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Obscenity: The Pig in the Parlor

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COMMENTS

OBSCENITY: THE PIG IN THE PARLOR[1]

Since its decision in *Roth v. United States*[2] thirteen years ago, the United States Supreme Court has been constantly searching for the formula of obscenity regulation most consistent with our first amendment freedoms. This comment will explore the traditionally offered constitutional, practical and philosophical arguments supporting obscenity regulation and reveal their manifest inapplicability to the present American socio-political setting. The author will also examine the impact of *Stanley v. Georgia*[3] on state regulation of obscenity and show why this decision heralds the arrival of the "nuisance theory" as the only constitutionally permissible approach to obscenity regulation.

It seems appropriate to begin with that frequently articulated anathema—"[O]bscenity is not within the area of constitutionally protected speech or press."[4] The Court has apparently reasoned that if the material is in fact "obscene,"[5] the states are free to regulate such matter by virtue of their "police powers,"[6] unimpeded by any first amendment concepts and limited only by the due process requirements that the regulation be definite and not arbitrary or capricious. In the past the judicial scrutiny has not extended to such considerations as the purpose of the regulation or the existence of any "clear and present danger" of unlawful action or other evil consequence. Nor has there been any balancing of interests between the states' right to regulate and the "interest of the

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[1] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), where Mr. Justice Sutherland commented that "[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

[2] 354 U.S. 476 (1957).

[3] 394 U.S. 557 (1969).

[4] Roth v. United States, 354 U.S. 476, 485 (1957). *See also* Ginsberg v. New York, 390 U.S. 629, 635 (1968); Jacobellis v. Ohio, 378 U.S. 184, 186-87 (1964); Smith v. California, 361 U.S. 147, 152 (1959).

[5] As defined by *Roth* and its progeny: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957). Under the *Roth* definition "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 wihout redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966). Note, however, that the scope of this comment is not necessarily limited to this particular definition of obscenity.

[6] *See* extended discussion in text *infra* accompanying notes 48-54.

speaker, or in the interest of society in his freedom to speak."[7] Obscenity simply *was* not constitutionally protected.[8]

However, in *Stanley v. Georgia*,[9] the Court retreated[10] from its prior position and held that obscenity is, at least to a limited extent, protected by the first amendment and "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[11] Under authority of a search warrant, police officers searched Stanley's home for evidence relating to his suspected bookmaking activity. They found no wagering paraphernalia, but while searching an upstairs bedroom, the police did find three reels of eight-millimeter film. They viewed the films, concluded that they were obscene, and arrested Stanley. Stanley was later convicted of violating Georgia law which proscribed "knowingly hav[ing] possession of . . . any obscene matter . . . ."[12]

In reversing Stanley's conviction, Mr. Justice Marshall, writing for five members of the Court,[13] sought to distinguish *Roth*[14] and all other similar cases on the ground that they all involved some form of *public distribution* of obscene material and not mere private possession. The Court reasoned that the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society"[15] and, consequently, private possession of obscene material is protected by the first amendment, supplemented by a right of privacy. The key to the decision lies in the Court's recognition of the "right to receive" obscene material. *Stanley* cannot be dismissed as a mere privacy decision, since the Court spoke un-

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[7] Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 397 (1963).

[8] For a typical state court interpretation of its power to regulate obscenity, *see People v. De Renzy*, 275 A.C.A. 419, 79 Cal. Rptr. 777 (1969). The court said: "Obscenity, in whatever form, is wholly unprotected by the free speech guaranty of the First Amendment. . . . The several states are free to regulate and suppress such matter by virtue of their constitutionally reserved police power . . . [a]nd courts will not hesitate to enforce any valid law against obscenity." *Id.* at 422, 79 Cal. Rptr. at 778.

[9] 394 U.S. 557 (1969).

[10] For a similar interpretation of *Stanley*, *see Stein v. Batchelor*, 300 F. Supp. 602, 606-07 (N.D. Tex. 1969), *appeal pending*.

[11] 394 U.S. at 568.

[12] GA. CODE ANN. § 26-6301 (Supp. 1968).

[13] Justices Douglas, Fortas, Harlan, Marshall and The Chief Justice for the majority. Mr. Justice Black concurred on the ground that all obscenity legislation violates the first amendment. 394 U.S. at 568. Justices Stewart, Brennan, and White also concurred, but upon fourth amendment grounds. 394 U.S. at 569.

