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OBSCENITY LAWS—A SHIFT TO REALITY?

Earl Warren, Jr.*

INTRODUCTION

In a World which is a massive crucible of questioning and change, where critical issues of poverty and war and disease and discrimination scream for solution, it is a peculiar phenomenon that the laws relating to obscenity have suddenly jumped into sharp focus in the eyes of both the public and the legal profession. Having lain relatively dormant and accepted for many years, they now strangely command attention of an unusually intense, and even violent, nature.

The emotional basis for this reaction may be obscure to those resilient few who adjust to change readily or who have early in life adopted a live-and-let-live philosophy. But to the great majority of others, who have been taught that proper conduct is largely governed by a certain number of "absolutes," the battle is very real. To such people, transgressions against what they believe to be the old norms are likely to seem to be a direct assault upon the entire structure of traditionally accepted forms of human behavior. Apparently, the public emphasis on sexual themes in recent years falls squarely into this category.

THE MERGER OF ECCLESIASTICAL AND CIVIL LAW

From a legal standpoint, the fundamental reason for the tension lies in the peculiar merging long ago of two distinct bodies of law—ecclesiastical law and the bodies of laws made by governments to regulate their everyday affairs. Therefore, any discussion of the legal aspects of obscenity must logically begin with an awareness of this fact.

In the days when religious bodies governed the citizens of a region just as much as did the civil authorities, the civil laws were mainly concerned with regulating conduct only as necessary to pre-

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serve reasonable order in the society—while matters relating strictly to morality were left to the workings of ecclesiastical law. However, as the civil governments became more powerful and the political control of the churches waned, the civil law gradually absorbed many of the ecclesiastical laws.¹ In doing so, these religion based laws generally took on a revised nature so as to conform to the enforcement patterns for the civil laws. Hence, a religious law which perhaps called only for “atonement” or “confession” when broken in the ecclesiastical sphere, usually carried a penalty of jail, fine, forfeiture, or worse when it became part of the civil law.²

Unfortunately, in the years since these mergers took place, the members of the legal profession, as well as governments and their citizens, have increasingly come to forget the derivation of the two bodies of laws and the distinctions between them which were once so important. Thus there has been a distinct trend to think of conduct as being legal or illegal instead of in terms of being moral or immoral.

Today, however, when nearly all traditional values and customs are being tested to see whether they are founded in logic and humanitarianism or only in special interest, the earlier distinctions are being consciously or unconsciously bared. And many citizens are insisting that civil laws return to the status of being those which secure an orderly, free and just society, leaving matters of an otherwise personal nature to the desires of the individual and the dictates of his God. Among these citizens are a great number of men of the cloth.

From a practical standpoint, this is difficult to accomplish completely, for there is an unavoidable amount of essential overlapping of the two concepts. And from a human nature standpoint, history indicates that it is virtually impossible—because men and their governments will invariably attempt, to some extent at least, to impose their personal views on others by mandatory compliance with certain civil laws. It is thus an age-old battle. A battle between those who believe in influencing by intellectual persuasion and those who believe in achieving conformity by governmental fiat.

FREEDOM OF SPEECH AND THE FIRST AMENDMENT

Those of us living in the United States have a rare means of challenging both our laws and public attitudes—a means which in

¹ Henkin, *Morals and the Constitution*, 63 COLUM. L. REV. 391 (1963); G. MUELLER, CRIME, LAW, AND THE SCHOLARS 1-30 (1969).

² 2 WHARTON, CRIMINAL LAW 2234-39 (11th ed. 1912); 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883); 4 W. BLACKSTONE, COMMENTARIES (1769).

some cases amounts to a mandate. This is the First Amendment's provisions for freedom of speech. As the cornerstone of any discussion involving the rights of an individual to express his ideas to others, and receive the thoughts of others, it provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³

Although the reference is only to "speech," this was early recognized to include non-verbal conduct which serves as a means of expression,⁴ and there is no apparent vestige of challenge to that proposition today. Hence writings, photographs, movies, paintings, statuary, bodily gestures, and other symbolic conduct are all recognized as being within the purview of its intended scope.⁵

However, it is equally clear that the courts have consistently held that obscenity is not, and never has been protected by the mantle of the First Amendment.⁶ And it is here that the controversy really begins to swirl, for not only does the Civil Law vs. Ecclesiastical Law concept come sharply into play, the efficacy of the First Amendment itself is seriously challenged by how narrowly or broadly the term "obscene" is defined.

