] The trial judges were unconvinced. They turned the defendants' nationalist argument on its head, stressing the need to maintain Japanese legal and moral censorship traditions against Western influence.[402] The trial court's guilty verdict was sustained by the high court.[403]

The Supreme Court's affirmance in a Petty Bench decision provided little analysis. The most noteworthy feature of its opinion was a new list of five factors to be considered in obscenity cases:

> [1] the extent, and its style, of explicit, detailed portrayal and depiction of sex in the said literary work;
>
> [2] the relative weight given to that portrayal and depiction in the entire work;
>
> [3] the correlation between the ideas and so forth expressed in the work and that portrayal and depiction;
>
> [4] the structure and development of the work;
>
> [5] and furthermore, the degree to which sexual stimulation is mitigated by artistry, intellectuality and so forth.[404]

The Court presented this five-factor list as an elaboration of factors set out in *Oyama*.[405] The Court held that *Yojōhan*, in which explicit descriptions of sexual intercourse "constitute the core of the work qualitatively and quantitatively," was undoubtedly obscene.[406]

5. Film and Customs Cases

Controversies over nationalism were also prominent in obscenity cases involving film censorship and customs laws. Film censorship in the postwar period was largely the work of Eirin, the Film Classification and Rating Organization of Japan.[407] Like the Motion

401. *See id*. at 176–77, 182–83.

402. *See id*. at 188.

403. *See* Saikō Saibansho [Sup. Ct.] Nov. 28, 1980, 34 no. 6, SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 433, *translated in* LAWRENCE WARD BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970–1990, at 470 (1996); *see also* CATHER, *supra* note 326, at 295 n.9.

404. *See* Saikō Saibansho [Sup. Ct.], 34 no. 6, KEISHŪ 433, at 470.

405. *See id*.

406. *Id*.

407. *See* CATHER, *supra* note 326, at 78.

Picture Association of America, on which it was modelled, Eirin established a voluntary industry-wide self-censorship process, designed to obviate direct government intervention.[408] Filmmakers accused of producing obscene works were able to avoid conviction by highlighting their good-faith compliance with the Eirin self-censorship process.[409]

The first film obscenity cases involved *pinku eiga*, soft core pornographic films.[410] The 1965 film *Black Snow* told the story of the son of a brothel madam on the outskirts of an airbase, who takes violent reprisals against American soldiers for the abuse they inflict on Japanese prostitutes; in the end the Americans capture and execute him.[411] The film's presentation of the American occupiers as a source of violence, degradation, disease, and racial contamination threating the "sexual innocence and cultural purity" of their Japanese victims ensured that its anti-American nationalism would be a major focus of the legal proceedings.[412] At trial, the director sparred with the prosecutor over whether the film's primary goal was political or pornographic.[413] The trial court found the work political and not obscene. The high court reversed but nevertheless acquitted the defendants because they had complied with all the cuts mandated by Eirin.[414]

During the 1960s, the Japanese film industry slumped.[415] Competition from increasingly sexually explicit foreign films, which were not subject to the domestic voluntary self-censorship regime had increased dramatically.[416] Most of the major Japanese studios began producing low-budget pinku eiga to preserve market share.[417] In 1972, the Nikkatsu studio launched its Roman Porno series, with substantially higher budgets and production values.[418] In turn, the

408. *See id*. at 79.

409. *See id*. at 85-86, 106-13.

410. *See id*. at 78.

411. *See id*. at 88-89.

412. *Id*. at 91.

413. *See id*. at 91-92.

414. *See id*. at 85-86, 106-13.

415. *See id*. at 120.

416. *See id*. at 121. Of course, customs official could and did insist on extensive cuts, but they encountered embarrasing resistance at least in the case of internationally acclaimed art-house films. *See id.* at 122.

417. *See id*. at 122.

