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THE TWILIGHT OF NONSPEECH

BERNARD E. GEGAN*

"LIBELOUS UTTERANCES, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'" Beauharnais v. Illinois.¹

"We hold that obscenity is not within the area of constitutionally protected speech or press." Roth v. United States.²

Through these two cases was woven into our law an approach to freedom of speech that Professor Kalven has called the "two-level" theory. "There are two categories of speech—that entitled to first amendment scrutiny, although after such scrutiny it may prove subject to regulation; and that so without importance or ideas that it is virtually per se subject to regulation and raises no constitutional issues."³

Both Beauharnais and Roth rested most heavily on history and tradition. If libel and obscenity were understood to be subject to regulation at the time of the adoption of the Constitution and thereafter, then clearly it could not have been intended that they should receive constitutional protection. Historical practice, however, has a way of yielding to new doctrine and the technique of carving out categories of constitutional nonspeech has received heavy blows in recent years. In the case of libel it has been discarded and in relation to obscenity it has entered a twilight of decline. It will be the purpose of this article to examine the influences that led to this state of affairs and look forward to the probable shape of things to come.

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¹ 343 U.S. 250, 266 (1952).


Libel: Speech or Nonspeech?

At the time of the Beauharnais case the prevailing standard used to distinguish protected expression from regulable action was the phrase first used by Justice Holmes in Schenck v. United States:⁴ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁵ At issue in Beauharnais was the constitutionality of a so-called group libel statute which made it a crime to portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any color, race, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision or obloquy or which is productive of breach of the peace or riots. . . ." Since the reference to breaches of the peace was in the alternative the state courts refused to grant Beauharnais' request for a jury instruction in terms of clear and present danger. It was this feature of the case that led the Supreme Court to read libel out of the first amendment. To what extent the test was inapposite to varying types of free speech issues or was incomplete in guiding judgment in those cases to which it logically applied, need not detain us at this point. The only way the group libel statute could pass muster was to avoid the clear and present danger test; and the only way to avoid the test was to hold the first amendment inapplicable to libel.

It was unquestionably true that some kinds of speech were routinely actionable. The Court had recognized as much in Chaplinsky v. New Hampshire:⁶ "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words."⁷ Since insults, lewd and obscene displays and the like shock and offend the unwilling listener and libel presently injures reputation, it is unlikely that the Court in Chaplinsky was indulging in more than an elliptic affirmation of the harm-causing capacity of certain speech. The examples given were instances of palpable clear and present danger, not a list of exceptions to the test's requirements.⁸ The Court, however, chose to cast libel, and by analogy, group libel, beyond the constitutional pale, where it remained until retrieved by New York Times v. Sullivan⁹ in 1964.

For all its improvement over prior law the test concealed unresolved questions. In the words of a leading scholar:

Even where it is appropriate, the clear and present danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of

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⁴ 249 U.S. 47 (1919).
⁵ Id. at 52.
⁶ 315 U.S. 568 (1942).
⁷ Id. at 571-72.
⁸ Kalven, supra note 3, at 48-50.
more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech or activity is launched.\textsuperscript{10}

These complexities were first recognized by Justice Brandeis in his eloquent dissent in \textit{Whitney v. California}:\textsuperscript{11}

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive.\textsuperscript{12}

As fate was to have it, when the Court finally accepted the Holmes-Brandeis test and recognized its complexities in the Smith Act prosecutions of the Communist leaders\textsuperscript{13} it stood Brandeis' qualification on its head and used the relative gravity of the apprehended evil, not as a source of heightened protection for speech, but as a substitute for clarity and imminence.

It is against this background that the \textit{New York Times} case enters the stream of first amendment doctrine. There, the Alabama courts subjected the \textit{New York Times} to a large libel judgment based on false statements concerning a police commissioner contained in a paid civil rights advertisement. Drawing inspiration from Professor Alexander Meiklejohn's special concern for speech in relation to matters of public policy in a self-governing society,\textsuperscript{14} the Court discerned in the historical rejection of the Alien and Sedition Act of 1798 a "central meaning" of the first amendment. As the Court said in a later case involving criminal libel:

For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."\textsuperscript{15}

The Court accordingly held that defamatory falsehood concerning the official conduct of a public servant could be actionable only if made with conscious disregard of the truth. The same rule was later applied to defamation of private citizens involved in public issues.\textsuperscript{16}

