HCJ 4804/94

1. Station Film Co.

2. Gil Besarev

v.

1. The Film Review Board

2. Minister of the Interior

The Supreme Court Sitting as the High Court of Justice
[January 9, 1997]
Before President A. Barak and Justices E. Mazza, M. Cheshin

Facts: Respondent no. 1 decided to allow the screening of the film "*L'Empire Des Sens*," on the condition that several scenes be omitted from the film, and that the film only be shown to adults. According to respondent no. 1, these scenes were of a pornographic nature, and there was a near certainty that screening these parts of the film would cause serious, grave and severe harm to societal sensibilities and public morality. Petitioner accepted that the film could only be shown to adults. In this petition, it contests the deletion of the omitted scenes, except for scenes in which minors appeared.

Held: Freedom of expression is a fundamental right in Israel. The Court held, however, that this freedom may not be extended to pornography if there exists a

near certainty that the pornography would cause serious, grave and severe harm to public order. Whether a work is pornographic should be judged by looking to the work as a whole, when the pornographic parts are seen as part of the entire work. It is not enough that the entire work be seen as having artistic merit. Instead, the pornographic parts of the work must contribute towards the work as a whole. The Court held that respondent no. 1 did not use the "work as a whole" test when evaluating the film. Instead, respondent evaluated the pornographic parts of the film in isolation from the film as a whole. As such, respondent's order to delete the pornographic parts of the film was invalid, except for the portions which the petitioner had agreed to delete.

Israeli Supreme Court Cases Cited:

[1] Crim. App. 255/68 *The State of Israel v. Ben Moshe*, IsrSC 22(2) 427
[2] HCJ 153/83 *Levy v. Southern District Commander of the Israeli Police Force*, IsrSC 38(2) 393
[3] CA 723/74 *"Ha'aretz" Newspaper Publications v. The Israel Electric Company*, IsrSC 31(2) 281
[4] HCJ 73/53 *Kol Ha'Am v. The Minister of the Interior*, IsrSC 7 871
[5] CA 105/92 *Re'em Engineers and Contractors v. The Municipality of Nazareth-Illith*, IsrSC 47(5) 189
[6] HCJ 243/62 *Israeli Film Studios v. Gary*, IsrSC 16 2407
[7] PCA 4463/94 PIA 4409/94 *Golan v. Prison Services*, IsrSC 50(4) 136
[8] HCJ 399/85 *Kahane v. Managing Committee of the Broadcasting Authority*, IsrSC 41(3) 255
[9] HCJ 372/84 *Klopfer-Nave v. The Minister of Education and Culture*, IsrSC 38(3) 232
[10] HCJ 806/88 *Universal City Studios v. The Film and Play Review Board*, IsrSC 43(2) 22
[11] HCJ 606/93 *Advancement of Entrepreneurship and Planning (1981) v. The Broadcasting Authority*, IsrSC 48(2) 1
[12] IA 2/84 *Neiman v. Chairman of the Elections Committee for the Eleventh Knesset*, IsrSC 39(2) 225
[13] Crim. App. 677/83 *Borochov v. Yeffet*, IsrSC 39(3) 205

[14] HCJ 14/86 *Laor v. The Film and Play Review Board*, IsrSC 41(1) 421
[15] FH 9/77 *The Israel Electric Company v. "Ha'aretz" Newspaper Publishing Company Ltd.*, IsrSC 32(3) 337.
[16] HCJ 2481/93 *Dayan v. Jerusalem District Commander*, IsrSC 48(2) 456.
[17] PLA 7504/95 *Yassin v. Party Registrar*, IsrSC 50(2) 45.
[18] Crim. App. 126/62 *Dissenchik v. The Attorney-General*, IsrSC 17 169.
[19] HCJ 411/89 *The Temple Mount Faithful and Land of Israel Movement v. The Jerusalem District Police Commander*, IsrSC 43(2) 17.
[20] HCJ 448/85 *Daher v. The Minister of the Interior*, IsrSC 40(2) 701
[21] HCJ 243/81 *Yeki Yosha v. The Film and Play Review Board*, IsrSC 35(3) 421
[22] HCJ 89/80 *Ohayon v. The Play and Film Review Board*, IsrSC 34(2) 530
[23] Crim. App. 495/69 *Omer v. The State of Israel*, IsrSC 24(1) 408
[24] HCJ 175/71 *Abu-Ghosh/Kiryat Yearim Music Festival v. The Minister of Education and Culture*, IsrSC 25(2) 821
[25] CA 448/60 *Lev v. The Central "Mashbir" Ltd.*, IsrSC 16 2688
[26] HCJ 549/75 *Noah Films Ltd. v. The Film Review Board*, IsrSC 30(1) 757
[27] FH 3/87 *The Film Review Board v. Laor*, IsrSC 41(2) 162
[28] CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*, IsrSC 49(4) 221
[29] HCJ 6218/93 *Dr. Cohen v. The Israeli Bar Association*, IsrSC 49(2) 529
[30] Crim.App. 3520/91 *Turgeman v. The State of Israel*, IsrSC 47(1) 441
[31] HCJ 241/60 *Kardosh v. The Registrar of Companies*, IsrSC 15 1151
[32] HCJ 742/84 *Kahana v. The Speaker of the Knesset*, IsrSC 39(4) 85
[33] HCJ 758/88 *Kendall v. The Minister of the Interior*, IsrSC 46(4) 505
[34] HCJ 146/59 *Cohen v. The Minister of the Interior*, IsrSC 14 283

[35] HCJ 92/56 *Weiss v. The Chairman and Members of the Legal Council*, IsrSC 10 1592
[36] HCJ 176/58 *Parcel 11 Block 6605 Co. Ltd. v. The Minister of Development*, IsrSC 13 1109
[37] HCJ 383/73 *Avidan v. Gary, Chairman of the Film and Play Review Board*, IsrSC 28(2) 766
[38] HCJ 193/58 *Rosenberg Orthopedics Company v. The Chief Certified Physician, The Department of Rehabilitation*, IsrSC 13 1654
[39] HCJ 162/72 *Kinross v. The State of Israel*, IsrSC 27(1) 238
[40] HCJ 260/60 *Forum Film v. The Film and Play Review Board*, IsrSC 15 611
[41] HCJ 807/78 *Ein Gal v. The Film and Play Review Board*, IsrSC 33(1) 274
[42] HCJ 351/72 *Keinan v. The Film and Play Review Board*, IsrSC 26(2) 811
[43] PL Crim. App. 1127/93 *The State of Israel v. Klein*, IsrSC 48(3) 485
[44] HCJ 73/85 *"Kach" Faction v. The Speaker of the Knesset*, IsrSC 39(3) 141
[45] HCJ 910/86 *Ressler v. The minister of Defence*, IsrSC 42(2) 441

Israeli District Court Cases Cited:
[46] DC (Haifa) 404/82 *Yishayahu v. The State of Israel*, 1984 (2) D.C. 522.

Irish Cases Cited:
[47] *Irish Family Planning Association v. Ryan* [1979] I.R.J. 295.

United States Cases Cited:
[48] *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964).
[49] *Roth v. United States*, 354 U.S. 476 (1951).
[50] *Miller v. California*, 413 U.S. 15 (1973).
[51] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

[52] *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).
[53] *Grove Press v. Christenberry*, 276 F.2d 433 (2d Cir. 1959).
[54] *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).
[55] *Freedman v. Maryland*, 380 U.S. 51 (1965).
[56] *Kaplan v. California*, 413 U.S. 115 (1973).
[57] *Fort Wayne Book v. Indiana*, 489 U.S. 46 (1989).

English Cases Cited:
[58] *The Queen v. Hicklin* (1868) 3 Q.B. 360.

German Cases Cited:
[59] 67 BverfGe 218 (1984).
[60] "17 Mar. 1977" 86 *Archiv fur Urheber– , Film, Fumk– , und Theaterrecht* (1980) 204.

Canadian Cases Cited:
[61] *Re Ont. Film & Video and Ont. Bd. Of Censors* [1983] 41 O.R. 2d 583.
[62] *R. v. Butler* [1992] 89 D.L.R. 4th 449.
[63] *The Queen v. Towne Cinema Theaters Ltd.* [1985] 18 D.L.R. 4th 1.

Jewish Law Sources Cited
[64] Genesis 2:9, 25; 3:7, 10; 22:12
[65] Ecclesiastes 3:19
[66] Babylonian Talmud, Tractate Shabbat 33a
[67] Babylonian Talmud, Tractate Avoda Zara 5a

For the petitioner—A. Tzafrir
For the respondent—S. Nitzan (Office of the State Attorney)

JUDGMENT

President A. Barak

The Film Review Board was asked to grant a permit for the film "*L'Empire Des Sens*." The Board conditioned the issuance of the permit on the deletion of certain parts of the movie, which was to be shown to adults only. According to the Board, the targeted sections are of a pornographic nature and there is near certainty that allowing them to be viewed will cause serious, grave and severe harm to societal sensibilities and public morality. In the opinion of the film's distributor, the film has artistic value, and should remain intact. At base, this petition presents the need to decide between two conflicting positions, between an argument that focuses on the problems of pornography, and an argument that focuses on artistic merit.

The Film

1. "*L'Empire Des Sens*" is a Japanese-French film, directed by the Japanese director Nagissa Oshima. The film deals with the love between a girl named Sadda and her lover-master Kichi San. The film examines the couple's relationship. This relationship revolves around the couple's sexual encounters, which take on increasing intensity. Their quest for challenges to satisfy their lust ends in death, as Sadda chokes her lover in the course of intercourse. At the end, she cuts off his sexual organ with a knife. During the film, there are shots of intercourse, with depictions of the sex act.

The Facts

2. The petitioners are the distributors of the film "*L'Empire Des Sens*." They applied to the Film Review Board [hereinafter the Board] for a permit to screen the film; the Board had rejected similar requests by other distributors in the past. During its meeting on April 18, 1994, the Board viewed the film and decided unanimously not to grant the requested permit. In a notice delivered to the petitioners, the Board opined that "the film exceeds the limits of good taste with its excessive pornography, and contains scenes capable of arousing feelings of revulsion." A few months later, on July 11, 1994, the Board reexamined its decision. The petitioners' arguments were heard, and a discussion was held. This time, differences of opinion surfaced among the Board members. Some members pointed to the film's artistic quality, the caliber and prominence of the director, and to the awards that the film received at various festivals. Others claimed that the film was an obscenity, that there was nothing artistic about it, and that even if it did have artistic value, such value was not sufficient to negate the film's pornographic character.

The majority decision was to disallow the film's screening. Shortly thereafter, on August 8, 1994, the Board once again discussed the film. Once more, some Board members made reference to the film's artistic

value. Others, however, pointed to differences of opinion regarding the film's actual artistic value. This time too the Board decided to disallow the film's screening. In its decision, the Board stated that its refusal was based on "the excess of intercourse scenes with the exposure of sexual organs, penetration, sexual abuse involving children, and the like." Nevertheless, in his letter to the petitioners, the Board's Chairman stated: "the Board might find a way to approve the screening of the film if you were to remove about eight sections."

3. Following the Board's decision, the petition before us was filed. After its submission, the Board convened to discuss the film on September 11, 1994. By a majority decision, the Board decided to approve the screening of the film for viewers of eighteen years of age and up. The Board conditioned this permit upon the removal of nine sections, which, in total, amount to several minutes of the film. According to the Board, the screening of these sections is certainly capable of causing serious, grave and severe injury to societal sensibilities and public morality. The petitioners accept the Board's decision to restrict the film to adult viewers, but take issue with the demand to cut several scenes, save for the sections involving the appearance of minors.

The Parties' Submissions

4. Petitioners raised a number of arguments before this Court. First, they claimed that both the Board's working procedures and its composition were flawed. The Board, they argued, exceeded its authority by taking into account aspects not germane to the issue. Its initial decision to disallow the film's screening resulted from the "limits of good taste" test. This test has been invalidated under case law. The most recent decision to permit the screening of the film under certain conditions, they argue, was intended to "legitimize" its decision in the eyes of this Court. Petitioners further contend that the Board did not seriously consider the matter of the existence of a risk of injury to protected values, the intensity of the danger, and the degree of its probability. Regarding the Board's composition, it

was argued that the Board should not include people who are or have ever been government officials. It was also asserted that the Board does not constitute a representative cross-section of the public. Thus, it was contended that, in this situation, the Board does not represent the public and does not voice its concerns.

Second, it is submitted that the criteria that guided the Board in its decision were erroneous. According to this argument, the Board's task was to examine whether screening the film, in its entirety, entailed a near certainty of serious, grave and severe injury to the public order. Instead, the Board began examining the effect of the screening of certain sections—in isolation of their place in the film as a whole. Based on the proper test, petitioners argue, it cannot be said that the screening of the film in its entirety entails a serious, grave and severe injury to societal morality. According to this test, petitioners assert, the film should not be considered pornographic. It is imbued with social– artistic values that redeem the controversial sections. The film's message, context and artistic value distinguish it from a pornographic film that merely deals with sex. According to the argument advanced, proof of the artistic value of "*L'Empire Des Sens*" can be found in the international artistic recognition the film enjoyed, including the awards it has won, and the opinion of film critics and lecturers who have joined this petition. Furthermore, in terms of the asserted harm, petitioners claim that one must take into account the fact that the film will be screened before an adult audience only. The audience is not captive; the public is accustomed to permissiveness and openness, and, in any case, has access to material that features sex acts similar to those in the film under discussion. The petitioners also point out that the film has already been screened publicly, on February 28, 1995, on the European culture channel "*Arte*," which could be received in the Jerusalem area and in Ramat Gan. No resulting injury was shown. According to the petitioners, all of these facts illustrate the appropriateness of striking down the Board's decision.

Third, petitioners argue that the State must not be allowed to interfere with adults' decisions to watch films importing issues of morality and sexuality. The Board's decision may be characterized as a form of paternalism, which has no place in a democratic country. Alternatively, petitioners argue for the adoption of a more stringent test for limiting freedom of expression, such as the test of clear and present danger, which would be more appropriate.

Fourth, even if the Board is of the opinion that, by screening the film, the petitioners will violate Section 214 of the Penal Law-1997, thereby committing the criminal offence of the publication and display of obscene material, petitioners argue that the criminal offense is not a germane consideration. The crucial nature of freedom of expression means that only *post- facto* punishment can be imposed, rather than prior restraint of the expression. Further, it must be left to the courts to decide whether a criminal offence has in fact been committed. Alternatively, it was argued that the artistic merit of the work in its entirety redeems the disputed sections, so that they do not constitute obscenity. The film is a work of art.

Fifth, petitioners claim that they were discriminated against by the Board, which approved the screening of other films containing explicit sex scenes, such as "*Last Tango in Paris*," "*Clockwork Orange*," "*Rising Sun*," and "*Conan the Barbarian*."

Finally, petitioners conclude that the Board did not attach appropriate weight to freedom of expression, particularly in view of the enactment of the Basic Law: Human Dignity and Liberty. They argue that freedom of expression is part of human dignity, and that the individual must not be denied the right to decide whether he wishes to view a particular film. The petitioners also point out that the Board's claim that they are protecting human dignity by prohibiting the screening of the disputed sections is an argument first raised in this petition. Indeed, there is no mention of this reason in any of the Board's discussions or decisions.

5. In their submissions, the respondents defend the Board's decision. Their arguments are as follows. First, that the Board's composition reflects the diverse opinions of the Israeli population on the matter and is therefore representative. Most of its members are not civil servants. In addition, the Board claims to have acted within the scope of its authority. Its decision is reasonable. Its considerations were not "non-germane," but rather relevant and commensurate with the case law on the matter. Indeed, the case law instructs that when it is nearly certain that allowing freedom of expression in a particular instance will cause serious, grave and severe injury to societal sensibilities and public morality, the former must give way to the latter. Based on this criterion, the Board decided that, if the film is to be screened, the disputed sections must be deleted. The respondents stress that, in applying this criterion, the Board took into account the harm to the enlightened public's sensibilities and to current societal morality, rather than the feelings of extreme minorities. In their view, the Board adopted the "least restrictive means" for impairing freedom of expression, as the film was approved, rather than censored, and the parts that need to be deleted are small in length and number. In so doing, the Board by no means disregarded freedom of expression. Instead, it gave it significant weight. The respondents conclude by stating that the Board's decision strikes the proper balance between the conflicting interests in the matter.

Second, they point out that in reaching its decision, the Board took into account the fact that some of the disallowed sections contain humiliating scenes that entail certain and severe injury to man's dignity. The reference here is to scenes that feature close-ups of a man's sexual organ being cut off or a woman's clitoris being split. The same applies to scenes depicting sexual abuse of minors or the elderly.

Third, respondents note that the Board weighed the film's artistic value. Conflicting opinions regarding whether the film should be classified as art or pornography were presented to the Board. According to most of the Board members, the film is devoid of artistic value. Moreover, they argue that even if the film as a whole has artistic value, the disqualified sections

themselves lack such artistic value; consequently, cutting these particularly offensive scenes from the film will not harm the film's artistic value. Their approach invites us to examine the redeeming artistic value of the individual sections, rather than to consider whether the film's general value, as a whole, is capable of redeeming the individual sections. In addition, the respondents maintain that even if the artistic value of the individual sections were proven, this value would have to yield in view of the certain and severe injury to societal sensibilities and public morality which would ensue were those sections to be screened. The Board's members are not art critics, and neither is the public. The film's artistic value is a relevant, but not singular, consideration. We are not discussing art, and in any event, artistic freedom must occasionally yield to the values that clash with it.

