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# A Better Test for Obscenity: Better for the States—Better for Libertarians

By ARNOLD H. LOEWY\*

A decade ago, I wrote an article entitled *Free Speech: The "Missing Link" in the Law of Obscenity*.<sup>1</sup> In that article I noted that the Supreme Court's unwillingness to treat obscenity as a species of speech precluded its evaluation of the state interests that might justify the suppression of obscenity. After all, if that which is being suppressed is not speech or otherwise fundamental, the state hardly needs a reason to suppress it.<sup>2</sup>

*Stanley v. Georgia*<sup>3</sup> gave us reason to believe that the Court had abandoned this approach when it held that Stanley had a first amendment (not merely privacy<sup>4</sup>) right to read obscenity in the privacy of his home. It distinguished *Roth v. United States*<sup>5</sup> on the ground that public distribution of obscenity created dangers of children's inadvertently receiving the material or members of the public's sensibilities or privacy being disturbed.<sup>6</sup> For the first time the Court was looking at *why* a state would want to regulate obscenity and balancing this justification against the first amendment interests involved. As a result of *Stanley*, one might have anticipated that future obscenity laws would have been upheld only where the state interest in the law outweighed the first amendment interest upon which it infringed. We all know, however, that this was

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1. Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81 (1967).

2. See, e.g., *North Dakota State Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

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

4. 1969 SUP. CT. REV. 203.

5. 354 U.S. 476 (1957) (first case flatly to hold that obscenity is not speech).

6. 394 U.S. at 567.

not to be the case. In *United States v. Reidel*<sup>7</sup> and *United States v. Thirty-Seven Photographs*,<sup>8</sup> the Court upheld prohibitions on the mailing of obscene materials to consenting adults as well as the private importation of obscene materials. These decisions, of course, rendered *Stanley* virtually meaningless and made its protection little more than hypothetical, to the point where Justice Black wondered aloud whether *Stanley* now meant that a man must write salacious books in his attic and print them in his basement if he desires to read them in his living room.<sup>9</sup> The apex of this absurdity came in *United States v. Orito*,<sup>10</sup> where the Court held that a person could be punished for transporting an obscene film on an interstate airplane flight even if the film was intended for purely private use. After all, reasoned the Court, there is a "risk of ultimate exposure to juveniles or to the public."<sup>11</sup> Thus, it seems safe to conclude that the first amendment right enunciated in *Stanley* has a smaller penumbra and less breathing space than any other first amendment right that ever has been, or in all probability will ever be, announced.<sup>12</sup>

In *Paris Adult Theatre I v. Slaton*<sup>13</sup> the Court did make some effort to define the governmental interests in regulating obscenity. The Court said that "[t]hese include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."<sup>14</sup> But the Court did not closely scrutinize either the substantiality of the community environment interest or the probability that the Paris Adult Theatre's dirty movies would interfere with the public safety. Why should it? "Speech" was not involved.

In recent years, the Court has decided a series of cases in which

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7. 402 U.S. 351 (1971).

8. 402 U.S. 363 (1971).

9. 402 U.S. at 382 (Black, J., dissenting).

10. 413 U.S. 139 (1973).

11. *Id.* at 143. This stands in stark contrast to several earlier decisions in which the Court said that the interest in protecting juveniles could not justify a broad based restriction on the materials available to adults. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (plurality opinion of Brennan, J.); *Butler v. Michigan*, 352 U.S. 380 (1957).

12. The Court later reaffirmed the narrow nature of the *Stanley* holding by making clear that *Stanley* was a privacy decision and that the privacy rights so established were essentially limited to the facts of that case. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66-67 (1973). See generally F. SCHAUER, *THE LAW OF OBSCENITY* 64-68 (1976); Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 *STAN. L. REV.* 1161 (1974).

13. 413 U.S. 49 (1973).

14. *Id.* at 58.

it was compelled to weigh various governmental interests against the first amendment claims of purveyors of sexually explicit but arguably nonobscene materials. Since the materials were not definitionally obscene, closer evaluation of the state interest was required. An analysis of these cases suggests a new approach to obscenity. Before turning to this new approach, I would like to analyze the cases that have suggested it: *California v. LaRue*,<sup>15</sup> *Southeastern Promotions, Ltd. v. Conrad*,<sup>16</sup> *Erznoznik v. Jacksonville*,<sup>17</sup> and *Young v. American Mini Theatres, Inc.*<sup>18</sup>

In *LaRue*, the issue was the state's power to regulate sexually explicit entertainment in establishments licensed by the state to serve alcoholic beverages. The state's argument was basically that sex and liquor do not mix. It presented an impressive array of evidence indicating specific criminal activity committed by patrons of establishments which served alcoholic beverages and also presented sexually explicit entertainment. Furthermore, although the challenged regulation forbade certain explicit depictions of sex acts and nudity below the waist, no effort was made to regulate on the basis of content. Thus, a place of entertainment could serve liquor and advocate anything it desired in the most risqué language imaginable without violating the regulation. The only limitation was that the establishment had to choose between eliminating liquor or eliminating sexually explicit entertainment.

