

Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's *In the Realm of the Senses*

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I. INTRODUCTION

The question of whether government can regulate or censor media portrayals of sexuality and violence involves two fundamental issues. The first is evidentiary—whether there is a causal relationship between exposure to media portrayals of sexuality and violence and subsequent behavior in society sufficient to warrant regulation of that content in the interest of maintaining social order and tranquility. In essence, this is a question of whether exposure to sexual or violent behavior in the media encourages some members of the public to believe that such behavior is commonplace and, particularly in the case of violence, an acceptable means of mediating social relationships and therefore acceptable behavior. Also at issue here is whether media portrayals of sexuality and violence in some manner advocate or entice illegal behavior or instruct some members of the public in how to engage in such behaviors.¹

The second issue is constitutional—whether government can regulate the sexual and violent content of media without contravening constitutional guarantees of free expression. In essence, this is a question of whether the expression (sexual or violent portrayals in the media) can reasonably be seen as creating an imminent threat to social order.² In practice, government

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¹ In American jurisprudence, this “incitement doctrine” comes from *Brandenburg vs. Ohio*, 395 U.S. 444, 447 (1969). See generally Thomas G. Krattenmaker & L.A. Powe Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978) (arguing that content-based regulation of television is unconstitutional); Stephen Kim, Comment, “Viewer Discretion Advised”: A Structural Approach to the Issue of Television Violence, 142 U. PA. L. REV. 1383 (1994); Dana Fraytak, Article, *The Influence of Pornography on Rape and Violence Against Women: A Social Science Approach*, 9 BUFF. WOMEN'S L.J. 263 (2000/2001) (addressing arguments that media portrayals of rape and violence incite behavior); Christine H. Hansen and Ranald D. Hansen, *Rock Music Videos and Antisocial Behavior*, 11 BASIC AND APPLIED SOC. PSYCHOL. 357 (1990); and *Testimony of Henry Jenkins on Media Violence before the U.S. Senate Commerce Committee* (1999) (statement of Henry Jenkins, Director, Massachusetts Institute of Technology, Comparative Media Studies Program), available at <http://www.senate.gov/~commerce/hearings/0504jen3.pdf>.

² See Harry Kalvin, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191 (1964); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L.

regulation tends to operate under stricter constitutional constraints when attempting to regulate expression, while being accorded greater latitude in regulating circumstances where regulation of expression may be warranted.³

It is in this latter category (the regulation of circumstances) that judicial doctrine usually comes to accept certain “areas of exception” to absolute constitutional protections of expression, such as when civil disorder is purposely being provoked,⁴ an individual’s livelihood or reputation may be compromised,⁵ or the expression is considered to contribute little to public discourse.⁶ In each, doctrinal sliding scales or “degrees of protection” expectedly emerge as the content of expression includes elements of both protected and “less protected” areas of expression.⁷ In the 19th century, statutory regulation of obscenity in many industrial societies encompassed a wide range of types of expression, including but not limited to topics of a sexual nature.⁸ However,

REV. 943 (1995); Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209 (1994).

³ Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 ALB. L. REV. 183 (1998). See also Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STANFORD L. REV. 113 (1981); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

⁴ See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 TEX. J. WOMEN & L. 207 (1999); Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993); Rodney A. Smolla, *Emotional Distress and the First Amendment*, 20 ARIZ. ST. L.J. 423 (1988).

⁵ See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Jerome K. Skolnick, *The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677 (1986) (discussing libel, slander, defamation, and “hurtful speech”).

⁶ The range of speech deemed “not contributing to public discourse” can be quite subjective, and as first enunciated in American jurisprudence in *Roth v. United States*, 354 U.S. 476 (1957), obscenity is one area that is considered non-contributory by definition and not protected by First Amendment free speech guarantees. For the range of subjectivity within the “obscenity exception” in American law, see generally David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Paul Kearns, *Obscenity Law and the Creative Writer: The Case of D.H. Lawrence*, 22 COLUM.-VLA J.L. & ARTS 525 (1998); Daniel Mach, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383 (1997); Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990).

⁷ Sliding scales most often take into consideration the content of the material and its mode of expression, the nature of the intended and unintended audience of the expression, and the projected immediate (or even long-term) effect on the subsequent behavior of those in the audience. See generally Wendy B. Reilly, Note, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 RUTGERS L. REV. 947 (2000); Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195 (2001); Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Values*, 31 GA. L. REV. 771 (1997); Amy Tridgell, *Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews*, 33 COLUM. J.L. & SOC. PROBS. 343 (2000); and discussion *infra* note 8.

⁸ Outrageous, blasphemous, slanderous, or vulgar utterances, spoken or published in public, were generally considered obscene based on a common law consensus regarding appropriate public topics and modes of expression enforced by magistrates who represented the general public. Central to the development of early American obscenity law was the English case of *Queen v. Hicklin*, 3 L.R.-Q.B. 360 (1868) (Cockburn, C.J.). In *Hicklin*, a pamphlet challenging Catholic practice also contained descriptions of “impure and filthy acts, words and ideas” that,

since that time, the term (and thereby regulation of) “obscenity” has, in practice, been confined to topics related to sex and more specifically those portrayals considered to purposely appeal to prurient interest and enticing some members of the public toward inappropriate (albeit not necessarily criminal) behavior.⁹

Violent expression has traditionally been treated differently from sexual expression, the latter having more immediately moral overtones. Portrayals of violence in the media therefore have tended to defy categorization under free expression guarantees, and can either be considered a separate category of expression warranting a constitutional “exception” from those guarantees or as a subcategory of obscene expression, an area of expression already treated in most societies as an “area of exception” from those guarantees.¹⁰ The latter course would assume that society assesses the potential for anti-social behavior resulting from exposure to violent expression with similar levels of probability as the potential anti-social behavior we presume would be induced by exposure to obscenity.¹¹ Inclusion of violent expression as a constitutional

despite the possibility of decent intention, were deemed obscene because their “tendency . . . [was] to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. . . . [I]t is quite certain that it 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.” *Id.* at 369-73. From this holding sprang two important precepts of Anglo-American obscenity law. First, *Hicklin* inaugurated “the most susceptible mind” judicial doctrine which anticipates the effect of obscene materials on public morality. Application of this doctrine is now largely abandoned except in the area of child pornography. Second, *Hicklin* established the role of the magistrate (rather than the jury) in enforcing the “appropriate sense” of public morality. This analytical structure has devolved into an awkward judicial anticipation of whether the materials in question appeal inappropriately to prurient interest of the “average person” and whether there may be an overriding public benefit (“redeeming social value”) to the distribution of those materials. The determination of the former, after *Miller v. California*, 413 U.S. 15 (1973), became an exercise in establishing “local standards” while the latter became a debate over the contributory value of creative expression to democratic discourse, art, literature, film, and music. The effort to establish a relevant “community” became vastly more complicated by pervasive public access to the internet, as described by Professor Clay Calvert. Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507 (2001).

⁹ As a basic definition, *erotic* representations are those related to sexual activity, intended to be celebratory, formal, figurative, informational, or stimulating. Erotic representations that stimulate and are intended to arouse sexual interest are considered *pornographic*. Pornographic representations that contravene prevailing social norms, as defined by convention or law, would be considered *obscene*. See generally RICHARD POSNER, SEX AND REASON 37-69 (1992); ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE: AMERICA’S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART 179-212 (1996) (describing how these definitions are reflected in the law); KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION 63-134 (1996) (analyzing connections to sexual violence).

¹⁰ The question of whether violent images in the media precipitate or incite behavior, or even eventually desensitize individuals from social norms that generally preclude such behavior, opens the more controversial topic of regulating expression simply because it is vulgar, unpopular, or shocking. Areas of expression are traditionally protected unless a direct relationship between the expression and subsequent behavior can be demonstrated or reasonably inferred. See, e.g., Clay Calvert, *The Enticing Images Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 595 (2000); John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L.Q. 1157 (2000); Richard Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 3 FLA. L. REV. 603 (2000); Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) [hereinafter Adler, *Perverse Law*]; Robert Firester & Kendall Jones, *Catchin’ the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1 (2000).

¹¹ The existence of an integrated societal connection between sexual violence (ranging from sex crimes to

subcategory of the unprotected area of obscenity would indicate a retrogression toward the broader, early 19th century constitutional definition of obscenity (beyond its current narrower focus on sexual topics), arguing in effect that both sexual and violent expression are equally capable of enticing unwanted social behavior and therefore warrant regulation in the interest of protecting the public welfare.