Fourth, it is submitted that the expression's criminality is a germane consideration. The law, at the very least, can serve as an indicator of the public's tolerance level. According to the Board, the controversial sections are tantamount to an exhibition of obscenity, in violation of Section 214 of the Penal Law. The Board attached significant, although not determinative, weight to this consideration.

Fifth, as per the Board's contention, there is nothing to support the discrimination argument advanced by the petitioners. Indeed, the Board has never permitted the screening of segments as problematic as those at issue here. Regarding the assertion that the obscenity law is not being enforced, no factual proof has been offered in support of this argument. Moreover, the fact that others may violate this law by no means compels the Board to grant a permit in this case. The respondent's conclusion, therefore, is that the Board's decision is a reasonable one. The Court must not replace the Board's discretion with its own. As long as the institution of the censor exists, we must not empty the Board's authority of all substance. Thus, they argue, the petition must be rejected.

Concerning Freedom of Expression and its Restrictions

6. Freedom of expression is a fundamental right in Israel. It is "democracy's most cherished principle." Crim. App. 255/68 *The State of Israel v. Ben Moshe* [1] (Agranat, J.). It occupies a place of honor in the "shrine of fundamental human rights." HCJ 153/83 *Levy v. Southern District Commander of the Israeli Police Force* [2]. It constitutes a "supreme right." CA 723/74 "*Ha'aretz" Newspaper Publications Ltd. v. Israel Electric Company Ltd.* [3] (Shamgar, P.); a "superior right." HCJ 73, 87/53 *Kol Ha'Am. v. Minister of Interior* [4] (Agranat, J.) "It is an integral part of our judicial ethos" CA 105/92 *Re'em Engineers and Contractors v. Municipality of Nazareth-Illith* [5]. The freedom of expression in Israel was first recognized by the Courts as being "among those fundamental rights that are not written in a book." Rather, they stem directly from the nature of our country as a freedom-loving democracy," HCJ 243/62 *Israel Film Studios Ltd. v. Gary* [6], at 2415 (Landua, J.). In several *obiter dicta*, a number of judges—myself included—expressed the view that today, freedom of expression enjoys constitutional status, as part of the right to human dignity anchored in the Basic Law: Human Dignity and Liberty. *See* CA 4463/94 PLA 4409/94 *Golan v. Prison Services* [7] (Mazza, J.).

Three rationales form the basis for recognizing freedom of expression as a fundamental right. The first rationale is the desire to expose the truth:

> Freedom of expression must be ensured in order to allow for different and varied views and ideas to compete with each other. From this competition—and not from the regime's dictate of a single 'truth'—shall the truth surface and emerge. For, in the end, the truth shall be victorious in the battle of ideas.

HCJ 399/85 *Kahane v. Broadcast Authority* [8], at 272

The second rationale is based on the need for human self-fulfillment. "The spiritual and intellectual development of man is based on his ability to freely formulate his world views." HCJ 399/85 *Kahane v. Managing*

Committee of the Broadcasting Authority [8] 273. Lastly, freedom of expression is a prerequisite for democracy. Thus, "the free voicing of opinions and the unrestricted exchange of ideas among people is a *sine qua non* for the existence of a political and social regime in which the citizen can weigh—without fear—what is required, to the best of his understanding, for the benefit and welfare of both the public as well as the individual, and how to ensure the continued existence of the democratic regime and the political framework in which it operates." HCJ 372/84 *Klopfer-Nave v. Minister of Education and Culture* [9], at 238 (Shamgar, P.).

7. Like other freedoms enjoyed by the individual in a democratic country, freedom of expression is not "absolute." Thus, we recognize the possibility, and even the need, to restrict freedom of expression in order to satisfy other values which society wishes to realize. Indeed, we distinguish between the scope of freedom of expression as a fundamental human right ("the issue of scope") and the scope of the protection given to freedom of expression ("the issue of protection"). *See* HCJ 806/88 *Universal City Studios. v. The Film and Play Review Board* [10].

According to our legal tradition, freedom of expression enjoys a broad scope. HCJ 606/93 *Advancement of Entrepreneurship and Planning (1981) v. The Broadcasting Authority* [11] Hence, freedom of expression as a constitutional right extends to every form of expression. It extends to any activity seeking to convey a message or meaning. It extends to any expression of a political, literary or commercial nature. The expression may take the form of words or behavior, symbolic or otherwise. With respect to the scope of freedom of expression, we do not examine whether the expression is truthful or false; no one scrutinizes its content; no one examines its consequences. "Freedom of expression extends to every expression, regardless of its content, impact and the manner in which it is expressed." *Universal City* [10], at 34; *see also Re Ont. Film & Video and Ont. Bd. of Censors* [1983] 41 O.R. 2d 583 [61]. As President Shamgar has noted:

> The exchange of ideas, the voicing of perspectives, public debate, and the will to know, to learn and to convince: all these are educational tools at the disposition of *every* opinion, *every* perspective, and *every* belief in a free society.

IA 2/84 *Neiman v. Chairman of the Elections Committee for the Eleventh Knesset* [12] 278 (emphasis added)

Thus, an expression entailing defamation is "covered" by the scope of freedom of expression. *See* Crim. App. 677/83 *Borochov v. Yeffet* [13]. Expression that offends is "covered" by freedom of expression. HCJ14/86 *Laor v. The Film and Play Review Board* [14]. An expression that constitutes a criminal offence is "covered" by freedom of expression. HCJ 399/85, *supra* [8].

8. A democratic regime, which seeks to protect the entire spectrum of human liberties and to further social goals, will not protect the full scope of freedom of expression. Recognition that certain expression is covered by freedom of expression does not guarantee that that the expression shall be protected. Thus, in order to advance human rights such as a person's dignity, good name, property, privacy and occupational freedom, we allow freedom of expression to be infringed. *See* FH 9/77 *The Israel Electric Company v. "Ha'aretz" Newspaper Publishing Company Ltd.* [15]; HCJ 153/83 *supra* [2]; HCJ 2481/93 *Dayan v. Jerusalem District Commander* [16]. We allow freedom of expression to be infringed in order to advance societal goals, such as ensuring country's very existence and democratic nature, as well as protecting the integrity of the judicial system, as well as public peace and security. *See* IA 2/84 *supra* [12]; HCJ 399/85 *supra* [8]; PLA 7504/95 *Yassin v. Party Registrar* [17]; Crim. App. 126/62 *Dissenchik v. The Attorney General* [18]; HCJ 411/89 *The Temple Mount Faithful and Land of Israel Movement v. Jerusalem District Police Commander* [19]. Freedom is not anarchy. Without order there is no liberty.

9. Restrictions on freedom of expression take different forms. There are those restrictions known as prior restraints. Other restrictions punish expression only subsequent to its publication. Another sort of restriction would require permits to be obtained. The most severe of these is, of course, prior restraint. At times, such restriction is required by reason of the expression's content. We prohibit an expression which causes defamation or entails harmf to the integrity of the judicial system. Sometimes, the expression's effect necessitates the restriction. Thus, we restrict the freedom to protest—regardless of the message conveyed by a particular demonstration—in order to protect the freedom of movement. These restrictions derive from the societal significance of the expression, on the one hand, and the values, interests and principles with which freedom of expression clashes, on the other. Moreover, political freedom of expression is not equivalent to its commercial counterpart. *See Advancement*, *supra* [11], at 13. Harm to state security is not on the same footing as harm to the freedom of movement. Indeed, the substance of the restrictions is the product of a balance between aspects of freedom of expression and other human rights and the public good. It is related to an evaluation of the social significance of the various values. It is based on the idea that infringements on freedom of expression can only be for a worthy purpose and may not exceed the necessary measure. Thus, in principle, we seeks to establish "a value-oriented guiding principle," which distances itself from any "chance paternalistic criterion." FH 9/77 *supra* [15], at 361 (Shamgar, J.).

Indeed, since the establishment of the state, Israeli jurisprudence has developed an extensive system of balances between freedom of expression and the values and principles with which it clashes. Fundamental guidelines were established, which determine the level of protection to be conferred on freedom of expression, on the basis of the relative social importance of the values and principles with which it may clash. One formulation of the freedom of expression in Israel was conceived by Justice Agranat in *Kol Ha'Am* [4]. This formula examines the proper balance between freedom of expression and public peace. It provides that,

in such a clash, freedom of expression may be impaired if the following two conditions are satisfied. First, the harm that the expression causes to the public peace must be serious, grave and severe. The harm must exceed the "level of tolerance" acceptable in a democratic society and shake that society to its very foundations. Second, the probability of such an injury to public peace occurring must be nearly certain. It is insufficient that the harm be only possible or probable. Of course, this is not the only balancing formula. Indeed, "the proper criterion is *not* fixed and uniform with respect to all types of cases... it is necessary to adopt a suitable test, while considering the substance and importance of competing principles, in our perception with respect to their *relative priority* and the measure of protection which we would like to grant each principle or interest." HCJ 448/85 *Daher v. The Minister of the Interior* [20], at 708 (Porat, D.P.).

Restrictions on Pornographic Expression

10. Freedom of expression, of course, extends to cinematic expression, be it commercial or noncommercial. Cinematic expression is an important tool for ideological discourse. Like a book and a picture, a film conveys an ideological message. It is a source of information and entertainment. It constitutes part of freedom of expression. Freedom of expression also extends to cinematic expression the content of which is pornographic. Indeed, freedom of expression "covers" expression featuring obscene or pornographic material. *Universal City*, *supra* [10], at 34, and does not distinguish between the two. *See* F. Schauer, Free Speech: A Philosophical Enquiry 179 (1982). Pornographic expression is also an activity that seeks to convey a meaning or message, and is, therefore classified as "expression." Indeed, the depiction of the sex act—be its content and offensiveness what it may—is expression encompassed by freedom of speech. *See R.. v. Butler* (1992) [62]; P.W. Hogg *Constitutional Law of Canada* 977 (3rd. ed., 1992); M. Reiman, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. Mich. J.L. Ref. 201 (1988).

11. Although pornographic expression is "covered" by freedom of expression, like any other expression, it too may be restricted. Indeed, no constitutional arrangement granting constitutional protection to freedom of expression protects all obscene material. Freedom of expression is not the freedom to express obscenities. In constitutional democracies, sensitive to freedom of expression, there is no general constitutional right to create or consume obscene material. Every society is entitled to protect itself against obscene expressions. Therefore, every society that is sensitive to human rights, in general, and to the right to freedom of expression in particular, is entitled to impose restrictions on freedom of expression with respect to obscenities. These restrictions should be for a worthy purpose. Their infringement on expression should not exceed the necessary.

We have stated that it is possible to restrict pornographic expression if there is near certainty that it would cause serious, grave, and severe injury to public peace. *See* HCJ 243/81 *Yeki Yosha v. The Film and Play Review Board* [21]; HCJ 14/86 *supra* [14]; *Universal City supra* [10]. In this manner, offensiveness may justify restricting freedom of expression if it exceeds the standard of social tolerance. In other words, if it is capable of shaking the foundations of mutual tolerance. *See Universal City* [10], at 38; *The Queen v. Towne Cinema Theaters* [1985] 18 D.L.R. 4th 1 [63]. Such harm can justify restricting pornographic expression to the extent that it is capable of degrading a woman, thereby causing both direct and indirect harm to the equal status of women in our society and encouraging violence, particularly towards women. Addressing the issue of criminal liability for pornographic advertisements, Justice Sopinka, of the Supreme Court of Canada, wrote:

> This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected

> to degrading or dehumanizing sexual treatment results in harm, particularly to women, and therefore to society as a whole.

Bulter [62], at 467.

Indeed, in the hearing before us, the parties did not dispute that a pornographic film can entail a near certainty of serious, grave and severe harm to public peace. *See* HCJ 89/80 *Ohayon v. The Film and Play Review Board* [22], at 531. Therefore, it was not necessary for us to consider the empirical basis for these shared postulates. The dispute before us relates to the pornographic nature of the film "*L'Empire Des Sens*." The petitioners claim that the film has artistic value, and is therefore not pornographic. The respondents, for their part, argue that the film is of no artistic value and, in any event, the sections that the Board wishes to see deleted are of a pornographic character. We shall now turn our attention to an examination of this issue.

On Pornography and Art

12. The dispute between the parties gives rise to the following question: what is pornography? A well-known answer is that provided by Justice Stewart, who, unable to define obscenity, said: "I know it when I see it." *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964) [48]. This answer is unsatisfactory. Indeed, the modern approach defines pornography as a publication in which—according to accepted contemporary community standards—the material's dominant theme, in its entirety, arouses impure carnal desire. This was the formula accepted by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 489 (1951) [49] and forms the basis of the test for pornography adopted by the Court:

> [w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest

We can employ this as an "operational" definition, while recognizing that it is not unique, and that other formulae exist for this purpose. See, for example, the definition of pornography in *Miller v. California*, 413 U.S. 15 (1973) [50]. Perhaps an all-encompassing definition cannot be formulated—see the words of Justice Brennan in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 85 (1973) [51]. We, however, have no need for deciding this matter, as all the relevant definitions have one thing in common: that a publication boasting artistic, literary, political or scientific value is not caught by the ban on pornographic publications. Thus, in *Roth* [49], at 487, Justice Brennan said:

> Sex and obscenity are not synonymous. Obscene material is material that deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.

Two very different perspectives may support this approach. According to the first of these, art and pornography are mutually exclusive. If the publication is of an artistic, literary, scientific or political nature, its character is, by definition, non-pornographic. Such is the law in the United States and Canada. According to the other viewpoint, the publication's artistic nature does not serve to negate its pornographic character. Rather, it alters the fundamental balance between freedom of expression and the restrictions that can be placed upon it, and is likely to offer a pornographic publication "protection" against criminal conviction. Such is the law in England. *See* C.R. Sunstein, The Partial Constitution 261 (1993). According to both the first and second approach, a publication of an artistic nature—literary, political or scientific—cannot be subject to the same restrictions as a pornographic publication. Opinions differ as to the measure of the literary, political or scientific value required. There are those who maintain—and so it was held in *Roth* [49]—that any such value is sufficient, and the work need not be of serious value. Others, for their part, maintain—and so it was held in *Miller* [50]—that serious literary,

political or scientific value is required. *See* F.F. Schauer, The Law of Obscenity 136 (1976). Thus, constitutional weight is allotted not only to freedom of expression, in general, but also to freedom of artistic expression. This freedom can be understood as being part of freedom of expression, "out of which several things grow, including the freedom of artistic expression in the literary field and in the visual area in all its forms." *Universal City supra* [10], at 27. "Freedom of expression is the author's freedom to break through his innermost feelings, to spread his wings and have his idea take flight." *Laor*, *supra* [14], *at* 433. It may be understood as a constitutional right that "stands on its own two feet," so to speak. It is based on the notion that man is an autonomous creature, entitled to self-actualization, as both a creator and as one who benefits from the creation. Indeed, freedom of artistic expression is the artist's freedom to create. It is the freedom to choose a subject and the manner in which it is presented. It is also the freedom of others to listen and absorb. Of course, freedom of artistic expression is also not absolute. Like other "freedoms," its nature is relative. Thus, it may be impaired for a worthy purpose, provided that the infringement does not exceed the required measure.

The "Work as a Whole" Test

13. As such, if the publication has (serious) artistic value, it is not caught by the prohibition on publishing pornographic material. The question, therefore, is how to determine whether a particular piece is of an obscene or an artistic character. For these purposes, the practice in nineteenth-century England was to examine individual sections of the piece alleged to be pornographic. According to this approach, it was deemed sufficient to base the fate of an entire piece on the effect of its individual sections. *See Regina v. Hicklin* (1868) 3 Q.B. 360 [58]. As per this test, important works of literature or art were deemed pornographic if they featured sections of a prohibited pornographic character. This test is no longer valid, neither in England nor outside it. *See Irish Family Planning*

Association v. Ryan [1979] I.R.J. [47]. In *Roth* [49], Justice Brennan wrote:

> The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible person, might well encompass material legitimately treating with sex and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.

The modern test for assessing a work's pornographic nature is holistic and involves the integration of sections alleged to be pornographic. This is commonly referred to as the "taken as a whole" test. This test was accepted in *Roth* [49], and subsequently in *Miller* [50]. This case marked the inception of "the work as a whole test" to determine whether a piece constitutes art. According to this test, material will be deemed pornographic only if the following three cumulative conditions are satisfied:

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

Id., at 24.

For our purposes, the third component of the *Miller* [50] test is of the essence. This prong provides that a work's artistic value is evaluated on the basis of the work as a whole. Thus, the artistic value of individual sections *per se* is not examined. This approach is also accepted in Canada. In *Butler* [62], Justice Sopinka wrote:

> The "internal necessities" test, or what has been referred to as the "artistic defence," has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent "dirt for dirt's sake" but has a legitimate role when measured by the internal necessities of the work itself.

Id., at 469. German jurisprudence adopted a similar approach in BVerfGE 67 (1984), 213 (known as "*The Street Theater case*"). There, the Constitutional Court wrote:

> Artistic expressions can be interpreted and are in need of interpretation. An indispensable element of this interpretation is that the work of art be viewed in its entirety. One may not take individual parts of the work out of context and examine them separately to see if they merit criminal sanctions.

