

1-1-1969

Obscenity: A Compromise Proposal

Larry M. Elison

Professor, University of Montana School of Law

Gary L. Graham

University of Montana School of Law

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Larry M. Elison and Gary L. Graham, *Obscenity: A Compromise Proposal*, 30 Mont. L. Rev. (1968).

Available at: <https://scholarworks.umt.edu/mlr/vol30/iss2/1>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

ARTICLES

OBSCENITY: A COMPROMISE PROPOSAL

By Larry M. Elison* and Gary L. Graham

Restrictions on free speech must be viewed with suspicion; restrictions in a system based on a concept of ordered liberty require meaningful guidelines. The following material suggests a new method of attack based on apparent Supreme Court attitudes, general social attitudes and the diversity of opinion in our Nation.

From Sir Charles Sedley's self exposure¹ to Stanley's self indulgence² the United States Supreme Court has been digging deeper and deeper into the quagmire of obscenity. The result is near total lack of predictability. The cause lies in the nature of the subject matter and the method of attack as well as the number of opinions in each decision.

Two hundred years after an English Court found Sedley guilty of obscene conduct the U. S. Congress passed its first obscenity law.³ This law barred obscenity in the mails. In the same decade, the English Courts formulated a definition of obscenity which was to last many years. Lord Cockburn, in *Regina v. Hicklin*, declared, "I think that the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."⁴ Ultimately this standard was adopted by the U. S. Courts.

In subsequent decisions much language has been added without corresponding clarification. Judge Learned Hand suggested that the term "obscene" should describe the critical point in the compromise between candor and shame as judged by the community standards.⁵ Judge Andrews, in *Halsey v. New York Society for the Suppression of Vice*,⁶ stated that the work must be judged as a whole. Judge Woolsey, in dealing with the James Joyce novel, *Ulysses*,⁷ said that the material

* Professor of Law, University of Montana Law School.
A.B., Idaho State College; LL.B. University of Utah; S.J.D., University of Michigan;

¹The *King v. Sir Charles Sedley*, 1 Keble 620 (K.B. 1663). Sedley also hurled bottles of 'offensive liquid' from the balcony he exposed himself from. Sir Charles was fined and imprisoned for a week for these imprudent actions.

²*Stanley v. Georgia*, 89 S.Ct. 1243 (1969).

³13 STAT 504 (1865). For a short history of the Act see PAUL AND SCHWARTZ, *FEDERAL CENSORSHIP, OBSCENITY IN THE MAILS*, New York: The Free Press of Glencoe, 1961. Pages 17-18.

⁴L.R. 3 Q.B. 360 (1868) at 371.

⁵*U.S. v. Kennerly*, 209 Fed. 119, 121 (1913). Judge Hand, in spite of his dissatisfaction with the Hicklin test, felt obliged to use it.

⁶234 N.Y. 1, 136 N.E. 219, 220 (1922). Judge Andrews indicated that even the Bible might be considered obscene if isolated passages were determinative.

⁷*United States v. "Ulysses"*, 5 F.Supp. 182, 184 (1933), *Aff'd* 72 F.2d 706.

must stir the sexual impulses or lead to sexually impure and lustful thoughts in the person with average sex instincts.

As the Court became increasingly concerned about the scope and vitality of First Amendment freedoms new protective shields were constructed. A unanimous Court held unconstitutional a Michigan statute which prohibited publishing materials tending to corrupt the morals of minors.⁸ Such a statute would reduce the adult population of the state to reading only that which would be fitting for children.

The unanimity of the Court was shattered in that same year when it was faced with the *Alberts* and *Roth* cases.⁹ Justice Brennan noted magnanimously that sex was not *per se* obscene. The new language for obscenity was 'whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest'.¹⁰

The *Jacobellis* case¹¹ defined the community standard in the *Roth* test as national rather than local.

Finally, in 1966 the Supreme Court edged closer to a new approach, but without sureness or clarity. In *Memoirs of Fanny Hill*¹² Justice Brennan qualified *Roth* by saying that if pandering was present in a close case, the requirement that the material be utterly without redeeming social value might be satisfied by taking the panders' evaluation at face value. The *Ginzburg* case¹³ emphasized that, "Where the purveyors' sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity."¹⁴

In *Redrup v. New York*,¹⁵ the Court cautiously added to the new approach, looking to the right of privacy to support their decision. "In none was there any suggestion of an assault upon the individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."¹⁶

And where does the Supreme Court now stand, Not only is the area of obscenity without contour but the Court is without a core of agreement. The individual opinions of the different Justices have been summarized by Professor Magrath.¹⁷

⁸*Butler v. Michigan*, 352 U.S. 380 (1957).