The purpose of this essay is not to review judicial doctrine or case law in the area of obscenity, though the origins and applications of obscenity as an “area of exception” are clearly germane, particularly if we are to include violent expression in that category. Furthermore, my purpose is not to delve into the actual and potential applications of psychoanalytical and sociological research regarding the relationship between obscene or violent expression and consequent anti-social behavior, although that causal relationship is also clearly germane to the regulation of either type of expression. Rather, this essay is more narrowly focused, seeking in a purely illustrative manner to explore several of these issues from the perspective of how a society other than the United States—Japan—attempts to mediate its notions of individual rights of expression, in particular expressions considered obscene and/or violent, with demands of the greater public welfare.

Our point of departure is the censorship trial of Nagisa Oshima,¹² a Japanese filmmaker who was indicted on obscenity charges related to his 1976 film *In the Realm of the Senses* (*Ai no koriida*¹³). While the film presents controversial themes and graphic images that intricately

simply violence against female victims) and pornography was effectively drawn by the work of Catharine A. MacKinnon and others in the 1980s. MacKinnon argues that pornography supports a dominant-value construct in American society that undervalues women and thereby encourages violence toward them. MacKinnon’s thesis sparked considerable debate over her basic premises, her identification of the types of images that support the dominant construct, correlations between pornography consumption and criminal behavior, and potential tort liability. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987). See generally Note, *Anti-Pornography Laws and First Amendment Values*, 98 Harv. L. Rev. 460 (1984); DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989). While the courts have never fully accepted the connection between pornography and sexual violence to warrant systematic reduction in free expression protection, they have almost unquestioningly accepted the existence of a direct relationship between child pornography and sex crimes against children. See, e.g., Adler, *Perverse Law*, *supra* note 10; Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001).

¹² Oshima was not the first modern or post-war Japanese film director to be indicted on obscenity charges. The first was Tetsuji Takechi in 1965 for his film *Black Snow* (*Kuroi Yuki*). However, Oshima was arguably the most visible and most provocative of those indicted in the 1970s, particularly since his *In the Realm of the Senses* was explicitly pornographic beyond commercial standards of the time and had been presented and received with much critical acclaim in the Directors’ Fortnight during the 1976 Cannes Film Festival.

¹³ *Ai no koriida* literally translates into “bullfight of love,” an allegorical phrase that was changed to *L’Empire des Sens* (*In the Realm of the Senses*) when the film was released to an international audience. The film reconstructs the famous true story of Sada Abe, a maid in a Geisha house owned by Kichi-zo. The two become sexually intimate and spend two weeks indulging and experimenting with the boundaries of sexual pleasure and physical pain. Sada, at Kichi’s tacit invitation, ultimately chokes him to death during sex. In the actual 1936 account, Sada was a low-class prostitute who had strangled her lover (possibly a pimp) and severed his penis. In Oshima’s version, Sada is portrayed as a former prostitute who has just started working in Kichi’s household as a servant girl. Kichi’s occupation and family situation are much more traditional in the film, making his descent into an all-consuming relationship with Sada even more scandalous. Oshima’s sex scenes include explicit images of male and female genitalia, coitus, fellatio, and female-female rape that far exceeded what had become accepted under Japanese government censorship standards during the *pinku eiga* period in the 1970s. See JACK HUNTER, *EROS IN HELL: SEX, BLOOD AND MADNESS IN JAPANESE CINEMA 14-25* (1999); THOMAS WEISSER & YUKO MIHARA WEISSER, *JAPANESE CINEMA ENCYCLOPEDIA: THE SEX FILMS 105-112* (1998).

connect elements of violence with sexual behavior, cinematic interpretations and subsequent legal consideration of Oshima's film have focused almost entirely on the degree to which it broke new ground for sexual explicitness.¹⁴ While such treatment may well have suited Oshima's aspiration to uniqueness, interpretation of the content and effect of the film cannot be extricated completely from its cultural context. When the film is placed in the context of Japanese culture and law at the time it was released, an enlightened perspective is gained on how a society, in its protection of what it determines to be its public welfare, uses law to regulate the content of expression (sexual and otherwise) while continuing to place primary value on the freedom of expression.

II. GOVERNMENT REGULATION OF ENTERTAINMENT MEDIA IN JAPAN

The re-release of the full, uncut version of Oshima's *In the Realm of the Senses* several years ago attracted scant attention in Japan other than from cinema critics who remember the international publicity surrounding the film's initial release at the Cannes Film Festival in Paris and the obscenity trial that followed in Japan several years later. Oshima, a leading Japanese New Wave filmmaker in the 1960s, was prosecuted on obscenity charges stemming from publication of a trade book of still photographs and script notes from the film. After a very public trial, Oshima was acquitted in 1982.¹⁵

Within the film industry, *In the Realm of the Senses* attained cult status as the first production for mainstream commercial distribution to include explicit or hardcore sex scenes. Due to restrictive censorship laws in Japan, Oshima directed the production on a closed set, developed and edited the film in France, and only showed the film in countries without censorship laws. The film was later shown in Japan with forty-nine objectionable scenes—close to one-third of the film—cut out or airbrushed. The recently re-released version of Oshima's film restores all of the edited scenes but digitally scrambles images of genitalia. The film, even in its restored version, is hardly graphic by contemporary standards. However, its re-release

¹⁴ Since the 1960s, American film analysts have been struck by the explicit violence (usually rape) in Japanese films that is often directed towards women and, most often, young girls. Strong themes and portrayals of sexual violence however do not trigger Japan's strict censorship laws unless male or female genitalia or pubic hair are visible. The issue of whether the "pornography of violence," or exceptionally graphic violence by itself, should be subject to censorship has been raised recently in Japan with regard to two recent films: Takashi Miike's *Audition* (1999) and Kinji Fukasaku's *Battle Royale* (2000), the latter heralded as a "neo-Darwinist exercise in terror." The same issue has been raised in France with regard to Virgine Despentes and Coralie Trinh Thi's sexually violent *Baise Moi* (2000). To date, however, there has been an almost total absence of film censorship cases in the Japanese courts over the past two decades. This fact indicates that issue of whether explicit violence, or sexual violence without companion images of sexual explicitness, would be considered obscene and subject to regulation has been argued primarily within national film classification boards.

¹⁵ In 1979, the Tokyo District Court ruled that the publisher San'ichishobo was not guilty of publishing obscene literature. *San'ichishobo Co. Inc. v. Japan*, 34 Keishu 721 (Sup. Ct., G. B, Dec. 12, 1980; Tokyo Dist. Ct., Oct. 19, 1979), as translated in the CONSTITUTIONAL CASE LAW OF JAPAN 1970-1990 449-450 (Lawrence Ward Beer & Hiroshi Itoh eds., 1996). While the decision was being appealed to the Tokyo High Court, prosecutors obtained a warrant and seized all additional printings of the book, a seizure challenged by the publisher on the grounds that the publications had already been ruled (by the District Court) not obscene. The Tokyo District Court however, subsequently affirmed by the Supreme Court, upheld the warrant, citing that the original finding on the publication was not final but still pending as on appeal, in *Japan v. Oshima et al.*, Hanrei Jiho, No. 945 (Tokyo Dist. Ct., Jan. 11, 1980).

affords an opportunity to reflect on how and why Japan and other societies develop and enforce standards on obscenity.

III. CENSORSHIP IN JAPANESE MEDIA

Historically, government officials in Japan have been accorded and have exercised much broader administrative discretion in regulating the content of film than their counterparts in some western societies, notably the United States. Japanese courts, however, have developed and used definitions of obscenity similar to those found in other societies. It is instructive to explore the application of obscenity law in Japan's unique cultural and political circumstances.

Entertainment media in Japan is well known for sexual and violent content, particularly in film, cartoons (*anime*), comics (*manga*), and video games. In the early 1970s, the Japanese film industry engaged in the wide-scale production and public distribution of violent ("gangster" or *yakuza*) and "soft core" (pink or *pinku eiga*) films, the latter emphasizing the nudity and the rape and torture of young girls. Without stretching the point too far, if we assume there is a general relationship between increased sexuality and violence in media and subsequent patterns of social behavior, we might expect to find increased levels of sexual violence in Japanese society. But this did not occur,¹⁶ raising the broader issue of the role of censorship in Japan.

In Japan, there has been a history of governmental scrutiny of public portrayals of a number of topics, such as those considered integral to the maintenance of national identity, pride, and values. Respectful treatment of government officials and policy, the family, and religion was expected, and critical treatment of these topics in a public venue was often considered a threat to traditional social norms and societal stability in general.¹⁷ As a matter of public policy, public discussion or portrayal of topics considered integral to social stability and the maintenance of national values was considered appropriate only if it was respectful and reinforced mainstream cultural and political values. Particularly from the mid-19th century, following adoption of European notions of inherent state administrative rights, government officials in Japan were not only empowered to control such portrayals through enforcement of existing laws, but were also expected to maintain general order and protect social welfare by enforcing a common sense of public decorum covering everything from individual manners and morals to public dignity and respect for national institutions and customs.¹⁸ Official actions were

¹⁶ Milton Diamond & Ayako Uchiyama, *Pornography, Rape, and Sex Crimes in Japan*, 22 INT'L J.L. & PSYCHIATRY 1 (1999). Diamond and Uchiyama attempted to match the increased prevalence of graphic sexual material in all media in Japan with incidents of six types of sex crimes over the period 1972-1995 and found that while the population increased twenty per cent, the number of reported sex crimes remained relatively constant. *Id.* at 4, 9. Further, incidents involving juvenile offenders, arguably the main source of societal concern over the prevalence of graphic sexual material, actually dropped by eighty-five per cent. *Id.* at 10.

