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OBSCENITY: A CONTINUING DILEMMA

by

Edwin Tobolowsky*

LOCAL citizens, law enforcement officers, lawmakers, and members of the media have been highly critical of the United States Supreme Court for its decisions in the obscenity field. The Supreme Court has been blamed for the flow of pornographic material in this country. Of course, there is little recognition that the Court is faced with the balancing of two constitutional rights. Nonetheless, the Supreme Court's inability to develop meaningful criteria for determining what is obscene, if that is possible, and at the same time to insure the guarantees of the first amendment to all press materials has created everlasting confusion among law enforcement agencies, purveyors of press materials, and lower courts. This Article is intended, in part, to demonstrate the chaos spawned by the Court's approach to obscenity. To look at the present dilemma, it is necessary to review the past.

I. A BRIEF HISTORICAL VIEW OF OBSCENITY

During the nineteenth century, obscenity laws shifted and were destroyed many times only to be replaced by more contemporary structures. The concept of obscenity law was missing from the foundation of early American jurisprudence.¹ For more than a century, the governments of the American colonies and later, the Republic, refrained from censoring obscenity. The United States literacy rate was rising sharply in the early nineteenth century, and Congress did not legislate on obscenity until 1842. The first federal law in this area was confined to obscenity imported from other countries.² It is interesting to note that Congress felt only foreign material could be obscene. There was no reference in the law to books, pamphlets, magazines, or other printed material. Pictorial art alone, and not the printed word, was considered dangerous. Perhaps some of the hesitancy on the part of Congress to regulate obscenity could be traced to an earlier debate in the Senate. In 1835, the proposal was made to bar from the mails all material which might incite rebellion among the slaves of the South.³ The most distinguished senators of the North and South, including

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¹ The first recorded case dealing with obscenity in the United States was an 1815 Pennsylvania case in which the defendant was accused of displaying a lewd picture. The court found the defendant guilty of filthy conduct. *Commonwealth v. Sharpless*, 2 S. & R. 91 (Pa. 1815).

The second obscenity milestone in the United States occurred in 1821 in Massachusetts where the defendant was convicted for publishing a sex-filled novel. The Massachusetts supreme court asserted that the publisher was convicted fairly because the material was obviously too obnoxious to show to respectable people. E. DEGRAZIA, *CENSORSHIP LANDMARKS* 40 (1969), quoting *Commonwealth v. Holmes*, 17 Mass. 336 (1821). Interestingly, the material involved in *Holmes* was the novel *Fannie Hill*, which the Supreme Court ruled not obscene in 1966. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

² Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 548.

³ E. DEGRAZIA, *supra* note 1, at 367 n.6.

Clay, Calhoun, and Webster, rose to declare such legislation a violation of the Constitution. In 1857, a clause on indecent and obscene "articles" was added to the statute of 1842, and all forms of photographs and printed material were included.⁴ By 1866, the mailing of obscene material was a criminal offense.⁵ The post office, however, had no power to actually exclude anything from the mails, and the penalty of fine and jail was to be imposed only after the offending material had gone through the mail.⁶ In other words, there existed no prior restraint.

Historical accounts do not record many obscenity prosecutions, but a few are worthy of comment. For example, Walt Whitman was dismissed from his post in the Interior Department because he wrote *Leaves of Grass*, "an indecent book."⁷ For a time, Mark Twain's *Huckleberry Finn* was censored because of its "adverse effect" upon school children.⁸ In 1905, Mrs. Warren's *Profession* was banned as one of George Bernard Shaw's filthy productions.⁹ During this period, the philosophy behind the law came from the English decision of *Regina v. Hicklin*.¹⁰ The *Hicklin* rule existed from the 1870's until recent times, and provided that material was obscene when its "tendency . . . 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."¹¹ The *Hicklin* test made no provision for the author's motives. It deprived an adult of material which was deemed unfit for a child, and it suppressed the work of many writers and artists of the day. Under the *Hicklin* rule, society's morally weakest segment determined whether the material would be censored. The most notable crusader in this country who adopted the narrow Victorian concept as expressed in the *Hicklin* test was Anthony Comstock. As a result of Mr. Comstock's efforts, Congress in the 1870's passed what we have come to know as the Comstock Law, which declared non-mailable any "obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character . . ."¹²