⁹*Roth v. United States*, 354 U.S. 476 (1957).

¹⁰*Id.* at 489.

¹¹*Jacobellis v. Ohio*, 378 U.S. 184 (1964).

¹²*A Book v. Attorney General*, 383 U.S. 413, 420 (1966).

¹³*Ginzberg v. United States*, 383 U.S. 463 (1963).

¹⁴*Id.* at 470.

¹⁵386 U.S. 767 (1967).

¹⁶*Id.* at 769.

(1) **Justices Black and Douglas:** All material is constitutionally protected except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests.

(2) **Justice Stewart:** All material is constitutionally protected at both the state and local level except hardcore pornography.

(3) **Justice Harlan:** All material is constitutionally protected at the federal level except hard-core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it is salacious and prurient.

(4) **Justices Warren, Brennan, and Fortas:** Material may be suppressed both by the state and the federal governments when prurient appeal, patent offensiveness, and an utter lack of social value coalesce; in addition, in close cases evidence that the producer, or distributor commercially exploited the material so as to emphasize its prurieny withdraws constitutional protection from otherwise protected material.

(5) **Justices Clark and White:** Material may be suppressed if its dominant appeal taken as a whole is to prurient interest.

Professor Magrath has courteously labeled the efforts of the Supreme Court in this realm 'a disaster area'.¹⁸

Obscenity is enigmatic—the purpose of its regulation is as illeconceived, poorly defined and unsupported as the resulting judicial decisions. What societal interests do we profess to protect by the regulation of obscenity? Professor Krislov suggests as the traditional bases for obscenity regulation:¹⁹

- (1) The prevention of improper sexual behavior;
- (2) The promotion and inculcation of desirable moral principles;
- (3) The avoidance of public displays that are morally and emotionally reprehensible;
- (4) The avoidance of public advocacy of unpopular, often illegal, sexual behavior.

Lockhart and McClure have classified the rationales supporting censorship of obscenity as: (1) Sexy thoughts; (2) Overt sexual misbehavior; (3) Exploitation of psychosexual tensions; (4) Community standards; and (5) Pornography.²⁰

Among all of the interests named, the strongest theoretical basis for censorship would be the prevention of improper overt sexual behavior. This was the main supporting rationale of the Hicklin rule²¹ and it is also part of the support for the Roth test which in modified form is used as the standard for censorship today. This basis is at best theoretical because there is no proof that obscenity 'depraves and corrupts'.²² There is no credible empirical proof that obscenity contributes to sexual

¹⁸*Id.* at 59.

¹⁹Krislov, *From Ginzberg to Ginzberg*, 1968 Sp. Ct. Rev. 153, 157.

²⁰Lockhart & McClure, *Why Obscene*, Printed in "TO DEPRAVE AND CORRUPT . . .", Edited by John Chandos, Great Britain: Association Press, 1962. Each of the rationale is critically analyzed in the article.

²¹The tendency of obscenity to deprave and corrupt was present in the statement of Hicklin test. See Text accompanying note 4, *Supra*.

crimes. It has been suggested by Justice Douglas that obscenity might provide a substitute rather than a stimulus for antisocial sexual conduct.²³ Again, there is no empirical evidence supporting this suggestion. One must conclude that the factual causal link between obscenity or pornography and specific antisocial behavior is too illusory to justify restrictions on free speech. The only concrete justification is the prevailing attitude that obscene-pornographic materials are *per se* antisocial apart from any direct or remote effects.

PRIVACY

"The principle which protects personal writings and any other production of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, saying, acts and to personal relations, domestic or otherwise".²⁴ The Brandeis-Warren theory of a 'right to be let alone' was based on a series of cases which referred to doctrines in the nature of a right of privacy.²⁵ In the past half century over 300 right of privacy cases have been decided.²⁶

As developed, the right of privacy is divided into two distinct segments: the right against governmental invasion and the right against private invasion.²⁷ The most recent and most comprehensive case dealing with protection of the right of privacy from governmental invasion is the *Griswold* decision.²⁸ A Connecticut statute prohibiting the use of contraceptives was held unconstitutional as an invasion of the right of privacy. Justice Douglas, writing the opinion, stated, "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." He based the right of privacy on the 'zones of privacy' which are created by the various constitutional guarantees.²⁹ Justice Goldberg, concurring, said that the right of privacy was one of the fundamental rights that was protected from governmental interference by the Ninth Amendment. Also in the *Griswold* case, Justice Douglas spoke of the Freedom of Speech;

In other words, the state may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right to freedom of speech and press includes, not only

²³*Stanley v. Georgia*, *Supra*, note 2 at 1249. Particularly footnote 9 and accompanying text.