¹⁷ See GREGORY KASZA, *THE STATE AND THE MASS MEDIA IN JAPAN 1918-1945* 59-71 (1988); and KYOKO HIRANO, *MR. SMITH GOES TO WASHINGTON: JAPANESE CINEMA UNDER THE AMERICAN OCCUPATION 1945-1952* 47-103 (1992). The association between societal stability and respect for public policies and public officials did not emerge as an enforced concern until the 1930s and was largely characteristic of government actions only through World War II. Official concern for societal stability eroded rapidly in the postwar years as literature and film began to explore all aspects of Japanese identity. *Id.*

¹⁸ HIRANO, *supra* note 17.

often justified on public health grounds and, in particular, the development and upbringing of children.¹⁹

The slow adoption of notions of private or individual rights culminated in the promulgation of Articles 19 through 23 of the 1947 Japanese Constitution.²⁰ These rights and freedoms of the spirit, however, were considered integral only within the context of the needs of the greater community. Individuals were prohibited from exercising those rights in an abusive manner, i.e., at the expense of the public welfare.²¹ Mindful of the constitutional guarantee under Article 21 that “no censorship shall be maintained,” government authorities typically used public hygiene laws to restrict the sale and distribution of obscene materials under Article 175 of the revised 1907 Criminal Code, which specified that

A person who distributes or sells an obscene writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment... or a fine. The same applies to a person who possesses the same for the purpose of sale.²²

Under enforcement of Article 175 of the Criminal Code, obscenity displayed in any form could not be sold, loaned, or passed to the public in any fashion for any reason.²³ Furthermore, obscene material could not be shown to any member of the public, whether alone or in a group.

Neither government administrators nor the courts were legally compelled to specify what constituted “obscene” material and how it offended public decorum, since their authority in this realm was subsumed under their general responsibilities to protect the public welfare in ways they deemed appropriate.²⁴ However, a discernable pattern of legal enforcement identified those areas considered objectionable and inappropriate for public discourse. As noted, this pattern

¹⁹ See Lawrence Beer, *Freedom of Expression: The Continuing Revolution*, in JAPANESE CONSTITUTIONAL LAW 221 (Percy Luney & Kazuyuki Takahashi eds., 1993) [hereinafter Beer, *Revolution*]; JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW 123 (1998); Paul Abramson & Haruo Hayashi, *Pornography in Japan: Cross-Cultural and Theoretical Considerations*, in PORNOGRAPHY AND SEXUAL AGGRESSION 173 (Neil Malamuth & Edward Donnerstein eds., 1984).

²⁰ John Maki, *The Constitution in Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in JAPANESE CONSTITUTIONAL LAW 48-52 (Percy Luney & Kazuyuki Takahashi eds., 1993); Beer, *Revolution*, *supra* note 19, at 223-224.

²¹ See Kawashima Takeyoshi, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, in THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 263 (Charles Moore ed., 1967); Beer, *Revolution*, *supra* note 19, at 223-247; Chin Kim, *Constitution and Obscenity: Japan and the U.S.A.*, 23 AM. J. COMP. L. 255, 264 (1975); ERIC FELDMAN, THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY 16 (2000); Maki, *supra* note 20, at 48.

²² LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 336 (1984) [hereinafter BEER, STUDY] (citing to JAPAN MINISTRY OF JUSTICE, CRIMINAL CODES I 39 (1961)).

²³ KASZA, *supra* note 17, at 16-71. In most cases, “objects” considered obscene involved visual depictions of specific objects within a photograph, object of art, cartoon, drawing, or film, spawning a broader and more critical debate over whether, in application, the presence of one objectionable image “taints” an entire piece. *Id.*

²⁴ Takeyoshi, *supra* note 21, at 263-271. The bureaucracy was empowered in the same manner under Article 9 of the 1889 Constitution to protect rights within the limits set by the law. Individual rights, then, could be enjoyed only within the context of restrictions placed on them, in the interest of the public welfare, by legislation, and by their levels of social obligation, mediated but not enforced by the state. *Id.*

tended to mirror western definitions of obscenity. Japanese officials had tried to emulate as closely as possible European and American standards as part of an effort to reestablish Japanese sovereignty and make Japan a more acceptable international trading partner with western industrialized nations.

For example, precedent-setting obscenity cases in Japan in the 1950s focused on the importation of classical (and sexually provocative) western literature. The foundation for the current Japanese judicial doctrine of obscenity was developed in response to translation and distribution of D. H. Lawrence's *Lady Chatterley's Lover*, which itself had precipitated obscenity standards in Britain and the United States during the same period.²⁵ In *Koyama v. Japan*, the Japanese Supreme Court ruled that a work could be judged "obscene" under Article 175 if it aroused and stimulated sexual desire, offended a common sense of modesty or shame, and violated "proper concepts of sexual morality."²⁶ By this ruling, the Court assumed final responsibility for articulating and protecting the appropriate standard of social morality in society, without particular reference to changing interests or tastes in society.²⁷

Subsequent decisions refined the *Koyama* definition, responding to questions of whether any one transgression within a work irretrievably "taints" the whole work,²⁸ whether more latitude ought to be accorded works of artistic or literary nature,²⁹ and more broadly, whether

²⁵ BEER, STUDY, *supra* note 22, at 348-49.

²⁶ *Koyama v. Japan*, 11 Keishu 997 (Sup. Ct., G.B., Mar. 13, 1957), as translated in COURT AND CONSTITUTION IN JAPAN—SELECTED SUPREME COURT DECISIONS 1948-1960 3-37 (John M. Maki ed., 1964), further maintaining that ". . . [obscene matter] is that which wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality." *Id.* at 7 (quoting the original First Petty Bench decision). The judicial standard was to be "the good sense operating generally in society, that is, the prevailing ideas of society" which however "are not the sum of the understanding of separate individuals and are not the mean value of such understanding; they are a collective understanding that transcends both." *Id.* at 9. Critical to this determination was the "sense of shame" that the court considered a visceral revulsion when sex acts, by their nature private, were brought into public view. The existence of a sense of shame was portrayed by the court as an integral aspect of basic universal morality, a morality that is enforced through law to perpetuate social order. That which is obscene has the effect of suspending one's reasonable judgment, i.e., one's natural revulsion, and inducing a disregard for morality, specifically sexual morality, which threatens social order. While the court recognized that "prevailing social ideas in respect to sex generally differ according to time and place . . ." and ". . . changes take place even in the same society . . .", nevertheless ". . . there are limits that must not be overstepped and . . . norms that must be generally observed." *Id.* at 10.

²⁷ *Id.*, *reaff'd*, *Ishii et al v. Japan*, 23 Keishu 1239 (Sup. Ct., G. B., Oct. 15, 1969), as translated in THE CONSTITUTIONAL CASE LAW OF JAPAN 1970-1990 183-217 (Lawrence Beer & Hiroshi Itoh eds., 1996) [hereinafter the de Sade case]; *Sato et al v. Japan*, 34 Keishu 433 (Sup. Ct., 2d P. B., Nov. 28, 1980), as translated in THE CONSTITUTIONAL CASE LAW OF JAPAN 1970-1990 468-471 (Lawrence Beer & Hiroshi Itoh eds., 1996); and *Matsue v. Hakodate Customs Director, et al.*, 38 Minshu 1308 (Sup. Ct., G. B., Dec. 12, 1984), as translated in THE CONSTITUTIONAL CASE LAW OF JAPAN 1970-1990 453-468 (Lawrence Beer & Hiroshi Itoh eds., 1996).

²⁸ Basically a question of balance, this issue is more germane when applied to works of drama, art, or literature, and less germane when applied to film, from which offending scenes could more easily be cut or masked. While political expression has traditionally been accorded more latitude under the 1947 Constitution, other forms (art, literature, film) were considered "entertainment" rather than expression and routinely subject to greater administrative scrutiny, particularly under health laws. New Wave filmmakers in the 1960s purposely framed scenes containing overt sexuality and violence with political expression, making it more difficult for government officials to cut offending sections.

