Obscenity and the Right to Be Let Alone: The Balancing of Constitutional Rights

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NOTES

OBSCENITY AND THE RIGHT TO BE LET ALONE: THE BALANCING OF CONSTITUTIONAL RIGHTS

I. INTRODUCTION

Since 1957, when the United States Supreme Court first attempted to deal with the problem of obscenity and the constitutional implications thereof, the Court has been roundly criticized. Typical of the general consensus of legal opinion is Professor Magrath's statement that "the Court has turned the law of obscenity into a constitutional disaster area." After Stanley v. Georgia it was thought that a doctrine had been adopted by the Court which could be consistently and neutrally applied to all future obscenity cases. However, United States v. Reidel and United States v. Thirty-Seven Photographs have recently cast doubt on the hope that the Court would fully adopt the doctrinal approach implied in Stanley.

While it may be true that no rationalizing doctrine exists in the area of obscenity, it is equally true that the cost of deciding obscenity cases without a conceptual framework is prohibitive. It has resulted in the Court becoming the "nation's board of censors." Not only is the Court "the most inappropriate Supreme

Board of Censors that could be found," but, from the standpoint of judicial economy, this vacuum places an intolerable burden on the Court. Even more disconcerting is the fact that in the absence of a conceptual framework, 

"[t]he Justices are forced to make a judgment which in spite of their Constitutional obligation tends to be personal."

The American public senses this, and as a result every decision is regarded as a determination of the obscenity of the book or motion picture according to the personal predilections of the individual Justices.

While on the one hand a conceptual framework for obscenity cases is essential, it is equally true that the Supreme Court has in the past accepted theories proposed by commentators without making significant progress in extricating itself from the quagmire. In light of this situation, the purpose of this Note is not to urge the Court to accept any new theory for dealing with obscenity, but, rather, to suggest a conceptual framework present in the results of its prior decisions and to urge its explicit acceptance by the Court. No attempt will be made to be faithful to all the language in the decisions, the thesis being, "[t]he most dependable guide to the Court's thinking is to be found in what the Court has actually done, not in what it has said."

II. AN HISTORICAL OVERVIEW

A review of the major cases dealing with obscenity is essential to an understanding of the difficulty which commentators and the Court alike have had in trying to develop a conceptual framework in this area of the law.


11. See Memoirs v. Massachusetts, 383 U.S. 413, 427-28 (1966) (Douglas, J., dissenting) for a vivid description of the volume and nature of mail received by the United States Supreme Court Justices relative to their obscenity decisions.


13. Laughlin, A Requiem for Requiems: The Supreme Court at the Bar of Reality, 68 Mich. L. Rev. 1389 (1970), suggests that the Court's acceptance of the theories of various commentators may itself, in large part, be responsible for the quagmire in which the Court presently finds itself.

Roth v. United States\textsuperscript{15} was the first modern case in which the United States Supreme Court fully considered the problem of obscenity.\textsuperscript{16} Roth, a New York publisher and seller of books, photographs, and magazines, was convicted in the lower courts for sending obscene advertising and an obscene book through the mails in violation of federal statute, 18 U.S.C. § 1461. The Supreme Court held, with Mr. Justice Brennan speaking for the majority, that obscenity was not within the constitutional protection of speech and press.\textsuperscript{17} The Roth test of constitutional protection was that if the publication was found not to be obscene it was protected by the first amendment; but, if it was found to be obscene, it was not protected and could be suppressed by the state or federal government. In essence the definition of obscenity was paramount, and the Court was subsequently inundated with cases requiring constant reevaluation of its definition of obscenity.\textsuperscript{18}

In 1967 the Supreme Court decided Redrup v. New York.\textsuperscript{19} In a per curiam opinion the Court reversed three lower court decisions which had found certain publications obscene. In two cases, the appellants had been convicted of selling obscene publications. In the third, certain publications were found obscene by the lower courts, and their distribution was enjoined.\textsuperscript{20} The High Court noted that in none of the cases did the state statutes reflect "a specific and limited state concern for juveniles. . . . In none was there any suggestion of an assault upon individual privacy by publication in