²⁴*Supra*, note 12 at 432.

²⁵Brandeis & Warren, *The Right to Privacy*, 4 Harv. L.Rev. 193, 213 (1890).

²⁶*Id.* The language 'the right to be let alone' was later used by the then Justice Brandeis in *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) in his dissenting opinion.

²⁷WESTIN, *PRIVACY AND FREEDOM*, New York: Atheneum (1967) 346.

²⁸The former would, of course, be based on the constitutional limitations on governmental action and the latter would be the tort action based either on the common law or upon statutory provisions. Both of these areas are currently expanding.

²⁹*Griswold v. Connecticut*, 381 U.S. 479 (1965). See also, *Mapp v. Ohio*, 367 U.S. 643, 656.

³⁰*Id.* at 483-485.

the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach—indeed freedom of the entire university community.³⁰

A recent California³¹ decision applied the *Griswold* right of privacy to an obscenity case. The defendant was charged and convicted of the possession of lewd films. He contended that they were not meant to be sold until they had been edited. The court granted the relief sought by the defendant. In doing so the court said "No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him."³² The same result was reached in a recent United States Supreme Court decision.³³

Case law suggests a right of privacy broader than the specific constitutional guarantees and underscores the apparent trend toward a greater recognition of the right of privacy in today's world. Perhaps one of the reasons for the expansion of the right is the diminishing ability of a person to escape from people—masses of people. There are continual assaults by massive government, massive institutions, and mass communications. In an increasingly complex society, the quiet sanctuary of ones home is more psychologically sacred than ever.

The right of privacy in tort law encompasses four separate torts:

- (1) Intrusion upon the plaintiffs seclusion or solitude, or into his private affairs;
- (2) Public disclosure of embarrassing private facts about the plaintiff;
- (3) Publicity which places the plaintiff in a false light in the public eye;
- (4) Appropriation, for the defendants advantage, of the plaintiffs name or likeness.³⁴

Intrusion on the plaintiffs seclusion seems to be an expansion of the intentional trespass doctrine and is of principal concern in the development of a tort doctrine of obscenity.

In *LaCrone v. Ohio Bell*, the court recognized the first category and defined it as follows: "[T]he wrongful intrusion into ones private activities in such a manner as to outrage or to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."³⁵ The Ohio court found that the tort consisted of several elements including; the invasion must be objectionable or offensive to the reasonable man; the

³⁰*Id.* at 482.

³¹In re Klor, 51 Cal.Rptr. 903, 415 P.2d 791 (1966).

³²*Id.* at 794.

³³*Supra*, note 2.

³⁴Prosser, *Privacy*, 48 Cal.L.Rev. 383 (1960).

³⁵120 O.A. 129, 201 N.E.2nd 533 (1963).

thing intruded on must be private; the interest to be protected is primarily a mental one; and actual damages need not be proven. The court said that this invasion of privacy was an intentional tort that was analagous to trespass.

With this definition of the tort and with the elements considered in its application as given above, it is an easy step to find that this tort action accrues at any time the home of a person is invaded by matters which would be offensive to a reasonable man. This, of course, would not apply to governmental actions such as search and seizure, where sufficient governmental interests are involved and where many constitutional safeguards protect the individual. The invasion by a private person is all that is spoken of here.

Montana,³⁶ along with a majority of other states,³⁷ has recognized the right of privacy. Some states have based their decisions on statutes which expressly create the right while other states have found the right to be of common law origin. Most state decisions are based on the protection of the right of privacy as enunciated by Brandeis and Warren. The right of privacy is recognized. The right is expanding. The right should accrue when one's seclusion is invaded by matter which would be offensive to a reasonable man.