The contrast in approach between *LaRue* and *Roth* or *Miller v. California*<sup>19</sup> is significant. In *LaRue*, the Court considered the actual state interest involved and balanced it against the less than total exclusion of the entertainment. Of course, the entertainment in *LaRue* was presumptively constitutionally protected,<sup>20</sup> whereas obscenity is not. But how much difference is there between entertainment which predominantly appeals to the prurient interest, describes sex in a patently

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15. 409 U.S. 109 (1972).

16. 420 U.S. 546 (1975).

17. 422 U.S. 205 (1975).

18. 427 U.S. 50 (1976).

19. 413 U.S. 15 (1973).

20. The entertainment in *LaRue* was, of course, live entertainment rather than pictures or written or spoken words. The Supreme Court has indicated that a lower standard of review might be appropriate for live conduct. *Miller v. California*, 413 U.S. 15, 26, n.8 (1973). But the degree to which the standard is lowered seems to depend on the nature of the performance, with theatrical productions being evaluated in more traditional terms. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). See generally, Comment, *The First Amendment Onstage*, 53 B.U.L. REV. 1121 (1973).

offensive way, and lacks serious literary, artistic, political, or scientific value on the one hand and the entertainment proscribed in *La Rue* on the other? For the basic framework of constitutional adjudication to turn on such a fine, or perhaps nonexistent, distinction seems fundamentally unsound.

In *Southeastern Promotions, Ltd. v. Conrad*,<sup>21</sup> the city of Chattanooga operated a nonprofit auditorium "for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship."<sup>22</sup> Acting pursuant to this directive, the auditorium directors refused to make the facility available for the rock musical *Hair*. In ruling against the city, the Supreme Court refused to attach any significance to the city's role as owner of the theater. Instead it held that whatever substantive and procedural rules apply when the city seeks to prevent a private theater from showing a play that it is willing to show must also apply when the city is in the position of being an unwilling theater manager. Presumably, under this decision the producers of a play which has been turned down by all of the theaters in a city because of its poor quality and probable lack of box office appeal can demand that the city run its play at the city's nonprofit theater—a theater which has been kept nonprofit to facilitate the city's desire to have a place where "clean, healthful entertainment" can be presented.

In the context of commercial entertainment (as opposed to purely political speech), would it not be better to allow, or indeed encourage, the city to provide wholesome family entertainment in its own theaters and let private theaters and their customers show and see whatever they wish? *Conrad*, of course, encourages precisely the opposite result by telling cities that the standards for keeping plays out of their auditoria are identical to the standards that must be applied to private auditoria and theaters.

*Erznoznik v. Jacksonville*<sup>23</sup> involved an ordinance which precluded drive-in movies from displaying nude scenes that were visible to passersby. Jacksonville sought to justify this ordinance on three grounds: first, that nudity might offend unwilling viewers; second, that children might see it; and third, that it was a potential traffic hazard. The Court rejected all of these arguments, concluding: first, unwilling viewers need not continue to look; second, the ordinance was not limited to

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21. 420 U.S. 546 (1975).

22. *Id.* at 549 n.4.

23. 422 U.S. 205 (1975).

movies that were obscene as to minors;<sup>24</sup> and third, the ordinance was not limited to movies which could be seen from the highway, and in any event there was no reason to think that nudity was any more distracting to the average motorist than "a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence."<sup>25</sup>

The *Erznoznik* approach stands in sharp contrast to *Paris Adult Theatre I v. Slaton*,<sup>26</sup> where the Court was willing to proscribe obscene nudity because of the community environment engendered by its mere availability to willing viewers. To be sure, obscene nudity differs from nonobscene nudity, but I submit that the difference is not great enough to warrant denying access to willing viewers of the one while foisting the other (albeit temporarily) upon unwilling viewers.