\begin{enumerate}
  \item \textsuperscript{15} 354 U.S. 476 (1957).
  \item \textsuperscript{16} See also Butler v. Michigan, 352 U.S. 380 (1957) (state statute that made the acceptability of all material sold in the state turn on its acceptability for children was struck down); Doubleday & Co., Inc. v. New York, 335 U.S. 848 (1948) (obscenity conviction affirmed by an equally divided Court without written opinion); Winters v. New York, 333 U.S. 507 (1948) (state obscenity statute held void for vagueness).
  \item \textsuperscript{17} 354 U.S. 476, 485 (1957).
  \item \textsuperscript{18} Memoirs v. Massachusetts, 383 U.S. 413 (1966), probably provides the basic general definition of obscenity applied by the Court:
    Under this 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 without redeeming social value.
  \item \textsuperscript{19} 386 U.S. 767 (1967).
  \item \textsuperscript{20} \textit{Id.} at 768-69.
\end{enumerate}
a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." 21 Implicitly recognizing that the Justices were severely divided on a proper definition of obscenity, the opinion in Redrup stated simply that regardless of which definition was applied the material in question was not obscene. 22

The next major case was Ginsberg v. New York 23 in which the appellant, an operator of a stationery store and luncheonette, was convicted of violating a state statute which prohibited the sale to minors of material which "is harmful to minors." 24 The statute defined such material in terms of the tests enunciated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 25 but as applied to minors. 26 In affirming the conviction, the Supreme Court found that it was not irrational for the state to determine that such material was harmful to minors, and that the state had a valid interest in protecting children. 27 The Court did, however, specifically note that the prohibition did not bar parents from buying such publications for their children if they so desired. 28

Stanley v. Georgia 29 presented the Court with the issue of whether a state could prohibit the private possession of obscene material in one's own home. Stanley was convicted of possession of obscene films after the police, looking for evidence of bookmaking, searched his home and found the films. The Supreme Court reversed Stanley's conviction and held that the United States Constitution prohibited the state from making the mere possession of obscene material a crime. 30 The Court distinguished Roth and subsequent obscenity cases as dealing with the sale or distribution of obscene materials or possession with the intent to sell or distribute. 31 Mr. Justice Marshall, speaking for the majority, stated that the Roth line of cases recognized a valid governmental interest in dealing with the commercial distribution of obscene material.

21. Id. at 769.
22. Id. at 770-71. See also Interstate Circuit v. Dallas, 390 U.S. 676, 705 n.1 (1967), in which Mr. Justice Harlan cogently illustrated the difficulty which the Court has had in formulating a definition of obscenity: "In the . . . 13 obscenity cases from the date Roth was decided . . . there has been a total of fifty-five separate opinions among the Justices."
24. Id. at 633.
27. Id. at 638-39.
28. Id. at 639.
30. Id. at 568.
31. Id. at 561.
but that there was no governmental interest sufficiently compelling

to justify prohibition of mere private possession of obscene ma-

terial.\textsuperscript{32} It was maintained that the first amendment “protects the

right to receive information and ideas, regardless of their social

worth.”\textsuperscript{33} Furthermore, as an “added dimension,” the right of pri-

vacy was recognized as protecting Stanley’s right to possess obscene

material.\textsuperscript{34} Balancing governmental concerns against the con-

stitutional rights asserted by Stanley, the Court considered the

state’s interest in protecting the individual’s mind from obscenity,

in preventing crime which may be caused by exposure to obscene

material, and in the enforcement of the statute’s prohibition of dis-

tribution of obscenity.\textsuperscript{35} After upholding Stanley’s right of

private possession, the Court specifically stated that \textit{Roth} and its

progeny were not impaired by \textit{Stanley}.\textsuperscript{36} After \textit{Stanley}, the lower

courts were divided on the issue of whether public distribution of

obscenity was protected.\textsuperscript{37}

\textit{United States v. Reidel}\textsuperscript{38} was the next obscenity case in which

the Court rendered a written opinion. In \textit{Reidel} the appellee was

indicted for mailing an allegedly obscene booklet in violation of 18

U.S.C. § 1461, which prohibits knowingly using the mails for the

delivery of obscene material. The Supreme Court, in reversing,

held that the statute was not unconstitutional as applied to the dis-

tribution of obscene materials to willing recipients who stated that

they were adults.\textsuperscript{39} Mr. Justice White, writing for the majority,

stated that \textit{Roth} was still good law and governed the case since both

cases involved the commercial distribution of obscene material.\textsuperscript{40}