The Constitutional Jurisprudence of the Federal Republic of Germany 435 (D.P. Kommers trans., 1989)

This approach is also currently accepted in England: although the work as a whole may be of artistic value, this in itself is not sufficient to preclude application of the obscenity law. *See* section 1(1) of the Obscene Publications Act-1959. It is also necessary that the sections alleged to be pornographic form part of the plot and of the message. It therefore follows that when a section of a work is ostensibly alien to the work as a whole, it may be examined in isolation. Based on "the work as a whole test," it was decided that James Joyce's *Ulysses* was not pornographic. The Court stressed that the book contains several passages, which, if examined in isolation, would be considered pornographic. When examined as a whole, however, the book has artistic value. *See United States v. One Book Entitled Ulysses*, 72 F.2d 705, 707 (2d Cir. 1934) [52]. Similarly, it was held that Lawrence's *Lady Chatterly's Lover* was not pornographic, notwithstanding certain passages which, if isolated and examined on their

own merit, can be described as being of a pornographic character. *See Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1959) [53]. Similarly, it was held that John Cleland's *Memoirs of a Woman of Pleasure*, also known as *Fanny Hill*, has artistic value, despite the pornographic passages it contains. *See Memoirs v. Massachusetts*, 383 U.S. 413 (1966) [54].

14. The work as a whole test is also the test applied in Israel. It is compatible with the path taken by our case law: to examine the expression according to its context and circumstances. To this effect, Justice Cheshin has written:

> The same word, or several words, can be unworthy of protection in one context—if, for instance, they stand on their own—but may warrant heightened protection in a different context, such as in a literary test.

HCJ 606/93 *supra*, at 29 [11].

Consequently, it was held that "we are bound by an enlightened viewpoint—according to what is commonly accepted nowadays—to accept even a substantial measure of provocative depictions of sex if they appear as an integral part of a work of literary or scientific value, which compensate for the works pornographic aspect." Crim. App. 495/69 *Omer v. The State of Israel* 412 [23] (Landau, J.); *see also* DC (Haifa) 404/82 *Yishayahu v. The State of Israel* 526 [46]. Thus, sections, which in and of themselves and taken in isolation, are liable to be perceived as pornographic, lose this character if they are part and parcel of an artistic work or a work that boasts other societal value.

The Board's Decision and the Scope of Judicial Review

15. It is incumbent upon the Board to examine whether the film is of (serious) artistic nature. If the film does indeed have artistic value, its screening must not be prevented by reason of its pornographic character.

Hence, the Board must probe the work's artistic value. It must also ascertain whether certain sections, which, in isolation, could be deemed to be pornographic, form part of the work's evolution, in terms of its plot and its message or, on the other hand, are alien to the film. To this end, the Board is entitled to seek out expert opinions. On the basis of the evidence before it, the Board will have to decide, employing "the work as a whole test," whether the film, as a whole, has artistic value, and whether the sections asserted to be of a pornographic character are part of the plot's evolution and of the message. For this purpose, it is not necessary that the Board become an art critic. It should not grade work, or determine whether its artistic value is great or minimal. Nor should it impose its own members' artistic preferences the members of our society. I highlighted this point in one of the cases cited:

> The question is not whether the script is of remarkable artistic value or not. The Board is not an art critic, nor is it the body responsible for evaluating scripts' artistic value

Laor [14], at 431.

Rather, the Board must determine whether the film, as a whole, has any (serious) artistic value. For this purpose, the Board must distance itself from all "cultural paternalism" (as per President Shamgar in *Universal City* [10]). It must understand that, at times, artistic expression seeks to break through the existing boundaries and establish new artistic horizons. It must take into consideration that artistic expression grants its creative author freedom, which must not be restricted in the name of contemporary conventions. *Compare* HCJ 175/71 *The Abu-Gosh/Kiryat Ye'arim Music Festival v. The Minister of Education and Culture* 828 [24]. In the area of artistic creativity, we must let a thousand flowers bloom in the artistic garden. Indeed, we must recognize the existence of artistic pluralism, and acknowledge the lack of clear-cut, objective criteria for this purpose. Thus, what is today perceived as a work devoid of artistic value may, in coming years, be considered a masterpiece. In light of the above, the Board must

take a neutral stance with respect to competing artistic perceptions. Therefore, in order to establish a work's artistic character, thereby negating its pornographic aspect, it is sufficient that the Board's assessment affirm the work's (serious) artistic nature, even if this assessment is controversial, and even if it does not reflect the assessment voiced by the majority of the public or by the majority of art experts.

> If material has serious literary value for a significant portion of the population, then the fact that this portion is neither average nor it be majority is irrelevant... If a work is a serious literary endeavor, with the purpose of stimulating the mind, and if it has this effect on a significant number of people, then literary value exists and there can be no finding of obscenity.

The Law of Obscenity, at 144.

We must bear in mind the following: in matters artistic and aesthetic, differences of opinion abound. We must not demand universality. It is sufficient that there is an opinion, even if it is controversial, with respect to the (serious) artistic value of a work. For our purposes, the words of President Agranat are rather fitting:

> A work of art is not required to be *universally* esthetically pleasing, and its artistic value does not depend on the *majority's* ability to appreciate it; the true test for these purposes is anchored in the degree of satisfaction and type of pleasure that the work confers on those able to best appreciate it

CA 448/60 *Lev v. The Central "Mashbir"* 2700 [25]. Indeed, if it is possible for us to err, we should err on the side of promoting freedom of expression and freedom of artistic creation. As Justice Landau, *Omer* at 411 [23], rightly stated:

> The line between that which is permitted and what is prohibited should be set by the Court in every case according to its

> discretion, in accordance with enlightened views, prevalent in our modern society, bearing in mind that each restriction of freedom of expression smacks of censorship; in borderline cases, therefore, the tendency must be to permit rather than prohibit.

Similarly, the ruling handed down by Justice Sopinka, *Butler* [62] at 471, dealing with criminal liability for obscene publications, provided:

> Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

This approach gives proper expression to the idea of "the mutual tolerance required in a pluralistic society." HCJ 549/75 *Noah Films Ltd. v. The Film Review Board.* [26] (Vitkon, J.). Indeed, the Board was not intended to fashion "criteria for morality," and its job is not to formulate "educational criteria." FH 3/87 *The Film and Play Review Board v. Laor supra* [27], at 163 (Shamgar, J.). True, the Board is composed of people from the fields of education, literature, journalism and law. They, however, must not express their subjective views with respect to the artistic value of a work. Instead, they must consider and decide, according to the material before them, whether it is possible to conclude that the film could be deemed to be of (serious) artistic character— even if this would not correspond to their own assessment— and that parts of it, even if they are pornographic taken independently, constitute an integral part of the piece.

16. The Board's decision is subject to judicial review by the High Court of Justice. *Inter alia*, the Court examines whether the purpose underlying the restriction on expression is proper, and whether the means adopted by the Board to restrict this expression do not exceed the required measure. When the argument is that the film has artistic value and is therefore not pornographic, the Court must examine whether the Board's

decision in this regard is reasonable. It is not enough for the Board to opine that certain parts of the film—if isolated from the whole of the work and observed independently—are pornographic. Instead, it is incumbent on the Board to examine the artistic nature of the work as a whole, in order to determine whether it is to be considered art or obscenity. Thus, it is also insufficient for the Board members to opine that the film, as a whole, is of no artistic value. The Court must ask itself if, employing the appropriate standard, a reasonable board would be justified in deciding that the film, in its entirety, is of no artistic value. Indeed, the test for the artistic value of a work must be based on the data before the Board and on the objective criteria according to which a work's artistic nature is determined. *Laor* [14], *at* 438. The question is not, whether, according to a Board member's subjective artistic perception, a work has no artistic value. Rather, the question is whether, according to the evidence presented to the Board members—and against the backdrop of the objective criteria used for testing the work's artistic nature—the work has artistic value. If the Board has not taken this objective approach, this Court will not hesitate to strike down its decision. Indeed, the work's pornographic character and the lack of all artistic, scientific, literary or political value constitute "constitutional data." This data has a mixed character of fact and law. The ultimate responsibility for determining it rests with the Court, as I noted in one of the cases:

> [T]he question before us is a basic constitutional question. It touches on the very substance of freedom of expression and the matter of delineating its boundaries. The responsibility for these matters rests with the Court.

Universal City [10], at 40. In a similar vein, Justice Harlan noted in *Roth supra* [49], at 497-98:

> [I]f 'obscenity' is to be suppressed, the question of whether a particular work is of that character does not really involve a

> question of fact but rather a constitutional *judgment* of the most sensitive and delicate sort.

Indeed, the Court will not ask itself if, in its own opinion, the work possesses artistic value. The Court—like the Board itself—is not an art critic. Instead, the Court will ask itself if whether, on the basis of the facts presented to it, a serious assessment affirming the work's artistic value exists, even if this assessment is controversial. More specifically, the Supreme Court does not conduct its own independent examination. This examination is conducted by the Board. The Supreme Court asks itself if, according to the material presented to the Board, this body, acting as a reasonable board, was entitled to conclude that the material is pornographic and of no redeeming artistic value. Schauer referred to this in his book, The Law of Obscenity, *supra* at 152, stating:

> What the scope of review involves is a determination of whether, as a matter of constitutional law, the materials are of such character as to be clearly outside the scope of First Amendment protection.

This test does not obviate the Board's function. It is the Board that establishes the facts and performs the assessment. This assessment, however, has a constitutional dimension. It infringes on freedom of expression. The Court therefore has the constitutional obligation to examine whether the Board's determination is anchored in the facts that were presented to it and whether it has reasonably exercised its discretion.

After all, the following must be borne in mind: the Board's refusal to grant a permit to a film prevents that film from being screened, thereby constituting a prior restraint. The prior restraint is imposed by a body that is not a court and does not possess the tools that a judge, using judicial criteria, has for testing whether a publication is obscene. It imposes the burden on those wishing to obtain a permit. In a constitutional regime that protects freedom of expression, it is necessary to exercise stringency with

a procedure involving prior restraint, which "freezes" freedom of expression and is carried out by a body other than a court. *See* HCJ 399/85 *supra* [8], at 297*; see also Freedman v. Maryland*, 380 U.S. 51 (1965) [55]. Indeed, a number of constitutional democracies do not allow the imposition of any prior restraints, such as the censorship of films, plays or books, and satisfy themselves with subsequent criminal proceeding, in which the burden of proof rests with the prosecution and where the defendant's rights are guaranteed. In Israel, the censorship of films is recognized. It forms part of the law, the validity of which is preserved as existing legislation, prior to the enactment of the Basic Laws, by virtue of Section 10 of the Basic Law: Human Dignity and Liberty. In exercising this censorship, it is necessary to ensure the effectiveness of judicial supervision. As Justice Dorner correctly pointed out:

> In cases in which the law authorizes an administrative authority to restrict freedom of expression, the law—as it is interpreted by the Court—determines the tests according to which the authority will decide whether or not to deny freedom of expression. Thus, the Court examines whether the authority's decision meets the conditions set out by the tests to which it is subject.

Advancement [11], at 10.

From the General to the Particular: Does the Film "L'Empire Des Sens" Have Artistic Value?

17. Reviews of the film *"L'Empire Des Sens"* are divided. On one hand, there are several opinions holding that the film is devoid of any artistic value and is nothing but pornography for pornography's sake. These statements stress that the film is merely an endless series of sex acts in different variations. According to this view, the film offers nothing but "hard-core pornography." Most of the Board members took this approach. They stated that the film has no artistic value, and that all it contains is a series of sex acts. It contains sexual perversions and close-ups of genitalia.

It features severe violence, and is merely an obscenity. The members stressed that if the Board has any purpose at all, it is to censor films of this sort.

18. On the other hand, there are many opinions, which hold that the film has great artistic value. These opinions, which were presented to the Board and to the Court, emphasize that the film does not encourage sexual arousal. On the contrary, it conveys an "anti-pornography" message; it stresses the folly of lust, and how it flickers, ending in death. It is emphasized that *"L'Empire Des Sens"* is a profoundly artistic film. True, the film deals with human sexuality, but it is not obscene nor pornographic. It expands and increases our aesthetic and spiritual wealth. Those who are of this opinion state that the film is exciting in its intensity and cinematic language. In addition, the Board and the Court were informed of the important awards won by the film at international film festivals, such as Cannes, Lugarno, London, New York and Chicago, the rules of which forbid the screening of pornographic films. It also won the award for the Best Film of 1976 in England. The Board and the Court were shown reviews published in the most important American and British weeklies and newspapers, including *Newsweek*, *Guardian*, *Sunday Times*, *Los Angeles Times, Times*. All of these articles emphasized that "*L'Empire Des Sens*" is an extraordinary, beautiful, real and powerful film. They also stated that the film is not pornographic, that it is the pioneer of art films dealing with sexual obsession, and that it is a high-level artistic work. It was screened in Israel on February 28, 1995 on cable TV's European culture and arts channel, "*Arte*," which is broadcast all over Europe. It has been approved for distribution in various European countries. Furthermore, previous judicial decisions have cited the film's respectable artistic value. Thus, German courts, both at the first instance and at the Supreme Court, dealing with the criminal aspect of exhibiting the film, held the film not to be pornographic, as it was not intended to sexually arouse the viewer, but rather to warn him of the danger inherent to an obsession focusing on sexual relations between two people. *See*, *Archiv fuer Urheber-, Film-, Funk-, und Theaterrechte*, 17 Mar. 1977 at

204. Some of the Board members also expressed the view that the film is a cinema classic.

19. It seems to me that, in light of the above, the Board should have determined that the film has serious artistic value, which precludes its classification as a pornographic film. The Board was presented with a factual basis according to which there was an assessment affirming the film's serious artistic nature. Based on these facts, the Board should have concluded that the film is art. The fact that there are differences of opinion in this regard should not negate this assessment. Several Board members stressed that they are not film critics, and rightly so. The obvious conclusion to be drawn from this is that where there is a credible and serious basis for upholding the film's artistic nature, this is sufficient to support an assessment of artistic value, even if there are dissenting opinions in this regard, and even if the dissenting opinion is voiced by the Board members themselves. They must not express their subjective view with respect to a work's artistic nature, but rather an objective view with regard to the question of whether there exists a serious opinion—even if it is not their own opinion—concerning the artistic nature of the work.

20. As mentioned above, the Board decided to condition a permit for the film on the deletion of several sections. In the vote taken, the Board members' opinions were divided. Most maintained that the film as a whole is of a pornographic nature and should not be permitted. The minority maintained that the film is of an artistic nature and consequently should be permitted, subject to deletion of the parts in which children appear). Ultimately—and after the Attorney General's representative pointed out to the Board that he could not defend a full ban on the screening of the film—the members reached a compromise whereby the film would be permitted if a number of sections were deleted from it. Therefore, very little attention was paid to the question of the fate of sections which, in isolation, could be characterized as pornographic, but which fit into the artistic work, and appear to be required for the plot's development and for the integrity of the message conveyed therein. Thus, it was found that the Board did not

discuss the pivotal question of this petition. During oral arguments, we brought up this point. In his answer, Mr. Nitzan pointed out that even if the film has artistic value, such value is not sufficient to prevent the deletion of certain sections, provided that these sections have no "redeeming societal, artistic value." This approach, as we have seen, is fundamentally erroneous. As noted, the test that the Board must employ is the "work taken as a whole" test. One must not scrutinize a number of isolated sections with a "magnifying glass," and ask whether these sections, *per se*, are pornographic. Instead, one must look at the entire work "from a distance" and ask whether this work, which integrates these and other sections, is a film with artistic value. The Board did not perform this examination.

21. I have concluded that there is no choice but to strike down the Board's decision. Indeed, if the film before us had constituted obscene material, there would have been no room to interfere with the Board's decision. The trouble is, that, according to the facts presented to the Board, the film as a whole is not pornographic, despite sections of it, which, if isolated—and not taken as part of the work as a whole—could be perceived as being so. According to the proper criteria, the Board should have determined that, in view of the differences of opinion regarding its artistic value, the work should be classified as having artistic value. It should have determined that, on the basis of the work taken as a whole test, it is unwarranted to delete sections which, if isolated, could be deleted as being pornographic. The Board's decision deviates from the bounds of reasonableness and must therefore be struck down. In view of this conclusion, we need not consider the other arguments advanced, as the Board based its decision on the film's pornographic character. In view of the collapse of the reasoning underlying its decision, there is no choice but to strike it down. There is therefore no room for examining the question of whether, notwithstanding the film's artistic character, it would have been appropriate to deny a permit for its screening, in view of the harm it causes to public feelings. As stated above, the main rationale for the

Board's decision is the film's pornographic character. Since this rationale has collapsed, the basis for the Board's decision has also disintegrated.

As a result, the *order nisi* is hereby made absolute. This is to say that the Board must allow the film to be screened, without deleting any sections from it (save for the two sections that the petitioners agreed to cut). The film shall be restricted to adults only.

Justice E. Mazza

I agree.

Justice M. Cheshin

I have read the opinion of my colleague, President Barak and, truly, it is a song of praise to the freedom of expression. I placed my hand in his and allowed him to draw me in his wake, as he made his way among the thickets. Happy and supportive, I followed him some distance. Nearing the path's end, however, I felt the road growing difficult for me. At the risk of stumbling, I decided to find my own path. Thus, I started, and in the end found myself alone, my colleagues not at my side.

Indeed, I agree with the main points made by my colleague, almost all of them. That "almost" signifies the small difference between us, and—perhaps—this difference might not be so small.

The Framework of the Discussion and the Clashing Interests

2. Prior to commencing a substantive examination of the issues, it is appropriate to dwell upon the discussion's framework and the expanse in which we are to move. In the subject upon which we deliberate, two main interests compete with each other, each pulling in its own direction. The first interest is that of the individual's freedom of expression. The other interest, likely to change from matter to matter, is variously formulated as "the public order," "the public good," "public feelings," and other such names and terms, which generally refer to the good of the community and

the public interest. Beginning with the individual's freedom of expression, let us examine both of these two types of interests.