²⁹ The Court has gradually accepted that artistic quality is a mitigating, but not a controlling factor, in whether a work is sufficiently obscene to warrant censorship. The outer bound in this issue was drawn in the de

ensorship in the name of public welfare violates the right of free expression.³⁰ To date, the rulings of the Japanese courts have been quite consistent in confirming the policy that protection of the public welfare through censorship of obscenity is *not* a violation of free expression guarantees, but rather is integral to the maintenance of a stable society in which those guarantees have substantive meaning.³¹

Japanese attempts to adopt and apply western standards of obscenity to foreign film proved more difficult because of the complexities of deciphering objectionable content due to variances in language translations and/or differences in the cultural context providing the setting for the piece. For example, an “art film” cast in a French setting, reflecting French (rather than Japanese) cultural values, and expressed in the nuances of the French language, would be difficult for Japanese officials to edit without totally losing the “artistic meaning” of the film.³² In most cases, therefore, foreign films were not censored or edited on grounds of objectionable story line content. Instead, enforcement was often reduced to considerations of objectionable visual depictions, particularly those related to sexual topics. While there were instances of leniency in some sexual depictions, perhaps due in part to traditional social acceptance in Japan of “non-sexual” nudity in some public contexts,³³ most displays of the genital area or pubic hair of either sex in film were considered automatic violations of decorum and subject to local indictment.³⁴ Following the pattern of several western societies, notably France and the United States, there was a gradual acceptance of more explicit nudity in Japanese filmmaking during the 1960s with the emergence of the *pinku eiga* genre, in which female nakedness of the torso and

Sade case, in which the Tokyo District Court held that sadomasochistic passages in translations of de Sade’s *Travels of Julliette* were offensive and violated public decorum, yet did not engender wanton appeal to sexual passion because they were too brutal and “unreal.” De Sade case, *supra* note 27, at 186-187.

³⁰ The Court has consistently ruled that the point at which society’s “sense of shame” has been transgressed by a mode of expression is “sufficiently understood” and due process does not require any further specification. Moreover, the Court has also ruled that censorship in one venue does not necessarily preclude access to other venues or other forms of similar expression. For example, in some cases of Customs censorship, the Court has ruled that censored works (works not allowed into the country) are still available to citizens should they travel abroad. See *Matsue*, *supra* note 26, at 458.

³¹ See BEER, STUDY, *supra* note 22, at 351.

³² In fact, the first foreign film to clear Customs scrutiny under these circumstances was Yasuzo Masumura’s *Garden of Eden* (*Eden No Sono* 1981), a Japanese/Italian production using Italian actors shot on location in Sardinia. In that film, Customs officials required fogging of genital areas in one sex scene but did not require fogging in another scene in which genital nudity but not sexuality was depicted. WEISSER & WEISSER, *supra* note 13, at 178-179. The first mainstream film imported showing pubic hair was Sally Potter’s *Orlando* (UK 1992), released uncensored and unmasked for domestic distribution in 1993. By the mid-1990s, in response to relaxation in censorship by both Customs and local police, the self-regulating film board in Japan (*Eirin*) modified the language of its operating code from “the pubic hair and sex organ should not be exposed” to “[i]n principle, the pubic hair and sex organ should not be exposed.” See WEISSER & WEISSER, *supra* note 13, at 31-32, and discussion *infra* note 35.

³³ See James Downs, *Nudity in Japanese Visual Media: A Cross-Cultural Observation*, 19 ARCHIVES SEX. BEHAV. 583 (1990).

³⁴ See Anne Allison, *Cutting the Fringes: Pubic Hair at the Margins of Japanese Censorship Laws*, in HAIR: ITS POWER AND MEANING IN ASIAN CULTURES 195 (Alf Hildebeital & Barbara Miller eds., 1998) [hereinafter Allison, *Cutting*].

buttocks was common. Depictions of the genital areas however were still strictly prohibited and either framed out by filmmakers (so as to not become an issue under local obscenity laws) or subject to blackout, airbrushing, or image scrambling. When American filmmaking moved in an explicitly hard-core direction in the late 1960s, thereby splitting the public audience into mainstream and X-rated markets, Japanese filmmakers did not, and could not, follow because of the strict enforcement of restrictions placed on films shown in public. Unable to include more explicit sexuality and in fear of losing market share, Japanese filmmakers at that point began to combine permissible depictions of sexuality with ever-more-graphic images of violence and sadomasochism.³⁵

IV. CENSORSHIP OF DOMESTIC AND FOREIGN FILMS

Enforcement of Japanese obscenity laws has primarily been the responsibility of local law enforcement, together with the Customs Bureau (regarding imports), and a self-governing regulatory commission composed initially of the top six major motion picture companies. The Customs Bureau is empowered to review and grant approval to imported products, including film, under Article 21 of the Customs Standards Law of 1910, and to restrict or censor those products “considered of such a nature as to excite sexual desire and give rise in people to feelings of shame or repugnance.”³⁶

Since World War II, Customs Bureau censorship under this standard involved strict cutting out or blurring of all offending frames prior to approval for domestic viewing. In many cases, imported films were so mutilated or blurred as to make no sense to audiences at all. But by the 1980s, Customs practices of censoring films had eased, particularly as imports of foreign film were progressively adjudged to have “serious artistic content,” i.e., containing sexual depictions not designed to arouse sexual desire or not likely to actually produce arousal based on how images were portrayed.³⁷

The self-governing Film Ethics Sustaining Committee (*Eirin Iji Inkai*, hereinafter *Eirin*) was established in 1949 as self-regulatory review body responsible for enforcing the self-

³⁵ See TADAO SATO, CURRENTS IN JAPANESE CINEMA: ESSAYS 229-232 (Gregory Barnett trans., 1982); HUNTER, *supra* note 13, at 10-32; and Maureen Turim, *The Erotic in Asian Cinema*, in DIRTY LOOKS: WOMEN, PORNOGRAPHY, POWER 83 (Pamela Church Gibson & Roma Gibson eds., 1993) [hereinafter, Turim, *Erotic*].

³⁶ BEER, STUDY, *supra* note 22, at 337.

³⁷ Kim, *supra* note 21, at 269-270. In what perversely became know as the “pubic wars” was the groundbreaking public acceptance of Kishin Shinoyama’s *Santa Fe*, a 1991 photobook of popular teenage model Rie Miyazama that in several photographs revealed the model’s pubic hair. Under standard application of obscenity laws, the entire photobook would have been “tainted” by the presence of those photographs but it was judged not to be obscene because the purpose and the effect of the publication was seriously artistic in quality rather than designed to titillate. Distinctions between serious and not serious works has not been made in Japan, where free expression guarantees have focused almost entirely on spoken and written political expression, with literature and cinema considered “entertainment” rather than a protected form of free expression. New Wave directors, however, overtly transformed film into vehicles of political statement, raising (albeit unsuccessfully) the issue of whether censorship of those films contravened Article 21 of the 1947 Japanese Constitution. When New Wave directors like Oshima delved into topics of social commentary, prosecutors and the courts responded by focusing on censorship of specific visual images rather than provocative and controversial text/context. This response allowed the courts to draw bright lines around certain images (such as graphic nudity) without attempting any doctrinal discussion regarding the appropriate range of free expression as applied to discrete images. *Id.*

imposed Motion Picture Ethics Code adopted in that year.³⁸ In response to what was perceived as its excessive leniency toward films portraying juvenile violence and latent social criticism (youth films or *taiyozoku*), *Eirin* was reorganized in 1957 to include members from outside the industry, successfully avoiding direct government regulation of the industry.

Eirin was responsible for reviewing and approving domestic films at various stages of production, including during script writing, and certifying they were in compliance with the Code developed by that body and were approved for showing in theaters of the Theater Owners Association, most of which were owned by or in contractual agreement with the six major motion picture companies.³⁹ Under the authority of the Healthy Environmental Law of 1957, domestic films without *Eirin* approval could not by law be distributed or shown in Japan.⁴⁰ In practice, film producers framed around those types of visual depictions they anticipated *Eirin* would find sufficiently objectionable to deny certification until appropriate masking or editing had been completed.⁴¹

Assessment of whether a domestic or foreign film violated obscenity laws was generally based on consideration of both story line content and visual explicitness, although foreign films were treated in a somewhat more lenient fashion and were scrutinized more on their explicitness than on their content.⁴² After initial consideration of a film's content, officials made recommendations for the editing of offending or potentially offending scenes, which could then be satisfied by the director through editorial cuts or visual masking.⁴³ Eventually, a mediated standard for domestic film production emerged by which masking would automatically be applied during production to scenes assumed vulnerable to *Eirin* censorship, even before *Eirin* officials viewed the film.⁴⁴

An imported film passed by Customs was automatically licensed for public showing without *Eirin* consideration. Initially, the less explicit domestic *roman porno* films were insulated from import competition by Custom's practice of radical cutting or masking of more explicit foreign films to the point that they became incomprehensible or unrecognizable.⁴⁵

³⁸ BEER, STUDY, *supra* note 22, at 340. Film censorship in the postwar era was conducted initially by American occupation forces with its Civil Censorship Division, primarily but not exclusively focusing on the elimination of feudal or anti-democratic content. By 1946 this role had passed to the Civil Information and Education Section (CI&E), still under occupation control, which reviewed and approved all films to be shown in public theaters. *Eirin* was a domestic body of film company representatives charged in 1949 with taking over regulatory responsibilities from CI&E. *Id.*

³⁹ *Id.* at 340-45.