\textit{Stanley} was distinguished factually, and the Court specifically re-

\begin{itemize}
  \item[32.] \textit{Id.} at 565-68.
  \item[33.] \textit{Id.} at 564.
  \item[34.] \textit{Id.}
  \item[35.] \textit{Id.} at 565-68.
  \item[36.] \textit{Id.} at 568.
  \item[37.] Lower court cases invalidating statutes prohibiting the distribution
          of obscene material under the authority of \textit{Stanley} included: Hayne v.
          Distributing Corp., 319 F. Supp. 1231 (W.D. Wis. 1970); United States v.
          \textit{see also} Eisenstadt v. Baird, 405 U.S. 438, 460-65 (1972), where Justices
          White and Blackmun, in a concurring opinion, suggested that the right to use
          contraceptives inevitably carried with it an associated right to distribute con-
         traceptives. Lower court cases which restricted \textit{Stanley} to a right of private
          possession included: Miller v. United States, 431 F.2d 655 (9th Cir. 1970);
          United States v. Fragus, 428 F.2d 1211 (5th Cir. 1970).
  \item[38.] \textit{Id.} at 351 (1971).
  \item[39.] \textit{Id.} at 352.
  \item[40.] \textit{Id.} at 354.
\end{itemize}
jected the extrapolation of a right to sell from the right to receive obscene material.41

In Reidel's companion case, United States v. Thirty-Seven Photographs,42 obscene photographs were found in the claimant's suitcase during a routine customs search and were seized by United States authorities pursuant to 19 U.S.C. § 1305(a), which prohibits the importation of obscene materials. It was stipulated that the claimant intended to use the photographs in a book which would be commercially distributed.43 Speaking for only four members of the Court, Mr. Justice White argued that regardless of whether the pictures were for private or public distribution, Stanley was inapplicable to the situation where one seeks to import obscene materials.44 Since Roth governed, the statute was held not to be unconstitutional as applied to the claimant. The unique nature of border searches and customs policy was emphasized. One Justice stated that the issue of importation of obscenity was not before the Court and should be avoided,45 and the other four Justices stated that importation for private use was protected by the first amendment under Stanley.46

III. A CRITIQUE OF SOME CONCEPTUAL MODELS

In the area of obscenity, the best that can be said is that the United States Supreme Court has provided "a plethora of verbiage and a dearth of guidance."48 Undaunted, several commentators have tried to reconcile the Court's obscenity decisions in light of Reidel and Thirty-Seven Photographs.49 It is unfortunately true that the methods used to try to reconcile these cases have proved less than adequate.

If Stanley is viewed as being based simply on the first amendment, then it has been overruled by Reidel and Thirty-Seven Photographs because these two later decisions explicitly reaffirm Roth and its holding that obscenity is not protected by the first amendment.50 If this is true, Stanley clearly had no more right to

41. Id. at 355.
42. 402 U.S. 363 (1971).
43. Id. at 366.
44. Id. at 376.
45. Id.
46. Id. at 378 (Harlan, J.).
47. Id. at 360, 378, 379 (Marshall, Stewart, Black & Douglas, J.J.).
50. 402 U.S. at 363.
possess obscenity than he had to possess any other contraband. Even *Stanley*, however, recognized that there was no right to private possession of narcotics or firearms.\(^1\) Furthermore, a simple first amendment analysis would require the extrapolation of the right to sell and distribute from the right to receive obscene material. If Stanley had the right to receive obscene material, he certainly had the right to purchase it; and, hence, the sale and the seller would have to be constitutionally protected. The logic of this analysis is inescapable in light of the fact that all three cases cited by the Court in *Stanley* recognized, at least implicitly, a right to distribute as well as a right to receive.\(^2\)

Any attempt to distinguish *Stanley* on a basis of private versus public or commercial possession of obscenity must also fail.\(^3\) Likewise, any argument that valid governmental interests\(^4\) outweigh the right of commercial dissemination of obscenity is doomed to failure, not only because of the impossibility of reconciling *Thirty-Seven Photographs* with this theory,\(^5\) but also because the overbreadth doctrine would require that the statutes be drawn no more broadly than essential to protect governmental interests.\(^6\)

The view that *Stanley* can be distinguished on the grounds that it was based solely on a right of privacy fails if for no other reason than such a theory not only ignores the clear language of *Stanley* itself, which characterized the right of privacy as merely

\(^{51}\) 394 U.S. at 568 n.11.