If some of the usual dictionary definitions of obscenity were applied (e.g. "disgusting to the senses," "grossly repugnant to the generally accepted notions of what is appropriate") it is obvious that the hallowed free speech provisions of the Constitution would be of little moment, for, in that case, only "generally accepted" ideas would be protected. Particularly onerous is the fact that this would apply to expressions of a religious or political nature as well as to other types of expression. Fortunately, the First Amendment has always been interpreted as obviously carrying more potency than this.⁷ Nevertheless, the laws relating to obscenity rocked along for many years without clear definition (often referring to accounts of such things as "bloodshed" and "crime")⁸ until in the landmark case of *Roth v. United States*,⁹ the scope at last narrowed to matters of a sexual nature and an attempt was made to spell out how it

³ U.S. CONST. amend. I.

⁴ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-05 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁶ *Ex parte Jackson*, 96 U.S. 727, 736-37 (1877); *Roth v. United States*, 354 U.S. 476, 481, 485 (1957).

⁷ *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Bridges v. California*, 314 U.S. 252 (1941); cf. *Dennis v. United States*, 341 U.S. 494 (1951).

⁸ *Winters v. New York*, 333 U.S. 507 (1948).

⁹ 354 U.S. 476 (1957).

should be determined if something was "obscene" in the eyes of the Constitution.¹⁰

Through this ruling, the Court hoped to provide a means of giving viability to reasonable laws relating to the problem, yet preclude them from unduly encroaching upon the sacred ground of the First Amendment. The Court was not unmindful of the public's "hangups" on such matters, and the general desire of the citizenry to keep unsolicited exposure to salacious themes at a minimum.¹¹ Yet it was also well aware of numerous past absurdities which are well illustrated by the notation in a later case¹² that the City of Chicago once censored a Walt Disney movie merely because it showed the birth of a buffalo calf!

THE ROTH FORMULA

Roth set forth a formula—a formula which was an earnest and thoughtful attempt to give guidelines in a highly confused and politically sensitive area. But it is equally apparent that the ruling was not to be a panacea—only the best that the Court could do at that time. Justices Black and Douglas dissented,¹³ Justice Harlan concurred in the result in one issue and dissented in another,¹⁴ and

¹⁰ "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Roth v. United States*, *supra* note 9, at 488-89.

¹¹ "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (See also the concurring opinion of the Chief Justice at 495, and the separate opinion of Justice Harlan at 501-02.) *Roth v. United States*, *supra* note 9, at 484-85.

¹² *Times Film Corp. v. Chicago*, 365 U.S. 43, 69 (1961).

¹³ Justices Black and Douglas felt that "[w]hen we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment By these standards, punishment is inflicted for thoughts provoked, not for overt acts nor anti-social conduct." *Roth v. United States*, *supra* note 9, at 508-09.

¹⁴ Justice Harlan stated, "[m]y basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of 'obscenity' are ignored." *Id.* at 496.

Chief Justice Warren concurred in the results but wanted them limited to the specific facts involved. Thus, although *Roth* became law, it did so with no great enthusiasm by the Court, for not only did it present a wide variety of differing views, subsequent cases¹⁵ were to disclose that even those in the majority did not share exactly the same opinions as to what the majority opinion appeared to say.

Nevertheless, *Roth* has been the foundation for all proceedings since its rendition, and therefore must be the starting point in analyzing where the law stands now. And its "formula" is still mandatory, although how it is to be practically applied, even in the simplest of cases, remains substantially in doubt these thirteen years since its pronouncement.

Justice Brennan, the author of the majority opinion in *Roth*, clearly restated the formula in *Memoirs v. Massachusetts*.¹⁶

We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest.' Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.¹⁷

A. *Prurient Interest*

In the first element, which is that the dominant theme of the material must appeal to a prurient interest in sex, the first real obstacle of workability is encountered in the word, "prurient." The California Legislature has construed it as meaning "shameful" or "morbid"¹⁸ and although this is probably a conceptually accurate approach, both constructions raise problems of interpretation and courtroom application which are typical of all of the definitions thus far put on the word.

"Shameful," for instance, has two distinct meanings, one of which is that the act is repugnant to the observer, while the other means that the act arouses a feeling of shame in the actor. "Morbid" has even more definite pathological foundations inasmuch as its best

¹⁵ Note Justice Clark's concurrence in the Chief Justice's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964). Compare the majority opinion in *Roth*, *supra* note 9, with the majority opinion in *Ginzburg v. United States*, 383 U.S. 463 (1966).

¹⁶ 383 U.S. 413 (1966).

¹⁷ *Id.* at 418 (citation to *Roth* omitted).