418. *See id*. at 123-24. The name is derived from the French *roman pornographique*,

police initiated criminal proceedings against Nikkatsu as "a warning to the film industry."[419] The government not only indicted Nikkatsu but also charged the Eirin inspectors who had approved the films as accessories to the crime of distribution.[420]

The Roman Porno series did not claim any particularly lofty political or artistic purpose. The films were at best popular entertainment. But the defendants argued that to remain competitive in an increasingly globalized international market, the Japanese film industry needed to be freed from excessively stringent obscenity regulation.[421] It is possible that this economic nationalist argument influenced the courts' decision to acquit, although the verdicts both in the district court and the high court were based primarily on the judges' confidence that Eirin was properly maintaining a "minimum degree of sexual morality" in the film industry.[422] The courts sought to protect Japan against contamination by foreign ideas of sexual liberation, but the defendants' economic nationalist arguments compelled them to consider foreign legal standards of obscenity regulation.[423]

The last major prosecution involving a Japanese film targeted not the film itself but rather a book presenting the film script alongside still photos. Nagisa Ōshima's 1976 film *In the Realm of the Senses* was Japan's first hard-core pornographic film.[424] Like Kafū, Ōshima celebrated sexuality as an antidote to nationalist militarism and authoritarianism.[425] Ōshima was one of Japan's most important directors, and the film is considered a landmark of international cinema. The plot is based on the notorious 1936 incident in which Sada Abe strangled her lover to death in a session of erotic asphyxiation, cut off his penis and testicles, and carried them around in her kimono for several days until she was apprehended by the police. The film is set against the backdrop of the increasing militarism and violence of

"pornographic novel."

419. *See id*. at 126. In the fourth film, the actors never removed their underwear, but the police deemed it too "sensational" and hence also obscene. *Id.*

420. *See id*. at 116–152.

421. *See id*. at 137-141.

422. *Id*. at 145.

423. *Id*. at 145.

424. The Japanese title *Ai no korīda*, means literally "The Bullfight [Spanish *corrida*] of Love."

425. *See* Donald Richie, In the Realm of the Senses: Some Notes on Oshima and Pornography (April 30, 2009) https://www.criterion.com/current/posts/1108-in-the-realm-of-the-senses-some-notes-on-oshima-and-pornography.

imperial Japan, with scenes of flag-wielding children tormenting an elderly man and troops marching through the street as the military tightened its grip in the wake of an attempted coup d'état. Ōshima's attack on the regulation of obscenity was firmly inscribed in a broader critique of nationalist authoritarianism.

Ōshima carefully avoided prosecution for the film itself by developing, editing, and distributing it from France after he shot it in Japan. He then reimported the film into Japan, complying meticulously with all cuts proposed by Eirin and the customs authorities.[426] While foreign audiences saw the unexpurgated film, their Japanese counterparts saw a heavily edited version. As they could not proceed against the film itself, prosecutors instead indicted Ōshima and his publisher for a book version consisting of stills from the film along with the text of the screenplay and several critical essays.[427] The publisher was acquitted, but the Supreme Court upheld the seizure of an additional printing issued while the prosecutor's appeal against the acquittal was pending.[428]

Japanese customs law regulates imported sexually explicit material under a different statutory rubric then domestically produced material. The 1984 *Matsue v. Hakodate* case upheld a Meiji-era customs law prohibiting importation of "items harmful to public morals and public order," including pornographic films and magazines.[429] The constitutional prohibition of censorship, the Court held, referred only to Meiji-style prior restraints.[430] Customs laws could not constitute censorship, according to the Court, because their purpose is to collect revenue rather than to regulate ideas. They could not be a prior restraint because they target already-published material that remains available abroad.[431] Again the Court adopted nationalist rhetoric, portraying the customs law as a necessary bulwark to protect the

426. *See* CATHER, supra note, at 326.

427. *See id*. at 197.

428. *See* Saikō Saibansho [Sup. Ct.] Dec. 12, 1980, 34 no. 7, SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 721, *translated in* LAWRENCE WARD BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970–1990, at 470 (1996). The Court's decision was purely procedural and did not address free expression issues. The verdicts in the lower courts rested on their determination that the book's film stills, separated from the script, were too static and staged to be arousing. *See* CATHER, *supra* note 326, at 212-20.

429. Saikō Saibansho [Sup. Ct.] Dec. 12, 1984, 38 no. 12, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 453, *translated in* BEER & ITOH, *supra* note 392, at 454.

430. *See id*. at 458.