⁴⁰ *Id.*

⁴¹ ANNE ALLISON, PERMITTED AND PROHIBITED DESIRES: MOTHERS, COMICS, AND CENSORSHIP IN JAPAN 164-168 (1996) [hereinafter ALLISON, DESIRES]. Given the financial investment involved in the shrinking domestic film market, producers could ill-afford the kind of protracted *Eirin* review or court litigation that befell Yamaguchi's *Love Hunter (Koi no karyudo)* which was completed at Nikkatsu in 1972 but was denied classification for public viewing and tied up in court proceedings and not released until 1978.

⁴² WEISSER & WEISSER, *supra* note 13, at 24-26.

⁴³ *Id.*; ALLISON, DESIRES, *supra* note 41, at 168-169.

⁴⁴ WEISSER & WEISSER, *supra* note 13.

⁴⁵ *Id.*

However, as Customs granted imported films more latitude in both content and explicitness, the market for film consumption in Japan became bifurcated, with domestic films governed internally by film producers through *Eirin*, and more explicit foreign films approved for domestic showing by Customs.⁴⁶ This pressured domestic filmmakers to ease their self-imposed standards in order to compete with foreign films for a consuming public that wanted to see more explicit and challenging films.

As the market contained imported products of more explicit nature and domestic products still mired in “softer” core standards, domestic filmmakers began to lose market share in the 1980s and strained the self-imposed boundaries of *Eirin* toleration with increased sexual and violent explicitness.⁴⁷ As a countermeasure, *Eirin* (which had by that time become more independent of the remaining four major film producing companies) demanded less provocative public advertising of both domestic and imported films, particularly those blatantly involving sex with and violence toward young girls, and an accord was reached in 1984 tempering of graphicness of public advertising for *pinku eiga*.⁴⁸

By that time, however, the pervasiveness of color television in the home and the expanding adult *manga* home video market had already significantly undermined market demand for *pinku eiga*. Public theater admissions had peaked in 1958 and declined precipitously after that, losing almost ninety percent of its 1958 audience share by 1995.⁴⁹ With increased competition from independent studios, the relaxation of restrictions on film imports, and the decline in theater attendance in general, the number of domestic films produced in Japan dropped from 545 in 1960, a market share of 78% in 7,457 theaters, to 281 in 2001, a market share of 44% in 2,558 theaters.⁵⁰ By 1980, two of the five mainstream studios had closed and Nikkatsu, arguably the first and one of the most innovative major studios in the earlier period of Japanese filmmaking and which had shifted most of its production to *pinku eiga* by the early 1970s to stay solvent, closed in 1988.⁵¹

V. OSHIMA’S *IN THE REALM OF THE SENSES*

There is no doubt that Oshima intended *In the Realm of the Senses* to be pornographic.⁵² And it is clearly obscene, at least in those scenes that contain explicit and visceral images of

⁴⁶ *Id.*; See BEER, STUDY, *supra* note 22, at 344.

⁴⁷ *See id.*

⁴⁸ WEISSER & WEISSER, *supra* note 13, at 28-29.

⁴⁹ Mark Schilling, *Yakuza Films: Fading Celluloid Heroes*, 43 JAPAN. Q. 30 (1996).

⁵⁰ While approximately 36% of domestic films were classified R-18 (no one under 18 admitted) by *Eirin* in 2001, compared to 5% of imported films, the continued production of low-budget adult films has in part been attributed to the obligation of some film producers to sustain three theater chains specializing in that fare. In the American market, theater chains specializing in X-rated fare have all but disappeared, replaced primarily by private (home) consumption via VHS and DVD formats. *See id.*

⁵¹ Hunter, *supra* note 13, at 14-25. Though it owned theaters, studios, a satellite channel, a video production company, and a library of thousands of films, Nikkatsu avoided bankruptcy in 1993 only by merging into Namco, a video game maker, and began making feature films again in 1996. *Id.*

⁵² NAGISA OSHIMA, *Text of Plea*, in CINEMA, CENSORSHIP AND THE STATE: THE WRITINGS OF NAGISA OSHIMA, 1956-1978 265-286 (Annette Michelson ed., 1982). *See also* MAUREEN TURIM, THE FILMS OF OSHIMA

male and female genitalia, coitus, and fellatio. The film would not have passed uncensored for domestic showing in Japan. The indictment of Oshima for obscenity violations under Article 175, however, was based on the publication of a trade book of limited printing containing still photos from the film and script notes. While Oshima was eventually acquitted, the greater and more public issue was whether the book was being challenged under Article 175 as a surrogate for the film itself, which at that time had not been presented to Customs for review as an imported film and had not even been shown in Japan. Oshima's demand that prosecutors specify what was and what was not obscene provides a useful starting point for us to consider some of the more challenging and complex issues raised by the film, even though the film itself never directly became subject to court review.

Oshima's film is comprised of a series of vignettes, each portraying an ordinary life circumstance that becomes transformed into a sexual encounter of some kind, leading the audience to the conclusion that all behavioral modes have sexual undertones that, if unrestrained by social mores, become obsessive and obscene. Each successive vignette represents an escalation in the level of obsession, to the point that the principals are unable to retreat to safer (norm-based) behaviors. Instead they push the boundaries of sexual exploration into areas society would consider deviant and taboo, and certainly not appropriate for public display or discourse.⁵³ In this manner, Oshima is purposely transgressive—confronting the audience with representations of unmitigated sexual appetite at the expense of social decorum and common cleanliness, the primitive aggressiveness of female sexuality, the rejection of the rational and prescribed social roles, the transformative qualities of violence in sexuality, and the fleeting nature of youth—common themes developed in Japanese New Wave cinema.⁵⁴ By so doing, Oshima purposely traps the audience into watching Sada and Kichi explore sexual avenues in private that many in the audience in the 1970s may have never experienced, or even considered, much less seen in film.⁵⁵ While other Japanese directors usually adhered to accepted decorum as established by censorship standards and left those sights or sounds to the imagination, Oshima denies the audience nothing. He actually frames and lingers on the most forbidden elements of sexual explicitness, and the audience begins to anticipate the destructive direction that the protagonists' relationship is headed but is helpless to intervene.

Oshima's framing directly exposes the audience to the jeopardy of straying outside established social norms and being lured into the more primitive, obsessive, exploratory, and violent behaviors that characterize Sada's futile, even nihilistic pursuit of sexual exhilaration. At some point the audience has to wonder if there actually is a sustainable relationship, much less a sexual relationship, between Sada and Kichi, since there appears to be no compassionate affection. At least on the surface, what the audience sees is an elaborate role-play, with Kichi

NAGISA: IMAGES OF A JAPANESE ICONOCLAST 125-143 (1998) [hereinafter TURIM, ICONOCLAST].

⁵³ TURIM, ICONOCLAST, *supra* note 52, at 128-131. See also Leger Grindon, *In the Realm of the Censors: Cultural Boundaries and the Poetics of the Forbidden*, in *THE WORD AND THE IMAGE IN JAPANESE CINEMA* 299 (Dennis Washburn & Carole Cavanaugh eds., 2001).

⁵⁴ See, e.g. DAVID DESSER, *EROS PLUS MASSACRE: AN INTRODUCTION TO THE JAPANESE NEW WAVE CINEMA* 48 (1988); KEIKO McDONALD, *CINEMA EAST: A CRITICAL STUDY OF MAJOR NEW WAVE FILMS* 125-26 (1983); GREGORY BARRETT, *ARCHETYPES IN JAPANESE FILM: THE SOCIOPOLITICAL AND RELIGIOUS SIGNIFICANCE OF THE PRINCIPAL HEROES AND HEROINES* (1998); SATO, *supra* note 35, at 229-30.

⁵⁵ See HUNTER, *supra* note 13.

initially playing the aggressor, conquering his servant, Sada, and converting her into his personal ersatz *geisha*. Gradually the roles reverse, with Sada becoming the constant aggressor and Kichi the submissive, complying with her every demand to the point that their sexual ministrations become ritualistic, almost tedious. As her sexual demands reach his physiological limits, they begin using violence—first hitting, then choking—as a means of sustaining him, and ultimately killing him.