\(^{52}\) In *Martin v. City of Struthers*, 319 U.S. 141 (1943) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), the appellant urging recognition of the right to receive was, in fact, the "distributor" who was seeking to have his own conviction overturned on the basis of the alleged infringement of the rights of the putative recipient of his information. In *Lamont v. Postmaster General*, 381 U.S. 301 (1964), it was the recipient who challenged the burden of a federal statute upon his right to receive information, but the transaction in question was a commercial one and the decision effectively protected the distribution as well as the recipient.


\(^{54}\) Protection of children and unwilling adults from exposure to obscene material has been traditionally recognized as a valid governmental interest. See *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Redrup v. New York*, 386 U.S. 767, 769 (1967).

\(^{55}\) In *Thirty-Seven Photographs* the Court implicitly recognized that there was little danger of the material falling into the hands of children or unwilling viewers but nevertheless found that it could be constitutionally seized. 402 U.S. at 378.

giving the case an "added dimension," but also its holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." Furthermore, if obscenity is excluded from the protection of the first amendment, it is contraband and the right of privacy would no more protect its private possession than it does the private possession of other contraband.

One commentator has suggested that Stanley can be distinguished from other obscenity cases by utilizing a "privacy-plus" theory. Basically this theory characterizes Stanley as involving a combination of the first amendment and the right of privacy which seemingly in combination have more value than each considered separately. Together they constitute a "special application of the more familiar theory of the 'chilling effect.'" Disregarding the fact that the United States Supreme Court would probably reject such a notion, this approach would serve only to distinguish private possession as a special situation to which general principles of obscenity law should not be applied—thereby tacitly accepting the proposition that Stanley is an aberration.

If the Supreme Court decisions in the area of obscenity are to be rationalized and a conceptual framework found in them for the doctrinal treatment of future obscenity cases, the underlying state interests supporting suppression must be evaluated. Only from a consideration of the conflict between the first amendment and countervailing state interests can any semblance of order in the obscenity cases be found. Stanley was the first case to extensively consider the state interests which are traditionally urged to justify the suppression of obscenity. In Stanley the state interest in protecting the individual's mind from obscenity and its effects was rejected. The Court stated simply: "[T]his may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." Although not explicitly stated in Stanley, it is unlikely that the state has any greater power to protect society in general from obscenity than it does to protect one individual's mind from obscenity. For this reason any argument that protection of

57. 394 U.S. at 564.
58. Id. at 568.
59. See text at note 52 supra.
61. Id. at 328.
62. In another context the Court has recently rejected the idea that principles of one constitutional guarantee can be applied to another, characterizing such an approach as the abandonment of "all semblance of principled constitutional adjudication." Kirby v. Illinois, 406 U.S. 682, 688 (1972).
societal morality constitutes a valid state interest in the suppression of obscenity must also fail. Mr. Justice Marshall, speaking for the majority in Stanley, also considered the state interest in preventing criminal behavior that might result from exposure to obscene materials. It was found that "education and punishment for violations of the law" were adequate means for dealing with criminal behavior. After stating that there was little empirical basis for the establishment of such a causal relation, the Court stated:

Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of spirits.65

Finally, the Court in Stanley rejected the argument that ease of administration of obscenity laws prohibiting distribution required the prohibition of mere private possession.66

IV. A PROPOSED CONCEPTUAL MODEL

After Stanley, it is clear that there are only two state interests which are recognized as sufficient to justify the suppression of obscenity. They are (1) protection of juveniles and (2) prevention of the intrusion of obscenity upon the privacy of the unwilling individual.67 These two legitimate governmental interests have been consistently recognized by the United States Supreme Court.68 Despite the validity of these two interests, they are not adequate to undergird a conceptual framework for obscenity cases. Acceptance of these two governmental interests as legitimate might justify regulation of obscenity, but it would not justify suppression. They would, in essence, require the Supreme Court to adopt a "nuisance" theory under which obscenity that was so obtrusive as to be unavoidable to minors and unwilling adults could be suppressed, but unobtrusive obscenity could not be suppressed by the state.69

64. Id. at 567.
65. Id.
66. Id. at 567-68.
67. Id. at 567.
Furthermore, such a result is mandated by the "overbreadth doctrine," which requires that a statute infringing upon constitutionally protected freedoms can be no broader in scope than required by countervailing governmental interests.\textsuperscript{70} Regardless of the desirability of such an approach, the United States Supreme Court has made it clear that the "nuisance" theory will not be adopted.\textsuperscript{71} Therefore, it is clear that even though the two valid governmental interests in suppression and/or regulation of obscenity have been identified, they have not been utilized or recognized in any manner adequate for the foundation of a conceptual framework which will both rationalize the results of all prior obscenity cases and also meet with the approval of the Supreme Court.