PROPOSED THEORY

Obscenity control has properly been termed a "constitutional disaster area". The tests applied to determine obscenity have been characterized by changing standards and general confusion. Emphasis has been shifted from the 'badness' of the matter itself to the 'badness' of the conduct of those who pander it. With this shift in emphasis, it becomes difficult to determine which particular governmental interest or what combination of governmental interests support the imposition of criminal sanctions against the producer or distributor of such materials. With standards so vague and justification for control so nebulous *criminal law should withdraw from the area of obscenity*. The tremendous urge to make criminal all activity of which we disapprove has already cast an unrealistic and unnecessary burden on law enforcement. If control is necessary other methods are preferable.

Based on the experience of Denmark, censorship is probably unjustified. It is reported that the abolition of all forms of censorship there has resulted in a depression in the sales of all obscene materials. This indicates that personal selectivity begins only when governmental censorship ends. At a minimum obscenity control should be removed from criminal law and placed in the field of general social sanction and tort law.

³⁶Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952).

³⁷PROSSER, HANDBOOK OF THE LAW OF TORTS, West Publishing: St. Paul (3rd Ed. 1964) P. 831.

Informal social sanctions have probably existed since the first obscene publication. Among the informal censors who became well known for their crusades were Thomas Bowdler and Anthony Comstock. Bowdler purged Shakespeare's works while Comstock was engaged in lobbying for adoption of the first obscenity laws in the United States.³⁸ Although many individuals have been active in this area, their sphere of activity is usually limited to the smaller communities. Several organizations have as their goal the suppression of obscenity. Notable among these is the National Organization for Decent Literature.³⁹ After a list of offensive books has been compiled by these organizations, they exert pressures on book sales outlets in various ways. If a bookseller refuses to sell the books that are on the organizations list, he receives a certificate of compliance. If not, he is threatened with a boycott. Occasionally the lists that are compiled by these organizations are used by law enforcement authorities as the basis for obscenity arrests. Other groups are active in purging school libraries of obscene and 'offensive' materials. As long as these groups function within the law and without the aid of criminal sanctions, they should be allowed to do their duty as they see it.

Another powerful group of informal censors are advertisers in the various forms of mass media. When 'offensive' material appears in one of the newspapers or television programs, an advertiser may withdraw his support from that medium or program in fear of large scale consumer reprisal. (Unfortunately material may be offensive to the advertiser because of its political, economic or social commentary quite apart from any obscenity.) If all criminal sanctions dealing with obscenity were removed there would still be a potent force working to rid the world of smut.

It is proposed that the only legal action that could be contemplated in the area of obscenity would be a tort action predicated on the general right of privacy. Under the proposed approach there would never be justification to look for, prosecute, or file civil charges against a man for producing, creating or possessing any variety of written, recorded or reproduced materials in the confines of his own home.⁴⁰ The action would be based on the right of privacy as discussed by Prosser⁴¹ and would require a penetration of the zone of privacy of an individual with matters which are offensive to the local community standard. Four

³⁸Comstock was said to have destroyed over 50 tons of 'vile' books and nearly 4 million obscene pictures. Excerpts from his book, *Traps for the Young*, are set forth in Appendix I to Justice Douglas's dissenting opinion in *Ginzberg v. New York*, 390 U.S. 629, 656 (1967). See also *Paul and Schwartz, Supra*, note 3 at 18-30; Alpert, *Judicial Censorship of Obscene Literature*, THE FIRST FREEDOM, Chicago: American Library Association, 1960.

³⁹THE FIRST FREEDOM, *Supra*, note 38 at 133-159.

⁴⁰This is in accord with recent decisions, *Stanley v. Georgia*, *supra*, note 2; *In re Klor*, *supra*, note 31.

⁴¹*Supra*, note 34.

elements would be necessary for the action: a (1) negligent (2) penetration of the (3) zone of privacy with (4) offensive matters as determined by local community standards. (General damage could be assumed if the proof of the basic elements of the cause of action was adequate. Special damage would have to be alleged and proved.)

Conceptually the most difficult and perhaps the most important element in the tort claim would be the delineation of the zone of privacy. This term was used in the *Griswold* case, but the limits of the zone were not specified. Although the cases since *Griswold* have given the term some content, most of them have dealt with the invasion of privacy of an individual by the state rather than by another individual.⁴² It would be convenient to retain the criminal definition of the zone of privacy in the tort field, but not necessary nor necessarily desirable since the interests involved are substantially different.

Perhaps the best initial approach would be to define the zone of privacy as the home and allow for further expansion by the courts as it appears necessary in the particular case. This would allow the courts to vary the zone and would serve to keep the concept of privacy dynamic. It would give everyone the basic assurance that they would be free of unwanted 'offensive' materials in their own home. At the outset this would be the extent of the protection afforded adults. One apt area of expansion of the zone might be to unrequested personal solicitation of adults in public places.