In regard to traffic safety, the *Erznoznik* Court seemed to concede that a regulation precluding any drive-in theater's screen from being visible from the highway would be permissible.<sup>27</sup> In suggesting that nudity is no more disruptive than any other form of movie fare, it adopted a position which is, to say the least, subject to question. Reasonable people could certainly deem the distracting qualities of a nude actress or actor to be significantly greater than those of one who is clothed. Indeed, as a passenger in a car, I would feel safer knowing that the driver was not seeing a nude scene while driving. To be sure, I would rather that he or she not be distracted at all, but if there were to be a distraction, I would feel safer knowing that it was a fully clothed one.

In *Young v. American Mini Theatres, Inc.*,<sup>28</sup> the Court by a five to four vote sustained the applicability of an antiskid row ordinance to adult movie theaters and adult bookstores. For several years, Detroit had an ordinance which precluded certain regulated uses from being within one thousand feet of each other. These included such things as pool halls, shoeshine parlors, and pawnshops. Obviously, the purpose of the ordinance was to prevent the development of skid row neighborhoods. After some study, the Detroit Common Council de-

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24. The concept of a modified obscenity test when juveniles are among the recipients was employed in *Ginsberg v. New York*, 390 U.S. 629 (1968). See generally F. SCHAUER, *THE LAW OF OBSCENITY* 87-92 (1976); Krislov, *From Ginzburg to Ginsburg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153.

25. 422 U.S. at 214-15.

26. 413 U.S. 49 (1973).

27. 422 U.S. 215 n.13.

28. 427 U.S. 50 (1976).

terminated that adult bookstores and adult movie theaters clustered together presented the same type of problem as pool halls, shoeshine parlors, and pawnshops. Thus, it included them within the ordinance. Although the regulation was to some degree content oriented, a plurality of the Court sustained the ordinance on the theory that sexually explicit speech was entitled to less protection than other forms of speech.<sup>29</sup> Mr. Justice Powell (the author of the Court's opinion in *Erznoznik*) concurred on the ground that the ordinance did not curtail the display of sexually explicit films in any significant way and that only adult movie theaters were creating the problem. Therefore, there was no need to regulate other types of theaters.<sup>30</sup>

Having briefly examined *LaRue*, *Conrad*, *Erznoznik*, and *American Mini Theatres*, I would like to propose a test for the state's power to regulate sexually explicit entertainment. This test, I believe, will protect *both* the first amendment and the various governmental interests better than the *Miller* test now does:

- 1) No regulation whose sole purpose is to preclude consenting adults from viewing or reading sexually explicit material is constitutionally sustainable.
- 2) Any regulation which is reasonably related to a legitimate state objective and does not significantly impede presentation of or access to sexually explicit material is constitutional.

It should be apparent by now that I see no great utility in distinguishing between obscene and nonobscene sexually explicit entertainment. Much of the harm alleged to be done by one might also be done by the other. Of course, depending on the state interest involved, sexually explicit entertainment might be defined differently. Thus, in *Erznoznik*, the ordinance regulated mere nudity,<sup>31</sup> whereas the ordinance in *American Mini Theatres* regulated an emphasis on specific sexual activities or anatomical areas.<sup>32</sup> Whatever vagueness may inhere in any of these standards cannot approach the vagueness of the Court's current standards. For example, how does one differentiate between an appeal to prurient interest in sex and an appeal to healthy interest in sex? When is the description of sexual intercourse or oral sex patently offensive, a little bit offensive, or not offensive at all? Indeed,

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29. *Id.* at 60-61. This gradation of the societal value of various types of speech was suggested by respondents in *Roth v. United States*, 354 U.S. 476 (1957).

30. 427 U.S. at 77-82 (Powell, J., concurring).

31. *Erznoznik v. Jacksonville*, 422 U.S. 205, 206-07 (1975).

32. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 53 (1976).

perhaps the least persuasive aspect of *Miller* (a largely nonpersuasive case to begin with) was its assertion that requiring specified sexual acts to be described in a patently offensive way will provide a dealer with fair notice of what to avoid.<sup>33</sup> Justice Harlan's observation of twenty years ago is as accurate now as it was then: "The Court seems to assume that 'obscenity' is a peculiar *genus* of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants."<sup>34</sup>

Once the Court recognizes that sexually explicit books, movies, and entertainment are speech, it does not have to hold that the state can regulate them only in the same manner as political speech.<sup>35</sup> Speech is not all of one kind, and it is not unheard of for certain types of speech to be subject to regulations that would not be permissible for other types of speech. For example, the Court recently held that advertising was constitutionally protected speech, thereby rescuing it from the outer darkness into which it had been cast along with obscenity.<sup>36</sup> In doing so, however, the Court indicated that advertising might be subjected to regulation which would not be tolerated with regard to other kinds of speech.<sup>37</sup>

The same is true of sexually explicit speech. If the regulation is reasonably related to a legitimate state purpose and does not significantly impede presentation of or access to sexually explicit material, the regulation should be sustained. In this area, unlike pure political speech, the "speaker" or "writer" is not often concerned with persuading a neutral or hostile audience, and thus strict scrutiny of the manner of regulation is less necessary.<sup>38</sup> As long as the message is made available to those who desire it, the interests of the first amendment would seem to be saved. Under this relaxed test for incidental regulation, the state would have prevailed in at least three and probably all four of the cases discussed.