While Sada does transform from a responsive instrument of Kichi's sexual satisfaction to a realization of her own independent need, there is a real question as to whether her need is sexual at all, and whether the film is in fact pornographic. Oshima frames the film in graphic sexual images, enticing his audience to believe that the couple seeks ultimate meaning in Sada's everlasting orgasm. But in doing so, the director leaves viewers wondering whether, if the graphic sexuality were peeled away, a deeper madness, or even nihilistic meaninglessness would be revealed.

VI. IS OSHIMA'S FILM OBSCENE ... OR EVEN PORNOGRAPHIC?

The circumstances of the Oshima obscenity trial reveal both constants and variations in the methods by which societies define and enforce obscenity standards. Societies traditionally judge obscene that which affronts accepted social values and transgresses what is common and expected. Obscene matter usually includes topics that are, by public decorum standards, considered private, intimate concerns, not appropriate for public discourse or display. The definition of what is obscene is often determined by a public consensus, a general common understanding as to what should be kept to one's own and not displayed or spoken of in the presence of others.

Such a consensus evolves over time, solidified through social convention and enforcement of laws based on accepted social mores. If a society values free expression as critical to both political and cultural democratization, it must continually redefine the boundaries of acceptable public discourse by mediating the inevitable tension between creative impulse, social commentary, and political dissent on the one hand and legal maintenance of social norms on the other.

Transgressions of social mores are shocking to the public consciousness because they intrude on the expected level of public quietude and are considered offensive or even repulsive. The intensity of public response to those transgressions is often in proportion to the public's relative unfamiliarity in public discourse.⁵⁶ An intuitive level of revulsion may, however, ease over time as the objects of revulsion, such as graphic depictions of sexuality or sexual violence, appear more commonly in public discourse. While obscenity in many societies is generally equated with sexuality, social revulsion is not always reserved only for sexual expression but often extends to topics related to other personal intimacies or controversial social, cultural, or political issues.

⁵⁶ The socio-cultural distinction between what is appropriate for public viewing ("on-scene" in theatrical terms) and what is not and should best be implied rather than shown ("off-scene") within a society changes from period to period, and differs from society to society. See, e.g., Linda Williams, *Pornographies On/scene, or Different Strokes for Different Folks*, SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 234 (Lynne Segal & Mary McIntosh eds., 1993) [hereinafter Williams, *Different Strokes*]. As a cultural dynamic, what must/should remain "private," i.e., not open to public scrutiny, changes with technology and expanding public appetites for information heretofore considered one's "private business." See, e.g., GURSTEIN, *supra* note 9, at 299-300.

In what context then can we assess whether Oshima's *In the Realm of the Senses* is sufficiently shocking to be classified as obscene and warrant censorship? First, we must remember that while Oshima wanted to stretch the boundaries of cinematic acceptability in Japan (as he had since 1959), he intended the film for foreign distribution and showing, i.e., in societies with more fluid boundaries of acceptable sexual imagery.⁵⁷ That the film in effect became subject to the constraining standards of Japanese obscenity law was unintended. And while the film itself was never subject to legal scrutiny in Japan, it subsequently passed Customs in the late 1970s only after significant editing and airbrushing.

In the Realm of the Senses presents sufficiently visceral images of male and female genitalia, fellatio, and coitus to trigger Customs censorship. The film also portrays the principals in what an audience might consider to be disturbing social behavior. In a society we assume to be controlled by social obligation, Kichi abandons his family and occupational responsibilities to engage in prolonged and purely hedonistic indulgences, resulting in a willful form of suicide. In a society we assume to be governed by communal conventions, Kichi and Sada abandon and even publicly flaunt any consideration of public decorum and cleanliness. In a society we assume to be paternalistic, Kichi becomes dominated by and subservient to Sada's every whim. If social norms define the range of acceptable public behavior as well as discourse, has not Oshima crossed the line in any one of these content areas sufficient to shock and disgust the general audience?

Maybe. But we must be careful not to impose our own values of what is acceptable public behavior or discourse, or too quickly apply what we believe to be prevailing norms in Japan. Historically, Japanese society has a long heritage of publicly accepted *erotica* and pornographic representation that only became ostensibly less acceptable during the Meiji Restoration when Japan was seeking broader cultural acceptance by western industrial societies. The same can be said of Japan's traditional acceptance of nudity in some public contexts.⁵⁸ While public portrayal of sexuality may be officially governed by more recently adopted (and perhaps more discrete) western standards, Oshima's inclusion of total nudity, even intimate nude embraces, may not be inconsistent with the norms of Japanese society.⁵⁹ And Oshima's exploration of obsessive, almost nihilistic sexual relationships is certainly not new, but rather a predominant theme of many of the New Wave productions of the 1960s.⁶⁰ Finally, that Sada should so easily be able to subvert Kichi's sense of social obligation, to the point of his own death, may be consistent not only with earlier film portrayals in the New Wave but also with

⁵⁷ OSHIMA, *supra* note 52, at 251-252; TURIM, *ICONOCLAST*, *supra* note 52, at 125-128; Grindon, *supra* note 53, at 294-295.

⁵⁸ See Downs, *supra* note 33.

⁵⁹ The threshold of female nudity in Japanese film was actually crossed in the mid-1950s with young women portrayed as either nude pearl divers or "jungle women," both arguably in their "natural" element. Frontal female nudity and intimate nude embraces became common fare from 1957 into the *pinku eiga* period of the 1960s and was characteristic in a variety of forms in the development of the highly successful gangster, grotesque horror, and sadomasochistic film genres.

⁶⁰ See, e.g., Oshima's *Violence at Noon* (*Hakuchi no torima* 1966), Masahiro Shonda's *Double Suicide* (*Shinju ten no Amijima* 1969), Koji Wakamatsu's *Go, Go Second Time Virgin* (*Yuke, Yuke—Nidome No Shoyo* 1969).

common *eros/thanatos* themes in Japanese folklore regarding demonic aspects of the female sexuality.⁶¹

Along thematic lines, then, Japanese audiences of the 1970s may have considered an uncut version of Oshima's film more vulgar and repugnant than shocking or disquieting. Explicit scenes of coitus, consensual or forced, may easily be specified as obscene simply because that was the standard enforced by government officials and the courts, by *Eirin* in its film certification process, and by domestic producers and directors making editing decisions to avoid those images.

What may be more difficult to determine is whether the explicit scenes would be considered obscene merely because they are too explicit, or because they are explicit *and* pornographic. If the applied standard is based on explicitness alone, the question becomes at what point images are so explicit that they affront public decorum, a scale that clearly changes over time with gradual public acceptance or familiarity. If the applied standard requires a synergy between explicitness and an underlying ideology—pornographic images being those designed to stimulate sexual interest—then the audience plays a more active role in interpreting the interaction of images and words, a role tempered by its own expectations, the director's presentation of common frames of reference, and the nature of the medium itself.⁶²

If the audience is comfortable with the traditional pornographic frame of reference, with visual imagery that conforms to social expectations if not consensual norms, then the images themselves need not be very explicit for a pornographic effect to be elicited. When the construct of sexual images also contains elements of violence, as in Oshima's film, where violence is portrayed as consensual and enhancing sexual stimulation, the audience may interpret the images differently, perhaps not in an erotic way.⁶³ In all of these cases, we are compelled not so much by the director's intent, but by our assessment of the degree to which the audience is actually sexually aroused.⁶⁴ Effective pornography, one might argue, does not need to be very explicit.⁶⁵

⁶¹ See IAN BURUMA, *BEHIND THE MASK: ON SEXUAL DEMONS, SACRED MOTHERS, TRANSVESTITES, GANGSTERS AND OTHER JAPANESE CULTURAL HEROES* 47-63 (1984); Grindon, *supra* note 53, at 304-310.

⁶² See Stephen Heath, *The Question Oshima*, 2 *WIDE ANGLE* 48 (1977).

⁶³ This was the position taken by the court in the de Sade case. See de Sade case, *supra* note 27.

⁶⁴ Such arousal depends on the ability of the producer/director to frame a construct of images familiar enough to the audience to evoke the desired response. BERKELEY KAITE, *PORNOGRAPHY AND DIFFERENCE* (1995); CONSTANCE PENLEY, *THE FUTURE OF AN ILLUSION: FILM, FEMINISM, AND PSYCHOANALYSIS* 83 (1989); Stephen Prince, *The Pornographic Image and Practice of Film Theory*, 27 *CINEMA J.* 27-28 (1988); Stephen Heath, *Difference*, 19 *SCREEN* 51 (1978). And while it may be within the power of a director to control the framing of such images, what is beyond the director's control is the degree to which the audience responds (and responds uniformly) in a predictable manner. See, e.g., Williams, *Diff'rent Strokes*, *supra* note 56, at 240-43.