The primary means of intrusion or penetration into the home is by television, radio, door-to-door printed or verbal solicitation, mail, delivered newspapers and telephone calls. Other more exceptional means might include mobile public address systems and paraded printed placards. There would be no need to demand physical trespass, since the invasion is to one's senses rather than his property.

The penetration of the zone of privacy would have to be by offensive matter. To be offensive, the material would have to offend the moral sensibilities of an individual rather than his political, economic or religious values. The definition of offensive matter could be narrowly or broadly interpreted by the jury based on a local community standard of morality. This position opts for recognition of a tremendous national diversity. A national standard certainly would be more practical. The danger of an overly broad definition of offensive matter and an unmanageable variety of standards is minimized, first because of the elimination of any criminal sanction, and second because such a determination would not prohibit production, possession or distribution of the

⁴²*Stanley, supra*, note 2, and *Klor, supra*, note 31, both indicate that the right of privacy extends at least to the home. In *Smayda v. U.S.*, 252 F.2d 251 (1965) the court refused to extend the right of privacy to a public toilet where there were reasonable suspicions that homosexual acts were taking place.

material but would merely prevent the distributor from foisting it upon the person who prefers to avoid it.

There are three alternatives for characterization of the tort: (1) Strict liability; (2) Negligent; and (3) Intentional. The strict liability theory would allow the plaintiff to recover on a showing of the last three elements of the tort. This theory may act too much to the detriment of the publishers and distributors. The intentional tort theory is more in line with the Supreme Court decisions dealing with the requirement of showing scienter. Proving both knowledge of the offensiveness of the material *and* an intent to invade the plaintiff's privacy would be exceedingly difficult and such requirement would probably make the proposal unacceptable.⁴³ The flaw in requiring a showing that the publisher or the distributor knew that the material was offensive and that they intended to invade the privacy of the plaintiff is that a heavy burden is placed on the individual plaintiff. The middle ground, negligence, seems on balance to be the most acceptable characterization. This would require the plaintiff to prove that the defendant knew or should have known that the material he was distributing was offensive and that he knew or should have known he was foisting upon unconsenting persons.

CLASSIFICATION

Under the proposed theory the zone of privacy of those under the age of 18 years would be expanded to preclude any exposure to matters which are offensive to local community standards. The only means by which this could be accomplished without interfering with an adult's right to be informed would be through classification which would assure that matters which are offensive would not be distributed to children. The basis for this expanded zone of privacy for children is an assumption that offensive materials will not corrupt adults, but may corrupt children. While this assumption is not supported or refuted by existing empirical evidence, moral values of adults are more firmly rooted and less susceptible to change. Children are still in the process of developing moral values. Until these moral values are developed, children may legitimately be considered incapable of dealing, as a matter of free choice, with materials which are generally deemed offensive.

*Prince v. Commonwealth*⁴⁴ recognized that the state has an interest in protecting the welfare of children and in seeing that they are 'safeguarded from abuses' which might prevent their 'growth into free, independent well-developed citizens'. The *Ginzberg* case⁴⁵ held that the state of New York had the power to prohibit the sale of matter to minors which could not properly be withheld from adults.

⁴³Smith v. California, 361 U.S. 147 (1959).

⁴⁴321 U.S. 158 (1944).

⁴⁵Ginzberg v. New York, 390 U.S. 629 (1968).

The Court approved the idea of variable obscenity which seems to mean judicial approval of classification for morally offensive matters.⁴⁶ It held that it was not irrational for the New York legislature to find that exposure to materials which were obscene within the meaning of the statute was harmful to minors. There seems to be greater unanimity among the 'experts' (still without much empirical support) that obscenity may be harmful to children and may not be harmful to adults and therefore classification is a reasonable and legitimate approach.⁴⁷

The determination of what could properly be withheld from children would not have to be based exclusively on sexual content. If obscenity can corrupt, so might depiction of violence. Presently there is substantial pressure to reduce the level of violence that is currently the vogue in children's television programs. Matters which are extremely and unnecessarily violent might be fairly determined to be morally offensive. If materials were found to be offensive to children, the distributor would be allowed to sell or present the material to adults but the material could not be distributed to children. A finding that particular materials were offensive would mean that the material could not be made available to children and could not be foisted upon adults within their home but could otherwise be made available to adults. There could never be and should never be total suppression of any material. This proposal would entitle an adult to purchase anything that anyone wanted to take the time to print, draw, photograph or otherwise prepare. To restrict the adult population to matters which are fit for children would be to "burn the whole house to roast the pig."⁴⁸