3. My colleague dwells at length on the various areas of freedom of expression, and I am prepared to agree with him—without, however, ruling on the matter—that this principle extends to all means of communication between man and man, whether in categories that man has preeminence over beast, or whether in categories that "man hath no preeminence above a beast." Ecclesiastes 3:19 [65]. To this effect, see my comments regarding the *Gal* Law, in CA 6821/93, PLA 1908/94, PLA 3363/94 *United Mizrahi Bank v. Migdal Cooperative Village* [28], 568-71. At the same time, let us remember that the ideal of the freedom of speech does not lay with equal force upon all modes of expression and types of statements, as if it was a rigid, stiff monument.

I was required to address this issue in the *Advancement* [11] case. In that matter, which dealt with commercial advertising, I opined that freedom of expression in matters of commercial advertising is far weaker than freedom of expression in matters of supreme importance, such as the issue of criticism of the regime and reporting about events that have occurred:

> In our attempts to examine the clashing interests lying at the heart of the conflict, we will take heed to distinguish between the great and the small, between primary interests and those below them; the protection accorded to freedom of speech and expression shall, to my mind, be in conformity with the interest being examined. Thus, for instance, the right to voice criticism directed at the regime or establishment—including the citizen's right to information—shall be guarded strictly, with heightened care and dedication. Commercial publications, for their part, do not require us to adopt such an extreme position, and we are satisfied with humbler tests. The level of protection shall correspond to the interest at hand. We will not adopt an extreme

> position with respect to commercial advertisements, even though its older brother and sisters are entitled to enhanced protection. When we deal with criticism directed at the government, we find ourselves in the fiery heart and soul of the ideal of freedom of speech, which we spare no effort to protect. Commercial advertisement is situated at the peripheries, a humbler place.

Id. at 28. *See also Id.*, at 11-13 (Dorner, J.) *See also* HCJ 6218/93 *Dr. Cohen Adv. v. The Israeli Bar Association* [29], 550-51 (Shamgar, P.)

In other words, even though commercial advertising resides in the house of freedom of expression, its status is not like that of freedom of expression relating, for example, to criticism of the regime. In the house of freedom of expression there are various modes of expression and speech, which have a place in the sanctuary, and there are other modes of expression and speech that do not. When freedom of expression clashes with opposing interests, the various modes of expression and speech wage battle, each with its own intensity. Freedom of expression is not an idol, that we should prostrate ourselves before it wherever we encounter it. Upon concluding that the matter at hand involves one of the derivatives of freedom of expression—an expression that finds shelter under the wings of the broader principle—we test its mettle before sending it out to battle with conflicting interests. Our way is the way of *atomization*, or, if one prefers: the way of *moleculization*—we divide the field of freedom of expression into individual categories, according to the type of interest which we protect. There is an article in a newspaper and then there are *belles-lettres*, there is a description of events and then there is a speech, there is a commercial advertisement and then there is criticism of the regime, there is societal criticism and then there are parades. Each one of these, and others besides them, reflect a certain interest, and the strength of the right will be equal to the strength of the interest. The same applies to modes of expression and speech: there are newspapers and then there is film, there is theatre and then there is television, there is radio and then there is the stage.

At times, sectors partially overlap, and sometimes, different sectors will constitute the two faces of Janus. Thus it is, for example, with radio or television commercial advertisements, or a social critique in a theatrical show or film. It is not relevant to analyze each of these sectors at this juncture. Our purpose now is to say only that various forms of freedom of expression are not fashioned from the same clay, and that in the area of freedom of expression, different types of flowers bloom, and though all are members of a single family—the family of freedom of expression—not all members are identical. Thus, when examining a particular matter, it will be incumbent upon us to focus on the relevant sector and examine it closely, in order to clarify its intensity and magnitude.

4. It is important that we say these things—that we say them and say them precisely—if only because we often find that people try to explain the nature of one type of freedom of expression using interests that support freedom of expression of another type, and thus we find ourselves mixing apples and oranges. Hence, for example, when considering freedom of the press or a documentary report on certain events, it is simple for the Court to establish the boundaries and strength of freedom of expression in a way which is commensurate with the issue being discussed before it—an issue forming one of the pillars of the democratic regime. In *Film Studios in Israel* [6], Justice Landau noted:

> A regime which takes upon itself the authority to determine what is good for the citizen to know, will eventually also determine what is good for the citizen to think; and there is no greater contradiction for a genuine democracy, which is not "guided" from above.

Id., at 2416. In *Advancement* [11], I quoted the remarks made by Justice Landau, and my question was whether:

> [t]hese things will apply—with all the intensity and feeling with which they were uttered—even to a commercial advertisement,

> such as advertisements for laundry detergent or hot-air balloons? Will the lofty and noble statements, which the Court was required to address, and rightly so, in *Kol Ha'Am, Ha'aretz*, *Avneri, Shiran,* and in HCJ 680/88 *Schnitzer v. The Chief Military Censor,* in *Kahana*—will these same lofty, noble statements bet set as a canopy over the head of commercial advertisements for the promotion of such and such a product or such and such a service? Does application of the principle of freedom of expression, in all its glory, to a commercial advertising, not constitute, if only to a small degree, a loss of perspective?

Words emanating from the pen of Justice Landau—lofty words in Orwellian language—will not hold in relation to freedom of speech in the matter at bar, and certainly will not hold in relation to other issues, such as commercial advertisements. This was the case when Justice Agranat said that freedom of expression is "democracy's most cherished principle," *Ben-Moshe* [1], at 435, and when Justice Shamgar granted freedom of expression a "supra-legal status." *Israel Electric Company supra* [3], at 295. I think I would not be wrong if I said that neither of the two directed his remarks and thoughts at a film such as "*L'Empire Des Sens.*" Indeed, *Ben Moshe* [1] involved a defendant on trial for attempting to murder Member of Knesset Wilner because of the MK's opinions and statements. In discussing this act, *Justice Agranat* said that "any act committed outside the law's framework and intended to harm others' freedom of expression—and, *a fortiori*, a violent act—is tantamount to harm to democracy's most cherished principle. *Id.* at 435. *Israel Electric Company* [3], for its part, turned on the issue of defamation. There, the Court primarily occupied itself with "the character of the democratic regime." What business have we to speak in flowery language and make use of expressions and descriptions—themselves full of substance—that are fundamentally unrelated to the matter at hand?

In the *Advancement* case [11], at.17, I cited the well-known saying attributed to Voltaire: "I may disagree with what you have to say, but I shall defend, to the death, your right to say it." To this, I added that were we to ask Voltaire if he would be willing to defend the petitioner's right to voice vulgarities to the death, "he would ask us to repeat the question: so far removed is the matter from his intent." *Id.,* at 18. That which we said regarding the above commercial slogan is equally applicable to the case at bar. To apply lofty principles, dealing with freedom of expression, to a movie that some deem to be pornography—and that, in any event, is fraught, and indeed overflowing, with sexual acts—demeans the importance allotted freedom of expression, thereby bringing these great principles into derision. Indeed, my statements in *Advancement* [11], at 19 are applicable to the case at bar, subject to the necessary modifications:

> Regarding the weight attaching to the saying *summum jus summa injuria*, I will say the following: enlisting freedom of speech in order to protect a commercial advertisement or a vulgarity is an unworthy use of conceptions of freedom and liberty, and is tantamount to equating the nation's most revered with the lowest of the land.

In Chief Justice Berger's words in *Miller* [50], at 30:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press'"

See also S. Kentridge, Freedom of Speech: Is It The Primary Right?, 45 *Int. & Comp. L.Q.* 253 (1996). For a different view, see Y. Zilberschatz, *On Commercial Freedom of Expression*, 3 Mishpat U'Mimshal 509 (1995-96).

We shall, therefore, separate between distant relatives, so that we shall not err in our way. Thus, in reading what judges (and others) have said regarding freedom of speech, we shall consider the context in which the remarks were made, as well as the background to their utterance. In this manner, and in this manner alone, shall we know how to gauge their proper measure and tell their correct weight.

5. In emerging into reality, freedom of expression meets opposing interests, which seek to make it vanish or, at least, to diminish its value and dimensions. These interests are collected and come from various areas and find shelter under the canopies of "public order," "public peace," "public feelings," and other similar expressions. These concepts are all-inclusive, and their scope of application will vary from time to time. See *Laor* [14], at 430. However, the expressions "public order" or "public feelings"—*per se*—are not sufficient to diminish the power of freedom of expression. We shall kindly request of the person who pleads on their behalf and relies on them to expound on his remarks, just as the person pleading on behalf of freedom of expression, must expound on what freedom of expression says on his behalf. For example, "harm to the existence of the state, to its democratic regime, to public peace, to morality, to religious feelings, to a person's good name, to the guarantee of fair judicial proceedings," *Id.*, [14] is insufficient. It is incumbent upon us to delve further and further into the said interest, to turn it upside down and on its feet, on its head and its sides, examine it thoroughly inside and out and, at the end of the examination, send it forth to contend with the specific freedom of speech interest that awaits it.

6. Against the backdrop of the two opposing interests, let us make a few comments about the film before us and about the question being disputed by the litigants.

The Film "L'Empire Des Sens" and the Matter in Dispute

7. Sharp differences of opinion have surfaced with regard to the artistic value of the film before us. There are those who praise it to the heavens, while others denounce it vigorously. However, there are no differences of opinion—and there cannot be any differences of opinion—regarding the film's contents and the events that it depicts. The story is about the tangled relationship between the film's main character, a Japanese man, and a girl who works in his household. Almost the entire film deals with the sexual encounters between the man and the girl, between the man and his wife, and even between the man and other women. The frequency and intensity of sexual encounters between the man and the girl constantly increase—in a myriad of variations—and they are at the center of their being and at the core of the film itself. The man and the girl sink into a sexual obsession, and one sex act follows another, almost from the beginning of the film until the end. One can say—without exaggeration—that no sooner does one sexual escapade culminates that the next one begins. Indeed, other than short statements exchanged between the actors— a little here and a little there—we find ourselves knee-deep in sexual encounters between the man and the girl, and in a minority of cases, between the man and other women. Many scenes combine sex and violence, including intercourse clearly exhibited, physical abuse of the genitalia of an old man and a boy, the rape of a woman, the rape of a girl with a wooden instrument, the girl's strangulation of the man, the strangulation of the man until he is dead, and the subsequent severing of his sexual organ. The actors' genitalia are clearly exposed to the viewer, be it during the sex act or otherwise.

The Board held many stormy discussions regarding the film. A summary of these sessions may be found in President Barak's opinion. At the end of these discussions, the Board took the following decision:

> *The Film Review Board's September 11, 1994. Decision with Regard to the Screening of the Film L'Empire Des Sens.*
>
> After studying its previous decisions on the matter, after hearing a review of the legal situation, and, in particular, a

review of the rulings set forth in the judgment with respect to the screening of *The Last Temptation of Christ* and the staging of the play *Ephraim Returns to the Army*, and after deliberations, in which members of the Board participated, the Board decided as follows:

The screening of the film *L'Empire Des Sens* shall be approved for screening to viewers who are at least 18 years of age, contingent upon the deletion of the following sections:

(a) Sexual intercourse in which the viewer clearly sees the male sexual organ penetrating the female.

(b) Physical abuse of the sexual organ of an old man by children (the section appears at the beginning of the film).

(c) Clearly shown masturbation, performed by an old man in front of a naked woman.

(d) Oral sex performed on the male lead by the female lead, until ejaculation.

(e) Sexual abuse of a boy (a two second section at the end of the first reel in which a woman pinches a boy's sexual organ).

(f) A lesbian rape of a young girl by several women.

(g) An orgy involving the main characters, during which we see close-ups of exposed genitalia.

(h) Sexual intercourse in a sitting position, during which the male lead is strangled by the female lead.

(i) A scene in which the female lead cuts off the sexual organ of the dead male lead and holds the severed piece.

According to the Board's decision, in each of the above-mentioned scenes, only those isolated seconds, in which the camera focuses on the genitalia during intercourse or sexual abuse, need be deleted.

In our assessment, the deletions total only a few minutes. In the Board's opinion, the screening of these sections entails certain or, at least, near certain probability of harm of a severe, serious, and grave nature to societal sensibilities and public morality.

This decision was approved by a majority of 8 members against 4, with the dissenters maintaining that the previous decision should be left in place, which disqualified the entire film for screening.

The decision's significance is as follows: the Board is prepared to approve the public screening of the film, provided that the distributors delete from it isolated seconds in certain scenes "in which the camera focuses on genitalia—during sex acts or sexual abuse." The total length of the deletions is, in the Board's opinion, "a few minutes." The petitioner has agreed to cut segments B and E ("abuse of the sexual organ of an old man by children" and "sexual abuse of a boy.") We are therefore talking about the other seven segments.

8. The battle before us is between freedom of expression and pornography, with the following question being asked: did the Board act within the confines of its authority, and did it carefully and properly exercise its discretion when it decided to disallow the screening of the film unless certain specific segments were cut from it? Was the Board entitled to disqualify the screening of those segments that it banned, when it maintained that they are capable of causing "severe, serious and grave

harm to societal sensibilities and public morality?" These are the main questions in the matter at bar, but before we deal with them, let us speak a little about the subject of pornography, which lies at the heart of our deliberations.

A Preliminary Note on Pornography in Contemporary Times

9. During the course of a trial—and even now—I am permeated with a strange sense of hot and cold, of yes and no. As though I am supposed to rule on differences of opinion, which have surfaced between litigants who are neither of our time nor of our place. The Board gave an order prohibiting the screening of the film entitled *L'Empire Des Sens* unless the distributors delete certain specific sections. And why, because the Board finds that those same film segments "are capable of causing certain, or at least a probability of near certain, harm of a severe, serious and grave nature to societal sensibilities and public morality." For the sake of brevity and convenience, we shall henceforth refer to these sections as "pornographic." In examining the Board's decision in isolation, detached from all that surrounds it—everything is perfectly proper. A strange feeling, however, overcomes us when we turn our heads to the sides and look around us. Is the Board's decision truly compatible with what we see and hear and know?

Indeed, the streets of our cities are filled with stores that rent out video films, and anyone with a credit card in his pocket—and who does not have a credit card?—can rent the video of his choice. And, as we all know, video films include the leading pornographic films. And if—heaven forbid—you are late and the store is closed, do not despair! Next to the same stores, there are automatic video machines—and your credit card will take you where you wish to go. Next to these stores, we all know about the adult bookshops, the sex paraphernalia shops, the "sex boutiques." At these stores, you can buy or rent pornographic video films; and the daily press continuously informs us of new film imports that

feature new and diverse tricks and stunts. Pure, unadulterated pornography.

Among our people we dwell, we among our people and our people among us. Thus are we and thus are the Board members. Knowing everything that we know, an obvious question arises: Are we dealing with reality? If you will: knowing these things, do they influence our discretion or the discretion of the Board? A few years ago, a similar yet dissimilar case came before us, Crim. App. 3520/91 *Turgeman v. The State of Israel* [30]. In that case, a woman operated a "massage parlor" at which customers were provided with sex services for pay. The Court convicted the woman of two crimes: procurement for acts of prostitution, and maintenance of a house of prostitution. She was given a prison sentence of eighteen months, six of which she was to actually serve in prison. The woman appealed to the Supreme Court, and the appeal before us primarily revolved around the punishment's severity. My colleagues, who presided over the case with me—Deputy President Elon and Justice D. Levin—believed that we must not interfere with the sentence imposed on the woman, whereas my own opinion was different. The judgment is long and complex, but the main point, for the purpose of our present deliberations, is that I discovered that "massage parlors" such as the one maintained by the woman in question, have mushroomed all over the country; that the press is crammed full of advertisements providing addresses and telephone numbers (and sometimes even relevant pictures); and that the police know about all these "parlors" and do not lift a finger to shut them down unless a neighbor files a complaint about the nuisance created by the parlor. In view of all these facts, I held that it was incumbent upon us to classify the appellant's acts—at least for the purpose of sentencing—not as the crime of procurement or a similar crime, but rather as the offence of "nuisance"; and the proper punishment for it, so I concluded, ought to be the same as for the punishment meted out to the creator of a nuisance.

Will we learn from the *Turgeman* [30] case and draw an inference to the case at bar, regarding the prohibition or permission of the screening of

pornographic films? Will we shut our eyes to what is happening around us? And perhaps the Board will become a kind of "last Victorian Island" in the sea that surrounds it? To be more precise: "The Pornography Index" (or, if you will: "The Tolerance Index") has changed, is changing and will change from place to place and from time to time, and there is no doubt that it must influence the Board's discretion with regard to the essence of one film or another. And yet, the question being asked revolves around the very existence and activity of the Board. Is it not a creature, a sort of anachronistic, clumsy dinosaur, belonging to a different place and era? What is the point of closing the front door to an uninvited guest if he can enter the house, undisturbed, through the back door, which isn't even such a "back door" anymore?

All of these questions—these and their progeny—accompany us at all times, and we shall keep them in our hearts.

A Little About Pornography and Obscene Material

10. The battle is between the pressing need to protect freedom of expression in the creation of a cinematic work and the Board's authority to prohibit the dissemination of pornography and obscene material. Everyone agrees that the Board has acquired the authority to act to prevent the distribution of "pornography" and "obscene material." However, when the question arises as to the *definition* of pornography and obscene material, a problem surfaces and confusion reigns. Thus, my colleague, President Barak, adopts as a "working formula" the words of the United States Supreme Court in *Roth* [49]. According to Mr. Justice Brennan, the test for pornography is

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Id., at 489. Near the same place, Justice Brennan speaks about treatment of the topic of sex "in a manner appealing to prurient interest." And in the

words of my colleague, in para. 12 of his judgment, “modern approach defines pornography as a publication in which—according to accepted contemporary community standards—the material’s dominant theme, in its entirety, arouses impure carnal desire."