¹⁸ CAL. PEN. CODE § 311(a) (West 1970).

known synonym is "unhealthy," and it is equated with "disease" in both medical and common parlance.

Hence at least two of these three meanings have medical overtones, and defense lawyers can legitimately seize upon this to insist that the prosecuting attorney must present expert medical testimony on the subject as a part of his *prima facie* case. Of course, this is a great burden on the prosecution, often an impossible one, and accordingly is usually rejected by the trial judge. But the defense can claim that surely the Court had something in mind other than merely whether or not the observer was shocked by what he saw.

Proceeding further into the area of practical application, we run into the word, "interest"—or more properly the phrase "a prurient interest." Who has such an interest? All of us? Or only certain deviant types? Does a homosexual act in front of a strictly heterosexual audience "appeal to a prurient interest"? Or is it non-appealing? Are we attempting to penalize actions which excite lustful inclinations, or are we attempting to penalize actions which instead create revulsion? Both? The answer is less clear now than it was prior to *Roth*.

We must also determine who that person is who must make the judgment as to whether there is such an appeal. We are told that it is the "average person."¹⁹ Not just the young, or just the old, or just the sophisticated, or just the naive—but *all* of these and a lot more. Sort of a composite type person. Does such a human exist? Or are we merely falling back on one of those legal escape valves we sometimes manufacture in order to avoid reality? It is one thing to say that the "average man," by his nature, will take reasonable care for his safety, and that he will normally use good business practices and otherwise conduct himself in a certain manner in certain situations. But can we honestly expect a handful of people on a jury to know whether or not certain actions will appeal to a prurient interest of unspecified persons of unspecified ages, sexes and cultural and religious backgrounds?

And how, under this mandate, do we treat the wide variety of situations which obviously create completely differing results? For instance, a nude in a nudist colony has a different impact on his observers than does a nude walking the mainstreet of town, yet the formula seems to say that we must nevertheless think of the effect on the same average man in each instance without consideration as to where the conduct occurs.

¹⁹ *Roth v. United States*, 354 U.S. 476, 489-90 (1956); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

At this point, it might be wise to pause and consider whether all this is merely nit-picking. These things are not, of course, merely pulled out of the sky to carp at, for they are issues trial attorneys and trial court judges must wrestle with on a very real day-to-day basis.

"But, after all," we might say (as so many do) "if something is bad, it's bad, and we shouldn't have to worry about such niceties." Or should we? If we were the board of censorship which was squeamish about the Disney movie, the Supreme Court would not think much of us for simply following our gut reaction. And it would be naive to assume that such learned justices agonizing over such a difficult problem would not try to say what they mean.

Naturally, the Court intended that we use our common sense in applying the formula. But "common sense" alone has not solved its inherent dilemmas. Justice Stewart delighted everyone when he said he could not define hard-core pornography, but he knew it when he saw it.²⁰ However, at the enforcement level we are not permitted the luxury of this approach, for the Court obviously would not evaluate the Disney movie in the same way as the Chicago censors did, and the records are replete with cases where the substitution of personal leanings for constitutional requirements at the trial level has resulted in convictions and reversals with all their traumatic consequences.²¹

Hence it is patently apparent that those who deal in the enforcement of obscenity laws must diligently attempt to ascertain not only the true ingredients in a formula such as that of *Roth*, but their respective dosages.

B. *Community Standards*

Assuming then that we somehow get by the first element in the formula, we must next determine if "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."²² This has generally been interpreted to mean that the act or material must go "substantially beyond" existing community standards of "candor" for that type of representation.²³

Immediately, we are faced with the problem of what is meant by the "community," and here we run into a fiction which is almost

²⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

²¹ *Winters v. New York*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952).

²² *Roth v. United States*, 354 U.S. 476, 489 (1956).

²³ *In re Giannini*, 69 Cal. 2d 563, 572, 72 Cal. Rptr. 655, 661-62 (1968).

as perplexing as that of the mythical "average man." For it is not the immediate community which most people think of—namely, their town and its environs—but probably at least the entire state,²⁴ and it may even be much larger than that.²⁵

Little quarrel can be made with the proposition that it would be wrong to allow a certain community to unreasonably label as criminal certain conduct which is proper elsewhere. But neither is it reasonable to expect sheltered communities to readily adapt to the more bizarre conduct of the "wide-open" communities.

And when a huge state like California is involved—where there are the most rural of communities and the most cosmopolitan, and every conceivable degree of sophistication in between—the task of determining a statewide standard is one of incredible magnitude and highly doubtful potential success. The same, of course, would also be true of a national standard.

Beyond that, we have a problem as to whether we are talking about a standard which relates to what takes place within the physical borders of the community, or whether we are really talking about an environmental community—namely what the people within the community are exposed to.

In many places, a very straight-laced city in State A lies adjacent to a very libertarian city in State B, and the citizens in each city are just as much exposed to the goings on in the other city as they are to those of their own. Therefore, it is legitimate to ask if it serves the constitutional mandates, in this age of great mobility, to rely on the tenuous environmental importance of historical lines of political demarcation.

Going deeper into the thicket, we run into the phrase "standards of candor," and must ask if we are talking about what "exists," or only what is "accepted"? Certainly it is not in keeping with our American way of life to suppress a form of otherwise legitimate expression merely because it is looked unfavorably upon by the majority. Yet simply because something undesirable has negligently been allowed to exist is not reason to give it sanction. So again we are faced with a requirement which, no matter how interpreted, does not accurately take into account the various cultures, conditions and attitudes which are present in any specified inhabited area.

As a last ingredient of this second part of the formula, we note that the complained of conduct must go "substantially beyond" the

²⁴ *Id.* at 577, 72 Cal. Rptr. at 665.

²⁵ See the diverse opinions in *Jacobellis v. Ohio*, 378 U.S. 184, 192-94, 200 (1964).

existing standards.²⁶ While this is an understandable attempt to give further protection to the constitutional freedom of thought and expression, it does suggest that the boundaries of obscenity can be nibbled away by going "a little beyond" but not "substantially beyond." It suggests that the standards will gradually become more and more relaxed, regardless of the fact that there may come a point at which the welfare of the entire system will be seriously jeopardized by further inroads.

C. *Redeeming Social Value*

Finally (assuming that we successfully traverse the mazes of the first two elements) we come to the no-man's land of the requirement that the conduct or material must be "utterly without redeeming social value."²⁷

The first curious thing we note about this point is that it violates the general rule that the prosecution must prove every element of the offense in order to present a *prima facie* case.²⁸ For, of course, it would be patently absurd to require the prosecuting attorney to speculate in this regard by even beginning to attempt to prove that the matter or conduct is totally devoid of any value.

While this procedural quirk is perhaps really not too bothersome, we do face a problem of fantastic latitude in interpretation and application, for the term "social value" is terribly imprecise and carries different meanings to different people. The usual response tends, in human nature, to be an emotional one—namely that if a person is sufficiently offended by what he has observed, he is not likely to be willing to see any value in it even if considerable value truly exists. And yet, we are told that, no matter how overwhelming the damning evidence is on the first two elements, such evidence cannot overrule the effect of existing social value. If value exists, the matter is automatically not obscene.²⁹

Although court decisions following *Roth*³⁰ have virtually erased any viability to the word "redeeming," it strangely remains in the formula and in the instructions the judge must give the jury. And the issue is also very unclear as to how far the trial judge must go in making an independent determination of the existence of social value.³¹

²⁶ *In re Giannini*, *supra* note 22 at 572, 72 Cal. Rptr. at 662.

²⁷ *Roth v. United States*, 354 U.S. 476, 484 (1957).

²⁸ 1 WITKIN, CALIFORNIA CRIMES §§ 88, 90 (1963).

²⁹ *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1963).

³⁰ *Id.* at 920, 31 Cal. Rptr. at 812-13.

³¹ *See* Annot., 5 A.L.R.3d 1158, at 1190-91 (1966).

The concept additionally snags upon the question of "social value to who?" This is frequently raised when psychiatrists testify that exposure to pornography is helpful in the treatment of certain patients, thereby implying that obscenity intrinsically has some social value. Is this enough to give protection to materials which have no such value to the rest of the population? If not, how large must the benefitted group be before the material or conduct becomes constitutionally acceptable?

THE UNWORKABILITY OF THE PRESENT APPROACH

All these questions about the formula remain essentially unanswered. Naturally, individual defense attorneys, prosecutors, policemen and judges have personal opinions as to what some of the answers should be, but there is nothing approaching unanimity on any point, and a well-handled case is likely to bring most of them into serious dispute.

The legal result is that cases of alleged obscenity are extremely difficult to prosecute, to defend, and to preside over, and the cost to the taxpayers is huge. With this goes a disproportionate amount of publicity, a rising of public frustration, and, not infrequently, attempts by legislative bodies to meet the problem by enacting repressive and constitutionally defective laws.³² In short, it is historically apparent that the formula falls far short of providing a workable solution to the problem of handling what we now term obscenity.

These failings are not pointed out by way of criticizing the thoughtful efforts of the courts to define what is obscene, for the formula is probably as good a one as could be devised for this purpose. But they are noted by way of illustrating the unworkability of this overall approach to the problem, and by way of suggesting that another approach is both desirable and necessary.

A DIFFERENT APPROACH

The correct tack is simply to abandon the concept of labeling any particular act or material as inherently obscene, and instead determine whether it is actionable within the context of how it is employed. It is not a new concept—just one we seem too timid to fully adopt.

It would far better protect the constitutional principles we

³² *Times Film Corp. v. Chicago*, 365 U.S. 43, 69 (1961) (dissenting opinion by Warren, C.J., joined in by Black, Douglas, and Brennan, J.J.).

operate upon, and yet at the same time give more effective protection against those unwarranted activities which so disturb the citizenry. And it would additionally help alleviate the dilemma created by the question as to what extent a government may go in attempting to legislate the morals of its subjects.

Happily, the concept also squares with the natural inclinations of human nature, and is consistent with what governments and their citizens *actually* do in the everyday conduct of their affairs. For example, nudity on a public street is taboo, yet we tolerate it in nudist camps. Naked models and racy plays are old hat in college classes, yet we don't allow them in grammar schools. The "dirty joke" may be commonplace in meetings of men's clubs, but distinctly out of line in mixed meetings. A book like the *Kinsey Report* would certainly never be labeled as pornographic today, yet if pandered to young children, it would raise the ire of most everyone.

The list could go on and on, hypocrisy after hypocrisy. Not hypocrisy within the context of human nature, but hypocrisy within present legal concepts. For, in the logical application of putting labels on matter as such, if that naked model in the college art class does not offend the fictional "average man" in that fictional "community," then he or she does nothing "obscene" by sitting in the grammar school art class. And, conversely, if the off-color joke is offensive to the mixed group, then it is legally wrong for mature males to tell it to each other.

No approach to the problem will be totally effective or as efficient as we would wish—and, in fact, some of the concepts and problems of *Roth* must necessarily be included. But it should be remembered that there are existing laws governing human conduct which we have lived gracefully with for many, many years, and which, if amplified a bit and applied to this problem, could far better accomplish what we need to achieve in the regulation of obscenity than do the laws we are now using for this purpose.

Nuisance

We have, for instance, the laws of "nuisance," which, though often cumbersome in application, have considerable potential for meeting many of the problem areas in a realistic manner.³³ Such laws give maximum leeway in the area of personal conduct, but at the same time provide the means of abating that conduct if it goes beyond what is legally permissible.

³³ For an excellent treatment, see Comment, *Obscenity: The Pig in the Parlor*, 10 SANTA CLARA LAW. 288 (1970).

The opponents of this approach can rightly claim that it is very difficult to enjoin threatened offensive activity, and that by the time the conduct is stopped, the "damage" is often done. Also that there usually isn't a workable "penalty" which attaches so as to prevent further such activity.

But it must be conceded that it is a unique area of the law from the standpoint of procedural fairness and from the standpoint of the fact that the issues are usually tried in very close proximity in time to the inception of the complained of conduct. Also, it cannot be denied that, more than any other established procedure, the laws of nuisance faithfully adhere to the constitutional abhorrence of "prior restraints" of freedom of expression.

Disturbing the Peace

There is also a very intriguing possibility in those quaint old laws which are generally classified in the category of "disturbing the peace." Although rather imprecise, somewhat vague, and usually archaic in language, they have flourished in every community since the inception of the Nation because of a need for them, and because they peculiarly recognize the vagaries of human nature.

In legal analysis, there is often little to recommend them, yet they have constantly proven their worth and therefore probably represent an important phase of "natural law." Since it is this very element which is now lacking in our approach to obscenity, and since somehow these half-forgotten laws once did a pretty fair job of regulating lewd conduct, they ought to be looked at again from a conceptual standpoint.

California provides that:

Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person, by loud or . . . tumultuous or offensive conduct . . . or uses any vulgar, profane or indecent language within the presence or hearing of women or children . . . is guilty of a misdemeanor. . . .³⁴

Like all such laws, it is imperfect, leaving ambiguities in definition and scope. But it nevertheless very firmly puts the spotlight on conduct and willfulness, and upon the effect the conduct actually achieves or is likely to achieve. And when compared with more modern legislative attempts to meet the problem, it looks very good indeed.

For example, nudity in California is now largely penalized by

³⁴ CAL. PEN. CODE § 415 (West 1970).

a re-enacted "disorderly conduct" law³⁵ and by a revised "indecent exposure" law.³⁶ Conviction under either statute requires subsequent registration as a sex offender.³⁷

Hence, it is disorderly conduct to engage in ". . . lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."³⁸ There is no consideration as to whether there are observers, or likely to be observers, of the conduct involved—just the question (1) whether the conduct is "lustful," "lascivious," "immoral" or "wanton"³⁹ and (2) whether it takes place in a "public place."

What if the conduct occurred in the center of a deserted national forest? What about the young couple that parks at the end of a deserted country road and engages in sex play?

The same concern is even more applicable to the first part of the indecent exposure statute which condemns anyone who "[e]xposes his person, or the private parts thereof, in any public place. . . ."⁴⁰ With not even a requirement of lewdness, how do we view a troop of Boy Scouts innocently skinny-dipping in a lake in the center of that remote forest?

The exposure statute goes on to add another catch-all provision: ". . . or exposes his person in any place where there are present other persons to be offended or annoyed thereby. . . ."⁴¹ What if someone (as many do) goes to a theater expecting to be "offended"? And isn't there a great distinction between a person being "annoyed" or even "offended" and involuntarily having his "peace" disturbed?

Assault and Battery

Another possibility is to expand the concepts of assault and battery. California defines a criminal assault as ". . . an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"⁴² and a battery as ". . . any willful and unlawful use of force or violence upon the person of another."⁴³ These definitions do not substantially vary from the patterns which exist in a rather universal form throughout the world.

³⁵ *Id.* § 647.

³⁶ *Id.* § 314.

³⁷ *Id.* § 290.

³⁸ *Id.* § 647(a).

³⁹ *People v. Babb*, 103 Cal. App. 2d 326, 229 P.2d 843 (1951).

⁴⁰ CAL. PEN. CODE § 314(1) (West 1970).

⁴¹ *Id.*

⁴² *Id.* § 240.

⁴³ *Id.* § 242.

Again, these are well-tested laws of exceptionally long-standing application⁴⁴ which have successfully dealt with man's unfortunate tendency to frequently use unjustified physical violence on his neighbors. If extended so as to adequately encompass assaults of a visual and audible nature, as has been done in the case of civil assaults and batteries,⁴⁵ these laws could well help fill one of the greatest gaps now existing in the obscenity field—namely, the need to protect people from being unconscionably preyed upon by those who deal in sex themes.

Thus it could be actionable, as a battery, if a patron of a theater or tavern was not warned of the heavy sex theme of the entertainment inside before he entered. And it could be actionable to sell the *Kinsey Report* to young children, or otherwise assault a nonconsenting person with a sex theme going beyond what is normally tolerated and expected in such situations.⁴⁶

⁴⁴ 3 BLACKSTONE, COMMENTARIES *120; 4 BLACKSTONE, COMMENTARIES *216; 2 BURDICK, LAW OF CRIME § 338 (1946).

⁴⁵ R. PERKINS, CRIMINAL LAW 107 (2d ed. 1969); W. PROSSER, LAW OF TORTS 32-52 (3d ed. 1964); 1 RESTATEMENT (SECOND) OF TORTS § 46 (1965); *South-eastern Greyhound Corp. v. Graham*, 69 Ga. App. 621, 26 S.E.2d 371 (1943); *Ft. Worth & R.G. Ry. v. Bryant*, 210 S.W. 556 (Tex. Civ. App. 1918); *Birmingham Ry., Light and Power Co. v. Glenn*, 179 Ala. 263, 60 So. 111 (1912).

⁴⁶ In *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969), there was an interesting joinder of the three concepts (nuisance, breach of peace, and assault). The defendant had been convicted under a statute which made it unlawful to use "profane language" or "indecent and obscene words" in a public place. The question before the appellate court was whether the statute was constitutional, and to this the Court replied:

That portion of [22 D.C. Code § 1107 (1967)] which makes it illegal for any person "to curse, swear, or make use of any profane language or indecent or obscene words" is on its face extraordinarily broad, so broad in fact that it would allow punishment of the hapless stonemason who, after crushing his toe, innocently utters a few relieving expletives within earshot of a public place. . . .

. . . .

Both the facts of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)] itself and the cases which followed it, indicate that the circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed. Apart from punishing profane or obscene words which are spoken in circumstances which create a threat of violence, the state may also have a legitimate interest in stopping one person from "inflict[ing] injury" on others by verbally assaulting them with language which is grossly offensive because of its profane or obscene character. The fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others. . . . We therefore conclude that Section 1107 would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which threaten a breach of the peace. And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under "contemporary community standards" so grossly offensive to members of the public who actually overhear it as to amount to a nuisance. *Id.* at 644-46.

Adoption of these concepts would basically allow mature, consenting adults to expose themselves, if they so desired, to matters now considered obscene, but would far better protect them from sex themes they would not want to be exposed to. It would give a freedom of choice which is not now present because of the constant uninvited deluge of such themes in the mails, periodicals, theaters, stores, and nearly every facility and media utilized by the public.

Those who desired to disseminate a sexual theme would do so at their peril—not at a risk of having the theme declared inherently bad, but at a risk of assaulting someone, or, as in the case of children, creating a degree of risk of harm which is too high to be tolerated.

Hence, legitimate expression could be better protected, the citizen's right of privacy could be enhanced, and a definite lessening of the present tensions should occur. Additionally (and this is a point quite important to priests, ministers, rabbis, and others who educate and counsel in matters of religion) there hopefully would be a substantial return from the present unnatural reliance on the concept of "legal-or-illegal" to concepts of "right-and-wrong."

THE FUTURE

Is there hope that the law may eventually shift over to this new course? The answer must be guarded, for it is a most difficult transition to make. But there are signs which give a basis for cautious optimism.

Roth was the product of widely diverse opinions, and therefore, did not close the door to later modification. Nor did any of its authors abandon an open mind on the subject—as is amply illustrated by their decisions in subsequent cases. So, although *Roth* has survived, there has been a distinct branching off which now appears to be leading in the direction of judging the use of the matter instead of the matter itself, and which, if continued, could form the main channel of legal thought in the area.

The first big breakthrough came in *Ginzburg v. United States*⁴⁷ where the Court introduced a new element. It said that matter which is not obscene, as such, can be rendered obscene if pandered in a commercial manner.⁴⁸

Although the prosecution conceded that the publications themselves were probably not obscene, the defendant was convicted under

⁴⁷ 383 U.S. 463 (1966).

⁴⁸ *Id.* at 467-71, 474-76.

a federal statute which made it a crime to knowingly use the mails for the mailing or delivery of any ". . . obscene, lewd, lascivious, or filthy book, pamphlet . . . or other publication of an indecent character. . . ." ⁴⁹

Upon reaching the Supreme Court, Ginzburg, the editor of several publications including a magazine called *Eros*, found himself tripped up by such things as the fact that the magazine bore the provocative postmarks of two little Pennsylvania hamlets called "Intercourse" and "Blue Ball." Because of such evidence, the Court simply held that it was apparent that the intent of the defendant was solely to minister to the baser passions of the reader.

Justices Black, Douglas, Harlan, and Stewart dissented vigorously,⁵⁰ but the majority decision was written by Justice Brennan, the author of *Roth*, and therefore must be considered as an amplification of that earlier decision and not an abandonment of it.

In short, then, the Court said that a course of conduct can be actionable, even though the basic subject matter involved is not obscene, and even though no individual element of the conduct is itself obscene.⁵¹ But, while the ruling was a shock to many who viewed it as an erosion of the First Amendment, it actually had the effect of raising the converse question as to whether it might be possible to utilize "obscene" matter in a nonactionable way.

⁴⁹ 18 U.S.C. § 1461 (1964).

⁵⁰ Justices Black and Douglas adhered to their previously expressed beliefs that government lacks the constitutional power to "put any type of burden on speech and expressions of ideas of any kind [as distinguished from conduct] . . ." Ginzburg, at 476. Justice Black further felt that the case's new guidelines were ". . . so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him." *Id.* at 478.

Justice Douglas added, ". . . a book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it." *Id.* at 482. Further, "I find it difficult to say that a publication has no 'social importance' because it caters to the taste of the most unorthodox amongst us. We members of this Court should be among the last to say what should be orthodox in literature However plebian my tastes may be, who am I to say that others' tastes . . . have no 'social importance'?" *Id.* at 491.

Justice Harlan stated that "[n]ow evidence not only as to conduct, but also as to attitude and motive, is admissible on the primary question of whether the material mailed is obscene. I have difficulty seeing how these inquiries are logically related to the question whether a particular work is obscene." *Id.* at 497.

Justice Stewart felt it was unfair to convict the defendant of "pandering" when he was not charged that way, and concluded, ". . . there is even another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his 'sordid business'. That is a power the Court does not possess." *Id.* at 501.

⁵¹ *Ginzburg v. United States*, 383 U.S. 463, at 465-66, 474-76 (1966).

Then along came *Stanley v. Georgia*⁵² which held that a person may possess obscene matter and not be liable therefor until he does something else with it. Justice Marshall, in delivering the majority opinion, flatly stated that neither *Roth*, nor the Court's decisions subsequent to it, ever involved prosecution for mere possession of obscene materials, but instead dealt with the power of government to "... prohibit or regulate *certain public actions* taken or intended to be taken with respect to obscene matter."⁵³

Having thus cast a different light upon *Roth* than was apparent before, the majority held that the Constitution gives a right to receive information and ideas, regardless of their social worth, and that this right is "fundamental to our free society."⁵⁴ Further, the opinion contained the pervasive statement that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."⁵⁵

Stanley has also been widely claimed to stand for the proposition that a state may never prohibit mere possession of obscene matter on the ground it may lead to antisocial conduct, but this blanket interpretation may be a bit premature. First, the Court conceded that there is always the danger that obscene material might fall into the hands of children, or that it might intrude upon the sensibilities or privacy of the general public. But it found that, "[n]o such dangers are present in this case."⁵⁶

Secondly, the Court's precise ruling was that, although the states have power to regulate obscenity, "... that power simply does not extend to mere possession by the individual in the privacy of his own home."⁵⁷

And lastly, it must be noted that although Justices Brennan and White concurred in the result, they did so on the basis of unlawful search and seizure, not on the grounds stated in the majority opinion. As architects of many of the earlier decisions in the field, their absence in the majority in this case may carry considerable significance in projecting the probable results of the many cases which will seek to amplify the ruling.

The argument is now being made that if there is a constitutional right to "receive," then there must also be a right to dis-

⁵² 394 U.S. 557 (1969).

⁵³ *Id.* at 561 (emphasis added).

⁵⁴ *Id.* at 564.

⁵⁵ *Id.* at 566.

⁵⁶ *Id.* at 567.

⁵⁷ *Id.* at 568.

seminate; and it is here that the battle will be most intense. One federal trial court has already ruled that if there is a right to possess obscene material, there is a right to buy it and receive it, and this means that the federal government cannot constitutionally prosecute a seller for sending such materials to a consenting adult through the mails.⁵⁸

It is a likely extension of *Stanley* that at least private dissemination will be held to be protected in most cases, but the line between public and private dissemination will be most difficult to draw—and the results of even private transfers as between some individuals (e.g. from adult to child) could be noxious.

In any event, *Stanley* takes a giant step toward saying that all the circumstances of the individual case must be considered, and that mere classification of matter as obscene or not obscene is only one factor to be considered in determining whether the course of conduct is actionable or not.

The opinion also puts heavy stress upon the right of privacy—at least from the standpoint of “unwanted governmental intrusions into one’s privacy”—but does not quite reach the important question as to how far government may go in protecting the individual from intrusions into his privacy by commercial and other private interests. However, in spite of language which frowns heavily on any governmental action which seems to be aimed at controlling what ideas its citizens might receive, *Stanley* does not appear to preclude governmental action which is reasonably designed to give citizens a freedom of choice as to what ideas they may elect to receive or reject.

CONCLUSION

Therefore, out of all the turmoil and trial and error which we have had to endure in this difficult area, a pattern of workability appears to be forming as great legal scholars and practical men courageously wrestle with the immense problems inherent in the subject matter. And it is to the great credit of most of them that they have remained receptive to new ideas and change, and have carefully avoided being absolutist in their initial theories.

Because of these attributes, the law on the subject has not vacillated in recent years, but has built upon itself and gradually

⁵⁸ *United States v. Letha*, CRS-884, Memorandum and Order filed April 29, 1970, United States District Court for the Eastern District of California. *See also* *Karalexis v. Byrne*, 360 F. Supp. 1363 (D.C. Mass. 1969). *But see* *Marvin Miller, Covina Publishing, Inc. v. United States*, Court of Appeals, Ninth Circuit, decision filed September 16, 1970, (No. 23935) which shows reluctance to extend *Stanley*.

metamorphosed instead of making disruptively abrupt changes. The landmark case of *Roth*, for example, is still valuable, and, in fact, has gained viability with each succeeding interpretation, even though it now bears little resemblance to what we originally thought it to be.

As the law progresses in this field, it is apparent that it more and more squares, not only with the Constitution and with the natural laws of man, but also with the historical concepts of jurisdiction between ecclesiastical and civil law. The judiciary thus finally appears to be working on a true course, and it is hoped that legislators and members of the executive branch of government will follow suit and not encumber or deter this trend by advocating and enacting unconstitutional or unworkable laws which run counter to it.