431. *Id*. at 458-59. The Court also rejected a vagueness challenge, limiting the term "harmful to public morals" to obscene material. *See id*. at 460.

nation against a tide of foreign filth: "in order to prevent effectively harm to healthy customs regarding sex in the whole nation through the inflow and spread of obscene publications, it is unavoidable that their coming into the country be stopped by a dam, so to speak."[432]

Nonetheless, customs officials often admitted foreign films that were more sexually explicit than domestic films, which were subject to the Eirin censorship system.[433] Domestic filmmakers, losing market share to foreign films in the 1980s, began to push the boundaries with more sexual and violent content to maintain their market position.[434] But under the Supreme Court's frozen obscenity jurisprudence, strict limitations remained in place on sexually explicit content. Violent pornography, not similarly restricted by law, proliferated and is today ubiquitous in Japan.

6. The Mapplethorpe Cases

In a pair of decisions at the turn of the twenty-first century, the Court failed to provide clear guidance on the current scope of Japanese obscenity law. Both cases presented challenges to seizures by customs officials of collections of work by the American photographer Robert Mapplethorpe. Mapplethorpe's work had drawn international attention in 1989, when the Corcoran Gallery in Washington, D.C. canceled a government-funded exhibit of his work amid cries of outrage from members of Congress and conservative groups over his sexually explicit homoerotic and sadomasochistic images. The following year, a Cincinnati museum hosting the same exhibit was tried and acquitted on state obscenity charges.[435]

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432. *Id*. at 459-60. Four justices dissented, arguing that the statute should thus be struck down as vague and overbroad. *See id.* at 466-68 (Ito, Taniguchi, Yasuoka, & Shimatani, JJ., dissenting).

433. *See* James R. Alexander, *Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's In the Realm of the Senses*, 4 ASIAN-PACIFIC L. & POL'Y J. 148, 159 (2003).

434. *See id*.

435. Grace Dobush, *25 Years later: Cincinnati and the obscenity trial over Mapplethorpe Art*, WASH. POST (Oct. 24, 2015), https://www.washingtonpost.com/entertainment/museums/25-years-later-cincinnati-and-the-obscenity-trial-over-mapplethorpe-art/2015/10/22/07c6aba2-6dcb-11e5-9bfe-e59f5e244f92_story.html?utm_term=.b232ca96f6b0 [https://perma.cc/X45A-BK7A]; Isabel Wilkerson, *Cincinnati Jury Acquits Museum In Mapplethorpe Obscenity Case*, N.Y. TIMES (Oct. 6, 1990), https://www.nytimes.com/1990/10/06/us/cincinnati-jury-acquits-museum-in-mapplethorpe-obscenity-case.html [https://perma.cc/L6HC-RTHT].

In the first Japanese case, customs officials seized a copy of a Mapplethorpe exhibition catalogue from the Whitney Museum. Following long-standing precedent, the Supreme Court held that several photographs "emphasizing genitals" were obscene and thus subject to seizure.[436] A few months later, a film distributor named Takashi Asai initiated a second challenge with a different photograph collection entitled *Mapplethorpe*.[437] Asai had purchased the copyright for this collection and published a Japanese edition in 1994. By 1999, it had sold several hundred copies without incident and was available in the public collection of the National Diet Library of Japan.[438] Still, customs officials seized the book when Asai, returning from a trip abroad, presented it for inspection. Asai convinced the trial court that the work's free circulation for several years in Japan showed that it was accepted as a work of art and did not violate Japanese moral standards.[439] The Tokyo High Court, arguing that artistic merit is not a defense, reversed.[440]

In 2008, the Supreme Court quashed the High Court's judgment.[441] The Court noted that the allegedly obscene photographs appeared on only nineteen of the book's 384 pages. Each of them "directly and concretely show[ed] male genitals arranged at the center of the planes thereof in an eye-catching manner" such that they "should inevitably be construed to emphasize the genitals themselves and emphasize the depiction of them."[442] Nevertheless, Mapplethorpe was exploring "themes that were related to the root of the existence of humanity" and enjoyed "a high reputation among art critics."[443] The book was "edited and composed from an artistic viewpoint" and included "portraits, flowers, still lifes, male and female nudes" alongside the genitalia.[444] Finally, the photographs were in black and

436. Saikō Saibansho [Sup. Ct.] Feb. 23, 1999, 1670, HANREI JIHŌ [HANJI] 3, 7.

437. *See* Yuri Obata, *Public Welfare, Artistic Values, and the State Ideology: The Analysis of the 2008 Japanese Supreme Court Decision on Robert Mapplethorpe*, 19 PAC. RIM LAW & POL'Y J. 519, 522 (2010).