⁶⁵ In this sense, pornography has become a craft of orchestrating and manipulating the frame of reference or construct, providing the audience with familiar motifs that allow easy interpretation of imagery. The same is true of horror and sadomasochistic films, genres with significant overlap between American and Japanese markets in film, *anime*, and adult *manga*. See, e.g., Sharon Kinsella, *ADULT MANGA: CULTURE AND POWER IN CONTEMPORARY JAPANESE SOCIETY* 44-49 (2000). The ideological and societal implications of pornographic framing, not only with regard to the widely debated perspective that pornography reinforces the systematic societal degradation of women, continue to be argued. See MACKINNON, *supra* note 11. See also Simon Hardy, *Feminist Iconoclasm and the Problem of Eroticism*, 3 *SEXUALITIES* 77 (2000) (probing the question of whether there can be a distinct "feminist pornography"). Ironically, Oshima enveloped his explicit sex scenes in a counter-construct—sadomasochism—that would deny the "mainstream" audience the expected frame of reference for pornographic films. However, the more

But the issue raised by this construct is more complex. Why a very structured society such as Japan would accept continuous portrayals of sadomasochistic sexuality and sexual violence toward women in film (and other entertainment media) is a provocative and perplexing question. Analysts have argued that Japan has gone through several periods in which its national identity was questioned, rethought and reconstituted, most recently in the twenty-year period following World War II.⁶⁶ During that period, the Japanese New Wave film genre emerged, challenging the entire spectrum of traditional societal values and in many ways converting entertainment media into avenues of escapism.⁶⁷

The question remains how a society that seems to revere women in performance of traditional roles has generally come to accept as a dominant construct of its entertainment media the exploitation of female sexuality and in particular the continuous sexual violation of them (particularly in films), and yet still exhibits fairly low levels of violence toward women in real life. One interpretation is that, as the traditionally compartmentalized structure of female gender roles in Japanese society was breaking down, women who maintained their traditional duties of nurturing children, stewarding their education, and maintaining the household were still revered as long as they remain within that construct.⁶⁸ Women become vulnerable to other less reverential constructions if they either had not yet entered into those traditional roles (such as young schoolgirls) or had stepped outside them (such as working or professional women). It is schoolgirls and professional women that are the prevalent objects of rape and other forms of violence in Japanese films.⁶⁹

fundamental question may be whether pornography equally addresses “intended” and “unintended” audiences based on their respective adopted gender roles (the social construct having little meaning to or effect upon “unintended” audiences) or even their socioeconomic class (as a measure of their willingness to “transgress” traditional social norms of behavior and taste). See Linda Williams, *Second Thoughts on Hard Core: American Obscenity Law and the Scapegoating of Deviance*, in *DIRTY LOOKS: WOMEN, PORNOGRAPHY, POWER* 46 (Pamela Church Gibson & Roma Gibson eds., 1994); Rebecca Huntley, *Slippery When Wet: The Shifting Boundaries of the Pornographic (A Class Analysis)*, 12 *CONTINUUM* 69 (1998).

⁶⁶ See, e.g. TURIM, *ICONOCLAST*, *supra* note 52, at 246-265; JOAN MELLEN, *THE WAVES AT GENJI’S DOOR: JAPAN THROUGH ITS CINEMA* 353-370 (1976).

⁶⁷ AUDIE BOCK, *JAPANESE FILM DIRECTORS* 309-337 (1985); SATO, *supra* note 35, at 233; and Abramson & Hayashi, *supra* note 19, at 178-179.

⁶⁸ ALLISON, *DESIREs*, *supra* note 41, at 153-55.

⁶⁹ Throughout the *pinku eiga* period and pervasive by the 1980s, entertainment media in Japan have focused almost obsessively on young girls in advertising, photobooks, *manga*, *anime*, and film. This peculiar vulnerability of young girls (as opposed to adult women) to sexually exploitive portrayals reveals ambivalent societal expectations of innocent young girls, who are not yet considered by social expectation to possess adult sensuality and not yet occupying responsible or valued social roles. Such portrayals perpetuate and invite fixation upon the pre-adolescent image of young women. Sharon Kinsella, *Cuties in Japan*, in *WOMEN, MEDIA AND CONSUMPTION IN JAPAN* 220 (Lise Skov & Brian Moeran eds., 2000) and BURUMA, *supra* note 61. As modern consumer culture reinforces the pre-adolescent roles of young women in Japan, it also seems to suspend any societal responsibility for insulating them from being portrayed as victims of violence and sexual exploitation in entertainment media. Allison, *Cutting*, *supra* note 34; Rosemary Iwamura, *Letter from Japan: From Girls Who Dress Up Like Boys to Trussed-up Porn Stars—Some of the Contemporary Heroines on the Japanese Screen*, 7 *CONTINUUM* 109 (1994); and Susan Napier, *The Frenzy of Metamorphosis: The Body in Japanese Pornographic Animation*, in *WORD AND IMAGE IN JAPANESE CINEMA* 345-356 (Dennis Washburn & Carole Cavanaugh eds., 2001).

To assume that the sheer visibility of explicit sexual images is stimulative and therefore pornographic is too simplistic. The images cannot be taken out of the framed construct of the film, since it is from that construct that the audience is able to interpret them.⁷⁰ For example, male initiated and dominated coitus, such as Kichi's initial predatory pursuit of Sada, his indifferent treatment of his wife, and his episodic rape of various household servants, may actually conform to traditional audience expectations of gender roles in society as a whole. Though members of the audience may not agree with or support such role differentiation, they may nonetheless accept the film's depiction as a familiar representation. On the other hand, female initiated and dominated coitus (Sada's control of her relationship with Kichi), or other acts of female-initiated sexuality, (Sada's initiation of violence into her relationship with the schoolmaster or the sexual initiation of the young *geisha* after Sada and Kichi's mock wedding), might be unexpected and considered inconsistent with generally accepted gender roles, and simply too confusing and "unreal" to be stimulative.⁷¹

That Kichi might become Sada's submissive supplicant is not an entirely unfamiliar role construct in Japanese theater or film. In traditional theater, the dominant male lead adopts and unwaveringly maintains a noble and indifferent posture toward women while the passive, weak male second lead adopts an empathetic (quasi-romantic) and self-sacrificing posture toward women.⁷² Kichi, however, adopts both roles. He accepts the role of self-sacrificing servant to

⁷⁰ To a certain degree, then, a photograph or a painting has the disadvantage of no surrounding context (developed scene, dialogue, musical score, etc.) from which the audience might draw ambience or reinforcement, and places greater responsibility on the audience to provide the construct. Aware of this, producers of pornographic photographs use standardized motifs in presenting their images, motifs with which members of the (intended) audience are already familiar and can readily provide context. When still photos are extracted from a film, however, as they were from the Oshima film for reproduction in the book, they lack the "proper staging" characteristic of commercially-produced pornographic photographs or images. That pornography relies on either proper film context or familiar "staging" in still photography presents a dilemma for those who wish to equate pornography with the explicitness of images. When images are viewed outside of a pornographic (sexual) context, there is serious doubt whether the intent of the producer is to provide sexual stimulation, the defining element of pornography, and/or whether sexual stimulation (of those in the audience) is actually produced. This predicament presents itself in a wide spectrum of circumstances: from nudity presented in classical poses (as in classical paintings or photographic poses) or in "natural" settings. The issue is further stretched when young girls, assumed to not yet possess adult sensuality (as discussed in *supra* note 69), are portrayed in "natural" nude poses for clearly sexually exploitive purposes, even with assurances that the models are over eighteen years of age. See, e.g., ANNE HIGONNET, PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD 195-96 (1998) and in particular the controversy surrounding Sally Mann's photographic work *Immediate Family*. *Id.* at 202-03.

⁷¹ This was in fact the basis of the court's ruling in the de Sade case. The Court reasoned that while the writings of de Sade were offensive to the average man's sense of modesty and in opposition to proper concepts of sexual morality, they did not (effectively) appeal to sexual passion and therefore could not be considered obscene under Article 175. See the de Sade case, *supra* note 27. The absence of erotic qualities is often interpreted as a situation of unresolved difference by creating a contradictory construction rather than a matter of explicitness of image. Constructions outside the expected could then be ruled pornographic (explicit) without being erotic (having the effect of appeal to sexual passion). Without erotic effect, however, pornography tends to be reduced to gratuitous graphicness or the grotesque.