If \textit{Beauharnais} is used as a starting point it no doubt seems as though libel has been catapulted from constitutional oblivion onto center stage. The surprise ought to be less if it is remembered that, apart from the fiat in \textit{Beauharnais}, libel had never

\textsuperscript{10} \textit{Freund, The Supreme Court of the United States} 44 (1961).
\textsuperscript{12} 274 U.S. at 377 (dissenting opinion).
\textsuperscript{13} Dennis v. United States, 341 U.S. 494 (1951).
\textsuperscript{14} Meiklejohn, \textit{Political Freedom} (1948); Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 Sup. Ct. Rev. 245.
\textsuperscript{15} Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).
been an “exception” to the restraints of the first amendment. Since libel injures a valued interest in reputation it clearly causes a “substantive evil” that the state has a right to prevent. *New York Times* is essentially a fulfillment of Brandeis’ insight that not every substantive harm is grave enough to deserve a remedy at the expense of discussion. The Court moved beyond considerations of proximity of danger to the basic position that individual reputation cannot be preferred to speech so important to the core purpose of the first amendment.

It is ironic that when the Court in *Dennis* misused Brandeis’ reasoning it did so under the banner of clear and present danger, whereas, when in *New York Times*, the Court gave substance to it, no indebtedness to the pathbreaking work of Brandeis was acknowledged. The values of doctrinal continuity would be better served if new rules could be made to grow naturally out of old ones rather than abruptly replacing them.

**Obscenity in Context**

It is commonplace to deplore the lack of clear purpose behind laws repressing obscenity. The proponents of such legislation have thus far been spared the hardship of such analysis because the Supreme Court has from the beginning relegated obscenity to the category of nonspeech.\(^{17}\) Although the Court drew support from history, a major ground of decision was the total lack of “redeeming social importance” in obscenity.

In the welter of conflicting views concerning this subject the principal recent development has been the Court’s rulings that the existence of redeeming social importance in an erotic work could chiefly depend on factors extrinsic to the work itself. In *Ginzburg v. United States*\(^{18}\) the Court held that pandering to the sexual appetite of potential consumers could be decisive on the issue of obscenity in doubtful cases. The Court observed of the defendant’s pandering: “The deliberate representation of petitioners’ publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content.”\(^{19}\) This echoes the Model Penal Code’s theory of the basic offense as “commercial exploitation of the widespread weakness for titillation by pornography.”\(^{20}\) Finally, the Court concluded that a clear appeal to this appetite “strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.”\(^{21}\)

The emphasis given by the Court to titillation as opposed to free speech shows the vigor still remaining in the concept of obscenity as nonspeech. At least in the realm of hard-core pornography there is a realistic psychological basis for so holding. Pornography is designed to act as a psychological aphrodisiac to stimulate erotic response.\(^{22}\)

\(^{17}\) Ginsberg *v.* New York, 390 U.S. 629 (1968); Roth *v.* United States, 354 U.S. 476 (1957).


\(^{19}\) Id. at 470.


\(^{21}\) 383 U.S. at 474-75.

\(^{22}\) Kronhausen & Kronhausen, *Pornography and the Law* 217-86 (1964); Lockhart & Mc-
In this sense the use of pornography is an experience more than a communication, an activity more than a speech. The experiential quality of pornography is shared by the company it keeps. Where tolerated, erotic objects are sold by the same merchants who vend pictorial and written erotica. They seemingly appeal to overlapping markets and serve the same purposes when used. It is clear that behavior, not communication, is involved in the use of such objects to arouse erotic response through the tactile sense. It is at least reasonable to assimilate hard-core pornographic stimulation through the visual sense to the same category. The psychological estimate of hard-core pornography is complimented by the functional purposes of the first amendment. The political expression rationale of Professor Meiklejohn has gained recognition through the "central purpose" of the first amendment discerned in the New York Times case. In this light the irrelevance of pornography to any "governing importance" is as significant as its meretriciousness. In both senses the Roth criteria of lack of redeeming social importance has been responsive to the realities of the problem.