The Comstock Law and the *Hicklin* rule prevailed in the United States for many years, and it was not until 1913 that the Victorian concept of obscenity was significantly challenged. In *United States v. Kennerley*,¹³ which became a landmark in the fight against censorship, Judge Learned Hand stated:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words 'obscene, lewd, or lascivious.' I question whether in the end men

⁴ Act of Mar. 2, 1857, ch. 63, 11 Stat. 168.

⁵ Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 507.

⁶ *Id.*

⁷ E. DEGRAZIA, *supra* note 1, at 154.

⁸ *Id.*

⁹ *Id.*

¹⁰ L.R. 3 Q.B. 360 (1868).

¹¹ E. DEGRAZIA, *supra* note 1, at 9.

¹² Act of July 12, 1876, ch. 186, 19 Stat. 90.

¹³ 209 F. 119 (S.D.N.Y. 1913).

will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interests in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.¹⁴

Judge Hand's words became more meaningful in 1922 when the Court of Appeals of New York in the *Halsey*¹⁵ case held that a book could not be labeled obscene simply because of selective words or paragraphs, but rather the entire work must be considered as a whole. *Halsey* was followed in *United States v. One Book Entitled Ulysses*.¹⁶ In affirming the "dominant effect" standard laid down by *Halsey*, a federal court of appeals stated:

In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.¹⁷

As a result of the decisions in *Halsey* and *Ulysses*, the Supreme Court adopted a new definition of obscenity in *Roth v. United States*,¹⁸ and the last vestiges of the *Hicklin* rule disappeared. The *Roth* decision defines obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."¹⁹ The *Roth* test was refined in *Manual Enterprises, Inc. v. Day*,²⁰ in which the Court stated that obscenity under federal statutes "requires proof of two distinct elements: (1) Patent offensiveness; and (2) 'prurient interest' appeal. Both must conjoin before the challenged material can be found 'obscene' . . ."²¹ In *Jacobellis v. Ohio*²² the Court shed some additional light on *Roth's* tripartite standard when it defined the contemporary community standard. Using "the smallest local 'community' that can be drawn around"²³ a particular establishment disseminating press materials was recognized as being oppressive to dissemination in other localities. For the Court in *Jacobellis*, nothing less than a national community standard of decency was deemed necessary to insure that all sections of the country have equal access to press materials and that one local community's moral standards would not be inflicted upon other communities with possibly different standards.

¹⁴ *Id.* at 120.

¹⁵ *Halsey v. New York Soc'y for the Suppression of Vice*, 234 N.Y. 1, 136 N.E. 219 (1922).

¹⁶ 72 F.2d 705 (2d Cir. 1934).

¹⁷ *Id.* at 708.

¹⁸ 354 U.S. 476 (1957).

¹⁹ *Id.* at 489.

²⁰ 370 U.S. 478 (1962).

²¹ *Id.* at 486.

²² 378 U.S. 184 (1964).

²³ *Id.* at 194.

In 1966, the Supreme Court, in three separate decisions handed down on the same day, affixed three variations to the *Roth* standard. In *Memoirs v. Massachusetts*²⁴ the Court reversed a holding by the Supreme Judicial Court of Massachusetts "that a book need not be 'unqualifiedly worthless before it can be deemed obscene.'"²⁵ The Court stated that in order for material to be suppressed, it must be *utterly* without redeeming social value, even though it appeals to the prurient interest and is patently offensive. Thus, all three of these elements must coalesce, and there can be no balancing or weighing of social value against prurient interest appeal and patent offensiveness. The Court's decision in *Ginzberg v. United States*²⁶ added a new factor for the lower courts to weigh in determining the issue of obscenity. In close cases, the fact that the material is being pandered may outweigh any slight redeeming social value the material may have. Pandering was defined by the Court as emphasizing the sexually provocative aspects of a publication. However, in a close case, deciding if a purveyor is selling materials with the "leer of the sensualist"²⁷ is virtually impossible since pandering would seemingly be necessary only for less offensive materials. Finally, in *Mishkin v. New York*²⁸ the Court held that in material which "is designed for and primarily disseminated to a clearly deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."²⁹ Thus, the *Mishkin* case gave the lower courts the added burden of determining if the material appeals to the prurient interest "of its intended and probable recipient group."³⁰