[14] Roth v. United States, 354 U.S. 476 (1957). The Court upheld the constitutionality of 18 U.S.C.A. § 1461 (1952) and Roth's conviction thereunder for *mailing* an obscene book and obscene advertising circulars.

[15] 394 U.S. at 564.

equivocally in terms of first amendment freedoms and even characterized the privacy factor as an "added"[16] consideration.[17]

The Court recognized that obscenity regulation does involve some suppression of the individual's first amendment freedoms of speech and press. Thus, the states' right to regulate obscenity pursuant to their police powers must be analyzed in juxtaposition with the individual's first amendment freedom of expression which includes the "right to receive information and ideas, regardless of their social worth."[18] More importantly, *Stanley* marks a departure from the "rational basis" approach to state regulation of obscenity.[19] Still, the most far-reaching implications of the *Stanley* decision arise from the fact that the Court examined the purposes behind obscenity legislation and evaluated the states' interest in the suppression of obscenity. Although the Court spoke in the context of the proscription of private possession of obscene material, its analysis is equally applicable to the states' absolute ban on the public distribution of obscene material.

Traditional Justifications for Obscenity Regulation

In *Stanley* the State of Georgia offered, and the Court rejected, the contention that the justification for obscenity regulations existed in the states' interest in the prevention of "deviant sexual behavior"[20] which may be incited by exposure to obscene material. In rejecting this argument, the Court said that "[t]here appears to be little empirical basis for that assertion."[21] The Court also pointed out that if the state's aim is to prevent antisocial conduct arising out of exposure to such literature, it could, "in the context of private consumption,"[22] achieve its aim through the ordinary and less restrictive deterrents of education and punishment for harmful conduct.[23] It must be noted here that this same criticism of excessively restrictive deterrents is equally applicable to the states' absolute prohibition of public distribution of obscene matter.[24] Similarly, "[i]t is unlikely that the evidence is any greater that contact with

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16 *Id.*

17 *See also,* Michelman, *The Supreme Court 1968 Term,* 83 Harv. L. Rev. 7, 151 (1969).

18 394 U.S. at 564.

19 *See Ginsberg v. New York,* 390 U.S. 629, 641-43 (1968), where the Court held with respect to obscenity's effect upon children that empirical evidence is inconclusive, but that it was "not irrational" for the legislature to find a causal connection to harmful effect and therefore the Court's inquiry was at an end.

20 394 U.S. at 566.

21 *Id.*

22 *Id.*

23 *Id.* at 566-67.

24 *See* text *infra* accompanying notes 82-85.

obscenity through public distribution leads to harmful conduct."[25]

Georgia's other argument was based on the proposition that the state has a "right to protect the individual's mind from the effects of obscenity."[26] This proposition was characterized by Professor H. L. A. Hart as "paternalism—the preservation of people against themselves,"[27] and it is the same concept that excited the invective of John Stuart Mill in his essay *On Liberty*.[28] The Court, in *Stanley*, summarily disposed of this argument as nothing more than an "assertion that the state has the right to control the moral content of a person's thoughts."[29] This, the Court argued, "is wholly inconsistent with the philosophy of the First Amendment."[30] Mr. Justice Marshall characterized the first amendment guarantees as "not confined to the expression of ideas that are conventional or shared by a majority."[31] Similarly, the Court's analysis in this regard is applicable to all obscenity laws. Since no state has the right to control the moral content of an individual's thoughts, it is immaterial whether the state seeks to achieve this end by making private possession of obscene material a crime or by absolutely prohibiting the public sale and distribution of such matter.

The above arguments are by no means exhaustive. Professor Hart[32] presents two theses which have been proffered in the past as an explanation and justification of the regulation of obscenity in general. One he described as the "moderate thesis" and the other, the "extreme thesis." The "moderate thesis" stands for the proposition that "a shared morality is the cement of society; without it there would be aggregates of individuals but no society."[33] Under this rationale, the state is justified in attaching criminal sanctions to immorality because it has a right to preserve its own existence as an organized society; immorality, like treason, is something which jeopardizes a society's existence.[34] Proponents of this rationale often make reference to history showing that "the loosening of moral bonds is often the first stage of disintegration."[35] However, it seems manifestly unreasonable to analogize deviation from ac-

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25 Michelman, *supra* note 17, at 150.

26 394 U.S. at 565.

