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# OF LINES AND MEN: THE SUPREME COURT, OBSCENITY, AND THE ISSUE OF THE AVERTABLE EYE

Norman W. Provizer\*†

## I. INTRODUCTION

In the aftermath of recent Supreme Court decisions dealing with the issue of obscenity, this article will engage in an analytical discussion of the considerations which affect the Court's decision-making process. Initially, propositions dealing with the functions of the Supreme Court as an institution will be considered. A preface relating those propositions to the line-drawing role of the Court in decisions dealing with constitutional law and politics follows. Next, the issue of the avertable eye in obscenity decisions of the Supreme Court is discussed by relating it to various themes, such as the input-output dimension of court rulings, the approach and application of judicial authority, the dynamic aspects of judicial decisions, and the judicial reasoning process.

## II. THE PROPOSITIONS

We are rapidly approaching the 175th anniversary of John Marshall's "critical" decision in *Marbury v. Madison*.<sup>1</sup> In the decades

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1. 5 U.S. (1 Cranch) 137 (1803). See B. SCHWARTZ, *CONSTITUTIONAL LAW* 3 (1972): "That Marshall's opinion was not radical innovation does not detract from its position as the cornerstone of the constitutional edifice." The use of the word "critical" here is in line with V.O. Key's discussion of "critical elections" as "a type of election in which there occurs a sharp and durable electoral realignment between parties". See Key, *A Theory of Critical Elections*, 17 J. OF POL. 4 (1955); see also W.D. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS passim* (1970).

that have passed since Marshall's opinion staked out the position and power of America's "least dangerous" branch of government,<sup>2</sup> the Supreme Court has played a crucial, if somewhat enigmatic role in the forging and continuance of the constitutional system of the United States. The passing decades, however, have not abated discussions of exactly what "is" and what "ought" to be the function of the Court in the American political system.<sup>3</sup>

While it is clearly beyond the scope of this paper to review and evaluate the myriad contours which are produced by the collision of differing perspectives on the Court, it is useful to articulate several basic propositions which are accepted *arguendo* throughout this analysis.<sup>4</sup>

The first of these propositions is that the Court is a multi-functional structure, integrating legal, political, governmental and moral dimensions within a single institution. In this sense, the Court not only adjudicates according to legal principles and traditions, but it is also inextricably interwoven into the public policy making process.<sup>5</sup> To use the words of Jack Peltason: "A judge is in the political process and his activity is interest activity not as a matter of choice but of function."<sup>6</sup>

For a brief overview of judicial review and *Marbury v. Madison*, see L. JAYSON, *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* 669-85 (1973).

2. "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . . The judiciary . . . has no influence over either the sword or the purse." *THE FEDERALIST* No. 78, at 521 (A. Hamilton) (J.E. Cooke ed. 1961). Cf. N. Glazer, *Towards an Imperial Judiciary?*, *PUBLIC INTEREST* 104 (1975). Also see A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) [hereinafter cited as A. BICKEL, *LEAST DANGEROUS*] and Justice Brandeis' comments in *Horning v. District of Columbia*, 254 U.S. 135, 139 (1920) that a judge "may advise; he may persuade; but he may not command or coerce."

3. That the passing of time has not ended such intellectual discussions is neither surprising nor unique. See, e.g., I. Shenkar, *Historians Still Debating the Meaning of the American Revolution—If It Was a Revolution*, *N.Y. TIMES*, Jul. 6, 1976, at 13. On the Court specifically, see R. BERGER, *CONGRESS v. THE SUPREME COURT* (1975).

4. For an example of differing perspectives, see the readings in *THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT* (D. Forte ed. 1972).

5. See G. SCHUBERT, *JUDICIAL POLICY-MAKING* (rev. ed. 1974).

6. J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 3 (1955). Yet to say that a judge is in the political process is not necessarily equal to holding that a judge is totally of the political process. Compare, G. E. WHITE, *THE AMERICAN JUDICIAL TRADITION passim* (1976), [hereinafter cited as G. E. WHITE, *JUDICIAL TRADITION*], to wit: "The hard question is one of degree: how large or small a political role should the Court play?". See also A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 99 (1976) [hereinafter cited as A. COX, *SUPREME COURT*].

Second, the Supreme Court, even as an institution, does not exist in a vacuum. Both the Court's self-perception of its role and its actions are intimately connected to social, economic, political, cultural, and ideological spheres which analytically lie outside "the marble palace." These various linkages and interactions, while including direct restraints, also produce less direct and less formal constraints on Court activities.<sup>7</sup> A corollary of this proposition is that the Supreme Court cannot be categorized as exclusively an independent or a dependent variable in the American constitutional system. Simply stated, the Court affects the system, while it is itself affected by the system within which it functions.<sup>8</sup>

The third proposition focuses on our disposition to avail ourselves of the Court's decision-making voice to provide answers for the consistently difficult questions which plague any political society. As de Tocqueville observed with his usual prescience: "Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question."<sup>9</sup> Yet this situation often places the Court squarely on "the horns of a dilemma": the Court's legitimacy motivates us to look to that institution for the resolution of critical questions, while the Court's actions in resolving such questions can erode the base of its legitimacy.<sup>10</sup>

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7. See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 19-29 (1964).

8. See the discussion of the reciprocal relationship between the court and the American populace in White, *The Supreme Court's Public and the Public's Supreme Court*, 52 VA. Q. REV. 373 (1976) [hereinafter cited as White, *The Supreme Court's Public*]. An attitudinal perspective on this issue is provided by W. Muir's study of 28 public school officials before and after the Court's decision in *School District v. Schempp*, 374 U.S. 208 (1963); see W. MUIR, *LAW AND ATTITUDE CHANGE* (1973), originally published as *PRAYER IN THE PUBLIC SCHOOLS* (1967). On the educational role of the Court, see A. COX, *SUPREME COURT*, *supra*, note 6, at 117-18. Also see the various impact studies in *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker and M. Feeley eds., 2d ed. 1973).

9. DE TOCQUEVILLE, *DEMOCRACY IN AMERICAN* (1835), to wit:

The language of the law thus becomes, in some measure, a common tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.

Also involved here is the issue (one which is of increasing importance) that if you cannot win in the legislature, you go to the courts, and by so doing the courts are used to circumvent the political process. Some of the negative implications of such action have been noted by James Bradley Thayer (i.e., that it "elapses . . . the political capacity of the people" and deadens "its sense of moral responsibility"), discussed in A. COX, *SUPREME COURT*, *supra* note 6, at 116-17.

10. See A. COX, *SUPREME COURT*, *supra* note 6, at 103-15, for an overview of the "power of the legitimacy"; accord, L. LUSKEY, *BY WHAT RIGHT? passim* (1975). See also P. KURLAND, *PROBLEMS OF THE POLITICAL COURT IN POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 170-206 (1970) [hereinafter cited as P. KURLAND, *WARREN*].

The fourth proposition holds that although the "Court" is a singular noun, it is, in fact, a plural institution. The Court is not a monolith, and while it issues an opinion, it frequently speaks in many tongues.<sup>11</sup> Thus, the Court's collegiate nature has enormous and varied repercussions both on the functioning of the institution itself and on its relationships with the "world" outside.

Our final proposition is, in many ways, obvious and simple, yet one which remains most perplexing and complex. The Supreme Court is not an abstraction void of values and views; it is an institution, but like all institutions it is made up of human beings who do not exist in a vacuum. To borrow the eloquent statement of Benjamin Cardozo: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."<sup>12</sup>

### III. THE PREFACE

A primary feature of constitutional adjudication in the United States is the persistence of uncertainty, and it is valuable to recall Holmes' statement that: "[W]here there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."<sup>13</sup> Choices need be made, lines must be drawn, and, in this sense, "[j]udgment consists in drawing lines."<sup>14</sup> Needless to say, such lines

COURT]. See also F. GRAHAM, *MIRANDA: SELF-INFLICTED WOUND, IN THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW* 153-93 (1970).

11. H. ABRAHAM, *THE JUDICIAL PROCESS* 199-217 (3d ed. 1975) [hereinafter cited as H. ABRAHAM, *THE JUDICIAL PROCESS*], offering a concise review of "assigning and writing opinions," including the importance of Marshall's departure from seriatim opinion writing.

12. B. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 168 (1975) [hereinafter cited as B. CARDOZO, *THE NATURE*]. See also J. FRANK, *Are Judges Human?*, in *COURTS ON TRIAL* 146-56 (1973); accord, J. M. ROSENBERG, *JEROME FRANK: JURIST AND PHILOSOPHER* 1-47 (1970).