Obscenity and Privacy

The historically safe harbor of obscenity legislation was penetrated recently in Stanley v. Georgia. In a virtual reenactment of the facts of Mapp v. Ohio, federal and state agents obtained a warrant to search Stanley's house for gambling paraphernalia. In the course of their search the agents discovered some film in a desk drawer. When the film proved upon examination to be obscene, a conclusion not disputed on appeal, Stanley was convicted in the Georgia courts of knowingly possessing obscene matter. The Supreme Court bypassed the clear violation of the Mapp rule against the use of unconstitutionally seized evidence and deliberately confronted the issue it had strenuously avoided in Mapp: whether mere private possession of obscene matter could constitutionally be made criminal? With freedom of speech linked with the value of privacy, with which it is frequently in conflict, the conclusion was irresistible: Stanley's actions were beyond the reach of the State. It was also inevitable that the other side of the pandering coin should turn up. Erotica could be sheltered as well as rendered vulnerable by the context in which it appeared.

Specifically joining the rights of freedom to read and privacy, the Court held: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." In shielding private indulgence from the reach of the law the Court confronted two possible bases upon which the State could assert an interest in private reading habits.
First, the Court rejected as wholly illegitimate under the philosophy of the first amendment the suggestion that the State could maintain a concern for the moral quality of a man's private thoughts. Second, the Court laid to rest the traditional strawman of obscenity regulation, the prospect of ant-social acts resulting from indulgence in obscenity. The Court first noted the lack of empirical evidence to support such apprehensions, and, secondly, quoting Justice Brandeis in Whitney, stated that "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law..."\(^{28}\)

Having thrust aside the two most paternalistic of the possible justifications for obscenity laws, the Court reaffirmed its fidelity to the line of cases led by Roth, and in doing so mentioned some of the legitimate social interests protected by such laws. "But that case [Roth] dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children... or that it might intrude upon the sensibilities or privacy of the general public."\(^{29}\)

This catalogue of interests provides much to think about. First, there is the case of children. The Court has recently sanctioned the approach of contextual obscenity laws specifically limited to minors.\(^{30}\) Although the passage from Stanley quoted above could be read as approving concern for children as a justification for general obscenity regulation, it is clear that such a meaning could not have been intended. The Court long ago ruled that the adult population cannot be reduced to reading only what is fit for children.\(^{31}\)

The reference in Stanley to intrusion upon the privacy of the public is amplified in Redrup v. New York\(^{32}\) to mean "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."\(^{33}\) Unsolicited mailings and indecent public displays are obvious examples. While the public nuisance type of regulation commends itself to the sternest critics of obscenity legislation,\(^{34}\) it has presented difficult problems in the context of political expression. While the public's sensibilities may be protected against psychic assault, their peace of mind may not be insulated from shocking ideas. In Terminiello v. Chicago\(^{35}\) the Court held unconstitutional a Chicago ordinance prohibiting speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." In holding the alternative criteria of the ordinance overbroad, the Court wrote:

"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose..."\(^{36}\)

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\(^{28}\) Id. at 566-67.

\(^{29}\) Id. at 567.


\(^{32}\) 386 U.S. 767 (1967).

\(^{33}\) Id. at 769.

\(^{34}\) Packer, The Limits of the Criminal Sanction 324 (1968); Henken, Morals and the Constitution: The Sin of Obscenity, 63 COLUM. L. REV. 391 (1963); Emerson, Toward a General Theory of the First Amendment 91 (1967).

\(^{35}\) 337 U.S. 1 (1949).
when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.36

The principles of *Terminiello* frequently come into play in cases of so-called “symbolic speech.” If the Court can be persuaded that the restrictive law is directed at the content of the protest rather than impartially at its physical manifestations, the right of free speech will prevail over public distaste for the style of the speaker.37

Thus, in *Stromberg v. California*,38 a defendant had been convicted of violating a California statute prohibiting the public display of a red flag “as a sign, symbol or emblem of opposition to organized government.” In an opinion by Chief Justice Hughes the Supreme Court held the statute to be an unconstitutional interference with the liberty of political expression secured by the fourteenth amendment. Similarly, the Court recently upheld the constitutional right of public high school students to wear sedate black armbands as an expression of their opposition to the war in Vietnam.39