27 H. L. A. HART, LAW, LIBERTY, AND MORALITY 31 (1963).

28 JOHN STUART MILL, ON LIBERTY ch. 5, 114-141 (The Liberal Arts Press, N.Y. 1956).

29 394 U.S. at 565.

30 *Id.* at 566.

31 *Id., quoting,* Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959).

32 H. L. A. HART, LAW, LIBERTY, AND MORALITY 31 (1963).

33 *Id.* at 48.

34 *See* DEVLIN, THE ENFORCEMENT OF MORALS 13-14 (1965).

35 *Id.* at 13.

cepted standards of morality, not involving harmful conduct, to something like treason which necessarily threatens the existence of society. Professor Hart points out that "no reputable historian has maintained this thesis, and there is indeed much evidence against it."[36] As a proposition of fact, he says, "it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes."[37]

The "extreme thesis" is a variant of the concept of "enforcing morality as such."[38] "[E]nforcement of morality or its preservation from change [are] valuable apart from their beneficial consequences in preserving society."[39] Under this theory, it is not necessary that immoral acts harm anyone directly or even weaken the moral cement of society. Instead, enforcement itself is of intrinsic value.[40] This particular rationale seems patently absurd in terms of its application to the American political system. Are we so concerned with the preservation of the *status quo* that we are willing to forego compliance with one of this nation's more fundamental premises which accepts the view that the institutions of this society, whether they be positive morality, the military-industrial complex, or motherhood and apple pie, are subject to criticism and peaceful change? It would seem that any argument offered to justify enforcement of morality simply for enforcement's sake would have to fall by the wayside when balanced against an individual's first amendment freedoms.

The foregoing analysis should make it clear that the traditionally offered purposes behind obscenity legislation are not sufficient to justify the imposition of restrictions by the state on the individual's first amendment "right to receive" ideas. This conclusion follows whether the restriction be in the form of proscribing mere private possession or in absolutely banning obscene material from public sale and distribution.

The Right to Receive and the Right to Distribute

If, as the Court in *Stanley* indicates, freedom of speech and press include the "right to receive information and ideas, regardless of their social worth,"[41] then how can the state frustrate that right by absolutely banning obscene material from public distribution

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36 Hart, *supra* note 27, at 50.
37 *Id.*
38 *Id.* at 49.
39 *Id.* at 82-83.
40 *See* Hart, *supra* note 27, at 49.
41 394 U.S. at 564.

and thereby make it impossible for the individual to receive such material? It is axiomatic that the "receipt" of material is an integral part of the "distribution" of it, and if the former is protected, it logically follows that some protection must also be afforded to the latter.[42]

This concept was recognized by the Court in *Martin v. City of Struthers*.[43] The Court struck down a municipal ordinance which prohibited door-to-door distribution of handbills on the ground that not only was the ordinance an infringement upon the freedom of expression of the distributor, but also an infringement of the rights of those property owners desiring to receive the information contained in the handbills. This principle was also recognized by Mill. Referring to the peoples of many states who had prohibited the public sale or distribution of fermented drinks, he said: "[p]rohibition of their sale is in fact, as it is intended to be, prohibition of their use . . . [and] the state might just as well forbid him to drink wine as purposely make it impossible for him to obtain it."[44]

Thus, there necessarily exists a corollary to the right to receive obscene material, and that lies in the right to distribute it. It cannot be denied that obscenity is a form of expression. The Court recognized this fact when, in *Stanley*, it said that the first amendment guarantee "is not confined to the expression of ideas that are conventional or shared by a majority. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."[45] The Court further pointed out that "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."[46] Thus, the Court has recognized that obscenity is at least partially countenanced by the first amendment, contrary to the indication of some of its earlier decisions. Nevertheless, the pragmatist will argue that the panderer and peddler of smut is concerned only with providing entertainment and reaping financial benefit from his debauchery and is not at all concerned with the expression of ideas. But it would be extremely injudicious for the Court or any other

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42 *See* Michelman, *supra* note 17, at 151-52.

43 319 U.S. 141 (1943). *See also Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), where Mr. Justice Brennan (concurring) said: "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right."

44 MILL, *supra* note 28, at 108-09.

45 394 U.S. at 566, *quoting*, Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959).

46 *Id.*

body, public or private, to sit *ex cathedra* and decree that this "debauchery" is not simply the individual's peculiar form of expressing his discontent with the existing institution of positive morality.[47]

THE POLICE POWER

Recognizing that obscenity problems do, in fact, involve first amendment concepts, obscenity's delicate regulation must be analyzed with an awareness that first amendment freedoms have traditionally enjoyed a hallowed position in our society.[48] Only under the most exigent circumstances does the Constitution tolerate an abridgement of those rights. Mr. Justice Holmes proposed that those circumstances are met only when the words are "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[49] Nevertheless, it is widely argued that the states may prescribe regulations to promote the public health, safety and morals by virtue of their constitutionally reserved "police powers." But what are the "police powers" of a state?

That imprecise and impalpable phrase, the "police power," has been the subject of varying and diverse judicial interpretations. For example, Mr. Chief Justice Taney in 1847 referred to the states' "police power" with regard to the regulation of interstate commerce as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[50] Similarly, in the *Slaughter-House Cases*,[51] Mr. Justice Miller said: "This power is and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and

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[47] The American Law Institute's concern (Model Penal Code § 207.10 Tent. Draft #6) as well as the Court's concern in *Ginzberg v. United States*, 383 U.S. 463 (1966), with the commercial aspects of the transaction and/or the seller's pecuniary motivation are subject to sharp criticism. If one does in fact have a right to receive obscene material, how can the state limit that right to situations where the individual acquires the obscene matter by means of non-commercial transactions? The fact that the distributor enjoys a pecuniary remuneration should not make the transaction any more objectionable, much less the subject of criminal sanctions. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 316-28 (1968).

[48] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937). Mr. Justice Cardozo regarded freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327. *Accord*, even *Roth v. United States*, 354 U.S. 476, 488 (1957), where the Court said: "[c]easeless vigilance is the watchword to prevent . . . erosion [of first amendment rights] by Congress or by the States."

[49] Schenck v. United States, 249 U.S. 47, 52 (1919).

[50] The License Cases, 46 U.S. (5 How.) 504, 582 (1847).

[51] 83 U.S. (16 Wall.) 36 (1872).

social life, and the beneficial use of property."[52] It has also been said that "[w]hatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to . . . the preservation of good order and the public morals."[53] In 1894 Mr. Justice Brown offered a definition more in keeping with today's trend when he declared that the police power would "include everything essential to public safety, health, and morals."[54]

A state legislature's determination that its particular regulation is a proper exercise of the state's police power is not final.[55] However, the Court has been hesitant to strike down such regulations as being contrary to the due process clause of the fourteenth amendment. In the area of economic regulation, the Court has seemingly limited its inquiry to whether the state had a "rational basis" for believing that the regulation was reasonably necessary for the public welfare. In holding that it is within the state's police power to fix the price of milk, the Court, in *Nebbia v. New York*,[56] said: "[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and the means selected shall have a real and substantial relation to the object sought to be attained."[57]

However, when analyzing a state's exercise of its police power with regard to personal liberties, and especially first amendment liberties, the Court's inquiry is not so limited. In *Board of Education v. Barnette*,[58] the majority opinion ably articulated the preferred position[59] of our first amendment freedoms when it said:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much

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52 *Id.* at 62.

53 Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877).

54 Lawton v. Steele, 152 U.S. 133, 136 (1894).

55 *Id.* at 137, where the Court said that the legislature's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

56 291 U.S. 502 (1934).

57 *Id.* at 525.

58 319 U.S. 624 (1943) (compulsory flag salute case).

59 There has been a split within the Court with regard to the question of the preference of our first amendment rights over property and other constitutional rights. For approval of the "preferred position" doctrine *see* Breard v. Alexandria, 341 U.S. 622, 650 (1951) (Mr. Justice Black dissenting); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Jones v. Opelika, 316 U.S. 584, 608 (1942) (Mr. Chief Justice Stone dissenting). *Contra,* Ullmann v. United States, 350 U.S. 422, 428 (1956); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Mr. Justice Frankfurter concurring); Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

> more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger. . . .[60]

Nevertheless, Mr. Justice Marshall, in *Stanley*, stated that "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."[61] What, then, are the limits of the states' power to regulate obscenity? It is not here contended that the first amendment freedoms of expression are absolutes and that no burden may legitimately be placed upon them.[62] Rather, since one does have the "right to receive" obscene material and there exists a concomitant right to furnish such material,[63] the state can abridge those rights only where there is present a sufficient state interest outweighing the individual's weighty first amendment freedoms.