13. See O.W. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS* 210 (1920). See also E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* at ii (1962); Cf. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917), (Justice Holmes states: "I recognize without hesitation that judges must and do legislate, but they do not do so only interstitially; they are confined from molar to molecular motions."); B. CARDOZO, *THE NATURE*, *supra* note 12, at 69-71, wherein the theory of "gaps in the law" is discussed. Accord, G. E. WHITE, *JUDICIAL TRADITION*, *supra* note 6, at 2, dealing with the 19th century view of the judge as law-maker.

14. Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63 (1968). It should also be noted at this point, that while the major thrust of our discussion is concerned with constitutional adjudication, the Court's decisions are not limited to that realm and include other, such as statutory, facets of adjudication.

are drawn by human hands functioning within a dynamic context, within a system in which even verities are oftentimes fleeting. Yet, the recognition of the act of line-drawing, as well as the acknowledgment of the difficulties inherent in perceiving "just how and where to draw a line,"<sup>15</sup> is not equivalent to conceptualizing and analyzing the process itself. Thus, before examining the Supreme Court and the issue of the avertable eye, we offer a brief preface to the line-drawing idea in the field of constitutional law and politics.

In this preface, line-drawing is explored in terms of four underlying themes. Together, these themes (*viz.*, input-output; differing approaches and applications; dynamism; and rational-arational) comprise a set. Therefore, while the themes are analytically distinguishable, they are also interrelated and, at points, a degree of overlap occurs.

The first of these themes, that of input-output, concerns itself with the fact that even though line-drawing is most widely discussed as an output (i.e., a final decision), there exists an additional and crucial input dimension which involves the making of what we might term preliminary decisions.<sup>16</sup> In a quasi-communications sense, this means that line-drawing is utilized not only in the sending out of messages, but also in the reception of signals.

This input dimension can be readily observed if we look at the process of case selection.<sup>17</sup> For there is, after all, the line-drawing question of which cases will or will not be taken, and the relationship of such line-drawing to the procedural and substantive orientations of the members of the Court. Frequently, this aspect of line-drawing is linked to what is commonly referred to as perceptions of judicial activism or restraint.

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15. A. COX, SUPREME COURT, *supra* note 6, at 42. Here Cox is speaking of this issue relative to crime. *Cf.*, Goldstein, *The Courts Are Blurry on Defining Entrapment*, N.Y. TIMES, July 18, 1876, at E7. Writing on entrapment, Goldstein states, "but the line exists in principle" (between legal and illegal police activity). This usage of the word, line, implies an established standard, whereas our main concentration is on line-drawing as a continual, creative process. See B. CARDOZO, THE NATURE, *supra* note 12, at 166; "I have grown to see that the judicial process in its highest reaches is not discovery, but creation." Yet it is important to note that the word is utilized on both senses and, furthermore, that both usages are related.

16. BLACK'S LAW DICTIONARY 494 (4th ed. 1968), defines decision as: "A term having no fixed, legal meaning." *Accord*, J. LAPALOMBARA, POLITICS WITHIN NATIONS 26 (1974), indicating decision making as "those processes . . . that involve choice."

17. See D. RHODE & H. SPAETH, SUPREME COURT DECISION MAKING 118-33 (1976); H. ABRAHAM, THE JUDICIAL PROCESS, *supra* note 11, at 174-85. Also compare, J. EISENSTEIN, POLITICS AND THE LEGAL PROCESS, 179 (1973), stating that through the Court's power to pick and choose appellate cases: "It can avoid deciding politically sensitive cases . . . or it can postpone them until a more auspicious time."

Who has standing? When does a case or controversy exist? What defines a political question? Which cases are ripe and of sufficient importance? These are all issues that are repeatedly associated with judicial orientation and whether a Justice's main commitment lies in means or ends.<sup>18</sup>

That such preliminary decisions are not always easily made can be seen in Justice Frankfurter's expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality.'" <sup>19</sup> Frankfurter's statement also brings us to another factor which should be explicitly noted. At the input line-drawing aspects of case selection, two levels are involved: First, there are the individual judgments of the Justices and second, there is the collective judgment (or line-drawing) made by the Court which consists of the individual judgments, but at the same time transcends them. If, for example, four justices vote to accept a writ of *certiorari* in a case in a particular area (based on the lines drawn relative to their individual commitments), then a collective input line is drawn, although it might not be congruent with all of the individual decisions.<sup>20</sup>

This two-level situation is also evident when we move to our second theme, that of differing approaches and applications. While this theme focuses directly on the output dimension of judicial decision-making, consideration must be given both to the output decisions of individual Justices and the output decisions of the Court as a collective body. Questions of judicial philosophy enter, and often output decisions are discussed in terms of Justice and Court activism or passivity.<sup>21</sup>

18. See, e.g., Henkin, *The Supreme Court 1967 Term*, *supra* note 14, at 72-76, dealing with, "The Standing of Standing: Laying Down a New Line". See also G. E. WHITE, *THE JUDICIAL TRADITION*, *supra* note 6, at 317-68, concerning "the mosaic of Warren Court," offering some perspectives of commitments.

19. H. WECHSLER, *TOWARD PRINCIPLES ON CONSTITUTIONAL LAW*, IN *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 11 (1961). Wechsler argues here that the line is thinner than it need or ought to be relative to his "neutral principles." Whether or not the line, in the sense used in the article, is too thin does not eliminate the fact that some sort of line exists. See note 15 *supra*.

20. That a collective input line is drawn in appellate cases does not rule out the existence of significance of dissent. See, e.g., A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* 93 (1958). See, A. BARTH, *PROPHETS WITH HONOR* (1975); see also, R. RUGWELL, *MODEL FOR A NEW CONSTITUTION* 21 (1970), stating that: "When it became common knowledge that many final decisions were made by a five to four majority . . . the fallacy of judicial infallibility was exposed."

21. It must be remembered that judicial activism or restraint need be measured in

Thus a consideration of the degree and kind of commitments held by the Justices and the Court toward proceduralism and substantivism is almost inexorably interwoven into discussions of output line-drawing.<sup>22</sup>

Rather than directly entering the conundrum of Court activism *per se*, this perspective on output line-drawing concentrates on less emotional continua and their corollaries. The first of these deals with the differing approaches brought by Justices (and, in turn, the Court) to the making of output decisions. In a very real sense, this "approach" perspective involves the drawing of base lines and revolves around the commitment to absolutist-relativist principles. It is important to note that included in this perspective are the following propositions: (1) the boundary maintenance between absolutist and relativist principles is weak; (2) absolutist and relativist principles, in their pure form, are ideal types and what is of key significance is the definable mixture of those principles existent within a given context and time period; (3) commitments to these principles are mutable; and (4) that a commitment to the absolutist area of the continuum is not a negation of line-drawing, but rather a particular expression of it.<sup>23</sup>

The second continuum concerns the actual lines drawn in the Court's opinions. Looking at a Court decision, we can distinguish (at least in terms of degree) hard or positive line-drawing from soft or

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a given context. G. SCHUBERT, *JUDICIAL POLICY* 213 (1974), argues that: "From a functionalist point of view, therefore, the Court is activist when its decisions conflict with those of other political policy makers, and the Court exercises restraint when it accepts the policies of other decision makers." However, this view runs into some difficulties when we consider a Court that *actively* pursues its "legitimizing" function, rather than its "checking" function. On the importance of the "legitimizing" function, see C. BLACK, *THE PEOPLE AND THE COURT* (1960). See also the comments on the "legitimizing" function in A. BICKEL, *THE LEAST DANGEROUS*, *supra* note 2, at 29-33; P. KURLAND, *POLITICS, THE CONSTITUTION*, *supra* note 10, at 34-39. Accord, Mason, *The Burger Court and Historical Perspective*, 89 *POL. SCI. Q.* 32 (1974), stating that: "The fact is that all Courts have been activist in one way or another."

22. Here the term "degree" implies a quantitative dimension, while "kind" implies a qualitative dimension. We emphasize "kind" because of its importance in seeing the difference between commitments to substantivism/proceduralism and commitments to a particular form of substantivism/proceduralism. See, e.g., G. E. White, *Judicial Tradition*, *supra* note 6, at 317-368.