Preferably there would be three classifications: adults, 13-18 year olds, and 12 and under. This would be in line with the *Butler*⁴⁹ idea that you should only prohibit matters which are assumed detrimental to the particular class. This would mean the development of a three-step classification in line with the maturing process of the individuals exposed. Even though three categories are recommended, for convenience it would probably be necessary to use only two. However, even with two categories an award of special damages would be available which would consider the particular damage sustained by the plaintiff. Since the defendant takes the plaintiff as he finds him, special damages could be enhanced by a showing of special injury as a result of the plaintiff's chronological, social or moral immaturity.

The proposed classification system would not prevent children from gaining access to offensive material if the parents decide that the material is proper for their children. This is in accord with the prin-

⁴⁶*Supra*, note 8.

⁴⁷*Supra*, note 45.

⁴⁸*Supra*, note 22. Also, any work written on obscenity has an opinion one way or the other concerning the harm if any that results from exposure to obscene materials.

⁴⁹*Supra*, note 8.

ciple expressed in the *Ginzberg* case⁵⁰ that the primary responsibility for the well-being of the child is in the parents, but that this parental control cannot exist at all times. The evil that the classification scheme seeks to prevent is the purchase of offensive material by the young child without the consent or even the knowledge of the parent. With a classification scheme in operation, there would be no interference with the child's right to be informed if it is agreed that at this age he does not possess the capacity to determine what information he should be exposed to and that duty falls upon the parents.

And who shall assume the Olympian and tyrannical duty of classification? The rational choice, if there can be a rational choice, is the person who prepares the material to be disseminated. The publisher or producer is more intimately acquainted with the contents of the material than any other person in a position of control. This scheme of classification has already found general acceptance in the motion picture industry.

JUSTIFICATION FOR THE APPROACH

Great confusion exists as to what is obscene today and what may be termed obscene tomorrow. There is a real need to provide a more definite standard and to eliminate criminal sanctions. Under the suggested approach, the only sanctions that could be used against a person are civil sanctions, and if the person properly classifies the material and then distributes it according to the classification he would avoid susceptibility to all sanctions.

The suggested tort approach would also do away with the necessity of the head in the sand approach that free speech guarantees do not protect obscenity since obscenity is not within the guarantee and that obscenity is whatever we decide it to be. Such a tautological definition of the limits of free speech is not acceptable. In the hands of a 'moralistic' Court it allows limitless repression. The original basis for the exclusion of obscenity from the free speech guarantee was extremely weak as pointed out in the dissent by Mr. Justice Douglas to the majority decision in *Memoirs*.⁵¹ One of the reasons that this theory seems ludicrous is that since the standards of the community are rapidly changing, things which were considered obscene a few years ago are now protected under the First Amendment. The material itself didn't change—only the attitude towards it. To base constitutional protection on the whim of the community standard seems the height of folly. Any material, reproduction, object of art or what have you should be available for purchase by the adult population with the only restriction being that it cannot be forced upon them.

⁵⁰*Supra*, note 45.

⁵¹*Supra*, note 12.

Of all the reasons for the suppression of obscenity, the one which seems to be the least supportable from a purely statistical behavioral standpoint is the claim that obscenity tends to corrupt the reader or viewer.⁵² There remains great conflict in this area. The tendency to corrupt is a segment of the vicious circle used to justify the present program of censorship. If material has a tendency to corrupt, it has no redeeming social value. If it does not have redeeming social value, it is not protected under the First Amendment. Since it is not protected under the First Amendment, the mere possibility that it may corrupt is enough to allow suppression. Such reasoning is illustrative of an approach which permits suppression of material without proof of its harmful effects. If the statement enunciated the idea that obscenity may corrupt, the rest could not follow and more has not been proved.

The suggested approach protects legitimate public interest in the suppression of offensive materials.⁵³ Adults who wish to be exposed to offensive material may risk corrupting themselves. This is a minor concession to free speech and to a more practical solution to the problem of morally offensive material. If obscene materials corrupt, who among us would risk corruption as a censor? In truth, if there is any validity in the thesis that obscenity will corrupt, it must be found to be limited to persons whose moral sensibilities have not matured. Then it would seem that any proposal which would protect the youth from exposure to morally offensive materials would satisfy any legitimate public policy. That which has been said about the tendency to corrupt is equally applicable to the tendency to trigger improper sexual conduct.