In 1967, the Supreme Court indicated in *Redrup v. New York*³¹ that a new factor may become relevant in obscenity cases. For the first time, lack of obtrusiveness was listed as a possible constitutional defense in an obscenity case.³²

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. . . . And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg*³³

*Stanley v. Georgia*³⁴ significantly expands on this idea of lack of obtrusiveness in its holding that private possession of obscene materials is a constitutionally protected right. The Court combined its reasoning in *Gris-*

²⁴ 383 U.S. 413 (1966).

²⁵ *Id.* at 419.

²⁶ 383 U.S. 463 (1966).

²⁷ *Id.* at 468.

²⁸ 383 U.S. 502 (1966).

²⁹ *Id.* at 508.

³⁰ *Id.* at 509.

³¹ 386 U.S. 767 (1967).

³² See Teeter & Pember, *The Retreat from Obscenity: Redrup v. New York*, 21 HASTINGS L.J. 175 (1969).

³³ 386 U.S. at 769.

³⁴ 394 U.S. 557 (1969).

wold v. Connecticut,³⁵ which concerned the sanctity of the bedroom, with lack of obtrusiveness to protect the defendant's pornographic library from search and seizure.

The questions raised by *Redrup* and *Stanley* are whether the right to private possession of obscene materials includes the right to have a commercial outlet from which to purchase the materials and whether the right to privacy in one's home can be expanded to include the privacy of an indoor movie theatre. In *Karalexis v. Byrne*³⁶ a federal three-judge panel interpreted the Supreme Court's decision in *Stanley*, that the obscene materials there were protected by the first amendment even though devoid of any ideological content, as a rejection of *Roth* and an adoption of an obtrusiveness test. The *Karalexis* three-judge panel interpreted *Stanley* as holding that *Roth* is applicable only to obtrusive public distribution and that controlled, unobtrusive commercial distribution both as to magazine materials and films is permitted under *Stanley*. On the other hand, in *Stein v. Batchelor*³⁷ another federal three-judge panel held that private possession of obscene materials is protected under *Stanley*, but public distribution, no matter how controlled, is not protected and is not a corollary to the right of private possession. *Karalexis* and *Stein* place squarely before the Court the opportunity to solve the dilemma created by the *Roth* tripartite standard and adopt obtrusiveness as the test in determining whether material should be suppressed. It seems that suppression of material disseminated in a controlled manner that does not affront the sensibilities of non-consenting adults and prosecution for such dissemination is socially functionless because there is no victim to be protected.

II. CONTEMPORARY TEXAS STATUTES AND CASES

Until the Supreme Court answers the questions posed above, the problems of regulating obscenity seem almost insurmountable. A prime example of such problems is that which local officials in Texas have been faced with in trying to implement Texas Penal Code articles 513, 514, and 527.³⁸

A. Article 527

The original article 527³⁹ was declared unconstitutional in *Stein v. Batchelor* insofar as "it fails to confine its application to a context of public or commercial dissemination"⁴⁰ of obscene materials. In defining the word obscene, the statute failed to include the phrase "utterly without redeeming social value."⁴¹ The present article 527 was enacted by the Texas legislature in 1969, and, in fact, became effective at almost precisely the same time that the *Stein* opinion was handed down.⁴²

³⁵ 381 U.S. 479 (1965).

³⁶ 306 F. Supp. 1363 (D. Mass. 1969).

³⁷ 300 F. Supp. 602 (N.D. Tex. 1969).

³⁸ TEX. PEN. CODE ANN. art. 513, 514, 527 (Supp. 1969).

³⁹ *Id.* art. 527 (1961).

⁴⁰ 300 F. Supp. at 607.

⁴¹ *Id.*

⁴² *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), was decided on June 9, 1969. TEX. PEN. CODE ANN. art. 527 (Supp. 1969) became effective on June 10, 1969.

Article 527, Section 9. The constitutionality of the original article 527 was also attacked in *Fontaine v. Dial*.⁴³ This attack was leveled at section 9 of the article, which permitted a magistrate to issue a search warrant for the seizure of allegedly obscene materials on the basis of material attached to the complaint or descriptions of the material by the complaining officers. The issue before the three-judge panel was "whether or not the Constitution of the United States requires that an adversary hearing to determine the question of obscenity must be held prior to the seizure of allegedly obscene motion picture film, and advertisements thereof."⁴⁴ The court held that:

The seizure of film after no more than an *ex parte* determination of probable cause is essentially a prior restraint of expression—especially inimicable to the First Amendment—and clearly lacks the sensitivity required by the Constitution. In fact, any procedure less sensitive than an adversary hearing on the issue of obscenity prior to seizure of the film, fails to meet the Constitutional requirements implicit in the First, Fourth, and Fourteenth Amendment.⁴⁵

Although this case arose under the old article 527, the *ex parte* search warrant section of the new article 527 is identical,⁴⁶ and is equally invalid.

On the basis of the three-judge panel's opinion in *Fontaine*, *ex parte* search warrant seizures of press materials were attacked on several fronts. Five cases were consolidated before a three-judge federal panel in Dallas in *Newman v. Conover*.⁴⁷ In each of the five cases, the constitutionality of the new article 527 was attacked. Section 9 was specifically attacked as being "void on its face because it specifically authorized the issuance of *ex parte* search and seizure warrants and also specifically authorized the seizure of allegedly obscene material without affording the affected party a prior adversary hearing on the issue of obscenity."⁴⁸ Citing extensively

⁴³ 303 F. Supp. 436 (S.D. Tex. 1969). TEX. PEN. CODE ANN. art. 527, § 9 (1961) provides:

Where possible and practical, obscene matter upon which prosecutions are based under the provisions of this article, should be obtained by peace officers or prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant. Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized. Moreover, no peace officer shall seize any obscene matter from the possession of any person except under the authority of a search warrant issued under the provisions of the Code of Criminal Procedure of Texas. Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing magistrate the opportunity to examine such materials to assist him in deciding whether the warrant shall issue. Where the alleged obscene matter is not available to present to the magistrate, the affiant or affiants to the complaint shall describe the alleged obscene materials in detail so as to assist the magistrate in deciding whether the warrant should issue. Moreover, where alleged obscene matter is not attached to the complaint, as in the case of motion pictures or statues, the magistrate to whom the complaint is presented shall, where practical, personally view the matter alleged to be obscene before issuing the warrant. Where a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers. Nothing contained in this section shall prevent the obtaining of alleged obscene matter under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

⁴⁴ 303 F. Supp. at 438.

⁴⁵ *Id.* at 439.

⁴⁶ See note 43 *supra*.

⁴⁷ 313 F. Supp. 623 (N.D. Tex. 1970).

⁴⁸ *Id.* at 627.

from *Fontaine*, the panel declared section 9 unconstitutional, but held that the section "could be severed without affecting the other provisions."⁴⁹ The court also stated that "state officials, in enforcing the substantive sections of Article 527, can adopt such procedures as are sanctioned in *Fontaine* . . . to secure, in a proper manner, evidence in support of prosecution."⁵⁰

The three-judge panel suggested as being constitutionally proper the injunctive procedure found in section 13 of article 527. It provides that upon application of the proper authority, a district court can issue "any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article [Or] to prevent any person from violating any of the provisions of this Article."⁵¹ However, no order will issue except upon notice to the person sought to be enjoined and a trial of the issues must be held within one day after joinder of issue.⁵²