On the other hand, as the Court said in *Cantwell v. Connecticut*:40

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.41

The difficulties are nowhere brought out more vividly than in the recent flag-burning case.42 One Street, was convicted of violating a New York statute prohibiting public mutilation of the United States flag. The majority of the Supreme Court found it unnecessary to reach the ultimate question whether flag burning was a protected form of speech. They reversed the conviction because, as they viewed the statute, the information and the evidence, Street could have been convicted for the words he spoke at the time he burned the flag and not just for the flag burning itself. Chief Justice Warren and Justices Black, White and Fortas each filed a dissenting opinion. Each felt compelled to reach the merits of the flag burning statute and each thought it constitutional. The Chief Justice went so far as to express his difficulty in imagining that the majority would have thought differently had they reached the issue. Only Justice Fortas wrote at length on the reasons why the statute was constitutional and he did not emphasize the shock effect of unwillingly witnessing the burning of the national emblem. However, the careful attention the majority opinion gave to the shock effect problem lends support to the Chief Justice’s observation concerning the entire Court’s view of the matter.

The most difficult aspect of the case is that the distasteful and shocking behavior of Street could not be said to inhere solely

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36 *Id.* at 4.
37 For an unsuccessful attempt to persuade the Court, see, e.g., United States v. O’Brien, 391 U.S. 367 (1968).
38 283 U.S. 359 (1931).
40 310 U.S. 296 (1940).
41 *Id.* at 309-10.
in his conduct independently of his views. This is fiendishly apparent when it is remembered that burning is the statutory method of respectful disposal. Clearly, what is controlling in the affront to sensibilities is the intent with which the burning is done. This is perilously close to suppression of hateful ideas. Yet it stops short of that. Street was prosecuted not for the content of his ideas about this country but for the offensive and provocative manner in which he expressed them. The psychic assault was primarily in the medium, not the message.

If sparing the ragged nerves of passers-by is the interest secured by the flag-burning statute then it does not clarify matters to argue “that loyalty to the flag, like loyalty to the country, cannot be coerced.” The tranquillity of the unwilling spectator is not dependent upon the loyalty of the incendiary. It must finally be admitted that there is an appealing live-and-let-live quality about a rule barring compulsory flag salute and a rule preventing public flag desecration.

The evil identified in Redrup as “pandering” and the interest referred to in Stanley as the “sensibilities” of the public taken together express the state interest in the public morality. As Professor Henken clarified some years ago, the evil actually perceived by the public which enacts obscenity legislation is infringement on the general moral standard of the community. It must be emphasized that this interest is distinct from the interest in freedom from unwanted imposition of offensive displays discussed previously. Here it may be assumed that no one is unwillingly exposed to an obscene performance or subjected to an unwelcome display of immodesty. The interest here is the suppression of public commercial transactions respecting books to be taken home and read in private or performances to be viewed by a willing audience behind closed doors. Under these circumstances is there a legitimate interest in suppressing the commercial solicitation to acts in contravention of the common moral code?

There exists a body of opinion that the state has no business embracing any particular moral position in respect of conduct which does not directly impinge on the interests of others. In his stimulating book, Professor Packer, analyzing the purpose of the Model Penal Code’s prohibition on commercial dissemination of obscenity, concludes: “The answer can only be, on their own assumptions, the repression of sin.” The Court in Stanley cites a passage from Professor Henken’s article:

Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others.

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46 Henken, supra note 34.
47 Packer, supra note 34, at 321.
Much of it is suppressed for the purity of the community and for the salvation and welfare of the "consumer." Obscenity, at bottom, is not crime. Obscenity is sin.\(^{48}\)

There is much that is true in Professor Henken's analysis. Yet his use of the word "sin" to describe society's condemnation of obscenity (and, presumably, other sexual derelictions) is surely a verbal gambit to enlist the tradition of separation of church and state in support of his position. Indeed, Professor Henken goes on to suggest that the legal enforcement of personal morals might constitute an establishment of religion.