The suggested solution would be an easy move for the courts to make since they already seem aimed in the proper direction. The Court has been placing more and more emphasis on pandering, as an invasion of privacy. The Court has also made direct reference to privacy in connection with obscenity cases. In the *Redrup* case⁵⁴ the Court Per Curiam stated "In none [of the cases being considered] 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." The Court in *Stanley*, in reference to the distribution of obscene materials noted the objection as "[T]here 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."⁵⁵ Control of offensive material through the use of the extended right of privacy is but a short step away.

⁵²*Supra*, note 48.

⁵³The *Stanley* case, *supra*, note 2, intimated that the two legitimate interests that obscenity regulation protects are isolation of children from the possible effects of obscenity and protection of adults right of privacy.

⁵⁴*Supra*, note 15.

⁵⁵*Supra*, note 2 at 1249.

HOW WOULD IT WORK?

Theory applied to the communications media.

Communications most likely to invade a man's castle include television, radio, newspapers, unsolicited mail and any form of uninvited door to door solicitation. To avoid civil litigation such communications would have to be inoffensive to the community moral standards. If there are any children in the home and it is reasonable to conclude that these materials will reach the children because of the time that they are presented or because of the manner in which they are distributed, they must conform to the community standards applicable to children. The general effect of placing the primary zone of privacy in the home might be to subject any form of communications that invades the home to the child's standard of scrutiny. This would not be in violation of the ideas expressed in *Butler* because this prohibition would only be effective as to those things which invade the home. An adult could voluntarily expose himself to anything outside the home. The main reason for reducing media such as television to programming that would be suitable for children is that parents should be given assurance that their children will be free from offensive matters in their own home. Parents can hardly be expected to be present at all times to control the materials that their children are exposed to on radio and television. This does not mean that the media will have to program pablum, only that they limit vivid portrayals of sex and violence. The standard applied to nationally produced and programmed material could be national. As to local production, sales and distribution, the standard could be local.

Once invasion of the home is no longer threatened, a system of classification would be invoked. If materials which are offensive to the local community moral standards are made available to children a cause of action would arise. This should prevent persons from selling or displaying offensive materials in any place where access to the materials cannot be controlled. In any case where a child was exposed to offensive materials, without parental consent an action could be brought. The determination of whether the exposure was negligent or could have been prevented would have to be made by the jury under their determination of whether the zone of privacy had been penetrated. Materials which would be considered offensive to children could be displayed and sold only in areas where the classification scheme could be enforced.

Bookstands

These would require implementation of the classification scheme previously considered. Any book that was not classified would be considered fit for sales to minors. The distributors would have the responsibility of separating the books that are expressly classified as being unfit for consumption by minors from those which are unclassified.

Children under the age of 18 would not be allowed into the area which
Published by ScholarWorks at University of Montana, 1968

contained classified books. If a right of action exists both the distributor and the publisher could be joined. What has been said about the classification of books would apply to all other forms of printed materials, recordings and photographs.

Theatres

The classification system which the motion pictures are using at the present time would probably be adequate. If the distributing company had not classified the film, it would become the responsibility of the local theatre manager to view and classify it. In this way the local community standard could be used in the classification. Not only would the films themselves have to be classified, but also the previews or trailers. This would be necessary to insure that offensive scenes were not shown to a general audience when the coming attraction is an adults-only film. Virtually the same method of classification would apply to live theatrical presentations. In some respects those would be easier to classify than movies since the presentation would be more localized and the local community standard could be readily determined before hand. However, preview of a live theatrical presentation might prove objectionable and difficult.

Libraries

These would require the same type of control features as bookstores discussed above. A separate area would be set aside for the display of materials which are restricted to adult reading. This would be based on the publishers classification. Any book that was classified would be restricted to adult readership. The library would also have the alternative of allowing only adults to select the books thus giving them the responsibility of classification in an informal way. This problem may be illusory since libraries probably have a very limited number of 'obscene' books on their shelves at the present time.