Article 527, Section 13. In *State v. Scott*⁵³ a Texas district court reached a result contrary to the *Newman* case and declared section 13 unconstitutional. The court stated that the injunction section failed to define proper procedural safeguards to protect first amendment freedoms. Specifically, the court noted that the section failed to establish procedural guidelines for issuing temporary and permanent injunctions, and that it failed to set forth proper guidelines concerning the date and time of the defendant's answer, the type of evidence to be produced at an injunction hearing, and the burden of proof. In addition, the court stated that under section 13 a defendant does not receive adequate notice to answer and defend the petition for an injunction, because the section "sets forth a trial setting which could be within one day after joinder of issue"⁵⁴

Notwithstanding the decision in *Scott*, and bolstered somewhat by the holding in the *Newman* case, the city and district attorneys' offices in Dallas, Texas, embarked upon an announced campaign to clean up "smut" in Dallas by using the procedural device set out in section 13.⁵⁵ Their initial effort was a suit for an injunction in *State v. Manhattan Arts Theatre, Inc.*⁵⁶ At the injunction hearing, after the objection concerning the extremely short notice of hearing was overruled, the court requested that the accused film be produced by the owner-operator of the theater. The owner refused to produce the film, relying on his fifth amendment right against self-incrimination. The court then cautioned the state that the owner's position might be valid as to the use of the evidence in any crim-

⁴⁹ *Id.* at 628.

⁵⁰ *Id.*

⁵¹ TEX. PEN. CODE ANN. art. 527, § 13 (Supp. 1970).

⁵² Another suggested procedure mentioned by the court was that utilized in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), where the state of Kansas used the device of a court order directed to the owners of allegedly obscene books to show cause why a warrant for seizure of the books should not issue.

⁵³ *State v. Scott*, No. 87,174-C (89th Dist. Ct., Wichita County, Tex., Feb. 19, 1970) (mem. opinion by Driver, J.).

⁵⁴ *Id.* at 3.

⁵⁵ Dallas Morning News, June 23, 1970, § D, at 1, col. 6.

⁵⁶ CA No. 70-6488C (68th Dist. Ct., Dallas County, Tex., filed June 25, 1970).

inal prosecution, but it ordered the owner to deliver the film anyway, since it could properly be used as evidence in a civil suit for permanent injunction under section 13, in that the film could be destroyed if found to be obscene. The theater owner remained adamant in his refusal, and he was ordered to jail until such time as he purged himself of contempt. It seems that the flaw in this procedure under section 13 is that use of a subpoena duces tecum to command production of an allegedly obscene film at a hearing to show cause why it should not be declared obscene or at a hearing on a motion for temporary injunction may very likely preclude criminal prosecution and leave only the remedy of destruction of the film. In instances where the film is of the sixteen millimeter variety, the cost of a single print is relatively minor as compared to the criminal sanctions prescribed by article 527, a fine up to \$1,000 and imprisonment up to six months for the first conviction.⁵⁷

Article 527, Section 7. In addition to the procedural problems involved in obtaining evidence for prosecuting violators of article 527, the statute is constitutionally suspect in other respects. Section 7 provides in part: "The jury, or the court . . . shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. . . . A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding."⁵⁸ Thus, a producer or distributor of a particular film could conceivably be put to the expense of defending a charge that its movie is obscene in every community in which it is shown, even though it has been found not to be obscene in other Texas courts. Two recent Supreme Court decisions,⁵⁹ when read together, seem to indicate that the city and county are mere divisions of a state as far as criminal prosecutions are concerned, and that a prosecution by any one of the three estops the others from prosecuting the same person on any charge based on the same facts. Thus, section 7 appears unconstitutional as to producers, exhibitors, and distributors of films who are prosecuted as to the same film more than one time under section 3 of article 527.

Furthermore, section 7 attempts to narrow the contemporary community standard as defined in *Jacobellis*⁶⁰ to the particular local community in which the particular material is alleged to be obscene. By statutorily denying res judicata effect to a special verdict on the issue of obscenity as to particular material, the legislature is attempting to allow each local community to determine that which affronts its local standards. Under section 7, a finding that a film is not obscene by a court in Brownwood, Texas, "is not admissible in a similar proceeding on that same issue in another Texas court."⁶¹

Article 527, Section 3. Until such time as the Supreme Court explains the

⁵⁷ TEX. PEN. CODE ANN. art. 527, § 8 (Supp. 1969).