In an attempt to develop any such conceptual framework for the obscenity decisions, the threshold problem is the proper role of the\textit{ Roth} doctrine that obscenity is not protected by the first amendment and thus obscenity is, by definition, subject to state suppression. From the beginning this doctrine has been criticized by the vast majority of commentators.\textsuperscript{72} The Supreme Court Justices, apart from being unable to agree on the proper definition of obscenity, thus making consistent constitutional adjudication impossible,\textsuperscript{73} have also criticized the\textit{ Roth} definitional approach. Mr. Justice Brennan, author of the Court's opinion in\textit{ Roth}, has recognized the shortcomings of the definitional approach.\textsuperscript{74} Even at the time\textit{ Roth} was decided, it was doubtful that its reasoning could withstand careful scrutiny.\textit{ Roth} began by noting that all

\textsuperscript{70} See NAACP v. Alabama, 377 U.S. 288 (1964):
A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

\textit{Id.} at 307. See also Shelton v. Tucker, 364 U.S. 479 (1960):
Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

\textit{Id.} at 488.

\textsuperscript{72} See notes 2 & 3 supra.
\textsuperscript{73} See note 22 supra.
\textsuperscript{74} See notes 8 & 9 supra; see also Walker v. Ohio, 398 U.S. 434 (1970) (Burger, C.J., dissenting) ("I find no justification . . . for this Court's assuming the role of a supreme and unreviewable board of censorship. . . .")

\textsuperscript{75} Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).
fourteen states which ratified the Constitution in 1792 then had statutes making blasphemy or profanity, or both, crimes.\textsuperscript{76} Certainly this is no reason for holding obscenity outside the protection of the first amendment, especially since the Supreme Court has expressly held that both blasphemy and profanity are constitutionally protected.\textsuperscript{77}

Furthermore, in \textit{Roth}, first amendment protection was denied to obscenity primarily on the basis of an analogy drawn to libel and fighting words which \textit{Chaplinsky v. New Hampshire}\textsuperscript{78} has found to be outside the scope of first amendment protection. Quoting from \textit{Chaplinsky}, the Court in \textit{Roth} stated:

\begin{quote}
There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. . . .\textsuperscript{79}
\end{quote}

If Mr. Justice Brennan had completed the quotation from \textit{Chaplinsky}, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,”\textsuperscript{80} the analogy would be tenuous at best.

The definitional basis for denying obscenity first amendment protection has been eroded even further since the \textit{Roth} decision. It is no longer certain that “fighting words” are outside the scope of first amendment protection.\textsuperscript{81} And surely the definitional approach is no longer applicable to libel.\textsuperscript{82} Hence, even though the definitional approach to obscenity might have been at one time in accord with first amendment doctrine, it is now simply an anomaly.

\textit{Stanley v. Georgia} implicitly recognized this situation and, although it was stated that the \textit{Roth} doctrine was not impaired by the \textit{Stanley} decision,\textsuperscript{83} it is clear that the \textit{Roth} definitional approach cannot survive \textit{Stanley}. In \textit{Stanley} the Court stated:

\begin{quote}
\textit{Roth} and its progeny certainly do mean that the
\end{quote}

\begin{itemize}
\item\textsuperscript{76} Roth v. United States, 354 U.S. 476, 482 (1957).
\item\textsuperscript{77} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Cohen v. California, 403 U.S. 15 (1971).
\item\textsuperscript{78} 315 U.S. 568 (1942).
\item\textsuperscript{79} 354 U.S. at 483-84 (1957), \textit{quoting} 315 U.S. at 571-72 (1942).
\item\textsuperscript{80} 354 U.S. at 483-84.
\item\textsuperscript{81} Gooding v. Wilson, 405 U.S. 518 (1972).
\item\textsuperscript{83} 394 U.S. at 568.
\end{itemize}
First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far.  