A perusal of this definition proposed to us—even if only a cursory reading—will reveal that it holds but only to a small extent. First of all, it directs us to standards accepted by the public, at a time when these standards themselves are veiled in thick fog. On the contrary, we may stand and ask: how will the Court know which standards the community accepts? Does it have, at its free disposal, "consultants for acceptable standards?" In the United States, this matter is subject to the decision of a jury, the presumption being that the jury is aware of the accepted community standards. However, where will we, who have no jury, find those accepted standards? In truth, the definition seeks to create a “reasonable man” for the purposes of pornography and obscene material. The Court sits among its people, and just as it creates “a reasonable man” for other purposes—for example, in relation to issues of damages—so will it also create the accepted "community standards." This merely means that the Court is supposed to act in its own way within its precincts. Indeed, the Court is supposed to reflect “objective” truth—it does not invent “subjective” standards—but we all know how close these matters are. This is the situation in the area of criminal law, whereas in the matter at hand, as we shall see below, the standard is to be determined by the Board.

Thus, a film dealing with “impure carnal lust," a “sexually depraved” film, revolving around “passionate urges," “lustfulness," “licentiousness," “debauchery," is prohibited. And what are these? We must admit: it will not always be easy for us to identify what is within the bounds of obscenity and what is beyond them. Moreover, these expressions are highly reminiscent of the Middle Ages (as this concept is interpreted in the common vernacular), Puritanism and monasticism, introversion and seclusion from the vanities of this world. If this were not enough, we know that the very same act can be classified as pornography or obscenity if it is

presented to the general public, but if it is done in private by two consenting adults—certainly if performed with affection—no one would dream of classifying it so. I wonder if an act performed by two consenting adults in private and with affection can be "impure carnal lust." Indeed, paternalism imposes itself powerfully in the subject matter before us, and needless to say, the answer to the question of the proper measure of paternalism will not be easily found. Thus, we cannot deny, not to ourselves and not to our fellow-men: we are walking in the kingdom of paternalism—we must remember that the concept of paternalism does not always connote something negative and is not always a disparagement—the question is only how far reaching it will be.

Finally, it is not our intention to engage in a discussion of the concept of pornography *per se*. This is not the issue before us. The accepted definitions of pornography are numerous, and it seems that, in view of their generality and vagueness, it is a good idea, even here, to take the path of atomization, *i.e.* to detail the types of material we see as obscene material and pornography. Apparently, this is the path followed by the Canadian Supreme Court, by both the majority and minority opinion, in deciding the *Butler* [62] case. Without voicing agreement or disagreement regarding what was said there, we seek only to point to a proper method of analysis.

11. Why does the law seek—without much success—to prohibit the distribution of pornographic material? They tell us, for example, that a pornographic film will harm the "public order," yet it is clear that this does not mean that it is feared that the screening of a pornographic film will lead to riots. What it primarily meant is harm to "public morality," which is one of the foundations of public order. Here again the question arises: what is the basis of this "public morality"? What is the purpose of a ban on the distribution of pornographic or quasi-pornographic material? After all, it is the purpose which will determine the limits of the prohibition.

In the beginning, there was Adam and Eve, and they were in the Garden of Eden. "And they were both naked, the man and his wife, and were not ashamed." Genesis 2:25 [64]. Then, there was no pornography, if only for the reason that there was no one to whom to exhibit it to. In the Garden of Eden, God planted "every tree that is pleasant to the sight, and good for food ... and the tree of the knowledge of good and evil." Genesis 2:9 [64]. And, Adam and Eve ate from the tree of knowledge, thereby transgressing God's commandment—"And the eyes of them both were opened, and they knew that they were naked; and they sewed fig-leaves together and made themselves girdles." Genesis 3:7 [64]. Adam and Eve became ashamed of each other's bodies, and even of God. So Adam said to God: "I heard thy voice in the garden, and I was afraid, because I was naked, and I hid myself." Genesis 3:10 [64]. Thus it was in the beginning, and since then man has been embarrassed to expose his genitalia. This embarrassment is so deeply imprinted on our consciousness that it has always resembled an instinct or a quasi-instinct in man (as we know, the position is different in certain communities around the world). This is the case regarding the exposure of genitalia and sexual contact; an internal consideration within us demands of us and commands us to do these things in private and not in public. This is man's preeminence over beast, animal and bird. Subsequently came the community, which built walls of education and a judicial system around these quasi-instincts, converting them into "public morality."

Following all these came the ban on discourse about these same things, which are in the private domain. Even though we know all the things we know, we shall not talk about them:

> Said Rabbi Hanan b. Raba: All know for what purpose a bride enters the bridal canopy. Yet against whomsoever speaks obscenely thereof, even if a sentence of seventy years happiness has been sealed for him, it is reversed for evil.

Babylonian Talmud, Tractate Shabbat 33a [66]. We all know why a bride enters the wedding canopy; the bride knows and we all know. But we shall not speak about it. There are things that are better said in private. The act shall be performed but we shall seal our lips. When Rabbi Hanan bar Raba said what he said, there were no films, television or video, therefore, he ordained a ban on speech. However, the ban that was established was a "framework ban"—a ban that was filled with substance from time to time, according to the place and the hour. The ban on discourse, like the dissemination of pornography nowadays, is a framework prohibition. This constitutes one reason—in the instant case, the main reason—for a ban on the dissemination of pornography.

I made similar statements in *Advancement* [11], regarding the voicing of crude expressions in public:

> [i]t is so with regard to human esthetics and so it is regarding man's behavior outside the home. Be a man when you go out in public: among the creations, act in the manner in which people act in public. At home, man can go around naked or in his underwear—all or part—but he will not do so outside his house. This is not only because it constitutes a criminal offence, but because in public, we act a certain way. The fact that man finds himself in public obligates him, to a certain degree. This is the way of the world. While we will not require a person to speak with the same refinement as though he were visiting the President's house, there is, however, a certain line, below which we will not sink.

Id., at 32-33. These things can particularly be applied to hard-core pornography, see, for instance, the Supreme Court of Canada's statements in *Butler* [62], but are also relevant to more subdued forms of pornography. For instance, a scene featuring intimate touching lets us see what we see. A human being has certain needs, and fulfilling those needs is the way of nature. These natural acts, however, should be done in private.

We will not allow them to be performed in the town square. This, in principle, is the matter before the Court. In the words of Justice Sopinka in *Butler* [62], at 469 (quoting other sources): we shall not condone "dirt for dirt's sake."

To these reasons, which are inherent to human nature, we add general social reasons, such as the denigration or degradation of human dignity, women's dignity being particularly relevant, and our fight against violence and the exploitation of minors. See *Butler* [62]; see also the following provisions of article 214A of the Penal Law, cited below.

The Board's Authority and the Limits of its Discretion

12. In the present case we are concerned with the Cinematic Films Ordinance-1927 [hereinafter the Ordinance]. Section 3 of the Ordinance instructs us to establish a Film Review Board, and Section 4 prohibits the screening of a cinematic film unless it has first been approved for screening by the Board. The Board's authority is established in Section 6(2) of the Ordinance, which instructs us, in the original English, as follows:

> 6. (2) *Application to the Board for Authorization*
>
> The Board may in its discretion grant, either with or without conditions imposed, or withhold authority for, the exhibition of any film or any part therefore, or any advertisement of a film.

This statute's provisions establish the framework of the Board's authority. It is indisputable that, in the matter at bar, the Board has acted within the limits of its authority. Section 6(2) of the Ordinance provides that the Board is entitled to make the screening of a film conditional upon the deletion of sections from it ("The Board is entitled ... to authorize the screening of any film or any part thereof ... either with or without conditions imposed..."). And yet, what about the Board's discretionary leeway in terms of the essence of a particular film? The Ordinance is a

framework Ordinance: It provides for the establishment of a Board and empowers that Board to authorize or withhold permission for the screening of films, with or without conditions. The Ordinance does not instruct us how the Board shall guide itself in deciding one way or another, and what weight it shall attach to its considerations. That which was omitted by the legislature, however, has been filled by case law and common practice.

13. First, we shall all agree that the Board's discretion is not "absolute discretion." Even discretion described as "absolute" is not absolute in fact. HCJ 241/60 *Kardosh v. The Registrar of Companies* [31], at 1162; HCJ 742/84 *Kahana v. The Speaker of the Knesset* [32], at 91-92; HCJ 758/88, 431/89, 2901/90 *Kendall v. The Minister of the Interior* [33], at 527-28); this is all the more so, where the law contains no explicit indication regarding the framework of the authority's discretion. Indeed, the lack of a statutory indication regarding the framework of the authority's discretion never points to the grant of "absolute" discretion. In effect, bestowing absolute discretion to an authority is not compatible with either the rule of law or a democratic regime. Israel is a democracy, governed by the rule of law. This was held to be true with regard to the interpretation of the Ordinance, in other words, the Board is not "entirely free in its considerations," and limitations have been placed upon its discretion. HCJ 146/59 *Cohen v. The Minister of the Interior* [34] at 284. (Silberg, J.), and in *Laor* [14], at 429 (Barak, P.).

What, therefore, is the framework of the Board's discretion? What considerations are the Board entitled to bring to bear and which considerations is it not allowed to take into account? Everyone would agree with respect to the following: the Board is entitled to take into account all those considerations intended to bring the statute's purpose to fruition and which seek to maintain the arrangement established by the law. "The fundamental point is that the purpose, for the sake of which the authority was granted, and the objective that it seeks to fulfill, determine its limits." *Id.* [14]. Accompanying this fundamental principle is an auxiliary rule, concerning the issue of whether or not certain

considerations come within the law's purpose. "Lacking a foothold in the wording of the law according to which it is possible to define the scope of the considerations belonging to the matter, the Court will not hurry to contradict the decision of the public body, where the question has diverse aspects, and it is likely to be at the center of a sincere controversy among people of ordinary intelligence." HCJ 92/56 *Weiss v. The Chairman and Members of the Legal Council* [35], at 1595 (Landau, J.). *See also* HCJ 176/58 *Parcel 11 Block 6605 Co. Ltd. v. The Minister of Development* [36], at 1113 (Agranat, J.) This ruling, concerning "the lack of a foothold," was explicitly applied to the authority of Film Review Board; *see* HCJ 383/73 *Avidan v. Gary, The Chairman of the Film and Play Review Board* [37], at 769 (Berenson, J.).

14. And after all this—what is the scope of the Film Review Board's authority? What are the considerations, which it is entitled—and obliged—to set before itself in deciding whatever it decides? Initially, the Board's authority was interpreted with excessive breadth. Thus, to this effect, Justice Silberg stated in *Cohen* [34], at 284:

> It seems to us, without getting into the minutest of detail, that the line of thinking directing the Committee in deciding whether to refuse or cancel a license must be as follows: a film whose screening is likely to offend morality or good taste, or likely to corrupt morals should be disallowed. This is because films today serve as an educational tool. We should therefore endeavor to prevent them from instilling spiritual and cultural values considered by the public to be undesirable.

Over time, the Court added and held that the Board's authority is narrower than originally defined, and that it is not appropriate to use the paternalistic standards of "good taste" or "educational tools." In President Shamgar's words in *Universal City* [10], at 28-29:

> There is concern that the above measure, as defined by Justice Silberg, will be understood in too broad and sweeping a manner. In accordance with the standards that are acceptable to us, essentially in light of the special status enjoyed by freedom of expression for our purposes, we would not, today, find it acceptable to ban a script or film merely because it "infringes on good taste." The Board—and even the Court—are not the guardians of good taste, itself a subjective term. The Court is not responsible for educating theatergoers or movie viewers according to the judges' personal artistic taste. Paternalism of this sort is foreign to our worldview. Rather, only a serious, severe and extreme infringement on a protected value can justify interference with freedom of expression.

The Court further determined that the code word is "public order," *i.e.* the Board's considerations in disqualifying a film—in whole or in part—are supposed to revolve around whether that film harms "public order," in the broad sense of the term. This concept of "public order" is a slippery and elusive concept, and it is no wonder that courts have not defined it precisely and sharply. For our purposes, we can rely on President Barak's words in *Laor* [14], at 430-31:

> We have seen that the Board's authority is to refuse or permit, depending on whether, in its opinion, the performance is likely to harm public order. "Public order," in this context, is not limited to a script the presentation of which constitutes a criminal offence. "Public order" is a broad concept, which is difficult to define, and whose definition varies depending on the context in which it is defined. In the context at bar, public order includes threatening the state's existence, harming the democratic regime, public peace, morals, religious sensibilities, a person's reputation, and fair judicial proceedings, as well as other matters that touch on the issue of public order.

See also President Shamgar's opinion in *Universal City* [10], at 29-30.

"Public order" is a father, and a father generally has offspring. Even after we have familiarized ourselves with many of these offspring, we know that we have not met them all—after all, the very same "public order" also includes "other matters that touch on the issue of public order. *Laor* [14], at 431. *Idem per idem*. I have not said these things in order to criticize; on the contrary. Fundamentally, the concept of "public order" is an abstract framework concept, a concept with an "open texture," an absorbent concept. Although it is not boundless, the outline it creates does not, by its very nature, lend itself to precise definition. "To each generation its seekers" Babylonian Talmud, Tractate Avoda Zara 5a [67]; to each generation its commentators. Furthermore, knowing that the Ordinance essentially does not establish a rigid framework for the Board's considerations; and after we have learned that the concept of "public order" covers a range of flexible areas, we also know that what will apply to us—as we have already said—is the auxiliary rule established by Justice Landau: that, lacking a foothold in the law regarding a framework for its considerations, the Court will not hurry to contradict decisions taken by the Film Review Board where the issue involved is likely to be the subject of a sincere controversy among people of ordinary intelligence.

15. Still, we have not said enough. A long-established theory says that it is possible to learn about the discretionary expanse of an authority by dwelling upon the nature of that particular authority. Thus, for example, where the legislature entrusts a physician with discretion, one can conclude that the discretion is intended to be based on medical considerations. *See, e.g.,* HCJ 193/58 *Rosenberg Orthopedics Company v. The Chief Physician, Department of Rehabilitation* [38], at 1659 (Landua, J.). When a government minister or the government itself is endowed with discretion, the presumption there is that this discretion is broad (though not limitless)—considering the status of the entity with whom the discretion rests. *See, e.g.,* HCJ 162/72 *Kinross v. The State of Israel* [39], at 241-42.

And with respect to the Board? Is the Board's composition indicative of its discretionary expanse? Does its composition tell us something about this Court's ability to intervene in the Board's discretion? The Ordinance itself does not teach us much about the Board's composition. According to Section 3(1) of the Ordinance, the Board is to be composed of "a chairman and several members, including at least one woman," and all of these "shall be appointed from time to time by the Minister of the Interior with the government's approval." *See* The Films Ordinance (Amended)-1948. Even if this provision provides a hint with regard to the Board's place in the civil service system, it appears that there is nothing in the law, capable of telling us much about the composition of the Board and its status. And yet, the Courts have long respected the Board's decisions—after they realized that it has a rich and diverse composition of prominent personalities. These are supposed to represent the public, and the Board's decision resembles the decision of the public. As per Justice Silberg in HCJ 260/60 *Forum Film Ltd. v. The Film and Play Review Board* [40] at 613:

> The Board is a representative public body, which reflects the various opinion prevailing among the public. This being the case, it was given broad powers by virtue of section 6(2) of The Films Ordinance-1927.

An even sharper tone was taken by Justice Berenson in *Avidan* [37], at 771:

> The law is what it is, and the Board is a public body responsible for enforcing it. Its opinion is therefore determinative. I can barely fathom a situation in which the Court will see itself authorized and free to strike down the Board's decision, following its careful and weighty deliberations, to permit or ban the screening of a non-documentary entertainment film. After all, the Board was chosen to represent the public's view in this matter. So long

> as it exists, its opinion must be the determining one. Such is the case when the decision in the matter before us was accepted unanimously, with only two board members being prepared to recommend this film for screening, but only after significant alterations, leaving it unrecognizable. Had the Court intervened in such an extreme case, it would have been tantamount to substituting the Court's critique for the Board's—and this is not for us to do.

Thus, the Board has been chosen to represent the public, and it is its opinion which is determinative. Sitting on the Board are representatives of the public, they are the ones who represent the people—*Vox Populi Vox Dei*. "I can barely fathom a situation in which the Court will see itself authorized and free to strike down the Board's decision, following its careful and weighty deliberations, to permit or ban the screening of a film." Forthright words. To this, Justice Vitkon added:

> I see no reason for us, as a court, to engage in film critiques. Indeed, a decision regarding whether a particular film should properly be screened or not, can only be the fruit of the viewer's taste and worldview. Thus, in vain we ask here what the "reasonable man" would conclude; the search for an objective standard here is futile. If we are at all convinced that films and plays should be subject to review prior to their screening, it is clear that only a body that represents the public, its diversity and views, can be entrusted with this task, not the Court. In this matter to, I agree with my colleague, Justice Berenson.

Similar words were spoken by Justice Landau in HCJ 807/78 *Ein Gal v. The Film and Play Review Board* [41] at 278:

> The respondent Board is endowed with broad discretion to permit or disallow a film, by reason of it being a public body, expressing the public's views.

And thus, in HCJ 243/81 [21], at 426, Justice Landau said: "as a body representing the public, the Board is charged with reviewing films." My colleague, the President, also held in *Laor* [14], at 430, that the Board's authority to prevent the screening of a film, said to offend public order, emanates from "the Board's composition… that is not composed of public servants… but is instead, a 'representative, public body'…"; and here, my brother cites the words of Justice Silberg in *Forum Films* [40]. We shall recall, in closing, Justice Vitkon's statements in *Noah* [26], at 764, regarding the breadth of the Film Review Board's discretion. There, Justice Vitkon criticizes the fact that the Board members were influenced by outside factors:

> My words should not be misinterpreted. I am not saying that the Board members are precluded from taking public opinion into account. In fact, the opposite is true, they were appointed to represent the public, its various sectors and strata. Indeed, the public speaks through their mouths. They are, however, held to decide what is to be screened, and what is beyond the level of tolerance, in accordance with their own discretion.