23. *Id.* at 331-55, wherein Justice Black's philosophy is shown to recognize Marshall's phrase, "[T]hat it is a constitution we are expounding . . ." and that: "This view which I have of the Constitution does not render government powerless to meet new times, new circumstances and new conditions." See H. BLACK, *A CONSTITUTIONAL FAITH* 8 (1969) [hereinafter cited as H. BLACK, *CONSTITUTIONAL FAITH*]. Black's literal approach to the Constitution is complimented by his expansive interpretation of the document's language, and lines are drawn even if "balancing" is rejected. Thus, while an absolutist perspective is in some ways different from a relativist one, it nonetheless remains linked to the line-drawing process within the American constitutional process.



tentative line-drawing. To use slightly different terms, does the judgment of the Court draw a reasonably clear and definite line in a case or, is the line drawn unclear and indefinite? Implicit within this consideration are two further, yet parallel questions. The first is whether the Court's decision has only ontogenetic implications, or whether the line drawn has implications of a general or phylogenetic nature.<sup>24</sup> The second is whether the line drawn exists comfortably within the realm of adjudication, or whether it significantly trespasses into legislative territory.<sup>25</sup>

There is an additional aspect of this differing "applications" perspective which must also be recognized. In some cases, it can be argued that there is not a line to be drawn,<sup>26</sup> but even more importantly that the Court's judgment seeks to avoid drawing a line. While line avoidance logically involves line-drawing within our view, it is nonetheless worthwhile to take somewhat special cognizance of decisions which attempt specifically to avoid lines by judging not on the merits of cases, but rather on secondary issues or circumstances.<sup>27</sup>

All of these factors combine to make the theme of differing approaches and applications one of enormous complexity. Yet there remains a final dimension which compounds the difficulties inherent in this theme. This dimension is related to the fact that line-drawing is more than a singular, discrete action. Line-drawing decisions in particular cases are also part of an ongoing process. To put it simply, line-drawing is not a one-shot operation. Given this situation, we have to consider the serial attributes of drawing output lines and examine

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24. The distinction between those decisions which are of importance for the development of a single case and those whose importance is for the development of a class of cases is highlighted here. Clearly, however, these are interrelated and the boundary between them is not always easily discernable. See H. ABRAHAM, *FREEDOM AND THE COURT* 189-205 (2d ed. 1972) [hereinafter cited as H. ABRAHAM, *FREEDOM*], wherein he attempts to establish "judicial line formulae" (such as the "clear and present danger" test and the "bad tendency" test in the area of expression).

25. H. ABRAHAM, *THE JUDICIAL PROCESS*, *supra* note 11, at 319-28, discussing "drawing the line or attempting to do so" between judicial legislating and judging. See also A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 35-36, analyzing Thayer's rule of "the clear mistake."

26. Henkin, *The Supreme Court 1967*, *supra* note 14, at 63.

27. See H. ABRAHAM, *THE JUDICIAL PROCESS*, *supra* note 11, at 354-76, for a discussion of "The Sixteen Great Maxims of Judicial Self-Restraint," note especially maxim twelve. Also consult Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936), wherein he outlines the seven rules that the Court has developed "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346.

whether later decisions reinforce, reconstruct, or erase the lines drawn earlier in a particular area.<sup>28</sup>

This point leads directly into our third theme, that of dynamism. For time and time again, "[w]e draw our little lines and they are hardly down before we blur them."<sup>29</sup> Thus we cannot escape the fact that line-drawing is a dynamic process whereby the Court may be concerned with the complex events existing in a limited time period and ignoring historical antecedents, or may be dealing only with the change in judicial language as it has occurred over a period of time.<sup>30</sup> The court is intertwined with a constellation of forces, and its judgments are interconnected with the realignments which take place within that constellation.

The forces themselves are many and they manifest themselves on a multitude of levels, ranging from intra-psychic, to intra-collegiate, to inter-governmental and trans-societal. Attempts "to draw the line once and for all,"<sup>31</sup> fail as the Court is touched by the political world of "[m]irrors and blue smoke."<sup>32</sup> Similarly, shifts in the visions of societal interests and obligations draw the Court into their vortex and "may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set upon their

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28. See B. CARDOZO, *THE NATURE*, *supra* note 12, at 48, where he states: "At last there emerges a rule or principle which becomes a datum, a point of departure, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed."

29. *Id.* at 161. In this regard, also note E. ROSTOW, *THE SOVEREIGN PREROGATIVE*, *supra* note 13, at 33, that the Justices "grapple with a new problem, deal with it over and over again, as its dimensions change . . . They settle one case and find themselves tormented by its unanticipated progeny."

30. While we are emphasizing the dynamic nature of linedrawing, we must exercise extreme caution not to ignore the role of *stare decisis* in the constitutional process and the Court's desire for institutional continuity. "But since constitutional law depends even more on its soundness than its firmness, in a conflict between precedent and progress, precedent will, more quickly than in other fields of law, yield to 'progress.'" C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 17 (1973). See also R. BISCHOFF, *The Role of Official Precedents*, in *SUPREME COURT AND SUPREME LAW* 77-85 (E. Cahn ed. 1971). Compare Justice Harlan's concurring memorandum opinion in *Orozco v. Texas*, 394 U.S. 324, 327 (1969); A. GOLDBERG, *Constitutional Stare Decisis*, in *EQUAL JUSTICE; THE WARREN ERA OF THE SUPREME COURT* (1972) [hereinafter cited as A. GOLDBERG, *EQUAL JUSTICE*].

31. H. ABRAHAM, *THE JUDICIAL PROCESS*, *supra* note 11, at 323, where he discusses Justice Robert's side by side theory in *U.S. v. Butler*, 297 U.S. 1 (1936). See also Chief Justice Chase's opinion for the Court in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

32. To borrow the colorful, but descriptive language in J. BRESLIN, *HOW THE GOOD GUYS FINALLY WON* 31 (1976).

journey."<sup>33</sup> Therefore, we must constantly recognize not only the existence of inextricable connections between the legal and other systems of society, but also consistently attempt to specify the form, direction, and meaning of such connections.<sup>34</sup>

Yet, while we have emphasized the flexible and dynamic aspects of line-drawing, and while some lines emerge based only marginally on rhyme or reason, the line-drawing process does not exist in a world separated from judicial/legal principles. Immersed in the political process, the Court nonetheless remains distinguishable (if not distinct) from other governmental institutions.<sup>35</sup> If one accepts, to some degree, that "the source of judicial authority [is] the process of judicial reasoning,"<sup>36</sup> then a principled approach to decisions, no matter how difficult to define and achieve, cannot be ignored.<sup>37</sup> In other words, "[t]hat a line has to be drawn somewhere does not mean that it may be drawn anywhere."<sup>38</sup>

Herein we discover the core of our last theme, the rational-arational continuum. This theme, in a very real sense, refers to the judgments made of the Court's judgment, and whether the Court's line-drawing decision is perceived to be "a symbol of rationality"<sup>39</sup> or based on a foundation of jurisprudential sand. Does the Court's opinion establish its grounding in "legal," rather than other considerations?<sup>40</sup> Should the Court decide less and explain more?<sup>41</sup> Both questions are closely related to the line-drawing process, as well as the issues of judi-

33. B. CARDOZO, *THE NATURE*, *supra* note 12, at 113.

34. See J. AUERBACH, *UNEQUAL JUSTICE* (1976), which paraphrases Thomas Reed Powell's definition of the legal mind "as one that could think of something that was inextricably connected to something else without thinking about what it was connected to."

35. See G. E. WHITE, *THE AMERICAN JUDICIAL*, *supra* note 6, at 371-72. Cf. M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* (1966).

36. G. E. WHITE, *THE AMERICAN JUDICIAL*, *supra* note 6, at 34.

37. *Id.* at 33-34; H. WECHSLER, *PRINCIPLES, POLITICS*, *supra* note 19, at 3-48; Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 49-65, wherein he comments that: "No good society can be unprincipled; and no viable society can be principle-ridden." See also J. Deutsch, *Neutrality, Legitimacy and the Supreme Court*, 20 STAN. L. REV. 169 (1968).

38. Henkin, *The Supreme Court 1967 Term*, *supra* note 14, at 63.

39. *Id.* at 64.

40. G. E. WHITE, *THE AMERICAN JUDICIAL*, *supra* note 6, at 370.

41. See L. LEVY, *THE SUPREME COURT UNDER EARL WARREN* 228-38 (1972). On this question related to the Warren Court, see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. COX, *THE WARREN COURT* (1968); P. KURLAND, *POLITICS, THE CONSTITUTION*, *supra* note 10, at 170-206; A. GOLDBERG, *EQUAL JUSTICE*, *supra* note 31, at 67-97.

cial legitimacy and judicial continuity and change.<sup>42</sup> In short, the Court is like the sower who "may mistake and sow his peas crookedly; the peas make no mistake but come up and show his line."<sup>43</sup>

#### IV. THE HIGHWAYS AND BYWAYS TO JACKSONVILLE AND BEYOND

From our preface to line-drawing, it is not difficult to see that the where, how, why and when dimensions of drawing the line involve some of the most crucial aspects of law and adjudication.<sup>44</sup> Line-drawing is a complex, perennial, and oftentimes difficult process, and must be recognized as such. Yet this recognition does not preclude us from examining and evaluating attempts at drawing a line. Thus we now move from the more general to the more particular, and analyze the lines surrounding the issue of the avertable eye.