It was assumed in Stanley that the material in question was obscene. Since under Roth obscene material is absolutely not protected, the result in Stanley granting constitutional protection to obscene material under some circumstances can only mean that the Roth definitional approach is no longer good law.

United States v. Reidel and United States v. Thirty-Seven Photographs, unfortunately, cast doubt on this interpretation. Reidel stated, "Stanley did not overrule Roth and we decline to do so now." A closer examination of Reidel reveals that it is based more on an analogy from the factual situation in Roth: "Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction . . . would be no more vulnerable than was Roth's." Simply stated, the Court in Reidel looked at Roth and Stanley and decided that Reidel's situation was more like Roth's than Stanley's. Thirty-Seven Photographs is a bit more difficult to rationalize, but the major difficulty is caused by Mr. Justice White's dicta that the materials were within the scope of governmental suppression even if intended for the claimant's private use. However, this dicta has not been accepted by the Court. On the facts of Thirty-Seven Photographs, the Court was called upon to decide whether obscene material imported for the purpose of commercial distribution could be validly seized by the government. Thus this case, on its facts, is also more similar to Roth than to Stanley and can perhaps best be understood on this basis.

If this analysis is correct, then it is clear that Stanley presented the Court with the ultimate irreconcilability of the Roth formula for dealing with obscenity. Since Stanley, the Court has had no conceptual framework for dealing with obscenity cases and is reduced to deciding these cases individually on the basis of the facts involved. If the Court was subject to criticism for being the

84. Id. at 563.
85. Id. at 559 n.2.
86. 402 U.S. 351 (1971).
88. 402 U.S. at 356.
89. Id. at 354.
90. 402 U.S. at 376.
91. See text at notes 47 & 48 supra.
"nation's board of censors" before, the situation has now only worsened. One way for the Court to extricate itself from this intolerable situation is to accept the conceptual framework which has been pregnant in all of its obscenity cases. The Court has always recognized the protection of juveniles and unwilling adults as valid governmental interests, but unfortunately it has never truly recognized in an obscenity case these interests for what they really are—fundamental individual constitutional rights. When they are recognized as constitutionally protected personal liberties, the problem of obscenity takes on a new light. The essence of the problem is the conflict of three fundamental constitutional rights: the freedom of speech and press, the right to be let alone, and the right to direct the upbringing of one's children. When these interests are recognized for what they are, the solution to the problem is simply to balance the rights to determine which should be given precedence in any given situation.

To determine the efficacy of this approach, it is first necessary to understand the nature and scope of the countervailing constitutional rights. The right to be let alone was recognized as early as 1928 as fundamental:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

In essence, the right to be let alone is, in this context, the right not to read, listen, or see. In the past, the Court has heard cases which required it to balance this right against the rights protected by the first amendment. Kovacs v. Cooper, for example, involved a city ordinance which prohibited the use of sound trucks or any other instrument which emitted "loud and raucous" noises anywhere within the city limits. In upholding the statute, the Court found that the right of the unwilling listener outweighed the sound

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93. See note 69 supra.
95. 336 U.S. 77 (1949).
truck operator's first amendment rights. Similarly, a city ordinance which absolutely prohibited door-to-door soliciting without prior consent of the homeowner was upheld by the Court in *Breard v. Alexandria.* The Supreme Court found that a householder's right of privacy outweighed the publisher's right to solicit door-to-door. In *Public Utilities Commission v. Pollak* the Court faced the issue of whether a public transit passenger's right not to listen outweighed the utility's right to provide radio entertainment for its passengers. Recognizing the right to be let alone and its importance, the Court found that it was nevertheless "subject to reasonable limitations . . . when its possessor ventures outside his home." Dissenting, Mr. Justice Douglas stated that "[t]he right to be let alone is indeed the beginning of all freedom." Explaining the precise nature of his dissent from the Court majority, Mr. Justice Douglas further opined: "One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.

The importance of the right to be let alone was perhaps most forcefully recognized in the 1970 case of *Rowan v. Post Office Department.* In that case, appellants, who were in the mail-order business, challenged the constitutionality of a federal statute which provides that any person who receives an advertisement in the mail which he, in his sole discretion, believes to be erotically arousing or sexually provocative can request the Postmaster General to order the sender to never mail anything to the recipient again. Unanimously, the Court found that even though, "[i]n operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalogue . . . [T]he answer is that no one has a right to press even 'good' ideas on an unwilling recipient." The Court reached this result because " . . . the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

96. Id.
98. 343 U.S. 451 (1952).
99. Id. at 464-65.
100. Id. at 467.
101. Id. at 468.
104. 397 U.S. at 737.
105. Id. at 737-38.
106. Id. at 736.
Thus, it is clear that the right to be let alone, i.e., the right not to read, see, or listen, is a fundamental constitutional right. The individual is protected in the exercise of this right, not only from the government, but also from other private citizens who would interfere with his personal liberty. Citizens are protected in the exercise of this right outside, as well as inside, their homes.107 Of course, although this right is a fundamental personal one, the state certainly has the power, if it wishes to exercise it, to act in its protection.108

Finally, the "overbreadth doctrine" has no place in the balancing of the right to be let alone against the right of free speech and press; Rowan has laid to rest any vitality such a theory might have had.109 Essentialy the only limitation on the right of a person to be let alone is the reasonableness of his expectation of privacy after he leaves the sanctuary of his own home. "[S]ociety cannot protect the neurotically thin-skinned against those trivial invasions of privacy which the normal person suffers with equanimity."110

The real problem in the area of obscenity is, as this analysis demonstrates, the conflict of two constitutionally protected rights: the right of free speech and press and the right to be let alone. When constitutional rights conflict, they should be balanced to determine which should be given precedence in the specific case at hand.

The right of parental tutelage is very closely related to the right to be let alone, as Mr. Justice Stewart cogently demonstrated in his concurring opinion in Ginsberg v. New York:111

A State may permissibly determine that, at least in some precisely delineated areas, a child—like someone


As the Court has stated in another context, "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). In Lynch v. Household Finance Corp., 405 U.S. 538, 548 (1972), the Court stated, "Property does not have rights. People have rights."


109. In Rowan the individual's right to stop offensive publications from coming into his home swept within it traditionally protected, as well as unprotected, publications. The Court gave the statute its broadest possible interpretation.


111. 390 U.S. 629 (1968).
in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.\textsuperscript{112}

The right to direct the upbringing of one's child is, apart from its close relationship with the right to be let alone, a personal right of independent significance. This right was recognized by the United States Supreme Court as early as 1923 when it struck down a state statute which forbade the teaching of German to children.\textsuperscript{113} Mr. Justice McReynolds, delivering the opinion of the Court, stated: "Without doubt, it [the fourteenth amendment] denotes not merely freedom from bodily restraints but also the right of the individual . . . to establish a home and bring up children. . . ."\textsuperscript{114} In \textit{Prince v. Massachusetts}\textsuperscript{115} it was established that the state has the power to protect juveniles from evil influences and safeguard them from abuses. This right, at least as a valid governmental interest, has been consistently recognized in the decisions of the Supreme Court in the area of obscenity.\textsuperscript{116} The right of a parent to direct the upbringing of his children and protect them, with the aid of the state, cannot seriously be doubted. Even the noted civil libertarian Norman Thomas recognized this: "I do not think the First Amendment gives any guaranty to men to seduce the innocent and to exploit the kind of unformed mind and unformed emotions of adolescents."\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 649-50.
  \item \textsuperscript{113} \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923).
  \item \textsuperscript{114} \textit{Id.} at 399. This right was explicitly reaffirmed by the Court two years later in \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925).
  \item \textsuperscript{115} 321 U.S. 158 (1944). \textit{Prince} went further than merely protecting the right of parents to direct the upbringing of their children and held that the state had the power to protect children from abuses at the hands of their parents and guardians. \textit{Prince} may be questioned concerning the right of the state to protect children against the wishes of their parents. \textit{See Tinker v. Des Moines School Dist.}, 393 U.S. 503 (1969); \textit{In re Gault}, 387 U.S. 1 (1967); \textit{Rowan v. Post Office Dept.}, 397 U.S. 728, 741 (1970) (Brennan and Douglas, J.J., concurring); \textit{Ginsberg v. New York}, 390 U.S. 629, 636-37 (1968) ("Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.") \textit{Id.} at 639.
  \item Regardless of the juvenile's rights as against the state, it is clear, as one commentator has stated, "[w]e have never defined our constitutional goal as giving juveniles a capacity to speak and hear against the instructions of their parents." Shapiro, \textit{Obscenity Law: A Public Policy Analysis}, 20 J. Pub. L. 503, 515 (1971).
  \item \textsuperscript{116} \textit{See note 69 supra.}
  \item \textsuperscript{117} \textit{Hearings on Juvenile Delinquency (Obscene and Pornographic Materials) Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess.} 217 (1955).
\end{itemize}
V. CONCLUSION