SUFFICIENT STATE INTERESTS

As has been discussed above, the traditionally offered purposes justifying obscenity legislation do not furnish that sufficient state interest. Both the "protection of the mental health of the community" rationale[64] and the "prevention of harmful conduct incited by exposure to obscenity" rationale[65] were rejected by the Court in *Stanley*. Similarly, the "cement of society" argument[66] lacks empirical proof and the argument characterized by Professor Hart as the "extreme thesis"[67] is manifestly inapplicable to the American political scene. What, then, are those sufficient state interests in the case where state legislation prohibits all public distribution of obscene material and thereby effectively abridges the individual's first amendment "right to receive information and ideas, regardless of their social worth"?[68] Or to posit the interrogatory in Holmesian terms, where are the circumstances that "create a clear and present

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[60] Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

[61] 394 U.S. at 568.

[62] *Cf.* dissenting opinion of Mr. Justice Black in Ginzberg v. United States, 383 U.S. 463, 476 (1966).

[63] *See* text *supra* accompanying notes 41-45.

[64] *See* text *supra* accompanying notes 26-31.

[65] *See* text *supra* accompanying notes 21-25.

[66] *See* text *supra* accompanying notes 32-37.

[67] *See* text *supra* accompanying notes 38-40.

[68] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

danger that they will bring about the substantive evils that . . . [the states have] a right to prevent"?[69]

The only constitutionally permissible answer to that inquiry lies in the "nuisance theory." Mill felt that the only purpose for which society could rightfully interfere with the liberty of action of any member of a civilized community, against his will, was *to prevent harm to others*.[70] He said, "his own good, either physical or moral, is not a sufficient warrant. . . . Over himself, over his own body and mind, the individual is sovereign."[71] "Harm to others" is the heart of the nuisance theory and it is the only substantive evil that the states have a right to prevent.

Practical Applicability of the Nuisance Theory

The application of the nuisance theory to obscenity would allow the states to regulate obscenity in order to prevent it from being thrust upon the unwilling or falling into the hands of children. While one does have a right to receive obscene material, no one has a right to foist it upon those likely to be affronted or alarmed by it. Freedom of speech affords no greater protection to the individual who thrusts obscenity upon the unwilling than it does to the individual who would "falsely shout fire in a theatre."[72] Similarly, the state has the right to prevent obscene material from falling into the hands of children. Even Mill recognized this principle when he qualified his statement regarding the individual's sovereignty over his own mind[73] by specifically excluding children: "Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury."[74] In light of the immaturity, impressionability and the naïveté of children, they are incompetent to consent to exposure to obscenity. Along this same line, Professor Louis Henkin points out that "our society recognized the authority of parents to educate their children, and the state may protect and support the right of parents to impose their morality on their children."[75] Thus, even where the parents' morality calls for their childrens'

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69 Schenck v. United States, 249 U.S. 47, 52 (1919).

70 Mill, *supra* note 28, at 13.

71 *Id.*

72 Schenck v. United States, 249 U.S. 47, 52 (1919).

73 *See* text *supra* accompanying note 71.

74 Mill, *supra* note 28, at 13.

75 Henkin, *supra* note 7, at 401. *See also Ginsberg v. New York*, 390 U.S. 629 (1968), where the Court said: "The legislature could properly conclude that parents . . . who have this primary responsibility for [their] children's well-being are entitled to support of laws designed to aid discharge of that responsibility." *Id.* at 639. *But cf.* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

exposure to obscene literature, the parents themselves could obtain the obscene material for the benefit of their childrens' "education." The important factor here is that the decision permitting exposure would be made by someone with the capacity to consent.[76]

The nuisance theory has not gone unnoticed by the Court. In 1967 a per curiam opinion[77] by the Court alluded to a nuisance theory. In reversing several convictions, two of which involved newsstand sales of obscene material, the Court said: "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[78]

The great value of the nuisance theory's application to obscenity law lies in the fact that it would maintain the precious and delicate balance between the individual's first amendment freedoms and society's right to be free from unwanted exposure to obscene material. The Court, in *Stanley*, hinted that an absolute ban on public distribution may be justified because of "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."[79] However, that *dictum* is by no means determinative of the ultimate issue of the applicability of the nuisance theory to obscenity legislation. The propriety, indeed the constitutionality, of an absolute ban must be analyzed in light of all relevant criteria.