16. Thus, the law is as follows: the Board's composition is intended to represent—and indeed it does represent—the general public. Board members are not civil servants, but rather, prominent personalities who reflect the mood of the nation. This leads us to conclude that the Board's decisions should be respected. Of course, we will not say that the Board's decision is the be-all-and-end-all of every case, but only in rare instances will we interfere in its decision.

The Board before us is a "representative Board," as were its predecessors. Sitting on it are four journalists, three authors and educators,

two Middle East scholars, four legal experts, a sociologist, three teachers, a police official, and two civil servants. Would it be difficult for us to say that they represent the public at large? Twelve members attended each of the most recent Board discussions. Eight of them requested that certain segments—tiny segments—be cut from the film, whereas four requested that the entire film be disqualified. What good reason is there for us to interfere with the Board's decision?

17. Generally speaking, at this time, we have not found a good and proper reason for interfering with the Board's decision, as did President Barak, who instructed: Lay not thine hand upon the film, neither do thou any thing unto it. *Cf.* Genesis 22:12 [64]

Interim Summary

18. We have seen the framework of the Board's authority and the limits on its discretion. We learned that the Board has acquired the authority to prohibit the screening of pornography and obscene material, and we know that these are difficult to define. The case law that we have reviewed relates that the Court only rarely intervenes in the Board's decisions to disqualify the screening of a film, in whole or in part. In particular, this is so because we know that the Board is a body that represents the public. Against this backdrop, and following an examination of the film before us, our conclusion must be not to interfere with the Board's decision. We are not under any duty to share the Board's opinion. Indeed, if I were a Board member, it seems to me that I would approve the film for screening without any cuts. However, this is not the matter that we have to decide. The legislature granted the authority in question to the Board—to the Board and not to the Court. Suffice it to say that I have not been provided with a good and proper reason to interfere with the Board's decision. In my opinion, the doctrine of separation of powers requires us to refrain from interfering with the Board's decision. We should also remember that the separation of powers is one of the fundamental principles of the rule of

law. This signifies that the Board's decision should remain precisely as it stands.

19. This summary does not appear to reveal any differences of opinion—at any rate, no *decisive* differences of opinion—between President Barak and myself. But it is here that our paths diverge. And, as we bid each other farewell, it is important that we pinpoint precisely the point of our separation.

The Board requests that several segments be deleted from the film, maintaining that screening these particular segments, all of which are "pornographic," "sex segments," "is capable of causing severe, serious, and grave harm to societal sensibilities and public morality." President Barak, for his part, does not examine these specific segments on their merits—either in whole or in part. Moreover, he does not make any effort whatsoever to contradict the Board's qualification of all these segments as pornographic. Thus, our assumption must be that those segments, which the Board sought to delete, individually and all of them together, are pornographic. In effect, this is how my colleague characterizes those segments intended for deletion "which, if taken in isolation, it would be possible to delete, by reason of their being pornographic in nature." *Supra*, para. 21. Consequently, since they are pornographic in nature, it is proper that these segments be cut from the film, and the Board's decision to cut them is, therefore, a decision taken lawfully and within the framework of its authority to delete. How, then, does my brother reach the conclusion that the Board must allow the film to be screened in its entirety, including these same "pornographic" segments? For this purpose, my colleague clings to a two-pronged test, composed of "the work as a whole" and "the artistic value" of the work tests. In traversing this corridor, he would like to escort the film to freedom. Is this possible?

The Two-pronged "Work as a Whole" and "Artistic Value" Test

20. The two-pronged "work as a whole" and "artistic value" test is not new. It finds shelter in our law. The first part of the test is the formal examination of the work, which must be done from the perspective of the "work as a whole." As such, individual segments of the work—those parts that are allegedly "pornographic"—should not be taken in isolation. Were we to do so, the entire piece would be deemed pornographic, as these "unkosher" segments would contaminate the entire work, rendering the entire work "impure." Instead, we probe the piece "cumulatively," as it "came out of the factory," and integrate the allegedly pornographic segments into the rest of the work, itself untainted by pornography. An artistic work cannot be cut to pieces, and we cannot take it upon ourselves to independently probe individual sections. Here ends the formal aspect of the test, this is to say, the "work as a whole aspect." it instructs us to take the work as a whole, as it came into the world, and only in this manner can it be judged.

21. The second part of the test instructs us to proceed as follows: in applying the "work as a whole" test, will it be possible to deem the given piece a work of art, due to artistic value of the work as a whole, beyond those segments tainted by pornography? Are those segments part and parcel of the piece in its entirety, such that they are "swallowed" by the whole? If so, the work will be found to have artistic value: the impurity is deemed to have been absorbed by the whole; the beautiful is deemed to have compensated for the ugly. If, on the other hand, we shall find that the work was only created in honor of those tainted segments, we shall conclude that the work has not successfully passed the "artistic value" test. In the words of Justice Landau in *Omer* [23], at 412:

> Respecting literary material, it is sufficient, for our purposes, to assert that we have before us descriptions of sexual subjects, whose only purpose is to arouse the reader via repugnant filth for its own sake. Such portrayals, in and of themselves, are capable of corrupting morals, as per section 179. On the other hand, we must take an enlightened view which, requires us to

> reconcile ourselves with a certain measure of discomfort according to what is deemed acceptable nowadays, regarding explicit sexual descriptions, provided that these appear as an integral part of a work boasting literary or scientific value, thereby compensating for its pornographic aspect. In such a case, we shall assert, in the words of the United States Supreme Court, that a book having "redeeming social value," shall redeem the obscene from its obscenity.

And in the words of the United States Supreme Court in *Miller* [50], at 24, the issue is:

> [w]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In adopting this test my colleague, President Barak, seeks to examine the film and, in finding that numerous film critics were convinced that the film has artistic value, my colleague concludes that the Board is precluded from censoring the film. My colleague does not judge these segments for himself; in his mind, the film critics' opinions were decisive, leading him to conclude that the Board's decision should be reversed. In his own words, *supra* at para. 18:

> These opinions, which were presented to the Board and to the Court, emphasize that the film does not encourage sexual arousal. On the contrary, it conveys an "anti-pornography" message.

Later on in his opinion, my colleague cites a German court, dealing with a criminal case, stating that the film "not to be pornographic, as it was not intended to sexually arouse the viewer," and agrees with the court's opinion, *see supra* para. 19:

> It seems to me that, in light of the above, the Board should have determined that the film has serious artistic value, which

> precludes its classification as a pornographic film. The Board was presented with a factual basis according to which there was an assessment affirming the film's serious artistic nature. Based on these facts, the Board should have concluded that the film is art.

And, subsequently, in paras. 20-21 of his judgement.

> [t]he test that the Board must employ is the "work taken as a whole" test. One must not scrutinize a number of isolated sections with a "magnifying glass," and ask whether these sections, *per se*, are pornographic. Instead, one must look at the entire work "from a distance" and ask whether this work, which integrates these and other sections, is a film with artistic value. The Board did not perform this examination.
>
> 21. I have concluded that there is no choice but to strike down the Board's decision. Indeed, if the film before us had constituted obscene material, there would have been no room to interfere with the Board's decision. The trouble is, that, according to the facts presented to the Board, the film as a whole is not pornographic, despite sections of it, which, if isolated—and not taken as part of the work as a whole—could be perceived as being so. According to the proper criteria, the Board should have determined that, in view of the differences of opinion regarding its artistic value, the work should be classified as having artistic value. It should have determined that, on the basis of the work taken as a whole test, it is unwarranted to delete sections which, if isolated, could be deleted as being pornographicSo held my colleague, despite the conflicting opinions presented to the board, which, for their part, saw the film as pornographic.

22. To my chagrin, I find myself unable to concur with my brother's opinion. For my part, I believe that the "work as a whole" test does not apply in the matter at bar—it certainly does not apply with the same force that my colleague ascribes to it. Indeed, the same may be said with regard to the test of the work's "artistic value." These two tests—which is really one two-pronged test—were born in another other area of the law. Thus, even if it is possible to import them to the present case, their strength is weakened beyond recognition when applied to the case at bar.

The Two-pronged Test: Invented for Criminal Law

23. A study of the case law setting forth the two-pronged test teaches us that this test—from beginning to end—encircles the concept of "obscenity"; that the concept of obscenity is that which brought about the birth of the case law, because the latter was designed—from beginning to end—to create a fence around the prohibition on "obscenity."

In *Omer* [23], for example, Omer was tried for possession of "obscene material" for the purposes of sale and dissemination, as defined by the criminal law. In *Butler* [62], the subject of the hearing was the indictment of a person for the sale and possession of obscene material, as defined by the Canadian Criminal Code. The case of "*A Book Named John Cleland's Memoirs of a Woman of Pleasures*" [54] (also known as "*Fanny Hill*"), involved a petition filed by the Massachusetts Attorney-General, seeking to declare the book obscene. In *Miller* [50], the deliberations concerned the defendant's indictment for dissemination of "obscene material." *Roth* [49] was also a criminal case: some of the defendants were indicted for the offence of sending "obscene" material by mail, contrary to the Federal Obscenity Statute, and the others were tried, under the California Penal Code, for the offence of possession and sale of obscene or indecent material. The *Grove Press Inc*. [53] case discussed the book *Lady Chatterly's Lover*, the issue being whether the book may be deemed "obscene" and could therefore not lawfully be sent by the mail. This was also the issue in *One Book Entitled Ulysses* [52], where the Court

examined a legal provision prohibiting the importation of "obscene" printed material.

24. In this manner, the two-pronged test revolves around the concept of "obscenity" and its boundaries are constituted by the criminal law and related legal provisions. In the words of Judge Bein in DC (Haifa) 404/82 [46], at 526:

> It is unwarranted. despite the various expressions adopted by the legislature, to distinguish between the "indecent or obscene" test in Section 42 of the Customs Ordinance and the "indecent or obscene" test in Section 12 of the Post Office Ordinance (New Version) and "obscene material" in Section 214 of the Penal Code.

This result, holds Judge Bein—and we concur—is desirable and it involves "the adoption of one standard for all the provisions which are *in pari material* and which are intended to protect—although by different means—the same social interest." *Id*. This interest is to prevent the dissemination of "obscene" material.

25. When the context of the two-pronged test against "obscenity" is set out, its logic and reason are manifest. Take Reuben, who is charged with the crime of disseminating "obscene" material. Reuben admits to disseminating the material but, in his defense, asserts that the material he disseminated was not "obscene." When the prosecution points out the "obscene" segments in the material, Reuben replies in his defense that he did not disseminate those segments individually, but rather as an integral part of the "work as a whole." As he disseminated a whole work—and not segments of a work—"the work as a whole" must be examined. Only if the "work as a whole" is "obscene," claims Reuben, is it possible to lawfully convict him. Reuben further and points to the work's "artistic value," the second prong of the two-pronged test.

Formulated as such, we can understand that the two-pronged test acts as "internal" protection for the crime of "obscenity." In other words, the two-pronged test is intended to determine the precise scope of the crime of "obscenity" Indeed, a work, which possesses, in its totality, "artistic value," according to its very characterization, will therefore not be considered "obscene" material. Art precludes obscenity, and vice-versa. Art and obscenity shall not live under one roof. Essentially, the two-pronged test is meant to serve as a built-in protection within the definition of the crime of "obscenity."

26. As we have seen, the two-pronged test was born and lives in the arena of criminal law. What does my colleague, the President, suggest we do? He suggests that we go to the criminal law, take the test in our hands, and plant it permanently into the considerations which the Board takes into account. We respond with a difficult question: is it indeed possible to draw an analogy between the area of criminal law to the powers—and particularly to the considerations—of the Board? Is the analogy indeed proper and legitimate? The answer, in my opinion, is negative for many reasons. We shall now expound upon these reasons, one at a time.

The Board's Authority is Not Restricted to the Crime of Obscenity

27. To begin with, the Board's authority is not restricted, by law, to obscene material as it is defined under the criminal law. Indeed, "when the Board is convinced that a play features a clear violation of an express penal stipulation in the empowering law ... it must not be a party to a breach of statute and it is entitled to restrain the presentation of the play." HCJ 351/72 *Keinan v. The Film and Play Review Board* [42], at 815 (Landua, J.) However, even if the play does not contain obscene material, and even if the play does not amount to a criminal offence, the Board is entitled to prohibit the screening of a film—in whole or in part—if, in its opinion, the film offends "public order," "public morality," "social morality," and the like. In the words of *Justice Barak* in *Laor* [14], at 430:

> It seems to me that the statute must be interpreted in light of its rationale: the Board's substantive authority is not limited to merely banning those films or plays whose screening would constitute a criminal offence. The statute's language in no way suggests a limitation of this nature. Neither is such a limitation required by the background of this statute's enactment. Indeed, the justificatory purposes underlying the statute are numerous, and include preventing harm to public order, whether the harm in question flows from the commission of a criminal offence or whether it results from an immoral act, or any other act that offends the public as a whole.

To this effect, see also Justice Barak's judgment in *Universal City* [10], at 37 n. 4. Compare with section 6 of the Telecommunications Law-1982, which distinguishes between films whose screening the Board did not permit, and pornographic material referred to by the Penal Law.

If this is the law—and it is—why should we "import" the two-pronged test from the area of criminal law to the area under consideration here? The two-pronged test is not a "modular" test, applicable in all places and at all times; it has adapted itself to criminal law, and therein it resides. What use shall we make of the two-pronged test in the Board's considerations? After all, even if the film does not amount to an "obscenity," the Board is entitled to prohibit its screening— if it harms the public order—as the scope of application of "public order" is broader than the scope of "obscenity."

Limited use of the two-pronged test may also be made with regard to the Board's authority. However, the test's content will differ from its content in the criminal law context. It will somewhat narrow the range of the Board's considerations, but will not enable it—as it would in the context of the criminal law—to determine a verdict. In other words, whereas in criminal law, the two-pronged test has the strength of giants in terms of its ability to immediately negate a transgression, in the matter at

bar, it must be defined modestly, as being, at most, an ordinary consideration, among others.

The Different Functions of the Court in Criminal Law and Film Censorship

28. Second, in being required to interpret a law, the Court stands directly in front of the law, and in the process of determining the proper and correct interpretation of the law, the Court uses the tools at its disposal. The legislature has said its piece, and now the Court must "knead" with the ingredients before it. It is such in the arena of criminal law, and also in the arena of civil law. It will also be so if the Court is required to determine whether someone has committed the offence of "publication and display of an obscene matter," or if he has committed the offence of "offensive publication on advertisements." Those offences are defined, respectively, in sections 214 and 214A of the Penal Law. Those offences are defined as follows:

> 214. *Publication and Display of an Obscene Matter*
>
> a. Every person who commits one of the following acts is guilty of an offence and liable for imprisonment for a term not exceeding three years:
>
> 1. Publishing a pornographic publication or preparing it for the purposes of publication;
>
> 2. Exhibiting, organizing or producing the display of pornography:
>
> A. in a public area or
>
> B. in a non-public area—unless it serves as a dwelling place or serves an association,

whose membership is restricted to individuals eighteen years and older.

b. Every person who uses the image or body of a minor in the publication or display of obscene matter is guilty of an offence and liable to imprisonment for a term not exceeding five years.

214A. *Offensive Publication on Advertisements*

a. Every person who publishes an offensive publication on a placard is guilty of an offence and is liable for imprisonment for a term not exceeding six months or a payment of a fee, three times the amount of the fee provided for in section 61(a)(1).

b. For the purposes of this section, an "offensive publication" shall be considered one of the following:

1. a picture of nudity or a picture featuring a man or woman's private parts;

2. a picture featuring sexual relations or sexual violence, or that contains sexual degradation or humiliation, or that features a person as a sexual object, to be exploited

3. A picture featuring partial nudity, of a man or woman, which offends the public's, or portions of the public's, moral sensibilities, or corrupts public morals, or harms minors or their education;

c. Advertisements shall be defined as—advertising signs placed on the side of roads, inside buses, public transportation, or on their outside of bus stations. This

> also applies to notice boards under the authority and supervision of a locality.

In considering the offence under Section 214 of the Penal Law, the Court meets "obscenity" face-to-face, and must decide whether the publication displayed is an "obscene" publication or not. The same is true for the offence defined in Section 214A, where the Court must decide whether a certain publication features "sexual degradation or humiliation" or if it displays a human being "as a sexual object to be exploited." This is not to say that the Court is precluded from seeking the assistance of expert testimony, for example, in relation to the matter of "the artistic value" of a certain work. At the end of the day, however, it is the court's duty to decide, and it will shoulder the responsibility. The Court is the body entrusted by the legislature to determine the scope of application of "obscenity," and in outlining its own powers it has established the two-pronged test. *Compare* Crim. App. 1127/93 *The State of Israel v. Klein* [43], at 499-501.

And so it is throughout the criminal law. So it is in civil law. It is not so, however, in the matter at bar, and this for two separate reasons, sharpening the difference between the various contexts. First, in the matter at bar, the face-to-face struggle between interests is not encountered. Second, the criterion for the test in the present case does not concern the concept of "obscenity" but rather a different, more general societal standard—pornography, which we dwelt upon in para. 27 *supra*. Moreover, the power to censor films is conferred, first and foremost, not on the Court but on the Board, composed of public servants, and supposed to apply general standards of "public order." In the case at bar, we are not at all referring to the "interpretation" of a statute, but rather to the application of a certain "public order," and the body responsible for that "public order" is the Board. Indeed, unlike the exercise of statutory interpretation, the present case involves the Board—the body entrusted to set the relevant standards, and the discretion with which it is endowed. In light of the above, the Court's role is to *review* the Board's discretion, and

unlike the matter of "obscenity" and criminal law, the Court does not stand directly opposite the law. Fundamentally, the Court, in cases such as the one at bar, is not supposed to decide between the various interests pulling in opposing directions. The subject of the hearing before the Court is *not* the struggle of interests as such. The Court's business is to review the Board's decision, and in conducting this review it is held to observe the struggle of interests through the veil of the Board's discretion.

We do not mean to say, of course, that the Board's discretion is the be-all-and-end-all. Nevertheless, we cannot ignore the fact that the legislature has established a type of "division of labor" between the Board and the Court, and the Court, as a servant of the Rule of Law, is obliged to preserve this "division of labor." We must not treat the discretion that the legislature has imparted to the Board as though it did not exist. We must respect the legislature as well as the Board members, as we explain below.

29. In this context, the opinions expressed by cinematic art experts were poles apart. Thus, alongside experts who praised the film as a work of art, we found critics who saw it as nothing more than a run-of-the-mill porn flick. My colleague believes that the praise bearers have the upper hand, if for no other reason than that we are concerned with freedom of expression. In this context, my brother says, *supra* para. 15:

> It is sufficient that there is an opinion, even if it is controversial, with respect to the (serious) artistic value of a work … Indeed, if it is possible for us to err, we should err on the side of promoting freedom of expression and freedom of artistic creation.

I find it difficult to agree with the above. First, the references my colleague brings in support of his viewpoint are irrelevant to the matter at bar, since all of them concern criminal cases dealing with obscene publications, apart from one reference which revolves around copyrights and certainly does not bear directly upon our matter. Under criminal law, no one would

dispute that differences of opinion regarding the artistic value of a work should be interpreted to the defendant's benefit. Indeed, just as, in criminal law, significance attaches to the work's artistic value—as an element that negates its being qualified as "obscene"—so too does value attach to differences of opinion among the experts. It is arguable that differences of opinion are sufficient to raise a doubt as to whether a certain publication is an "obscenity," and, as such, these differences of opinion are sufficient to bring about the acquittal of a defendant. In the instant case, however, the opposite is true. The underlying assumption is that the film, which is the subject of the hearing, contains pornographic segments, and hence the "burden" is on the applicant to prove that the film as a whole is of an artistic nature. Accordingly, since the onus is on the film applicant, one may contend that differences of opinion regarding the film's artistic value must actually be interpreted to his detriment. We do not, however, believe that this opinion will take us to such far-reaching lengths.

Moreover, as we have seen, the Board has been given discretion in deciding whether to allow or disallow the screening of a particular film. At any rate, the Board is authorized to prefer Reuben's evaluation over Simon's. If even this discretion has not been granted, then what has it been entrusted to do? In other words, in a criminal proceeding, the Court is the body responsible for determining "the artistic value" of a work; and this determination may be based on the testimony of experts on the subject. As an aside, it should be noted that, even in this connection, the Courts have expressed grave doubts, *see, e.g.*, *Omer* [23], at 413-14. However, in relation to a ban on the screening of a film, the Board is the relevant body, and is charged with ascertaining the film's "redeeming qualities." True, the Court will not refrain from interfering with the Board's decision in appropriate cases, but we shall not be able to pass over the Board's discretion as though it did not exist. I fear that my colleague's way leads to a wholesale invalidation of the Board.

An Additional Difference Between Criminal Proceedings and the Proceedings Before the Board

30. Third, criminal law sees in black and white: the accused is either acquitted or convicted. There is no partial-acquittal or partial-conviction with respect to the same charge. Even regarding the criminal charge of "obscenity," it is possible that the Court will either find that the defendant has published an "obscenity" and will convict him, or it is possible that the Court will find that the charge has not been proved and, accordingly, will acquit him. The proceeding follows an "either/or" path. The path pursued by the Board is not so. The Board, for its part, is both competent and entitled to decide "in installments," so to speak, and it is undeniable that the statute has expressly empowered it to "grant ... or withhold authority for, the exhibition or of any film or any part thereof." *See* the Ordinance, § 6(2). We are all aware that this power is characteristic of public law but foreign in body and spirit to criminal law.

Therefore, a permit or license may be granted to parts of a film. This is an express power with which the Board is endowed. By conferring the power to disqualify parts of a film, not only did the legislature place the Board in a different camp from that of the criminal law, but in so doing, the legislature showed us that it is aware of the possibility that parts will be clipped from a film; as if it sought to instruct us that alongside considerations for allowing or disallowing the screening of a certain film, and until the Board decides to ban the screening of a film, it may also consider the alternative possibility of deleting certain parts from the film. Nowadays, we call this "the rule of proportionality." We do not mean to say—nor have we said—that the very conferral of this power on the Board entitles it to make use of this power in any way it pleases. Nonetheless, we have learned that there is no similarity between a film placed on the table of the Film Review Board and the publication of "obscene" material, which is placed before the Court: judgment of the former may be a divided judgment, but not judgment of the latter. Furthermore, the Board's authority to order the deletion of segments from a film is likely to show us that the "work as a whole" test does not have the same force in this context as it does in the area of criminal law. Indeed, the Board's very authority to cut segments from a film illustrates that even if the "work as a whole" is

not pornographic, the Board nevertheless has the power to delete certain segments that it deems unfit for screening, because they are harmful to "public morals"—whether by reason of their being pornographic or almost pornographic, or for any other reason.

Additional Reasons for Not Intervening in the Film Review Board's Decision

31. Fourth, we cannot disregard the striking difference between a book and a film. In *Avidan* [37], at 770, Justice Berenson said that "reading is not similar to an potent visual presentation." Justice Landau also spoke of "the special power of persuasion inherent to visual material." HCJ 807/78 [41], at 278. And in view of the fact that the impact of a film can be greater than that of a book, the Court must naturally respect the Board when it rules as it does, and all the more so when it reaches its decision after holding numerous in-depth discussions.

Furthermore, we are all sensitive to prohibitions on freedom of expression—or to restrictions thereupon—regarding the spoken or printed word. Our sensitivity to these modes is greater than our sensitivity with regard to restrictions imposed on obscene films. As stated by the United States Supreme Court in *Kaplan v. California*, 413 U.S. 115, 119 (1973)[56]:

> A book seems to have a different and preferred place in our hierarchy of values, and so it should be.

It is possible that the traumatic events of the past—books being burnt at the stake—continue to influence us, even in our day. And perhaps there is a different reason for our attitude. It is also possible that our taste—the taste of our sons, grandsons, and great-grandsons—will change. However, at this time, the book and the spoken word have a loftier status than that of the film, and this cannot be ignored. *Compare* A. Rubinstein, The Constitutional Law of the State of Israel 772-74 (1991).

32. Fifth, in general, we can say that the audience that goes to see films is, on average, different from the audience that reads books, and as has been said many times, the audience that watches films—a sector which mainly consists of youth—is exposed to more harmful influences than the audience that reads books. *See, e.g.*, H. Fenwick, *Civil Liberties* 180 (1994). This difference too, *per se*, is capable of enlarging the extent of the Board's discretion, and, in any event, reducing the Court's discretion when intervening in the Board's discretion.

33. One final note: quantity is not converted into quality. But quantity has its own impact, and so it is in the matter at hand. In the case involving *One Book Entitled Ulysses* [52], the court noted

> The erotic passages are submerged in the book as a whole and have little resultant effect.

72 F.2d at 707. Can we say this about the film before us? Certainly not. The segments that the Board would like to see deleted from the film under discussion are not submerged in the film as a whole: the entire film is cut from the same cloth but some segments are more prominent than others. It seems that this factor, too, has an impact on the two-prong test.

Is "Artistic Value" Applicable to this Matter?

34. I summarize before I begin: the two-prong test will not apply to the case at bar, certainly not with the same force that is ascribed to it in relation to the obscenity offences in criminal law. The transplantation of the two-prong test from the area of criminal law to the area of film censorship is out of place.

35. Finally, and perhaps most importantly, in the area of criminal law, it has been held—and rightly so—that a work's "artistic value" is sufficient to extract it from the realm of "obscenity," that the two are mutually exclusive. The situation is different regarding the screening of a film for the public at large. Ultimately, the *real* question in the instant case

does not revolve exclusively around the film's artistic value—as such—but rather around the possible deleterious impact of the film on its viewers. And here, with respect to impact on the viewer, neither the Board members nor the Court itself—and they are the "reasonable men"—are less expert than the art experts. Indeed, the Board members—and, similarly, the Court—can and may be assisted by the opinions supplied by experts in the field, but these opinions shall not be determinative or bind either the Board or the Court. These things were clearly and explicitly stated by Justice Landau in *Omer* [23], at 413:

> [I]n the face of arguments asking us to reconcile ourselves with the publication of material that is generally considered pornographic, by reason of the publication's importance to advancing significant scientific goals, it will be appropriate for the Court to hear expert testimony regarding the publication's scientific value. This, however, is not the case, when the argument advanced is that the work's social value resides is its literary value. Literature is written for the public at large and the author's work is subject to the public's critique. Indeed, while literary review is a respected profession, requiring particular expertise, these reviews are also written for the public, seeking to convince via reasoning understood by any educated person, so that it may be understood with the help of general knowledge alone. Thus, even if experts and reviewers such as these are permitted to testify, in the end, the judge will have to decide for himself, among conflicting opinions, according to his own understanding and knowledge. His consideration of the matter shall outweigh all these expert opinions. This being the case, expert opinions of this nature may be presented to the Court, even in the parties' arguments, and literary experts may be heard.

These words were uttered regarding the submission of expert opinions in a *criminal hearing*, involving the publication of a *book*. All the more so

will this rule apply to expert opinions presented before the *Board*, concerning the screening of a *film*. As noted above, the authority in these matters rests first and foremost with the Board—not the Court. The Court's role is therefore not that of a first instance decision maker, but rather of a body intended to supervise and review other decisions.

36. And so, the law in Israel stipulates, and explicitly so, that it is not a film's "artistic value," which determines whether it harms—or does not harm—"public order," "social morality" and the like, but rather the nature of a film's impact on its viewers. The test is one of *result*, not of art and intention. And in the words of my colleague, Justice Barak in *Laor* [14], at 430-31:

> We have seen that it is within the Board's authority to consent or refuse to hand out a permit, if, in its opinion, displaying the script is likely to offend public order. "Public order," in this context, is not limited to those scripts whose publication constitutes a criminal offence. Rather, "public order" is a broad concept, not easily defined, which changes in function of its surroundings. It can mean threats to the state's existence, harm to the democratic regime, or harm to public peace, morality, religious sensibilities, a person's reputation, or fair legal proceedings. All these are all encompassed by "public order." The relevant test for ascertaining harm to the "public order" is results oriented. Thus, the question is not whether or not the script boasts an adequate degree of artistic value. The Board is not an art critic, nor is it a body responsible for handing out artistic grades. "The sufficiently brilliant or open-minded clerk, capable of and willing to distinguish between good and bad ideas, between good and bad art, has yet to be born." The question is whether presenting the play, be its artistic value what it may, threatens to harm public order. Hence, the question is also not whether the play properly reflects the reality it seeks to

> describe or not. The question is whether presenting the play, be its truth what it may, is likely to harm public order.

The issue of "artistic value" is relevant in determining whether the film is "obscene"—for, after all, "artistic value" pushes obscenity aside—however, regarding the question of a film's impact on "public morality," the issue of art, *per se*, is itself pushed into a corner.

If we adopt this test that has been accepted in the case law, the following conclusion in the matter at bar will automatically emerge: the experts' opinions will have negligible value, meager strength, and the determination regarding the question of the film's impact will depend—in principle—on the Board members' wisdom: as people who emerge from among the people and who represent the people. As one of the members stated at the Board meeting held on August 8, 1994:

> When viewers come to see the film, they do not bring with them experts who will tell them if the film is artistic or not. To a very great extent, we represent the general public, equipped with nothing other than what its eyes can see.

Indeed, the Court will review the Board's discretion, and in performing this review, will be guided by the fundamental principles of Israeli law, including freedom of expression. At the same time, however, the Court will not be entitled to disregard the Board's opinion.

37. A film's artistic value is significant, yet no less importance is attached to conflicting values, namely, the values prohibiting violence, preserving human dignity, "public morality," and the like. Possibly, art experts consider these conflicting values to be inferior to that of "art in its purest form." Who, however, appointed the art critics as supreme judges in the task of striking a balance between the values?

In my view, any evaluation—be it in law, morality, religion, art, politics or daily life—reflects a decision between various interests and

desires, each pulling in their own directions. The decision may be a sharp, one-sided decision or it may reflect a compromise, but in each case the decision will be made by the "authorized individual." For instance, in institutionalized religion, the decisions will be made by the religious clerics; and in art reviews, the art critics, literary critics, theatre critics, film critics, and the like will be those tipping the scales. It is possible that differences of opinion will emerge among authorities; it is possible that it will lead to the creation of schools of thought, a majority opinion and a minority opinion and other variations. Thus, when the "art critic" reviews the value of a certain film, his decision will, in the end, amount to a choice between diverse considerations. However, one way or another, the decision of the "cinema art expert" will be a decision of a film aesthete, a decision made by a person of the arts.

In applying all this to the matter at bar, the following may be said: It seems that no one would disagree that the film *"L'Empire Des Sens"* is one continuous series of sex acts and sex scenes between men and women. It also seems that no one would dispute that the deletion of certain excerpts from the film, and the screening of these excerpts individually, would reveal scenes infected with pornography to their very core. Even cinema art experts would admit this to be the case. Yet, some of these same experts (some—but not all) would also tell us that, in viewing the entire film, we would know that we have seen a piece of art, and thus it is incumbent upon us to judge the film as a whole. I am prepared to respect these art critics' opinion. I shall respect their judgment, and at a cinema art seminar, I shall open my heart to their words. But these art experts' opinion cannot be what determines either the Board members' opinion or our opinion as judges.

There are two reasons for this: First, the way in which the Board members—and the Court—think and judge is different from the way of the art experts. The latter are concerned with art in its simplicity, art in its "purest form," and general aesthetic values can sway their opinion, conquering all scenes infested with pornography. The Board members—

and the Court—have a different viewpoint. This is what the law commands of them, and in making their determination, they must attach different weight to the factors. Their concern is not art in its purest form, but rather the film's impact on those who view it. Indeed, the Board members can and may attach weight to the art experts' opinion; the Board's decision too is a compromise of sorts, and we are all in the same boat. However, in my opinion, the Board members are *prohibited* from attaching *decisive* weight to the art experts' opinion; they must not feel *compelled* to walk in the art experts' footsteps, if only because the role assigned to them by the legislature is different from the role of the art experts. If the Board members embrace the experts' opinion as is, I believe they err in interpreting their role, for the Board's "balancing norm" and the art critics' "balancing norm" are two different norms.

My colleague, the President, does not discuss the content of those short excerpts which the Board wishes to cut from the film. He settles for the film experts' opinion, holding that the judgment should be rendered according to their opinion. This absolute delegation of discretion to film experts in my view is inappropriate. Regardless of our opinion of the Board, we must bow our heads before the law, and the law provides that discretion has been granted to the Board, to it and not to the film experts.

Secondly, even if we had said that the art experts' considerations and the Board's considerations were the same—or even similar—it would still be forbidden for the Board members to delegate their authority and scrape and bow before the art experts' decision. According to the Ordinance, the authority to censor films was granted to the Board—to it and not to any other body. The Board is obligated to exercise "independent" discretion, and it must not delegate this discretion and its authority to others. *See, e.g.*, II B. Bracha, *Administrative Law* 43 (1996).

38. The ensuing conclusion is that the Board is prohibited from adopting the art experts' opinion merely because these opined the way they did. The same has also been said concerning the interpretation of

"obscenity" in criminal law, *see supra*, para. 35. This principle is also, *a fortiori*, applicable to the issue at bar—where the legislature placed discretion in the hands of the Film Review Board.

39. Let us illustrate this point so we may learn from it: there is a play which is praised to the heavens by all the experts. They say it is a classic, a glorious work, pure art, and truth for generations to come. And it is indeed such a play. But there is a problem: in the middle of the play, and as an integral part thereof ("the play as a whole"), the male lead has intercourse with the female lead—on the stage and in full view of the audience. They act precisely as did Adam and Eve before eating of the Tree of Knowledge: they are not ashamed. The play lasts approximately two and a half hours, whereas the sex act lasts only five minutes. It is truly submerged in the play as a whole. Everyone agrees that the sex act is a natural follow-up to what transpires prior to it, and that what comes after it is a natural follow-up to the sex act. The copulation is, without a doubt, an integral part of the play. It is wonderfully interwoven into the play, truly the work of a skilled artist. Everyone (or almost everyone) is happy and generous about it except the Play Review Board (which today is nothing but a legend). It rules that the sex excerpts must be removed from the play, or, at least, the message of the sex act must be conveyed to the audience in a different manner.

Would anyone among us, legal practitioners, open their mouth or raise a finger to object?

Before us is an example of the Board's right to delete excerpts from a film, even if the "film as a whole" is "art." There are "pornographic" segments that are so strong and make such an impression that they stand independently and warrant that the Board address them specifically. Even if the description of the continuous sex acts between Lady Chatterley and the forest ranger is identical to the display we have just watched on the stage, each must be judged for itself: one will not be disqualified whereas

the other may be. Reading is unlike seeing, and the impact of seeing is a thousand times greater than that of reading or merely listening.

40. Furthermore, the petitioners willingly agreed to delete two excerpts from the film. One excerpt depicts the "abuse of the sexual organ of an old man by children," and the other "sexual abuse of a boy." When the petitioners themselves waived the screening of these two excerpts, it obviated the need for us to express our opinion regarding these two parts. The question before us, however, is a question of principle and, in questions of principle, we shall not decide on the basis of the petitioners' stance. These excerpts are an "integral" part of the film. The art experts are full of praise for the film that *includes* those segments, and we have not heard them say that the said excerpts deserve to be deleted. And here, the question presents itself in full force: acceptance of the art experts' view—as per the President's opinion—almost automatically compels us to approve the film as is, including the excerpts featuring children; after all, the experts in the field have spoken. Is this what my colleague truly means? Shall we in fact approve excerpts featuring sexual abuse involving children merely because art experts did not find any flaw with their being integrated into the "film as a whole"? Whereas if it is possible to disqualify these segments—even without the petitioners' consent—what is the difference between these and other excerpts which the Board sought to disqualify?

Prior Restraint vs. Ex Post Facto Restrictions

41. Israel's judicial system examines restrictions on speech through several lenses. These include the *a priori* publication bans (as in the matter before us) and the imposition of *ex post facto* criminal liability in respect of a prohibited publication (for example, for the publication and exhibition of obscenity and an injurious publication, as provided by sections 214 and 214A of the Penal Law). My colleague, the President, characterizes the *a priori* restriction as the most severe, whereas he classifies the criminal

sanction as a restriction of less severity. In his words, in *Universal City* [10], at 35:

> The restriction of freedom of expression takes various forms. The most severe restrictions are those which prevent the expression in advance. An *a priori* ban prevents publication. The damage caused to freedom of expression is immediate. A less severe restriction is the criminal or civil liability of the person uttering the expression. The expression sees the light of day, but the person uttering the expression bears the responsibility "*post-facto*." If the *a priori* prohibition "freezes" the expression, then after-the-fact responsibility "chills" it.

If we were to anthropomorphize freedom of expression and position it at center stage, we would agree that the *a priori* ban is the heaviest restraint of all. That is because an *a priori* ban on a publication prevents its very birth, while the criminal sanction assumes that the publication has already been published. Preventing the publication's birth is more severe, from the publication's point of view, than imposing a sanction on the publisher after the publication has already seen the light of day.

However, it is arguable that it is not the publication, but rather the publisher or author, who takes center stage. Freedom of expression is nothing but a *concept* essentially intended to serve man. Man is the purpose, and freedom of publication is nothing but a tool, a means for improving man's situation. In a country such as ours, given the choice, I would rather that the authorities prohibit me from publishing, thereby forcing me to seek a remedy from a court of law, than that I be tried in criminal court and risk being sent to prison, or even carry on my back the hump known as a "suspended prison sentence," with the conviction recorded in the books. I take the liberty of assuming that my colleague is also of the same opinion, as is everyone else. In the final analysis, a pre-ruling is preferable to an after-the-fact sanction. And since criminal law is the severest of all, the judicial system adds reservations to a conviction

under the law, both in the interpretation of the law, in the amount of evidence which is required for a decision, and in the diligent preservation of the defendant's rights.

In the margins of the issue—and perhaps not so much in the margins—we shall add that, as is known, the United States judicial system meticulously safeguards freedom of expression, particularly when it comes to prior restraints. However, an obscene publication forms an exception to this rule. In the words of J.E. Nowak and R.D. Rotunda, Constitutional Law 1148 (1991):

> The Court has often stated that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Obscenity, however, is one of a few areas of the law in which prior restraint has been upheld.

What is United States Case Law Doing in Israeli Law?

42. Freedom of expression and "public morality." Both these concepts are pleasing to us and we have found them to be good and proper. What shall we do if one pulls northward while its companion pulls southward, and we are caught in the middle, between the two? How should we determine the boundaries of the protected freedom of expression, and how far should we be willing to go in spreading the protection around it? Primarily, the question is not a "legal" question. The tools placed in our hands are too crude and bulky for us to fashion with them clear, distinct legal rules. The tests are general and vague and we would find it difficult to apply them to daily life. The extra-judicial elements in the material before us fill most of the vacuum, and the jurist finds himself roving in a field that is outside his natural province. How, therefore, shall we decide between the opposing views?

Lacking direction from the legislature, we jurists are required—as is our way—to draw analogies from other places, to study fundamental principles, which guide our lives and our judicial system, as well as to

interpret life around us. I have said elsewhere that the judge is the "interpreter of life. *See* M. Cheshin, *Meir Shamgar—A President of Judges; a Justice and a Human Being*, 26 *Mishpatim* 203, 207 (1995-96). If that is so in general, then *a fortiori* is it so regarding a subject that raises fundamental social questions, as does this case.

43. My colleague the President, as well as I, quote from American jurisprudence, from which we seek to derive guidance. In particular, we have referred to the three-pronged theory, established in *Miller* [50], at 24, which instructs us, in the following manner:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Of course, we do not see ourselves bound by American rulings. However, in order to fertilize our country's judicial field, we seek to acquire knowledge from others. As for myself, I must admit that this is not an easy path for me to follow.

A judicial system that is in force in country "X" is analogous to a branch that grows on the trees of life and knowledge in that country. The residents of that country will eat from the fruit of the tree and it is good for them for, after all, the tree grew in their garden and on their soil. In our case, however, since the tree did not grow in our garden and on our soil, how may we eat from its fruit without jeopardizing our health? The law is merely a reflection of social and political life. And if we look into the mirror of strangers, will we not see their faces instead of our own? Indeed, in going towards the stranger, we shall distance ourselves from the

particular and the specific, and bring ourselves closer to the general and the universal. Where is that miraculous apparatus capable of separating the glue between the general and the particular—and how shall we separate those who cannot be separated? After all, the rules in that foreign country are made of a single clay; they did not prepare themselves for a "modular" separation of the elements that comprise them, so that some of them would go for export and some would remain for local consumption only.

Nevertheless, in so far as problem-solving judicial *techniques* are concerned, I do not see any obstacle to seeking assistance from foreign judicial methods. The same applies to *judicial framework* formulae, formulae that are free of substantive content. With regard to norms with substantive content, it would be relatively easy to find analogies in the areas of civil and criminal law. This is even the case in the area of commercial law, and is certainly so in the areas of international commerce. However, our concern here is with society's delicate fabric, its lifestyles, world-view, public morality—substance that grows from the depths of the human soul and society. Can we draw from them without harming ourselves? We should look around us and know that we live in our own world while others live in theirs.

44. In terms of the present case, three factors distinguish between American law and us. First, freedom of expression has gained a formal and unique status in the United States Constitution. Freedom of expression dwells on the mountaintop, and all interests that seek to detract from it must themselves first reach that peak. Only those among them that succeed in attaining the summit will be able to strive against the Sovereign, freedom of expression. That is the point of departure under American law. This is also the reason for certain techniques adopted by the United States courts, such as the ruling that material which is obscene is fundamentally not included in the First Amendment to the Constitution and, in any event, is not granted the protection of freedom of expression. See *Roth* [49] at 1308-09 and *Miller* [50], at 2614-15. Needless to say, all of these

judgments are integrally connected to the social views prevailing in the United States. Consequently we should be cautious not to import into our country principles, which have not been adapted to suit us, or our lifestyles. In Israel, unlike the United States, freedom of expression has not gained a formal supra-legal status. In any case, we would find it difficult to apply rules established in the United States, as if we did not know otherwise. Indeed, in our country, the place of freedom of expression has a place in the sanctuary, but it is not the Holy of Holies itself.

Second, the United States is composed of fifty States, and the law has recognized a certain expanse for each and every state in terms of defining obscene material. This is the second prong of the *Miller* [50] ruling. Thus, the law in the United States has recognized the difference between social life in its various States, and rejected an all-inclusive principle, which would apply to the entire country. This second part of the *Miller* [50] test gives clear expression to the fact that the subject of obscenity is derived from the heart of society, boasting a social dimension that varies from one society to another. Thus, for example, the various American states have broad powers to regulate nonverbal physical conduct in comparison to their authority to prevent the depiction or descriptions of that same behavior. See *Miller* [50], at 2616 n.8. To which of the states in the United States should we liken ourselves? Must we at all resemble an American state at all?

Third, in the United States, the decision regarding whether or not certain material is obscene rests with the jury, the same jury that is supposed to represent the society in which it lives. Indeed, while the jury must be guided by the legal tests established by the Court, the substantive decision is in its hands—as the representative of the people—not in the hands of the Court. Moreover, as we know, the jury does not give reasons for its ruling. The jury is also the body responsible for deciding the issues set out in *Miller* [50], *i.e.* a "division of labor" has been established between the jury and the Court. Is not the analogy to the matter at bar clear? We will provide judicial guidance to the Board, but the Board will

decide what will be exhibited and what will not be exhibited to the general public.

Requiem for the Board?

45. We have dwelt on the inherent difficulty in rendering a decision on a matter such as the one before us, and we shall not repeat what we have already said. This difficulty increases when we consider the permissive nature of contemporary society, and our knowledge of the pornographic material that is incessantly disseminated around us. *See supra*, para. 9. Nevertheless, we cannot ignore the special arrangement established by the legislature in setting up the Board and entrusting it with the decision whether or not a film should be screened to the general public. I regard the "division of labor" between the Board and the Court as being of supreme importance. As I have already noted, this division of labor is similar to that in force in the United States: on the one hand, the Court and the State legislatures establish legal guidelines for disqualifying obscene, and, on the other hand, the jury determines and decides in the cases that arise. The jury is the people, and as we have remarked time and again, so is the Board. There have always been differences of opinion with regard to the subject of "pornography," and we are condemned to live with them in the future as well. However, since the Board was established, we must honor it and we cannot disregard its decisions as though they did not exist. Even if my opinion differs from the Board's—and my opinion is indeed different, as I noted in para. 18 *supra*— the Board's decision is the decisive one.

46. Whether the Board should continue to exist is a separate question. Aware of the problems connected with its existence, the law has more than once delved into the issue of whether the Board should be allowed to continue functioning. Commenting on this matter, Justice Berenson noted in *Avidan* [37], at 770:

> Far be it from me to support censorship of any kind, other than that required for security reasons, public order, and perhaps for the purpose of safeguarding Israel's foreign relations. Censors

> are not always sensitive to the *zeitgeist*, particularly with regard to the younger generation, struggling to rise up and take its rightful place in society and to express its discontents. Every cultural and artistic work, provided that it does not harm state security or turn public order on its head, encouraging the violent overthrow of the political regime, is worthy of being given a chance to prove itself. If it will find favor in the public's eyes, it will flourish. If, on the other hand, it will displease, its destiny will in any event be to disappear in a flash and be relegated to the dustbin of history.

The judges, for their part, have always seen themselves as obliged to obey the legislature. In the words of Justice Berenson in *Avidan* [37], at 770-71:

> The abolition of censorship on films or the narrowing of its sphere of operation are a matter for the legislature, not the Courts, which usually only interprets and implements its instructions, to decide. If I am not mistaken, the Minister of Education and Culture recently decided to recommend that censorship of plays be abolished. Perhaps in our permissive generation we should also think the same about films? However, as noted, this is a matter for the government and the Knesset to attend to. For the time being, the law is what it is, and the Board is the public body responsible for implementing it. Its opinion is therefore the decisive one.

In *Noah Films Company* [26], at 763, Justice Vitkon added:

> We must bear in mind that whether we reject or support the institution of censorship—and it seems to me that it would be difficult to forego it completely—it is the arrangement that the legislature set out. Hence, we must not interfere with the Board's decisions when the true reason underlying our interference is merely—conscious or unconscious—opposition

> to the institution of censorship *per se*. We must be careful not to confuse issues. Abolition of censorship is a matter for the legislature to attend to, if it sees fit to do so, and it is not our role to narrow its boundaries and empty it of all content.

In light of the Board's unique composition, it seems to me that it is as it should be. We should also bear in mind that the Board does not count itself among the government authorities and that the majority of the Board's members are not civil servants. The issue of the Board's existence is a matter for the legislative body to address, and it is the legislative body that is supposed to express the public's inner feelings. Until a change is made in the existing law, we judges should not force the Board to embrace norms that it does not accept. No matter what our personal opinion of the film under discussion; no matter what the opinion expressed by the art experts; the Board has voiced its opinion in a clear manner, and I, for my part, have not found a good reason not to honor its decision. The authority to censor films was granted to the Board in principle, and, in the absence of proven harm to recognized basic values, we shall honor this representative body's decision.

This is the meaning of authority and this is the meaning of review of authority; this is the meaning of the separation of authorities and this is the meaning of respect for the members of the authorities. We do not refer to the respect, which we must have for the Board as an *institution*, when referring to a law, which sets the limits of the institution's authority. The Court is entrusted with interpreting the law. If the Court's interpretation of a statute is different from the interpretation given by the authoritative body, the honor of that body will not be impaired if the Court points to the law's correct interpretation. *See* HCJ 73/85 *Kach Faction v. The Speaker of the Knesset* [44], at 163; HCJ 910/86 *Ressler v. The Minister of Defense* [45], at 490. The position in relation to the Board *members* is different. They were chosen for the job from the very beginning as representative public figures, persons who are supposed to give expression in their decision to the standards of public morality accepted by the general public. Overturning the Board's decision violates the statute's purpose and

may even be interpreted as impairing the Board member's honor. We can see this very clearly in the statements made by the members during Board meetings. For instance, in the meeting of September 11th 1994, Professor M. Sharon noted:

> Even if I will be the only one here of this mind, I will vote that the film be disallowed. I would like the Supreme Court to take the role of censor upon itself. If has already done so in the past, and it is best that we reach the moment of truth … we are not unaware of the Supreme Court's decisions. We, however, employ tests of our own. Here, our test will be clear and straightforward, as we have sat in deliberations a number of times and our feeling for 'near certainty' perhaps differs from the Court's.

And on July 11, 1994:

> We act according to a certain standard, unrelated to one film review or another. We have viewed the film four times, and each time reached the same conclusion, in light of what we saw. We are not an artistic body or film critics—that is not our role. We are a public body, and we see this film as pornographic and for this reason seek to prevent it screening. If the High Court of Justice will see fit to permit it, then so be it. Let the Court then substitute itself for the Board.

In a similar vein were the words spoken by Mr. Y. Markovitz (at the same meeting):

> With all due respect, if the High Court of Justice sees fit to substitute itself for the Board, then let it replace it.

Said Mr. Y. Gutman at the Board meeting held on August 8, 1994:

> If we were to permit the screening of this film as is, we can, to my mind, allow each and every film. We will then deal merely with age limits and not with reviewing content.

And more, and more of these things were said.

47. My colleague, the President, feels that his decision, as he decided it, serves to play down the Board's status, and its powers drift away almost like smoke. In order to placate the Board members my colleague therefore adds that his words should not be understood as though they were meant to render the Board totally superfluous. On the contrary, the Board retains very valuable functions. In the words of my colleague, *supra* para. 16:

> This test does not obviate the need for the Board. It establishes the facts. It performs the assessment.

This food, which my colleague sets before the Board members, is but a meager portion; not only because these functions may be assigned to a clerk, but also when we consider the remainder of the President's words, to the effect that the same assessment which is performed by the Board "is of a constitutional dimension" in that it is "harmful to freedom of expression." In other words, a Court will examine the Board's "assessment" in depth, and in fact: a Court will replace the Board. For reasons, which we have already dwelt upon at length—perhaps at undue length—I find it difficult to agree with my colleague.

48. Ours is a pluralistic society, but even in pluralism, the place of paternalism is not lost. The Board is one expression of paternalism, and as long as this body exists, we are forbidden to dispossess its powers of real content. Had the Board disqualified film segments featuring close- ups of a person's intestines spilling out, or a person whose eyes are being slowly gouged out, it seems to me that we would not have interfered in its decision—even though the film was of an "artistic nature." The Board members feel this way regarding the excerpts that they want to cut from the film, and I have not found any reason why we should interfere in their decision.

We will not bring salvation to the world whether we approve or overturn the Board's decision. However, in the end, the matter that we must decide centers on appropriate social mores and public morality. These cannot be measured or weighed but lie at the heart of our existence. I do not know from whence comes our authority to teach the Board members what the standards of social mores and public morality are. The question is one of conscience, and I will not agree that my conscience is to be considered any purer than theirs. In this vein, it is appropriate to consider the remarks made by a committee set up in the United States to discuss the issue of pornography (The Attorney General's Commission on Pornography), as they are quoted in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) [57], at n. 22:

> The most important harms [of pornography—added by Justice Cheshin] must be seen in moral terms, and the act of moral condemnation of that which is immoral is not merely important but essential. From this perspective there are acts that need be seen not only as causes of immorality but as manifestations of it. Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it.

I fear that the opinion voiced by my brother, the President, is a requiem for the Board. From this day forward, we no longer require public figures, but can be content with a clerk. And so it shall be: films depicting brutal violence or hard pornography will not pose any problem and their fate will be disqualification. Nor will any problem be caused by films such as "*Gone With the Wind*" or "*My Left Foot*." With regard to "in between" films—and they constitute the majority—their fate will be decided according to the opinion of art experts. Pure and simple. This too, of course, is a method of censoring films, and it is worthy of study among the other ways of censorship. However, the question we must ask ourselves is

whether in taking this path we have not, without proper consideration, abolished binding legislation. Irrespective of our opinion regarding the necessity for the Board, the issue of deciding whether or not such a body should exist rests with the legislature, not the Court.

If my opinion were accepted, the *order nisi* would be vacated and the petition dismissed.

Decided in accordance with the President's judgment.

Rendered today, January 9, 1997.