In *California v. LaRue*,<sup>39</sup> the liquor board's regulation was certainly reasonably related to a legitimate state purpose. The particular entertainment could have been presented anywhere in the state that did not

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33. *Miller v. California*, 413 U.S. 15, 27 (1973).

34. *Roth v. United States*, 354 U.S. 476, 497 (1957) (Harlan, J., dissenting).

35. Thus, it may be necessary to scrutinize more closely the time, place, and manner restrictions on political speech.

36. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See also *Bigelow v. Virginia*, 421 U.S. 809 (1975).

37. 425 U.S. at 771-72 n.24.

38. *Compare Terminiello v. Chicago*, 337 U.S. 1 (1949).

39. 409 U.S. 109 (1972).

serve liquor. To the extent that it might be argued that nobody would choose to present or watch this entertainment without alcohol, the first amendment aspects of the entertainment are severely diminished.

In *Southeastern Promotions, Ltd. v. Conrad*,<sup>40</sup> the desire to preserve an auditorium for clean, healthful entertainment seems permissible. Indeed, as I have already indicated, it seems desirable to encourage a municipality to build a theater and provide all the clean, wholesome entertainment it wishes, while at the same time allowing other theaters to show what they wish to show and citizens to see what they wish to see. If the city owned the only facilities in the area that were fit for a show such as *Hair*,<sup>41</sup> the case for the producers of that play would be strengthened. Even then, however, the city should not be required to provide a forum for the entertainment—it simply could not suppress it.

*Erznoznik v. Jacksonville*<sup>42</sup> is the most doubtful case of the four. The traffic control rationale<sup>43</sup> could not sustain the ordinance because it was not limited to drive-in screens which were visible from the highway.<sup>43</sup> If it were, however, I would have little difficulty in sustaining it.

Actually, the privacy rationale seems sounder. To be sure, we have to put up with fleeting glances of many things that many people find offensive, such as jackets that say "Fuck the draft."<sup>44</sup> But that the phrase embodied the expression of a political idea. There is, however, nothing ideological about nudity. Nudity itself is not speech. It is merely part of a movie which is speech. I assume that actors and actresses could be convicted of indecent exposure if they performed in a nude play in a public park,<sup>45</sup> even though a similar conviction could not be obtained for performing the same play in front of a forewarned audience in a public theater. Thus, on balance, I believe that the *Erznoznik* ordinance should have been upheld.

Finally, *Young v. American Mini Theatres, Inc.*,<sup>46</sup> represents a very real attempt to prevent urban blight. As with *LaRue*, *Conrad*, and *Erznoznik*, no effort has been made to censor the material. If those who want to show it can still show it and those who want to see it can still

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40. 420 U.S. 546 (1975).

41. Cf. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), (where the concept of alternative methods of communication is discussed).

42. 422 U.S. 205 (1975).

43. *Id.* at 206-07, 214.

44. *Cohen v. California*, 403 U.S. 15 (1971).

45. See *Miller v. California*, 413 U.S. 15, 25-26 & n.8 (1973).

46. 427 U.S. 50 (1976).

see it, the regulation seems to steer far wide of any first amendment problems. On the contrary, in Detroit, unlike Boston, one does not have to risk his life to see a dirty movie.

To a first amendment purist who says "no law means no law," my proposal must seem like a halfway measure at best. However, the Supreme Court prides itself on its practical wisdom and is not about to let sexually explicit entertainment go unrestrained. This proposal can aid the real first amendment values at stake in the obscenity controversy as well as the legitimate interests proffered by states and municipalities. In addition, the proposal will reduce the amount of time the Court spends reading dirty books and watching dirty movies.

Nothing else in this area has worked. Maybe this will. I think it is at least worth trying.<sup>47</sup>

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47. Subsequent to the writing of this article, Mr. Justice Stevens delivered a dissent in *Smith v. United States*, 45 U.S.L.W. 4495, 4500-03 (1977), in which he advocated an approach similar to the one suggested herein. Although it would have been better to have had a majority opinion adopting such an approach, minority support is better than no support at all.