438. *See id*.

439. *See id*. at 524.

440. *See id*. at 525–26.

441. Saikō Saibansho [Sup. Ct.] Feb. 19, 2008, 62 no. 2, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 69, http://www.courts.go.jp/english/judgments/text/2008.02.19-2003.-Gyo-Tsu-.No..157,.2003.-Gyo-Hi-.No..164-103831.html [https://perma.cc/7HJ6-W3S4].

442. *Id*.

443. *Id*.

444. *Id*.

white and did "not directly depict scenes of sexual intercourse."[445] The Court held "in light of these factors . . . that diminish sexual stimulation" that the work could not be considered prejudicial to good morals.[446]

Although five of the photographs in this case were identical to those found obscene in the first Mapplethorpe decision, the Court insisted that the two decisions were not inconsistent. Without elaboration, the Court simply explained that the "composition [was] different" in the two photography collections, and that there was "also [a] difference with regard to when the disposition in [the] dispute[s] was given."[447] This language leaves unclear whether the Court really believed that the Whitney museum catalogue in the first case was somehow more salacious than Asai's collection, or whether the standard for obscenity had changed between 1999 and 2008.

The legal standard for obscenity under these decisions is opaque and subjective, giving judges leeway to reach their preferred result and empowering administrators to curb sexual expression in arbitrary or discriminatory fashion. Artistic purpose or even a museum setting will not necessarily immunize a work from suppression. For example, in 2015, the police censored an art exhibit featuring nudes by the gay photographer Ryudai Takano.[448]

7. Rokudenashiko: The Good-for-Nothing Artist

The obscenity prosecution of Megumi Igarashi, who goes by the sobriquet Rokudenashiko ("Good-for-Nothing Girl"), has attracted international attention.[449] Using art and humor to demystify the vagina and empower women to speak about their bodies without shame, Rokudenashiko calls herself a *manko* ("pussy") artist.[450]

445. *Id*.

446. *Id*.

447. *Id*.

448. The police threatened museum staffers with arrest, compelling them to cover the lower halves of offending works. *See* Tomohiro Osaki, *Artist veils photos showing his genitalia to parry police censorship*, JAPAN TIMES (Sept. 4, 2014), http://www.japantimes.co.jp/news/2014/09/04/national/artist-veils-photos-showing-genitalia-parry-police-censorship/ [https://perma.cc/R6SH-32HM].

449. *See, e.g.*, *Japan vagina artist cleared over kayak model but fined for data distribution*, BBC NEWS (May 9, 2016), http://www.bbc.co.uk/news/world-asia-36247459 [https://perma.cc/R2B6-4SEN].

450. *See* ROKUDENASHIKO, WHAT IS OBSCENITY? THE STORY OF A GOOD-FOR-NOTHING ARTIST AND HER PUSSY 4 (Anne Ishii trans., 2016).

Consciously appropriating the forbidden word, she has created a wide range of work using molds of her own vulva: dioramas ("*diora-manko*"), action figures ("*transformanko*"), *manko* iPhone cases, and *manko-chan* fantasy creatures appearing as manga drawings, finger-puppets, and glow-in-the dark figurines.[451] In 2013, she realized she could use 3-D printing to create even larger works of art and resolved to create the world's first *manko* boat.[452] Because the project would be expensive, she resorted to crowdfunding. She linked a down-loadable file of her *manko* to those contributing over ¥2,000, and she encouraged these contributors to use the file to create their own art.[453] After raising more than one million yen (roughly $10,000 USD) she constructed a bright yellow *manko* kayak and rowed it along the Tama River on the edge of Tokyo.[454] At the end of 2014, Rokude-nashiko was jailed and formally charged with distributing obscene materials in violation of Article 175.[455]