Under the nuisance theory, it would be neither necessary nor desirable to absolutely prohibit the public sale or distribution of obscene material. Instead, the state would be justified in taking only those steps reasonably necessary to prevent the substantive evil that they have a right to prevent, *i.e.*, nuisance. Not all types of public distribution intrude upon the individual's right to remain free from unwanted exposure to obscene material. For example, an indoor theater showing a film previously indicated as obscene would not thrust obscene material upon anyone, but simply afford the means by which individuals might exercise their "right to receive information and ideas, regardless of their social worth."[80] Contrariwise, the pig *is* in the parlor when the obscene films are shown at

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[76] *See* Ginsberg v. New York, 390 U.S. 629 (1968). The Court said: "Moreover, the prohibition against sales to minors does not bar parents who desire from purchasing the [obscene] magazines for their children." *Id.* at 639.

[77] Redrup v. New York, 386 U.S. 767 (1967).

[78] *Id.* at 769.

[79] 394 U.S. at 567.

[80] *Id.* at 564.

an outdoor theater. The legislature could achieve its aim by simply proscribing the sale and distribution of obscene material to minors and by regulating its public exhibition in a manner consistent with the individual's right to be free from unwanted exposure. Professor Herbert Packer suggests that the latter aim might by attained by the adoption of some special form of identification, like the skull and crossbones, which would distinguish obscene literature from less offensive material.[81]

The states will undoubtedly argue that the absolute ban on public distribution is necessary to prevent obscene material from falling into the hands of minors or being thrust upon the unwilling. An analogous argument was presented in *Stanley*, where the State of Georgia insisted that the prohibition of mere possession was necessary to facilitate the enforcement of its valid obscenity laws.[82] To this, the Court responded that the mere ease of administration of otherwise valid criminal laws cannot justify interference with first amendment rights which are so "fundamental to our scheme of individual liberty."[83] Likewise, it would seem that less restrictive deterrents would be available to the states in that they could punish any abuse of public distribution if it became a nuisance.[84] Consequently, if the only sufficient state interests in regulating obscenity are the protection of children and the prevention of obscenity from being thrust upon the unwilling, the conclusion is inescapable that a complete ban on public sale and distribution would be too restrictive. Although an absolute ban would undoubtedly ease administration, that consideration is inconsequential when balanced against the individual's first amendment "right to receive" obscene material.[85]

CONCLUSION

Full expression and disclosure of all facets of life is the essence of the first amendment freedoms. Obscenity is, in the final analysis, a means of conveying ideas, whatever their social worth, and those ideas should not be restricted by the political, religious, or moral

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81 PACKER, *supra* note 47, at 326.

82 394 U.S. at 567.

83 *Id.* at 568.

84 *See* text *supra* accompanying notes 22-23.

85 *See* concurring opinion of Mr. Justice Brennan (joined by Mr. Justice Goldberg) in *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964), where it was noted, with reference to the legislative policy aspects of the problem, that "state and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children rather than at totally prohibiting its dissemination." *Accord*, State v. Settle, 90 R.I. 195, 156 A.2d 921 (1959).

dictates of the majority.[86] Unfortunately, the relevant inquiry with regard to existing obscenity legislation really seems to be "whether government can espouse one moral code as against another and apply sanctions against those who write or speak against the norm."[87] Judge Learned Hand saw the need for judicial review of morals legislation when he said: "Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies."[88]

California Penal Code section 311.2[89] makes it a misdemeanor to knowingly exhibit, distribute, or offer to distribute, or possess with intent to distribute or exhibit or offer to distribute, any obscene matter. This statute and all similar statutes should be legislatively revised or constitutionally construed by the courts to read: Whoever knowingly exhibits or distributes any obscene matter to minors or otherwise exhibits or distributes such obscene matter where there exists a clear and present danger[90] that (1) it will be thrust upon the unwilling and/or (2) fall into the hands of minors, is guilty of a misdemeanor.

Obscenity is as much entitled to protection as any other form of expression, and similarly it is subject to reasonable regulation if it becomes or threatens to become a nuisance.

Ronald Hayes Malone

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86 WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 28-29 (1958).

87 *Id.* at 62-63.

88 LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

89 "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor." CAL. PEN. CODE § 311.2 (West Supp. 1970).

90 The Court in *Roth* rejected the requirement that there exist a "clear and present danger" that exposure to obscene material will incite anti-social conduct. Instead the Court simply said that "obscenity is not protected speech." 354 U.S. at 486. However, in light of the holding in *Stanley*, this comment's proposed "clear and present danger" test (propounded in terms of nuisance) is in no way impaired by *Roth*.