In his classic dissent in *Olmstead v. U.S.*,<sup>45</sup> Justice Brandeis wrote of the idea of privacy—"the right to be let alone"—as "the most comprehensive of rights and the right most valued by civilized men."<sup>46</sup> Here, Brandeis "pleaded for an application of the Fourth and Fifth Amendments not in their narrow, literal terms, but in their larger design as safeguarding a right of privacy essential to the idea of human dignity and personal integrity."<sup>47</sup> Whether or not privacy is "the right most valued by civilized men" is a question which lies beyond the purview of this study. Yet, while we hesitate to undertake a comprehen-

42. See WHITE, *THE SUPREME COURT'S PUBLIC* *supra* note 8, at 375, stating that: "If the Court is not somehow distinguishable from its current occupants—if the institution itself has no identity over time—then law becomes equated with idiosyncratic judgments by people on whose actions there is no effective political check." Also note Brandeis' statement, in *Horning v. District of Columbia*, 254 U.S. 135, 139 (1920), that the judge "does coerce when, without convincing the judgment, he overcomes the will by the weight of his authority." Compare Brandeis' view with R. McCLOSKEY, *THE MODERN SUPREME COURT* 279 (1972), that:

Legislators are not always strangers to the reasoning process: judges cannot always eliminate all quality of fiat from their decisions. Perhaps the most we can say is that judges should be thought of as striving more determinedly to reduce the element of fiat; that they must be more reluctant to reach the point where will alone rules.

43. A. RANNEY, *CURING THE MISCHIEFS OF FACTION* 210 (1975) (citing the aphorism of Ralph Waldo Emerson). It should be noted here that while we speak of drawing a line, we often are referring to a plural process where several lines are developed or where a single line consists of, in fact, a series of shorter lines.

44. T. ROSENBERG, *JEROME FRANK, JURIST AND PHILOSOPHER* 135 (1970), and A. BIKEL, *THE LEAST DANGEROUS*, *supra* note 2, at 60.

45. 277 U.S. 438, 478 (1928).

46. *Id.* See also the phrase, "the right to be let alone" as discussed by Judge Thomas Cooley in A. BRECKENRIDGE, *THE RIGHT TO PRIVACY* 1 (1971).

47. A. BARTH, *PROPHETS WITH HONOR* 65 (1974).

sive explication of both the normative and empirical sides of this question, we are, nonetheless, drawn to a consideration of the broad implications of "the right to be let alone."

This consideration rests neither on the sanctity of the home, nor on the conjugal bed, nor strictly speaking on the procedural guarantess of the Bill of Rights.<sup>48</sup> Rather, it roots itself in the question of the private right "to be let alone" in public. If "a zone of privacy"<sup>49</sup> exists, then is it in "a sphere of space . . . that a man may carry with him into his bedroom or into the street?"<sup>50</sup> If "the concept of a right to privacy attempts to draw a line between the . . . self and society,"<sup>51</sup> must that line vanish when confronted by the openness which lies beyond our doorsteps? In other words, do we not have the right to establish a "zero-relationship"<sup>52</sup> with others, relative to interactions and/or communications, in a public context if we so choose?

Not surprisingly, even this narrowed perspective on the privacy question is perplexingly replete with issues, each containing its own distinguishable dimensions. Without ignoring this factor, we will specifically concentrate here on the issue of "public thrusting" on unconsenting adults or, what may be termed the right not to be expressed to, outside the home.<sup>53</sup> Upon whom does the burden fall, the expresser to curtail his message or the expressees to avert his eyes? As a vehicle for this exploration, we will concentrate on the Supreme Court's decision in *Erznoznik v. City of Jacksonville*.<sup>54</sup>

Although there are aspects of *Erznoznik* that are external to our direct concern, the case, nevertheless, provides us with a useful nexus for inquiries on the avertable eye question. To begin with, this case

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48. See A. WESTIN, *PRIVACY AND FREEDOM* (1967); S. WARREN & L. BRANDEIS, *THE RIGHT TO PRIVACY* 133-52 (1890). For general reviews of privacy, see Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Comment, *The Constitutional Right of Privacy: An Examination*, 69 NW. U.L. REV. 253 (1974).

49. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

50. Konvitz, *Privacy and the Law*, 31 LAW AND CONTEMP. PROB. 272, 279-80 (1966).

51. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 545 (1970) [hereinafter cited as T. EMERSON, *THE SYSTEM*].

52. Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW AND CONTEMP. PROB. 281 (1966).

53. See Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?* 67 NW. U.L. REV. 153 (1972) [hereinafter cited as Haiman, *Speech v. Privacy*]. But see Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975).

54. 422 U.S. 205 (1975).

does not involve the right to privacy within the ambit of the freedom of expression, but rather presents the clash between these two ideals. The scope of privacy here, whether based on "emanations," "penumbras," and/or extrapolations from Madison's 9th Amendment,<sup>55</sup> is *freedom from expression*, not freedom to express.<sup>56</sup> Second, since this case touches upon the areas of sex and obscenity, an additional factor is added to make the attempts at line-drawing even more fascinating (including, for example, the question of "protecting" non-adults).<sup>57</sup> Lastly, the nature of *Erznoznik* presents us with the opportunity to focus clearly on the intricate and dynamic aspects of line-drawing as the issues of "the right to be let alone" in public, the first amendment, and police power each run into others.

Before turning to the specifics of the case, it is worthwhile to note briefly two academic works, related to the issues at hand, that have not gone unnoticed by the Court. These two studies have many points in common, but at the same time are divergent in several key areas, thus providing useful perspectives on the Court's decision and line-drawing with regard to the issue of the avertable eye.

The first of these works is Thomas Emerson's *The System of Freedom of Expression*.<sup>58</sup> Arguing that the Court has never developed any comprehensive theory of what the first amendment expression guarantee means, Emerson goes on to offer his system for freedom of expression.<sup>59</sup> For our purposes two themes in his voluminous work

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55. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); J. DOUGLAS, *THE RIGHT OF THE PEOPLE* 57 (1975), originally published prior to *Griswold*, where Douglas wrote: "There is, indeed, a congeries of these rights [procedural and substantive] that may conveniently be called the right to be let alone." He did not at this point, however, mention the ninth amendment. For a brief discussion and outline of the use of this amendment, see L. JAYSON, *THE UNITED STATES CONSTITUTION 1257-58* (rev. ed. 1973). We should also keep in mind that: "The Senate rejected that amendment which Madison said he prized above all others, the one that prohibited the states from infringing on personal rights"; see R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 215 (1969). Lastly, we should mention the importance of Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961). For the development of the constitutional right of privacy, see G. E. WHITE, *THE AMERICAN JUDICIAL*, *supra* note 6, at 351-56.

56. See T. EMERSON, *THE SYSTEM*, *supra* note 51, at 549, where he states that: "The problem of reconciling First Amendment rights and privacy rights, where they conflict, is therefore one of defining the constitutional boundaries of the privacy system."

57. We will not deal directly with the what, how, where and why of obscenity, and will resist the strong temptation to wallow a bit here. See H. ABRAHAM, *FREEDOM*, *supra* note 24, at 176.

58. *Supra*, note 51; see also T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966).

59. T. EMERSON, *THE SYSTEM*, *supra* note 51, at 15, 717; see also H. BLACK, *A CONSTITUTIONAL FAITH*, *supra* note 23, at 43-66.

stand out. These are the notion of a "captive audience" and the distinction between expression and action. Taking the latter point first, Emerson, recognizing the "special status" of expression, emphasizes the need to draw a line between expression and action, despite the inherent difficulties of so doing.<sup>60</sup> His reasoning here is not so much a commitment to Justice Black's conception of the Bill of Rights, as it is an appreciation of the fact that expression can be protected from the authority and power of state and society only by differentiating it from action.<sup>61</sup> Importantly for us, Emerson states: "If an obscene communication is forced upon another person against his will it can have a 'shock effect' and thus a communication can properly be described as 'action.'"<sup>62</sup> Thus, "forcing obscenity upon another person constitutes an invasion of his privacy, and for that reason . . . falls outside the system of freedom of expression."<sup>63</sup> In other words, since sex, in its broad sense, has a "shock effect" in our society, its actual manifestations (e.g., nudity or intercourse) in public, present us with an action, not an expression, and thereby can be justly restricted. To counsel that we should lie down together is one thing, to use the streets to demonstrate that counsel is another matter.

The significance Emerson attaches to the "shock effect" of a communication can also be seen in his analysis of the notion of a "captive audience." In his view, it is intolerable that someone be "compelled to see or hear erotic communications," and therefore "an advertisement on a billboard or on a theater marquee might be prohibited whereas the same advertisement in a book could not."<sup>64</sup> Citing the Court's per curiam opinion in *Redrup v. New York*,<sup>65</sup> Emerson believed that the Court was prepared to accept the doctrine of "shock effect."<sup>66</sup>

The second work to be considered, Franklyn Haiman's important

60. T. EMERSON, *THE SYSTEM*, *supra* note 51, at 8-9, 495, 717-18; *but see* H. BLACK, *A CONSTITUTIONAL FAITH*, *supra* note 23, at 53-58.

61. T. EMERSON, *THE SYSTEM*, *supra* note 51, at 9.

62. *Id.* at 496 (emphasis added).

63. *Id.* at 495.

64. *Id.* at 500, 501. *See also* Brandeis' opinion in *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

65. 386 U.S. 767, 769 (1967) (where the absence of any assault upon individual privacy, such that it would be impossible for the unwilling observer to avoid exposure to it, was specifically noted).

66. *See* T. EMERSON, *THE SYSTEM*, *supra* note 51, at 501. *Also consult* H. ABRAHAM, *FREEDOM*, *supra* note 24, at 185.

article, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*,<sup>67</sup> offers us a different perspective on the issue of the avertable eye. While the article covers a wide field (including the introduction of theories of "the psychology of the human communications process" into the debate),<sup>68</sup> our attention is drawn to his "proposed set of guiding principles." These are stated in terms of a general proposition, four corollaries, and two additional principles.

[*General proposition:*] The law should not attempt to insulate any person in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that the law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it.

[*Corollary One:*] A critical distinction must be made between situations in which the target of a communication is physically free to escape from its continuation and those in which the target is physically captive.

[*Corollary Two:*] The target of communication is physically unable to "turn off" the message.

[*Corollary Three:*] Considerations of voluntarism with respect to the target's initial presence at the scene of communication should be regarded as irrelevant.

[*Corollary Four:*] In circumstances where the receiver of communication is physically unable either to remove himself from the source of an unwelcome message or to "turn it off," and has also exhausted all other possible means, including self-imposed inattention, for shutting out the flow of communication beyond its initial impact, he should then be entitled to protection by the law. Suppression of a communication itself should thus be viewed as a last resort when less restrictive alternatives have failed.

[*First Additional Principle:*] There can be no guarantee through the law that a person, short of sealing himself in a room, will be immune from unwanted communicative interruptions.

[*Second Additional Principle:*] There must be no restric-

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67. *Supra*, note 53. See also F. HAIMAN, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, in *DISSENT: SYMBOLIC BEHAVIOR AND RHETORICAL STRATEGIES* (H. Bosmajian ed. 1972).

68. Haiman, *Speech v. Privacy*, *supra* note 53, at 182-83. The categories that Haiman surveys are: door-to-door solicitation; residential picketing; unwanted telephone calls and mail; public address systems and sound trucks; and billboards and other public thrusting. Haiman also offers a useful, if not always on target, evaluation of the restrictive position. *Id.* at 177-85.



tion on uninvited communications on the grounds that either the content of the message or the manner of its expression may be offensive to some persons [including children]<sup>69</sup> upon whose eyes or ears it may fall.<sup>70</sup>

In short, Haiman's position is that we cannot allow our sympathies for "tender psyches" and "the right to be let alone" in public to produce "serious erosions of the first amendment," and that privacy is sufficiently safeguarded if the unconsenting can escape after their first exposure.<sup>71</sup> Unlike Emerson, Haiman's concern with our choice over the messages we receive and the intrinsic offensiveness of certain communications is small indeed.

With these differing perspectives in mind, we now return to *Erznoznik* to see how the Court there drew its lines in the difficult task of dividing the pie of individual freedom between the positive freedom of expression and the negative freedom to be free from expression in public.<sup>72</sup>

More than three years elapsed from the time that Richard Erznoznik, manager of the University Drive-In Theater, was charged with violating the municipal code of Jacksonville, Florida,<sup>73</sup> and the decision of the Supreme Court reversing his conviction on the above charge. The ordinance in question made it unlawful, and declared it a public nuisance, for any "person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any *public street or public place*."<sup>74</sup> The movie in question, "*Class of '74*," R-rated, contained pictures of uncovered female breasts and buttocks and was visible from public streets and places.

69. *Id.* at 192-99. For some perspectives on the issue of "children" or "minors", see *Ginsberg v. New York*, 390 U.S. 629 (1968); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); and *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

70. Haiman, *Speech and Privacy*, *supra* note 53, at 194-99.

71. *Id.* at 199, argues that: "The human psyche, whether adult or juvenile, is tougher than most of its would-be protectors are inclined to admit." Also see his comments on juveniles, *Id.* at 198.

72. In this context, we are speaking of a zero-sum game.

73. JACKSONVILLE, FLA., MUNIC. CODE, § 330.313 (1972).

74. *Id.* (emphasis added). See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In this case, the District Court of Appeals for the First District of Florida affirmed the ruling of the trial court, 288 So. 2d 260 (1974). The Florida Supreme Court denied *certiorari* with three judges dissenting, 294 So.2d 93 (1974).

The trial court upheld the ordinance as a legitimate exercise of police power. The District Court of Appeals affirmed the decision relying on a similar judgment in *Chemline, Inc. v. City of Grand Prairie*<sup>75</sup> and *City of Grand Prairie v. Chemline, Inc.*,<sup>76</sup> but ignoring a later court of appeals decision in *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*.<sup>77</sup> *Cinecom* ruled an ordinance very much like Jacksonville's unconstitutional for overbreadth. In his opinion for the Seventh Circuit, Judge Campbell responded to the contention of Fort Wayne, that this ordinance was a valid protection for children and unconsenting adults whose privacy was violated by the "offensive" material thrust upon them, with the following points:<sup>78</sup>

First: The court was not persuaded by the *Chemline* decision, and legal considerations influenced the court that were not considered there.

Second: Since *Chemline*, the Supreme Court had decided *Interstate Circuit, Inc. v. Dallas*,<sup>79</sup> invalidating for vagueness a protective ordinance for children relative to the classification of films. Thus, while laws can exist for the "protection" of children in the area of obscenity, as in *Ginsberg v. New York*,<sup>80</sup> even nonadults should not be subjected to the mere whim of the censors.<sup>81</sup> Here the Court was not faced with obscenity in the typical sense, and the breadth of the ordinance could have precluded the presentation of innocuous or culturally beneficial items for children.

Third: In line with *Redrup v. New York*<sup>82</sup> and *Cohen v. California*,<sup>83</sup> the "assault" here was not "so obtrusive" nor so narrowly defined as to require protection more than the advertizing of the unwilling party's eyes.

Fourth: The police power issue, relative to traffic regulation, was nonexistent in the facts before the court.

Fifth: Though drive-in theaters may be regulated more than other theaters, the court must be careful on the freedom of expression

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75. 364 F.2d 721 (5th Cir. 1966).

76. 364 F.2d 721 (5th Cir. 1966).

77. 473 F.2d 1297 (7th Cir. 1973).

78. Here we are not replicating the judge's opinion, but rather are indicating his position through our words.

79. 390 U.S. 676 (1968).

80. 390 U.S. 629 (1968).

81. *Rabeck v. New York*, 391 U.S. 462 (1968).

82. 386 U.S. 767 (1967).

83. 403 U.S. 15 (1971). See also T. EMERSON, *THE SYSTEM*, *supra* note 51, at 501.

question.<sup>84</sup> "The ability of government, consonant with the Constitution, to shut out discourse solely to protect others from hearing it, is dependent on a showing that substantial privacy interests are being invaded in an essentially intolerable manner."<sup>85</sup> Such a situation was not presented in this case.

After the Florida Supreme Court denied *certiorari*, the U.S. Supreme Court noted probable jurisdiction, and Justice Powell, writing for the Court, stated that the Jacksonville ordinance was facially invalid as an infringement of first amendment rights.<sup>86</sup> Powell's opinion for the six man majority followed very closely the line of reasoning produced by Judge Campbell, even though there was but a passing reference to *Cinecom*.

The city ordinance clearly went beyond films that could be classified as obscene under the Court's 1973 *Miller v. California* decision.<sup>87</sup> Therefore, as in *Cinecom*, the case resolved not on the obscenity issue per se (since the films in question were entitled to first amendment protection), but rather on the City's contention that any movie containing nudity may be suppressed as a nuisance, *if visible from public places*.<sup>88</sup> The reasons for this suppression raised by Jacksonville followed those stated by the City of Fort Wayne.