⁷² The appearance in Japanese theater of the handsome, kind and gentle, sympathetic second leading man (*ninai*), directionless and without dignity, yet capable of showing emotion and often falling in love with the unfortunate woman spurned by the noble but indifferent main lead (*tateyaku*), became a staple of the *Shimpa*-style love tragedies characteristic of Japanese theater 1900-1920 and in Nikkatsu films in the 1930s, often leading to double-suicide. See generally SATO, *supra* note 35, at 15-56 (discussing the evolution of standard types of roles in Japanese film); BARRETT, *supra* note 54, at 118-140. The amalgamation of this traditional role into chivalric films

Sada's sexual impulse while retaining his dominant posture toward other women in his household, thereby allowing the audience to maintain some recognition of the dominant male role in sexual relations, albeit in the form of raping his servants when they exhibit disrespect.

In this, Oshima visualizes Kichi's sexual behavior purely in terms of re-establishing social dominance, probably a relatively unattractive and unstimulating portrayal to many in contemporary Japan. That the traditionally dominant Kichi can at the same time become totally compliant to Sada's whims raises the specter of a recurring theme in Japanese folklore—that of the demon-woman who uses her irresistible sexual charms to lure man to his eventual and willful destruction.⁷³

At the risk of interposing Eurocentric notions, the sexual relationship between Sada and Kichi is neither passionate nor romantic. Initially, their sexuality is played out as the vehicle of his predatory conquest. When he then becomes addicted to their sexual relations, their sexuality becomes a vehicle of his fatalistic pursuit of his youth and her obsession with status and possession. In short, despite the sexual explicitness of the various scenes, their relationship is hardly "sexy" or alluring. On the contrary, one might argue that the obsessive tedium of their sexual activities reveals an affective emptiness that itself seems vulgar. While Oshima provides us with a few recognizable images of conventional sexuality, contextually necessary to be classified as obscene, he systematically denies us the ability to escape into more traditionally comfortable sexual fantasy (that might be classified as pornographic) by suffocating us with boorishly constant and graphic sexual incidents and playing out the principals' roles to an apparently meaningless and pathetic end.⁷⁴

(*ninkyō eiga*) and ultimately into the "good gangster" (*yakuza*) films that dominated the Japanese market in the 1960s and early 1970s was the staple of the Toei and Nikkatsu Studios.

⁷³ TURIM, *ICONOCLAST*, *supra* note 52, at 137-140; BURUMA, *supra* note 61, at 47-63. There is certainly room for psychoanalytical debate over the nature of Sada's allure. Her allure was portrayed initially as Kichi's fascination with the youthful perfection of her skin but perhaps it is ultimately reduced to his failed attempt to capture/recapture the fleetingness of his own youth. This fatalistic interpretation is reinforced by the fact that Kichi has numerous confrontations with images of old age and death throughout the film. However, utilizing a different psychoanalytic construct, one might interpret Kichi as the protagonist (rather than Sada), that it is he who seeks consummate liberation and through his sacrificial death finds it, leaving Sada behind, incomplete, unfulfilled, and lost in the real world.

⁷⁴ Likewise there is room for psychoanalytical debate over whether the last scene, where Sada severs Kichi's penis with a large knife and holds it in her hand, is necessary or gratuitous. Clearly Oshima has introduced the audience to sharp instruments (Kichi's razor, and first a smaller and then later a very large knife) as weapons of both violence and control throughout the film. For example, on a number of occasions, Sada threatens to cut off Kichi's penis if he copulates with his wife again. If the audience has already acknowledged this construct, witnessing the actual severing might be seen as unnecessary and done gratuitously—for shock value. However, if the construct is accepted on a more metaphorical level by the audience, the debate would focus more on questions of fetish--Kichi having fetishized her satisfaction and Sada having fetishized his penis (as opposed to phallus)--and which of those constructs has become dominant by the final scene. Finally, the construct could be interpreted in Lacanian terms, with Sada and Kichi repeatedly striving for idealized sexual complementarity and he ultimately achieving a singular sense of purity by sacrificing his own being (his "gift") to her satisfaction—leaving her ultimately alone (with a "keepsake"). See Peter Lehman, *In the Realm of the Senses: Desire, Power, and the Representation of the Male Body*, 2 *GENDERS* 91 (1988). This construct focuses audience attention on whether there exists a metaphorical competition between Kichi (who has a penis and therefore has status in society) and Sada (who "lacks" but strives to "have" control as an expression of her aspiration to status or power). The audience is also left grappling with the question of whether the phallus is such an integral and independent element in a society that two people could compete over it or could, metaphysically, share it. Under either analysis, the final scene in which the penis is severed has important contextual meaning and is not simply gratuitous. See, e.g., Barbara Creed, *Horror*

VII. CONCLUSION

Clearly, as in most precedent cases in Japan, the legal scrutiny of Oshima's *In the Realm of the Senses* focused entirely on whether the film's images of sexuality were too explicit for public showing in Japan.⁷⁵ Understandably, Oshima demanded that the court explain that standard—philosophically, politically, conceptually, and visually—before it was applied to his or any other film subject to government censorship.⁷⁶ Specifically, he wanted the court to identify exactly what elements comprise the “explicitness” of an image—its graphicness? Its detail? Its context? Its implied values? The court would not say.

Had benchmarking elements been offered, we would then be forced to gauge whether a particular image could be considered *excessively* explicit. Might an image be too explicit for public viewing because it shocks those in the audience? Because it causes public embarrassment or shame? Because it causes personal revulsion or disgust? How are we to measure these inherently subjective conclusions for individuals, much less an entire audience that in all likelihood has widely varying expectations of what constitutes public fare?⁷⁷ The only answer can be that these judgments are by nature individual, and while an intuitive consensus regarding public decorum may be breaking down in many post-industrial societies, there remain basic judgments to be made regarding how public discourse affects the broader social welfare. The question becomes—to whom falls the responsibility of making that judgment on behalf of all in society?

As a society, Japan has traditionally accepted and adhered to the notion that social welfare concerns preempt individual preferences. The Japanese courts have accepted and supported constitutional notions of individual rights defined primarily as matters of mutual respect, i.e., within the broader context of communal welfare. This is consistent with the practice in many other industrial/post-industrial societies other than the United States, which assumes that the individual has an inviolable right of expression—in all areas of expression—unless or until the government can demonstrate a compelling social welfare justification for constraining that right.⁷⁸

and the Monstrous-Feminine: An Imaginary Abjection, THE DREAD OF DIFFERENCE, GENDER AND THE HORROR FILM 35 (Barry Keith Grant, ed., 1996).

⁷⁵ CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 15.

⁷⁶ OSHIMA, *supra* note 52, at 268-279.

⁷⁷ The difficulty in gauging the effectiveness of pornography in stimulating sexual interest in the audience is that we cannot presume the members in the audience are uniformly comfortable with or responsive to a single construct of pornographic framing. See Sharon Kinsella, *supra* note 65. If members of the audience are using multiple, or even contrary frames of reference, the pertinent question becomes whether some in the audience will respond in a prurient fashion to the presented construct while others will be indifferent or even hostile to that construct. This raises the fundamental issue of whether a society is warranted in regulating expression for all when its (undesired) effect is only on some. See Calvert, *supra* note 8; KAITE, *supra* note 64.

⁷⁸ Applications of obscenity law in the United States are founded on the assumption that there exists a societal consensus on civility, with appeals to common sense and the values of the “average person,” and little political or legal debate as to what that core of civility might be or should be. See Calvert, *supra* note 8. That judgment is currently left to juries (rather than judges) to apply “local community standards” in deciding whether materials are obscene, under the assumption that sexually violent behavior is a manifestation of the breakdown of that social consensus, the lack of a sense of public decency and decorum, and the absence of a sense of civility. For this reason, the dominant rationale for regulating obscenity in the United States is not to protect an established and

In Japan, however, the regulation of individual behavior is already accepted as an appropriate responsibility of government officials and court judges.⁷⁹ This issue is not argued on a case-by-case basis. Individual expression rights have always subject to constraint by legislation, and there has historically been broad societal acceptance and adherence to this goal. Obscenity law as applied by judges, not individual members of the public, continues to be the measure by which a traditional sense of public decorum is maintained. And that sense of decorum is considered societal rather than individual.

In this process, there is no legal or ideological presumption that specific anti-social or criminal behavior is associated with the consumption of obscenity. To a certain degree, there is a broad legal acceptance that sexuality and violence are a part of one's normal social experience, and that citizens, even young people, might be exposed to materials portraying sexuality and violence as long as those portrayals are not so explicit that they violate a sense of public decorum as benchmarked in previous court decisions. In Japanese law, then, obscenity is defined in terms of the explicitness of visual images rather than anticipations of aberrant behavioral consequences. This is a reflection of Japan's underlying ideological commitment to stable social norms. While *In the Realm of the Senses* was a path-breaking and provocative film in many respects, it will always be considered obscene, though hardly pornographic, under Japanese law.

consensual sense of public decorum as in Japan, but rather to prevent what is feared will be the subsequent anti-social behavior.

⁷⁹ See generally Kawashima, *supra* note 21.