In 2016, a trial court convicted Rokudenashiko for distrib-uting her digital *manko* file.[456] The court acquitted her on counts re-lating to the display of the kayak and art, ruling that their garish col-ors rendered them too unrealistic to be arousing.[457] In 2017, the Tokyo High Court affirmed the lower court's decision on all counts.[458] Ironically, it appears that no one except the police ever used the digital data that Rokudenashiko distributed to create an ac-tual model of genitalia, as 3D printers are expensive and fairly ra-

451. *See id*. at 9–12, 18. The suffix *chan* is a hypocoristic diminutive form of the honorific *san*.

452. *See id*. at 11.

453. *See id*.

454. *See id*. at 11–12.

455. *See id*. at 107.

456. See Callie Beusman, *'Too Arousing, Offensive': Why Japan's Vagina Artist Was Convicted of Obscenity*, VICE NEWS (May 9, 2006), https://broadly.vice.com/en_us/article/too-arousing-offensive-why-japans-vagina-artist-was-convicted-of-obscenity [https://perma.cc/9CHH-F6MR].

457. *See* Shusuke Murai, *'Vagina artist' Igarashi loses obscenity case over 3-D data but is acquitted over pop art replicas*, JAPAN TIMES (May 9, 2016), http://www.japantimes.co.jp/news/2016/05/09/national/crime-legal/vagina-artist-convicted-of-obscenity-court-acknowledges-pop-art-motive/ [https://perma.cc/8Q9P-H4T2].

458. *See* Eiji Shimura, *Court rejects appeals in obscenity case over 'vagina art,'* ASAHI SHIMBUN (Apr. 13, 2017). Updates are available at Rokudenashiko's blog, 6d745.com (in Japanese).

re.[459] The only people ever placed in danger of being aroused, it seems, were the law enforcement officers who had been keeping Rokudenashiko under surveillance. For Rokudenashiko and her supporters, this case highlights the absurdity of the current system of obscenity regulation, under which the transmission of a 3-D scan of a vulva is a criminal offense, but phalluses are freely paraded through the streets at various seasonal Shinto festivals around Japan.[460]

CONCLUSION

Judicial review is widely defended as a bulwark of fundamental freedoms and minority rights. The reality has often been less glorious.[461] As Michael Klarman has suggested, the U.S. Supreme Court's heightened solicitude for freedom of speech in the aftermath of World War II owes perhaps more to the "political empowerment of ethnic, racial and religious minorities" critical to the New Deal coalition than to the Court's own "heroic countermajoritarianism."[462] Conversely, a political backlash against the empowerment of previously marginalized groups underlies the Nixon Court's retrenchment of obscenity doctrine in *Miller*.

Miller's fictitious history, in which Comstock's relentless prosecutions of feminists and sexual liberationists as well as literary classics "in [no] way limited or affected expression of serious literary, artistic, political or scientific ideas,"[463] provided the rhetorical preparation for the Court's re-criminalization of art that is deemed to lack *seriousness*. The exception for material of *serious* literary or artistic value casts judges in the role of cultural critics, which they often play poorly.

Miller retained the community standards test, but its insistence on local or statewide rather than national standards was an aspect of the Nixon Court's turn to federalism, the judicial rallying cry of opponents of the Warren Court's innovations in civil rights and

459. *See* Philip Brasor, *The vagina on trial: more absurd than obscene*, JAPAN TIMES (May 28, 2016), http://www.japantimes.co.jp/news/2016/05/28/national/media-national/vagina-trial-absurd-obscene/#.WJt9sO8izIU [https://perma.cc/U6V7-CNFE].

460. *See*, *e.g.*, ROKUDENASHIKO, *supra* note 450, at 48-49.

461. Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 VA. L. REV. 1, 2, 45 (1996).

462. *Id*. at 2.

463. Miller v. California, 413 U.S. 15, 35 (1973).

civil liberties. *Miller*'s effect was to create localized safe spaces for intolerance in which deviant sexual discourse could be suppressed. Today, its anomalous regime of locally varying standards for a national constitutional guarantee is crumbling, undermined by the internet and other global forces. But as long as the Court refuses to revisit it, the *Miller* doctrine remains a dangerous tool in the hands of puritan communities.