Justice Powell replied to the City's position by noting that:

"This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. Such cases, demand delicate balancing because [they occur in a] . . . 'sphere of collision between claims of privacy and those of [free speech . . .]'.<sup>89</sup>

84. When we refer to the first amendment in this case we, of course, mean as "incorporated" into the fourteenth amendment. For a general review of incorporation, see H. ABRAHAM, FREEDOM AND THE COURT, *supra* note 24, at 29-88. See also Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952), overruling Mutual Film Corp. v. Industrial Comm., 236 U.S. 230 (1915).

85. Cohen v. California, 403 U.S. 15, 21 (1971).

86. 422 U.S. 205, 206-18. See also Note, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. (1975), for a discussion of the "legal" aspects of *Erznoznik*.

87. 413 U.S. 15 (1973). See also *Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973). In *Slaton*, the Court adhered to the principle which was established in *Roth v. U.S.*, 354 U.S. 476 (1957), that obscene material is not protected by the first and fourteenth amendments.

88. On obscenity and the first amendment, consult H. ABRAHAM, FREEDOM AND THE COURT, *supra* note 24, at 176-89. See also R. FUNSTON, PORNOGRAPHY AND POLITICS: THE COURT, THE CONSTITUTION, AND THE COMMISSION, in JUDICIAL CRISES: THE SUPREME COURT IN A CHANGING AMERICA (1974).

89. 422 U.S. 205, 208 (1975) quoting partially from *Cox Broadcasting Corp. v.*

Each case depends on its own specific facts, but there are certain general principles that have developed.

For the majority, there were three such general principles relevant here. First, a state or local government may protect "privacy" by establishing reasonable and narrow regulations dealing with the time, place, and manner of expression when applied to all speech irrespective of content, but not when the government acts as a censor "to shield the public from some kinds of speech on the ground that they are more offensive than others."<sup>90</sup> Second, this form of selective restriction has been upheld "when the speaker intrudes on the privacy of the home" but not relative to the general right "to be let alone" in public.<sup>91</sup> Third, this form of selective restriction has also been upheld when "the degree of captivity makes it *impractical* for the unwilling viewer or auditor to avoid exposure."<sup>92</sup>

The three general principles articulated, combined with the fact that in today's complex society "we are inescapably captive audiences for many purposes,"<sup>93</sup> did not support the city's claim in this case. Outside of narrow circumstances, Powell opined, "[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."<sup>94</sup> The burden, in other words, falls not primarily on the expresser, but on the viewer to protect his sensibilities "simply by averting [his] eyes."<sup>95</sup>

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Cohn, 420 U.S. 469, 491 (1975). See also *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976).

90. 422 U.S. at 209. See also *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966); *Police Department v. Mosley*, 408 U.S. 92 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

91. 422 U.S. at 209. See also *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). Also note here the issue of a drive-in screen visible through the windows of a home. Does this intrude on the privacy of the home? This issue which we do not directly deal with was involved in an earlier drive-in case, *Rabe v. Washington*, 405 U.S. 313 (1972), but the Court there avoided drawing any significant lines by basing its opinion on narrow procedural grounds.

92. 422 U.S. at 209 (emphasis added). See also *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

93. *Rowan v. Post Office Dept.*, 397 U.S. 728, 736 (1970).

94. 422 U.S. at 210. See also *Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting): "It has also been suggested that government may proscribe by a properly framed law, 'that willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.'" See the discussion of the 1972 trilogy (*Rosenfeld, Id.*; *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972)) in G. GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1184-86 (1975). Powell dissented in *Rosenfeld*, but concurred in the other two cases. See also *Gooding v. Wilson*, 405 U.S. 518 (1972).

95. 422 U.S. at 211. See also *Cohen v. California*, 403 U.S. 15 (1971); *Spence*

The opinion then moves to a consideration of the protection of nonadults, where it concludes (in line with Judge Campbell's decision) that "if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription."<sup>96</sup> The third reason presented by the city for its ordinance, that of traffic regulation (raised for the first time in oral argument), is dealt with rather curtly: "By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet . . . would be any less distracting to the passing motorist."<sup>97</sup>

Lastly, Powell's opinion focused on the reasons for holding the ordinance facially invalid and noted the difficulties in narrowing its construction and the unwelcome choice facing drive-in operators (i.e., "restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable").<sup>98</sup> Thus, without deprecating "the legitimate interests asserted by the city of Jacksonville," the Court found that the ordinance in question "does not satisfy rigorous constitutional standards that apply when government attempts to regulate expression."<sup>99</sup>

Not surprisingly, the lines drawn by the Court here were not based on any simple form of unanimity. In a concurring opinion, Justice Douglas continued adherence to his position that any state or federal regulation of obscenity is prohibited by the Constitution. He argued that while "under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences or to promote highway safety,"<sup>100</sup> no such regulation could be made selectively on the basis of content without intruding upon the freedom of expression guarantees of the Constitution.<sup>101</sup>

While Douglas's view implies that the Court, in part, reached its

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v. Washington, 418 U.S. 405 (1974).

96. 422 U.S. at 214.

97. *Id.* at 214-15.

98. *Id.* at 217. Cf. *Olympic Drive-In Theater, Inc. v. City of Pagedale*, 441 S.W.2d 5, 8 (Mo. 1969) (relative to the cost of blocking the screen from view).

99. 422 U.S. at 217.

100. 422 U.S. at 218 (Douglas, J., concurring).

101. *Id.* See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (Douglas, J., concurring); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

results through the questionable process of balancing the unbalanceable, to Chief Justice Burger, in his dissent<sup>102</sup> (joined by Rehnquist), the Court erred in its judgment by *mechanically* applying principles developed from cases which had little to do with each other or *Erznoznik*. The Court, from Burger's perspective,

seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of 'communicative' activity on the basis of its content.

. . . .

None of the cases upon which the Court relies remotely implies that the Court even intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to do so.<sup>103</sup>

Relying on the "tyranny of absolutes" (to use Justice Frankfurter's phrase), the majority here disregards the admonition articulated by the plurality opinion in *Lehman v. City of Shaker Heights* that "the nature of the forum and the conflicting interests have remained important in determining the degree of protection afforded by the First Amendment to the speech in question."<sup>104</sup> In this regard, the Chief Justice contended, the Court cannot ignore "the unique visual medium" regulated by the ordinance, both in terms of its physical structure and its presentation of images to the passing, unconsenting viewer.<sup>105</sup>

Furthermore, Burger would hold that since the ordinance does not restrict (in a prohibitive sense) constitutionally protected expression, but rather regulates "the contents of a certain type of display," the involvement of first amendment interests in the case are, at best, "trivial." If a play held indoors featured nudity, would that mean that the nude performers could hold their production in public, immune to ordinances dealing with indecent exposure? The Chief Justice thinks not, and similarly the Jacksonville ordinance, while "no model of draftmanship," does not suppress the expression ideas per se, but is rather based on legitimate state interests and the accepted police power to regulate nudity "regardless of any incidental effect upon communication."<sup>106</sup>

102. 422 U.S. at 218 (Burger, J., dissenting).

103. *Id.* at 219.

104. 418 U.S. at 302-03.

105. 422 U.S. at 222. *See also*, *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

106. 422 U.S. at 223. *See also* *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Although Burger does not mention his concurring opinion in *Rabe v. Washington*,<sup>107</sup> his position expressed there is clearly applicable to his *Erznoznik* dissent:

I, for one, would be unwilling to hold that the First Amendment prevents a State from prohibiting such a public display of scenes depicting explicit sexual activities if the State undertook to do so under a statute narrowly drawn to protect the public from potential exposure to such offensive materials.

Public displays of explicit materials . . . are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view, involve no significant countervailing First Amendment considerations.<sup>108</sup>

In short, the purveyor of questionable materials should be expected to shield them from public view even more than the unconsenting viewer should be expected to avert his eyes.

A similar view is taken by Justice White in his dissent in *Erznoznik*,<sup>109</sup> but White also noted an additional area of disagreement with the Court's decision, which is of importance to the issue of line-drawing. To White's mind, the Court's conclusion "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content,"<sup>110</sup> was not incorrect, but also unnecessary. For if the rationale of the majority that the ordinance was overbroad relative to the protection of children is accepted, then the ordinance would be fatally overbroad as to the population generally, and that part of the opinion dealing with "limited privacy interest" is superfluous. The Court, in other words, did not limit its constitutional judgment to the minimum level needed for its decision, but set forth principles which went beyond that level.<sup>111</sup>

Keeping in mind the views of the Justices expressed in *Erznoznik*, as well as the perspectives presented by Emerson and Haiman, several observations can be made on the process of line-drawing in this case.

The first of these observations is that, unlike its per curiam

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107. 405 U.S. 313, 316 (1972).

108. *Id.* at 317 (Burger, J. and Rehnquist, J., concurring) (citations omitted).

109. 422 U.S. at 224.

110. *Id.* at 212.

111. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1187, 1193 (1975), Proposition No. 1 ("The Supreme Court tends to ignore narrow 'adjudicative' facts and to focus on larger, more general problems.").

decision in *Rabe v. Washington*,<sup>112</sup> the Court in *Erznoznik* faced, at least in part, the clash of interests (between privacy in public and expression) and drew some lines. As we have seen, arguments can be formulated to show how the Court could, and perhaps should, have avoided certain issues within the case. Also, alternative routes to the Court's results can be articulated based upon the *United States v. O'Brien*<sup>113</sup> governmental interests test. But what remains most significant for our discussion is the fact that many of the Court's lines are more apparent than real.

This leads us to another observation. While the Court seems to reject Emerson's position that sexually oriented material thrust upon an unconsenting person has a "shock effect," and as such lies outside of freedom of expression, it does so only in a limited sense. The decision deals with *constitutionally protected speech* and does not preclude the careful regulation of highly erotic material and/or acts.<sup>114</sup> Where the legitimate interests of a city are clear and properly framed in law, the Court's opinion in *Erznoznik* would not appear to stand in its way. To put it somewhat differently, the "Fernwood Flasher" would not rush out to purchase a new London Fog.

Similarly, the Court's decision relative to the averting of one's eye away from personally objectionable activities is not total or complete. Here the Court is closer to Haiman's position than that of Emerson, yet the line drawn by the Court is not nearly so clear cut as that established in the former's article.<sup>115</sup> As noted above not all visual forms are to be tolerated, and, furthermore, Justice Powell raises some additional questions on the "captive audience" issue by his use of language. While citing *Redrup*, that the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it,"<sup>116</sup> Powell also states that selective restrictions have been upheld when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."<sup>117</sup> A test of impracti-

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112. 405 U.S. 313 (1972) (reversing the conviction in question on narrow procedural grounds without deciding the broad constitutional issues raised). See the discussion of *Rabe* in Haiman, *Speech v. Privacy*, *supra* note 53, at 173-75, and especially note the decision of the Court of Appeals reviewed there.

113. 391 U.S. at 377. See also, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 129 (1975).

114. See *Smayda v. U.S.*, 352 F.2d 251 (9th Cir. 1965).

115. Haiman, *Speech v. Privacy*, *supra* note 53, at 160.

116. 422 U.S. at 212 (quoting from *Redrup v. New York*, 386 U.S. 767, 769 (1967)).

117. 422 U.S. at 209 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in support of this proposition).



cability is one which has much more leeway than a test of impossibility, thus the distinction is not without importance.

In line with these factors, we should take notice of the perspective that: "Overbreadth review should . . . be employed only when the Court is unable to formulate a satisfactory general rule of privilege."<sup>118</sup> In *Erznoznik*, the "Court's choice of overbreadth review, then, signals reluctance to forfeit doctrinal flexibility by announcing a comprehensive rule governing the conflict between privacy and expression."<sup>119</sup>

That the Court utilized the stance that one's eyes can be averted from nudity projected on a drive-in screen, just as they could be averted from the politically relevant epithet on Paul Cohen's jacket, is not without import.<sup>120</sup> That the Court drew some lines that were not so unclear and indefinite as to be without meaning, and that those lines have implications beyond the specific case in question, is also of no small significance.<sup>121</sup> Yet *Erznoznik* was far from a final word; just how far would be illustrated one year and one day later.

Before looking at *Erznoznik* as a precedent, it is of value to restate two fundamental, if not innovative, points. The first of these is the oft-mentioned fact that previous judicial decisions rest in a cornucopia from which we choose those most supportive of our position. The second point is that decisions in individual cases are subject to multiple interpretations. In our discussion, for example, we have seen how *Redrup* was used as a departure point for two quite different trips, one interpreting the decision as an indication that the Court was prepared to accept the "shock effect" idea, the other utilizing the decision as grounding for a movement away from the same.<sup>122</sup>

With this dynamism in mind, let us take a brief glance at the 1976 Detroit adult-film zoning case, *Young v. American Mini Theaters*,

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118. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 129, 131 (1975).

119. *Id.* at 131.

120. The epithet in question in *Cohen v. California*, 403 U.S. 15, 20 (1971), was "Fuck the Draft." Here, see the discussion of the "double standard" in H. ABRAHAM, FREEDOM AND THE COURT, *supra* note 24, at 8-28; see also Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

121. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1193, 1193-99 (1975). While it can be argued that the Court in *Erznoznik* focused on "larger, more general problems" than necessary, it would be difficult to hold that the particular facts in the case "were a matter of almost no concern . . . to the Justices."

122. Compare T. EMERSON, THE SYSTEM, *supra* note 51, at 501, with Powell's opinion for the Court in *Erznoznik*, 422 U.S. 205 (1975).

*Inc.*<sup>123</sup> Although this five to four decision by the Court did not directly deal with the avertable eye question, the debate over the meaning of *Erznoznik* in the four opinions filed, provides us with important perspectives on the Court's decision in *Erznoznik*.

Delivering the opinion of the Court, Justice Stevens upheld Detroit's zoning ordinance on adult movie theaters against a challenge of unconstitutionality, and by so doing reversed the U.S. Court of Appeals for the Sixth Circuit.<sup>124</sup> Without detailing Steven's opinion, the following arguments made by the Justice are most crucial for the concern of this paper:

First: The location of several adult theaters in a neighborhood tends to have a detrimental effect on that neighborhood in physical, criminal, moral, and economic terms.<sup>125</sup>

Second: "We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment."<sup>126</sup>

Third: The Court emphasized that all theaters were subject to some zoning and commercial restrictions.<sup>127</sup> So long as the restrictions imposed as to the time, place and manner of speech were reasonable,<sup>128</sup> the disparate treatment of adult theaters from other theaters did not offend the first amendment.<sup>129</sup> The fact that the distinction was based upon the content of the films shown was relevant only to the equal protection question.<sup>130</sup>

Fourth: In considering whether such a content-based distinction did violate equal protection, the Court said:

123. 427 U.S. 50 (1976). Note the issue of prior restraint in this case and keep in mind that Chase & Ducat, *CONSTITUTIONAL INTERPRETATION* (1975), list *Erznoznik* under Freedom of Press/Prior Restraint. It is also useful here to compare the Court's vote in *Erznoznik* and *American Mini Theaters*:

*Erznoznik*: Powell delivered the opinion of the Court, joined by Douglas, Brennan, Stewart, Marshall, and Blackmun. Douglas filed a concurring opinion. Burger dissented and was joined by Rehnquist. White filed a separate dissent (6:3).

*American Mini Theaters*: Stevens delivered the opinion of the Court, joined by Burger, White, Powell (in part), and Rehnquist. Powell also concurred in part. Stewart dissented, joined by Brennan, Marshall and Blackmun. Blackmun also dissented, joined by Brennan, Stewart and Marshall. (5:4).

The major shift is thus related to the replacement of Douglas' by Stevens' and Powell's votes. Throughout our discussion, emphasis has been added to highlight our concerns.

124. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975).

125. 427 U.S. at 54-56, 71-72.

126. *Id.* at 60.

127. *Id.* at 62.

128. *Id.* at 63 n.18.

129. *Id.* at 63.

130. *Id.*

[W]e learned long ago that *broad statements of principle*, no matter how correct in the context in which they are made, *are sometimes qualified by contrary decisions* before the absolute limit of the stated principle is reached. When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case with the stated principle that there may be no restriction whatever on expressive activity because of its content.<sup>131</sup>

Fifth: After reviewing the numerous areas in which first amendment protection varied according to the content of the speech, the Court went on to discuss how such restrictions could be applied to obscenity:

Surely the First Amendment does not foreclose such . . . prohibition[s]; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

Such a line may be drawn on the basis of content without violating the Government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical messages the film may be intended to communicate . . . .<sup>132</sup>

Sixth:

[I]t is manifest that society's interest in protecting this type of expression is of a . . . lesser magnitude . . . .<sup>133</sup> [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice . . . . [W]e hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.<sup>134</sup>

Since many of the major points in *American Mini Theatres* do not appear to comport too comfortably with the reasoning in *Erznoznik*, the newest Justice spent considerable time (albeit in footnotes)<sup>135</sup> attempting to justify both decisions. For example, he stated that: "The Court's opinion in *Erznoznik* presaged our holding today by noting that the presumption of statutory validity 'has less force when a

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131. *Id.* at 65-66 (emphasis added).

132. *Id.* at 69-70.

133. *Id.* at 70.

134. *Id.* at 70-71.

135. 427 U.S. at 71-72 nn.34 & 35.

classification turns on a subject matter of expression.'"<sup>136</sup> Furthermore, Stevens points out that whereas the Detroit ordinance attempts to avoid the "secondary" effects of adult movie houses (i.e., area deterioration and crime), not the dissemination of "offensive" expression, the Jacksonville ordinance's justification rested primarily on the protection of its citizens from exposure to unwanted and "offensive" expression.

Granted that distinctions between the two cases exist, it is nonetheless difficult, in light of the major lines of reasoning in both cases, to avoid the feeling that the Justice "doth protest too much."<sup>137</sup> Having just torpedoed the ship, the scramble is on for wreckage on which to cling.

Justice Powell, in his concurring opinion, noted that while he agreed with much of the Court's decision, he did not agree with the view that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression."<sup>138</sup> To Powell, the case was one of "innovative land-use,"<sup>139</sup> with freedom of expression concerns only incidental. Thus while the "[r]espondents would have us mechanically apply the doctrines developed in other contexts. . . . [T]his situation is not analogous to [those] cases. . . ."<sup>140</sup>

Moving from that statement (which is closely akin to Burger's view in his *Erznoznik* dissent)<sup>141</sup> Powell wrote: "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of the ordinance upon freedom of expression."<sup>142</sup> Yet in his *Erznoznik* opinion, the Justice had offered the position that the Jacksonville ordinance would "deter drive-in theaters from showing movies containing any nudity, however innocent or even educa--

136. *Id.* at 72 n.35 (quoting from *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)).

137. Another uncomfortable feeling that arises here is that much of the Court's distinction between the two cases can be linked to a poorly prepared presentation by the City of Jacksonville, rather than "real" differences.

138. 427 U.S. at 73 n.1.

139. *Id.* at 73.

140. *Id.* at 76.

141. The Jacksonville ordinance was struck down "by a mechanical application of 'general principles' distilled from cases having little to do with either this case or each other". 422 U.S. at 219.

142. 427 U.S. at 78.

tional,"<sup>143</sup> within the context of the *cost* to block the screen from public view. The deterrent effect of the Jacksonville ordinance was real and substantial, since the owners of drive-in theaters were "faced with an unwelcome choice . . . they must either restrict their movie offerings or construct adequate protective fencing which may be *extremely expensive* or even physically impracticable."<sup>144</sup>

In his *American Mini Theaters* concurring opinion, Powell also utilized the tests of *United States v. O'Brien*,<sup>145</sup> and argued that the ordinance in question met these tests noting that Detroit had not embarked on an effort to suppress free expression.<sup>146</sup> Lastly, Powell attempted to answer the dissent's reliance on *Erznoznik* for its present position by pointing out the distinctions between the cases and finding: "In sum, the ordinance in *Erznoznik* was a misconceived attempt directly to regulate content of expression. The Detroit zoning ordinance, in contrast, affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression."<sup>147</sup>

The major dissent in *American Mini Theatres* was that of Justice Stewart.<sup>148</sup> Without pulling his punches, Stewart noted that *American Mini Theatres* was "an aberration" and argued that "[t]he factual parallels between that case [*Erznoznik*] and this one are striking."<sup>149</sup>

It is not our purpose here to pass judgment on the judges or to separate the heroes from the villains; rather, it is sufficient for us to point out that these cases indicate the dynamic complexity of line-drawing and the changing nature of the judicial balancing act. They illustrate that the issue of the avertable eye is far from closed.

143. 422 U.S. at 211.

144. *Id.* at 217 (emphasis added).

145. 391 U.S. 367 (1968). *See also*, 427 U.S. at 79.

146. 427 U.S. at 79.

147. 427 U.S. at 84.

148. 427 U.S. at 84 (with whom Brennan, J., Marshall, J., Blackmun, J., joined dissenting).

149. 427 U.S. at 87, 88, stating that the first amendment requires:

[t]hat time, place and manner regulations that affect protected expression be content-neutral except in the limited context of a captive or juvenile audience. . . . The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

. . . .  
The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the market-place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But this is the price to be paid for constitutional freedom.

*Id.* at 86, 88.

## V. A BRIEF REPRISÉ

In the preface of this paper, we quoted Louis Henkin's statement that: "Judgment consists in drawing lines." The discussion in the section that followed gave numerous indications of what arduous tasks are involved in that process, as judges "back and fill, zig and zag, groping through the mist for a line of thought which will in the end satisfy their standards of craft and their vision of the policy of the community they must try and interpret."<sup>150</sup>

When we are faced with the clash of interests between "the right to be let alone" in public and freedom of expression, we are caught in the pull of socio-cultural issues, as well as those of a political-constitutional nature. The freedom to express is pivotal for any society which voices a belief in individual liberty; yet that freedom is not without boundaries, especially when the form and function of expression blends into the realm of action. We rightfully desire that our sensibilities, however defined, not be offended; yet such offensives are often inextricably interwoven into the fabric of a free society. We are oft-times captives of such disparate items as fashion and location,<sup>161</sup> for we have long passed beyond the simple world where true "zero-relationships" are possible.

The context is constantly changing and we must be prepared to avert our eyes and by so doing defer to the first amendment. Yet such deference does not mean that no limits exist in a given time/place framework.<sup>152</sup> When rights are in conflict, some mode of accommodation must be sought. In this area, reasonable regulation is the watchword.<sup>153</sup> We cannot allow the exercise of a right to be voided, simply because it might annoy or offend the passerby.<sup>154</sup> For such a view is not only a denial of protection to minority perspectives, but it also lends itself too easily to misuse. To use the words of the California Supreme Court: "The right to speak one's view aloud, restricted by the ban that

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150. E. ROSTOW, *THE SOVEREIGN PREROGATIVE*, *supra* note 13, at 33.

151. Here we are thinking of see-through blouses, a string bikini, and Bourbon Street, in that order.

152. It is of critical importance to recognize here that such limits, while they exist, shift within differing time/place frameworks.

153. See T. EMERSON, *THE SYSTEM*, *supra* note 51, at 559; *Saia v. New York*, 334 U.S. 558 (1948); *Kovacs v. Cooper*, 336 U.S. 77 (1949): "In spite of the general confusion left by two decisions, there appears to have been substantial agreement on principle. . . . [T]here must be an accommodation between the two interests that would allow reasonable regulation . . . ." See also A. COX, *SUPREME COURT*, *supra* note 6, at 47-8.

154. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

prevented anyone from listening, would frame a hollow right."<sup>155</sup> At the same time, however, we should not be compelled to enter the world outside our doors with our eyes tightly shut, because we have run out of places where we can comfortably avert them; nor should we be forced to be prisoners, each inside his own darkened room.

Faced with such a situation, it is difficult to accept either extreme; we must engage in delicate balancing as we draw our lines. It has been argued that line-drawing is "judgment of and by degree"<sup>156</sup> and:

Yet the judgment of degree may be impossible to make save by sheer arbitrariness, and then the judge's only remaining choice is to sacrifice the result he would like to reach, the result that conforms to the tendency he favors but is not quite willing to follow to its principled conclusion.<sup>157</sup>

But is not all judgment (i.e., the use of critical faculty to discern and distinguish relationships and alternatives) fundamentally a matter of degree? The act of balancing contains both substantive and procedural dimensions, and need not be prefaced by the term *ad hoc*. There can be principled balancing when the lines drawn transcend the particulars of the moment. Admittedly, there will be imprecision and doubt, but can it be otherwise in a system not *in stasis*? "In the final analysis we must confidently look to the Court to draw a line based on constitutional common sense. No other agency of government is equally well qualified to do so."<sup>158</sup> Perhaps the search for greater finality is "like the anti-hero in a Lost Generation novel, looking for God in the wrong places."<sup>159</sup>

155. *Wollam v. City of Palm Springs*, 59 Cal. 2d 276, 284, 379 P.2d 481, 486; 29 Cal. Rptr. 1 (1963). See also Haiman, *Speech v. Privacy*, *supra* note 53, at 168-69.

156. A. BIKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 60-61 (1970).

157. *Id.*

158. H. ABRAHAM, *FREEDOM AND THE COURT*, *supra* note 24, at 205, (discussing the freedom of expression). See also A. COX, *SUPREME COURT*, *supra* note 6, at 118:

For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus . . . For me, belief in the value of the enterprise is an article of faith.

159. R. Schroth, *The Death and Life of Bishop Pike*, N.Y. TIMES, Aug. 1, 1976, at 3.