⁵⁸ *Id.* § 7.

⁵⁹ *Ashe v. Swenson*, 397 U.S. 436 (1970); *Waller v. Florida*, 397 U.S. 387 (1970).

⁶⁰ See text accompanying notes 22, 23 *supra*.

⁶¹ *State v. Allred*, CA No. 16-728 (35th Dist. Ct., Brownwood, Tex., filed June 10, 1970).

reach or limitations of its holding in *Stanley v. Georgia*, the constitutionality of section 3 of article 527 is in doubt insofar as it fails to differentiate between public, or obtrusive, and mere private distribution and exhibition of obscene materials.⁶⁸ Section 3 has been declared unconstitutional in *State v. Scott* on just such a basis.⁶⁹ In another case, however, section 3 was held constitutional by a three-judge panel in *Newman v. Conover*.⁶⁴ There, the plaintiffs asserted that section 3 is "unconstitutionally overbroad, because it prohibits any person from publishing, preparing, printing, distributing or selling allegedly obscene material to adults for their private use."⁶⁵ The three-judge panel rejected this contention and interpreted the Supreme Court's affirmance of *Gable v. Jenkins*,⁶⁶ which was a decision by a three-judge panel in Georgia upholding the constitutionality of the Georgia obscenity statute, as meaning that *Stanley v. Georgia* should be narrowly construed.⁶⁷ However, attributing any significance to the Supreme Court's affirmance of the *Gable* case seems questionable in view of the fact that a decision by a federal three-judge panel on the constitutionality of a state statute is appealable by right to the Supreme Court.⁶⁸ Therefore, the Court must either affirm or reverse. Since the Court presently has the *Karalexis* and *Stein* cases before it for decision concerning the scope of *Stanley v. Georgia*, there seems little ground for attributing any significance to the affirmance of *Gable v. Jenkins*.

B. Articles 513 and 514

The Texas legislature in its last session enacted another provision for waging war against obscene films. It added to article 513 the following section: "A disorderly house is any house, building, theater or other structure where obscene motion pictures are displayed, exhibited or shown to persons under twenty-one years of age."⁶⁹ Article 514 establishes the penalties for keeping a bawdy or disorderly house, and exempts from its operation any film projectionist who has no financial interest in the theater.⁷⁰

In September of 1969, an action under these articles was instituted

⁶² TEX. PEN. CODE ANN. art. 527, § 3 (Supp. 1969), provides: "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 prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

⁶³ See text accompanying notes 53, 54 *supra*.

⁶⁴ 313 F. Supp. 623 (N.D. Tex. 1970).

⁶⁵ *Id.* at 625.

⁶⁶ 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd*, 397 U.S. 592 (1970).

⁶⁷ In *Gable v. Jenkins* the attackers of the Georgia statute, which is very similar to TEX. PEN. CODE ANN. art. 527, § 3 (Supp. 1969), contended that the statute was overbroad in that it prohibited dissemination of obscene material "to any person." GA. CODE ANN. § 26-101 (1969). The federal three-judge panel interpreted the majority's language in *Stanley v. Georgia*, that "'the States retain power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home,'" to indicate "a conscious desire on the part of that Court to keep *Stanley* limited to its facts." 309 F. Supp. at 1000.

⁶⁸ 28 U.S.C. § 1253 (1964).

⁶⁹ TEX. PEN. CODE ANN. art. 513, § 2(a) (Supp. 1969).

⁷⁰ *Id.* art. 514.

against the manager of a drive-in theater.⁷¹ The film showing at the theater was alleged to be obscene and the manager was arrested for operating a disorderly house in violation of articles 513 and 514. Before the manager was brought to trial, a suit was filed in a federal district court on behalf of the manager by the producer and distributor of the motion picture seeking to have the prosecution enjoined on the basis that articles 513 and 514 are unconstitutional.⁷² In federal court, the plaintiffs asserted that the sprawling doctrine of public nuisance is too broad for regulation of first amendment rights.⁷³ If the theater manager is convicted under articles 513 and 514, the theater could be closed by injunction for one year and the manager could be required to post a \$5,000 bond before reopening it.⁷⁴ This is prior censorship of the first order, since the theater would be denied the right to show motion pictures for one year because of what it has shown in the past, in addition to being required to post bond to reopen and operate under penalty of forfeiture of that bond.

Articles 513 and 514 could be used as effective means of harassing theater operators by disgruntled private citizens. The use of any premises as a disorderly house as defined in the Penal Code (article 513) can be enjoined at the suit of either the state or any citizen thereof.⁷⁵ This means that every adult citizen in the state of Texas has it within his ability to harass motion picture producers, exhibitors, and distributors by filing suit to have a theater declared a public nuisance as defined in article 513 of the Penal Code. The fact that articles 513 and 514 have been almost totally ignored by law enforcement authorities as a means of controlling theaters showing allegedly obscene films seems to indicate that such authorities place little faith in their validity.

III. CONCLUSION

The problem of what to do with obscenity has become increasingly more complicated as the courts continue to attempt to reconcile the first amendment guarantees given to press materials with suppression of free speech. It is unlikely that the Supreme Court will stand on its present position that only obscene materials found in the privacy of one's home are protected under the first amendment. The Court seemingly is moving toward an obtrusiveness standard whereby both sale and exhibition of obscene materials would be protected as long as they do not confront an unwilling viewer with representations he may reasonably regard as offensive. Such an approach would then give law enforcement authorities a legitimate group to protect (other than minors). If the Supreme Court has truly rejected the position that obscene material leads to deviant and

⁷¹ State v. Riner, CA No. 21-917 (County Ct. at Law, Smith County, Tex., filed Sept. 19, 1969).

⁷² Eve Productions, Inc. v. Harlan Long, No. 5087 (E.D. Tex., filed Dec. 10, 1969); Eve Productions, Inc. v. State, No. 5105 (E.D. Tex., filed Dec. 10, 1970).

⁷³ See Grove Press, Inc. v. City of Philadelphia, 300 F. Supp. 281 (E.D. Pa.), *aff'd in part*, 418 F.2d 82 (3d Cir. 1969).

⁷⁴ TEX. REV. CIV. STAT. ANN. art. 4666 (1952).

⁷⁵ *Id.* art. 4667.

socially undesirable behavior, as it seems to have done in *Stanley*, then its only logical course is to adopt obtrusiveness as its standard for suppressing obscene materials. A great and unnecessary burden would then be lifted from our court systems and law enforcement agencies.

The President's Commission on Pornography has published its findings and concludes that fears that sexy films, books and magazines are aggravating sex crimes and corrupting youngsters' morals are unfounded. In sum, there is no evidence that exposure to pornography operates as a cause of misconduct in either youths or adults.⁷⁶ These findings, coupled with the Supreme Court's holding in *Stanley*, are very persuasive support for permitting consenting adults to view pornography in any form as long as no unwilling viewer is exposed. Since the motion picture industry already has its own system of self-regulation in the form of ratings to inform the public of the content of films and age limit requirement for admission, a literate adult viewer will not be exposed to pornography in motion pictures against his will. Similar precautions by purveyors of printed pornographic materials would shield those members of society desirous of and in need of protection from exposure to pornographic materials. Society, having no need to protect itself from the nonexistent dangers thought inherent in viewing pornographic materials, should then concentrate on shielding its members who want or need protection.⁷⁷

⁷⁶ THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970).

⁷⁷ The recent case of *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970), recognizes that the government's only legitimate interests in dealing with the problem of obscenity are in protecting children from exposure to obscenity and preventing assaults on the sensibilities of an unwilling public. The court ruled that the government cannot prohibit mailings of obscene materials to requesting adults because there is no public display and children are not involved.