Recognition of the right to be let alone and the right to direct the upbringing of one's children for what they are—fundamental constitutional rights—would free the United States Supreme Court from the problems of dealing with obscenity on a case-by-case basis and give it a conceptual framework with which it could consistently deal with the cases. Obscenity cases could be decided in the same manner the Court handles cases of conflicting constitutional rights in other areas of constitutional law—by balancing the rights involved and deciding which should take precedence in a given situation.118

In balancing the conflicting constitutional rights, the Court could also utilize the three part formula, as it has in the past when deciding obscenity cases,119 but this formula would no longer suffer from the disadvantages attendant to its being used as the absolute definition of whether a given publication or motion picture is entitled to first amendment protection. Under the proposed theory, obscenity is protected by the first amendment but countervailing constitutional rights may take precedence and require the suppression or regulation of the particular material. The patent offensiveness of the material, because of its affront to contemporary community standards, is relevant to the reasonableness of an individual's expectation of being let alone. The more offensive a particular publication, the more pressing is an individual's claim that its existence threatens his right not to be confronted with it and not to have his children confronted with it against his wishes. Similarly, the prurient appeal of the material and its redeeming social value is relevant to a determination of the weight to be given to an individual's right of free speech and press in the particular case. The level of obtrusiveness, while not dispositive, is also relevant to the balancing process.120

One may criticize this theory on the ground that it offers no protection to political or religious speech since it is possible that a particularly repugnant doctrine could be determined to be less valuable than the two countervailing constitutional rights. However, the case law which has developed thus far denies any such

118. In balancing these conflicting rights, the unique nature of obscenity which distinguishes it from all other forms of speech must be recognized. See W. Hocking, Freedom of the Press (1947): "A published obscenity is not an idle mental image—it is a disruptive mental image, a violent displacement of the self-sense of the viewer . . . ; it begins a psychological disintegration." Id. at 122.
119. See note 18 supra.
possibility. The balance which has been struck in effect draws the line between the right of free speech and press, the right to be let alone, and the right of parental tutelage someplace near the line between hard-core and soft-core pornography. Furthermore, the expressions of ideas, no matter how repugnant, are constitutionally protected and, outside the sanctity of one's home, are preferred over the other two countervailing constitutional rights.

A good example of the utility of this balancing approach can be seen by its application in Cohen v. California. In Cohen, the appellant was convicted of disturbing the peace because he wore a jacket in the corridor of the county courthouse, in the presence of women and children, on which the words "Fuck The Draft" were plainly visible. The United States Supreme Court clearly employed the balancing process advocated here and determined that the right of free speech outweighed the right of the unsuspecting viewer to be free from seeing appellant's vulgar mode of expression in the factual situation of that particular case. Mr. Justice Harlan, delivering the opinion of the Court, stated:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority [Rowan] would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Viewing the problem of obscenity as one of three conflicting but independent constitutional rights simply recognizes what has been implicit in most Supreme Court decisions. It is not a new theory, but instead seeks only to give consistency to the Supreme Court decisions in the area; it gives the Court a conceptual framework for obscenity cases. More importantly, this conceptual framework is not result-oriented. It expects and permits the individual Justices to find the balance between the conflicting constitutional rights at different points within the scope of precedent. Since it is not a result-oriented approach and since it gives effect to constitutional rights which have always been recognized as fundamental by the Court, there would seem to be no reason why it cannot be accepted as the proper approach to obscenity cases by all members

123. 403 U.S. 15, 16 (1971).
124. Id. at 21.
of the Court. The alternative is for the Court to continue to decide each obscenity case individually and without reference to any neutral constitutional principles. Hopefully the Court will renounce its claim to the title of "Supreme Board of Censors." 125

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