The root assumption underneath these positions is the equation of morals and religion, vice and sin. The practice of righteous behavior as a path to salvation is enjoined by all the great religions. Yet to simply equate the two is inadmissible. Sin is an offense against God for which divine retribution will be exacted. Immorality is a departure from right reason in behavior deflecting man from his duty as he sees it in terms of his own nature and his relations with others. Whether derived from natural law, other ethical insights, or just received tradition, a sense of right and wrong, honor and baseness has always been part of human awareness. When the people feel that homosexuality, bestiality, incest, polygamy and other vice are not tolerable in whole or in part, they forbid them, not to propitiate God, but to still their own fears and suppress passions incompatible with human dignity, inimical to individual happiness and, if allowed to flourish, harmful to valued institutions, e.g., the family. In these judgments society may be right or wrong, too strict or too lax, nonfeasant or paternalistic. Moreover, the interests served by such laws must also coexist with other values, such as privacy. The adjustment between these interests may be the subject of fruitful debate, as Professor Hart and Lord Devlin have shown us.\(^{40}\) What is clear, however, is that the existence of public policy in matters of morals cannot be dismissed categorically as an ultra vires exercise in theocracy. The long-settled constitutional policy against coercion of religious belief and state support of religious institutions does not apply to society's repression of morally repellent behavior.

In any event, the Court has shown little disposition to deal with such issues in terms of establishment of religion. There does remain to be worked out, however, an accommodation between the claims of private autonomy and the demands of public morality. Professor Packer, for one, can see no satisfactory affirmative answer to "the question whether if, assuming the thing being exploited commercially should not itself be suppressed, there is any reason to suppress its commercial exploitation."\(^{50}\) This misconceives the reasons for which, according to Stanley, society stays its hand in the case of private indulgence. It does not acknowledge a "right" to undergo pornographic experiences in private any more

\(^{48}\) 394 U.S. at 565.


\(^{50}\) Packer, supra note 34, at 321.
than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellent activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in Stanley is, in short, a shield for the private citizen, not a sword for the purveyor.

Of course, the personal autonomy resulting from the immunity conferred by Stanley may take on an affirmative life of its own. Moving beyond a passive right to be let alone, the private consumer of pornography may lay claim of access to outside sources of supply without which his antecedent "right" would be hampered in its enjoyment. Courts would then decide whether the protection of public morality against commercial dissemination was a sufficiently compelling state interest to justify the chilling effect thereby thrown upon the right of private indulgence.

At present, the Court, through its reaffirmation of Roth and reference to the Model Penal Code, appears content to recognize a valid social interest in stopping commercial exploitation of the "well-nigh universal weakness for a look behind the curtain of modesty." There is a clear analogy to the Model Code's treatment of prostitution in which "sexual activity is penalized only when carried on as a business or for hire."

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51 See Schwartz, supra note 20, at 678.
52 Id.

Conclusion

Apart from its significance for obscenity and the first amendment, Stanley does not push the frontier of the emerging constitutional right of privacy beyond the boundary of the landmark decision, Griswold v. Connecticut. Of the two, Griswold is the more difficult case to justify in terms of the source of constitutional rights and the Court's role in relation to a written constitution. In unlocking the coffin of nonspeech in which obscenity had reposed the Court disinterred a remarkably healthy corpse. While society may yet prevent it from stalking about in public, its new standing as a form of private speech is firmly grounded in the basic purposes of the first amendment. In contrast, Griswold's holding that marital privacy required immunity from anti-contraceptive legislation could draw little comfort from any right specifically recognized in the Constitution. Justice Douglas' struggle with penumbras, emanations and zones of privacy scattered through the Bill of Rights was more ingenious as an effort to avoid the bad odor of substantive due process than convincing as an affirmative grounding of a right immanent in the specifics of the Bill of Rights.

It seems certain that further changes will flow from the energies released by the Court's opening of the formerly closed categories of nonspeech. It is worth noting that libel and obscenity left the category in opposite directions. Libel became protected in so far as it is public. Obscenity acquired protection in so far as it is private.

53 381 U.S. 479 (1965).
Professor Kalven, in a landmark discussion,\textsuperscript{54} saw a repudiation of the doctrine of seditious libel as the "central meaning" of the first amendment. The special protection given by the Court to criticism of public men and public measures underwrites that view. Yet it is difficult to escape the feeling that an equally central point in the meaning of the first amendment was grasped by Justice Marshall in \textit{Stanley}, when he wrote: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."\textsuperscript{55} In the long story of liberty the securing of a private citadel of freedom of thought has been no less important for the soul of man than the protection of the aggressive spirit of public controversy has been for the society of men.


\textsuperscript{55} 394 U.S. at 565.