Canadian obscenity doctrine is likewise in disarray. In *Labaye*, the Supreme Court said Parliament may not criminalize sexual speech without proving that it causes harm "beyond a reasonable doubt,"[464] while in *Butler*, it had said Parliament was free to criminalize expression that "is perceived by public opinion to be harmful to society" without actual proof of harm.[465] Yet *Labaye* claimed simply to be following *Butler*. *Butler*'s sweeping criminalization of "degrading" material,[466] rooted in religious conservative and pro-censorship feminist ideology, has not been formally repudiated, despite a grotesque history of repressive implementation. Its future is profoundly unclear.

As *Butler* was being invoked to target gay and feminist presses and bookstores, the anticensorship feminist scholar Carlin Meyer argued that the result was completely predictable.[467] Efforts to repress pornography are rooted in a "superficial understanding concerning the way in which culture functions"[468] and support sexist ideology by literally *enforcing* the nexus between sex, sin and women.[469] Censorship rests on a naïve and "one-dimensional view of representation" that assumes that "what an image *depicts*, it *urges*."[470] Moreover, pornography is "largely marginal to the process by which sexual relations are constituted and sexual aggression against women is generated."[471] For a full account of that process, one must examine all practices and institutional vehicles of acculturation, including, for example, popular and high culture, religion, the military, and sports,

464. R. v. Labaye, [2005] 3 S.C.R. 728 (Can.).

465. R. v. Butler, [1992] 1 S.C.R. 452, 479 (Can.).

466. *Id*. at 484.

467. *See* Carlin Meyer, *Sex, Sin and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1123 (1994); *see also id*. at 1120 n. 96.

468. *Id*. at 1101.

469. *See id*. at 1100, 1102-1110, 1117-1123.

470. *Id*. at 1142.

471. *Id.* at 1101.

whose cumulative effects dwarf those of pornography.[472] Sexism in all spheres of culture should be confronted and critiqued, but the use of legal coercion to suppress expression is counterproductive.

In India and Japan, courts have persistently invoked nationalist rhetoric to justify the suppression of sexual speech. They cast themselves as guardians of public morality and (paradoxically) defenders of national tradition, even when deploying imported values and legal mechanisms to control indigenous artistic and literary expression. Because "community values" are generally in practice merely the values of the trier of fact, it is significant that Indian and Japanese obscenity prosecutions, unlike their U.S. and Canadian counterparts, are tried before judges without juries. With their elite and often socially conservative values, Indian and Japanese judges have not often been enthusiastic champions of the freedom of sexual expression.

In India, the Supreme Court's recent move in *Sarkar* to a community-standards approach was a welcome liberalization, but the Court's perfunctory discussion left the doctrine's scope profoundly unclear.[473] There has been no clear break with the old approach, as courts continue to weigh social value against prurient appeal on a case-by-case basis. Indian obscenity law thus remains a dangerous weapon in the arsenal of government censors and ultranationalist agitators. Unfortunately, it is just one weapon of many. Colonial-era laws still criminalize speech causing disharmony between castes or communities, or insulting religious beliefs, supporting countless bans of literary and scholarly works.[474] Colonial-era sedition law is still deployed repressively against artists and activists.[475] The Supreme Court of India has now gotten into the game of legislating new restrictions on speech: *Tuljapurkar* atavistically restored obscenity doctrine to its religious and authoritarian roots, reanimating the obsolete doctrines of blasphemy and *lèse-majesté* in a novel metastasis.[476] If

472. *See id.* at 1157-73.

473. *See* Sarkar v. West Bengal, (2014) 4 SCC 257, ¶ 24.

474. *See* BHATIA, *supra* note 137, at 135-69. Additionally, post-independence enactments criminalize speech denigrating women, supporting sati, and insulting members of scheduled castes or tribes. *See id.*

475. *See id*. at 83.