Schools

Since the only materials which would give rise to an action for invasion of privacy are those which are offensive to the morals of the community, there would be no problem with most textbooks. The main foreseeable problem would be sex education programs. The school library would operate in the same manner as any other library except that there would probably be no need for them to have any books that were classified as being unfit for children. By the time most persons reach university age they would no longer be considered children under the classification scheme and could voluntarily expose themselves to any material. Here the important thing would be to ensure that no person be *required* to read or view material which would be offensive to objective moral sensibilities. Thus required reading in required courses would

have to conform to the moral standards of the community.⁵⁶ If the course is not required for graduation, the instructor would be required to list potentially offensive materials prior to registration. An instructor in a required course could also avoid the invasion of privacy by using the questionable material as supplementary rather than required reading. The principal objective with college age persons would be to give them notice of the questionable nature of the material and then allow them free choice.

Public Gatherings

Unless an event is held in a location where attendance can be limited to certain age groups, the person making the presentation would be limited to presenting matters which would not be offensive to the moral sensibilities of those present. This follows the general theory that the zone of privacy of children follows them wherever they are and wherever they are permitted or encouraged to go.

The above descriptions of the practical applications of the proposed invasion-of-privacy tort do not pretend to cover all situations but should provide a basis from which an extrapolation can be made and a conclusion reached that will apply to most situations.

SHORTCOMINGS

The premise that obscenity is not harmful to adults as long as they have the choice of being exposed to it is probably the point most susceptible to criticism. As has been pointed out previously, there is a wealth of opinion supporting either side. However, it seems fallacious to base a restriction of free speech and the freedom to be informed on the tenuous assumption that obscenity has a tendency to stimulate sexual misbehavior. It is against the principles of freedom to treat suspicion as adequate grounds for suppression. Neither the courts nor the legislatures should ever accept such a proposal.

As has been mentioned above, the courts are becoming more privacy conscious and might be willing, for the sake of ending the present confusion, to adopt such a theory. In states which consider the right of privacy a common law right, the courts would be free to develop such a theory without legislative intervention. Legislation would be needed to repeal criminal sanctions for the publishing and distribution of obscenity. Where the right of privacy is considered statutory, the entire adoption of the theory would be in the hands of the legislature. This would create substantial difficulty since those who are in favor of strict censorship and severe criminal sanctions are usually the most vocal.

⁵⁶This approach is most compatible with the pedagogical view that required courses are mostly nonsense and university students should be encouraged to exercise great freedom in choosing their own educational molds.

The amount of increased informal censorship that might result from the adoption of this proposal can not be predetermined. It is generally assumed that when the state ceases to act as a censor, groups of interested citizens tend to assume that role. Since it is a matter of speculation it can only be mentioned here as a matter to be considered.

A final difficulty in making the proposal work is the requirement of classification. There are many dangers inherent in the idea of classification. The main fear of classification is that it may act as a prior restraint and discourage the production of materials which might be questionable. Under the theory as presented, this is an idle concern. The only thing that the classification will affect is the quality of material that is presented or made available to children. To classify an item as unfit for children means only that it would give rise to an action for invasion of privacy if it were made available to a child. The conclusion that a particular matter is obscene will not remove it from the reach of everyone but will merely restrict it so that it will not fall within the reach of the group that it is supposed it might harm.

CONCLUSION

Freedom of expression should be a most carefully guarded freedom. Nevertheless it can be wielded in a number of vicious and destructive ways. An accused person's right to a fair trial can be destroyed by unrestrained expression which creates an atmosphere of prejudice. The damage to the accused is unquestioned—it may cost him his liberty or his life. Neither the court nor the accused have legal authority to protect the criminal process from such outside interferences—freedom of expression is deemed too important!⁵⁷

People who speak plain lies about public figures stand protected unless malice is proved.⁵⁸ The damage to the individual maligned is unquestioned. The lies may cost him his job and his reputation but he is without legal remedy⁵⁹—freedom of expression is too important!

By contrast it seems a strange and perverse twist that calls forth criminal sanctions to limit freedom of expression if it dallies too long

⁵⁷The judicial system is forced to rely on continuances, changes of venue and reversals to protect the accused and purify its own processes. See *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *Sheppard v. Maxwell*, 384 U.S. 333 (1965); *State v. Dryman*, 127 Mont. 579, 269 P.2d 796 (1954).

⁵⁸A virtual impossibility. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Beckly Newspapers v. Hanks*, 389 U.S. 81 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

⁵⁹He must rely on public reputation which is perhaps an adequate remedy in a free society.

on the subject of sex⁶⁰ even though there is a serious question as to the damage that flows therefrom.

In many respects our law is an image of our troubled society. Values have evolved from political and economic strength and from the strength of human emotions—not from empirical evidence and reasoned judgment.