476. *See* Tuljapurkar v. Maharashtra, Crim. App. No. 1179 of 2010 (May 14, 2015). The Court's recent important decision recognizing a broad constitutional right to privacy in *Puttaswamy v. Union of India* offers hope of a way forward for the freedom of sexual expression. Writ Petition (Civil) No. 494 of 2012 (Aug. 24, 2017). *Puttaswamy* arose out of a challenge to Aadhaar, the world's largest biometric identification system. The unusually

the Court cares about freedom of speech and separation of powers, it will overrule that lawless and illiberal decision.

The Supreme Court of Japan is famously conservative. Observing that the Court has "struck down only eight laws" as unconstitutional over the course of its entire existence, David Law recently concluded that judicial review in Japan has been a failure.[477] Certainly, in obscenity cases, the Japanese courts have hardly been heroic countermajoritarians. The postwar Constitution did away with Meiji-style prior restraints, but the Meiji-era obscenity statute remained in place, and the courts resumed their role as guardians of public morality, if necessary, as the *Oyama* Court suggested, against society itself.[478]

The Supreme Court of Japan still enforces a Meiji-era prohibition of depictions of genitalia or intercourse, at least where they are deemed sufficiently clear and realistic.[479] But pornographic images, including much violent material, are ubiquitous in Japan in advertisements, magazines, manga, and television.[480] This pattern of selective suppression and indulgence may seem arbitrary or even incomprehensible, but Anne Allison has argued that the focus of the Japanese censorship regime is to protect "that which is most sacred and central to the state's ideology of national identity—stable families, reproductive mothers, and orderly homes."[481] This explains, she argues, why the state censors realistic depictions of genital copulation

large 9-judge Constitution Bench's unanimous judgment overruled decades of prior precedent to recognize a broad right of privacy. Several of the opinions in the case specifically mentioned the right to sexual privacy, apparently undermining the Court's 2013 decision recriminalizing sodomy. *See* Koushal v. Naz Foundation, (2014) 1 SCC 1; *see generally* Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1, 29-49 (2015). In 2018, a panel headed by the Chief Justice ordered reconsideration of that decision in light of *Puttaswamy*. *See* Johar v. Union of India, Writ Petition (Criminal) No. 76 of 2016 (Order of Jan. 8, 2018). The full impact of *Puttaswamy* remains to be seen, but its strong endorsement of a right to sexual privacy could strengthen recent trends toward liberalization of Indian obscenity doctrine.

477. David S. Law, *Decision Making on the Japanese Supreme Court: The Politics of Supreme Court Adjudication: Why Has Judicial Review Failed in Japan?*, 88 WASH. U.L. REV. 1425, 1426 (2011).

478. *See* Saikō Saibansho [Sup. Ct., G.B.] Mar. 13, 1957, 1953(A) no. 1713, 11(3) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997, *translated in* Supreme Court of Japan, http://www.courts.go.jp/app/hanrei_en/detail?id=11 [https://perma.cc/7Y3X-64YG].

479. *See* ALLISON, *supra* note 304, at 149 (1996). Until 1991 there was also a ban on the depiction of pubic hair. *See id.*

480. *Id*. at 149–50.

481. *Id*. at 151.

but freely tolerates sexualized depictions of prepubescent girls "as well as sex acts that have no chance of leading to reproduction—voyeurism, sadism, anal penetration, fellatio."[482] The combination of repression and indulgence is dictated to a considerable extent by commercial considerations in a consumer economy where sex is used to sell products, and various sexual service industries such as the hostess clubs and the sex trade itself (legal in Japan but restricted to nonprocreative acts) are tolerated and even encouraged as a means "to sustain work relations [and] release and relieve work-induced stress."[483]

In the Internet era, obscenity law has little effect on the wide availability of sexually explicit material in free countries. It can hardly be considered effective in achieving its purported goals, whether of maintaining social morality or preventing harm. But it remains a powerful tool in the hands of prosecutors and judges wishing to persecute writers, artists, feminists, and sexual "deviants." Justice Brennan's belated judgment that the suppression of obscenity cannot be reconciled with the freedom of speech[484] is amply confirmed in the dismal records of constitutional courts around the world.

482. *Id*.

483. *Id*. at 154.

484. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting).