The Devil and the D.A.: The Civil Abatement of Obscenity

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THE DEVIL AND THE D.A.:  
THE CIVIL ABATEMENT OF OBSCENITY

Obscenity has long been a plague to courts and legislatures seeking ways to stem the rising tide of adult bookstores and theatres. Traditionally, obscenity has been dealt with through the criminal courts. But the criminal law in this area has often been difficult to administer, and frequently the first amendment has stood in the way of convictions.1 With the approval of the courts, prosecutors have turned increasingly to civil proceedings to check the flow of obscene exhibitions.2 California is no exception.

In the spring of 1976, the California Supreme Court issued its opinion in People ex rel. Busch v. Projection Room Theatre.3 In that case, the Los Angeles District Attorney brought a series of civil actions seeking injunctive relief against the proprietors of adult bookstores and theatres, basing his complaint on the public nuisance laws.4 In ruling against the defendants' demurrer, the court introduced a new procedure into California obscenity law, finding the civil public nuisance statutes applicable to obscene exhibitions for the first time.5

The Busch Decision

What Busch Does

California defines a civil public nuisance as "anything which is injurious to health, or is indecent or offensive to the senses."6 The court in Busch, reading "indecent" and "offensive to the senses" as alternative bases of public nuisance, found that obscenity is indecent and that it therefore falls under the code definition. Another code section enables the district or city attorney to bring an action in equity to abate a nuisance.7 Thus, the court generally approved District Attor-

1. For a thorough discussion of the problems the courts have encountered in their dealings with obscenity, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).
2. For a general discussion of the use of equity in criminal cases, see Mack, The Revival of Criminal Equity, 16 HARV. L. REV. 389 (1903).
4. Id. at 47, 550 P.2d at 602, 130 Cal. Rptr. at 330.
6. Id. § 3479.
7. CAL. CODE CIV. PROC. § 731 (West 1955).

[1329]
ney Busch's complaint, although it reserved judgment on the exact nature of injunctive relief available.\(^8\)

Having decided that obscenity is in fact a public nuisance, the court then examined the constitutional objections—vagueness and prior restraint—to the abatement procedure and found that the procedure was adequate to overcome these objections. The court defended the nuisance statute against the challenge of vagueness by construing the term "indecent" to mean *obscene* as it is defined in *Miller v. California*.\(^9\)

The court rejected the alternative theory of Busch's complaint, which sought an injunction under the Red Light Abatement statute.\(^10\) This statute enables the courts to close down buildings used for illegal gambling, lewdness, assignation, and prostitution.\(^11\) In *Busch*, the court concluded that the word "lewdness" must be read in the context of the other provisions of the statute, that is, as referring to live sexual conduct. Further, the court reasoned that if the legislature had intended to include adult theatres and bookstores within the ambit of the statute, it could have so provided, as it did with illegal gambling.\(^12\)

This introduction of the civil abatement procedure into California obscenity law marks a significant shift away from previously recognized law. Prior to *Busch*, the controlling law was found in *Harmer v. Tonylyn Productions, Inc.*\(^13\) There the court of appeal rejected the complaint of six private citizens seeking to enjoin the showing of a particular film on the ground that it was a public nuisance. The plaintiffs had not alleged special damages to show that the exhibition of the film resulted in any injury to them as members of the public:

> [t]he film involved was shown only in a closed theatre. Only those persons could view it who had paid the admission price and who had entered the theatre. Thus, only those members of the community were exposed to the film who voluntarily chose to see it... In the statute's terms, the alleged nuisance at bench did not "... affect at the same time an entire community or neighborhood..."\(^14\)

Thus, *Harmer* stood for the proposition that adult establishments could not be reached by the civil public nuisance statutes.\(^15\)

\(^8\) 17 Cal. 3d at 60, 550 P.2d at 611, 130 Cal. Rptr. at 339.
\(^9\) *Id.* at 56, 550 P.2d at 608, 130 Cal. Rptr. at 336.
\(^10\) **CAL. PEN. CODE** §§ 11225-35 (West 1970).
\(^11\) *Id.*
\(^12\) 17 Cal. 3d at 61, 550 P.2d at 611-12, 130 Cal. Rptr. at 339-40.
\(^14\) *Id.* at 943, 100 Cal. Rptr. at 576-77 (quoting **CAL. CIV. CODE** § 3480 (West 1970)) (emphasis added).
\(^15\) *See, e.g.*, People ex rel. Busch v. Projection Room Theatre, 17 Cal. 3d 42, 67-68, 550 P.2d 600, 615, 130 Cal. Rptr. 328, 344 (Tobriner, J., dissenting).
Busch, then, was an abrupt about-face in California law. The Busch court expressly rejected the reasoning in Harmer, observing that it "misses the point." The public's interest in controlling obscene exhibitions is not, said the court, diminished by the fact that such exhibitions take place behind closed doors. In Harmer, the court implicitly balanced the first amendment interests in showing and viewing such material against the interest in avoiding involuntary exposure to it. The Busch court recognized additional public interests that had to be weighed. The presence of adult establishments in a community is a public concern not because the general public is exposed to particular films or books, but because the public has an overriding interest in the moral content of any materials exhibited to any part of the community. It has traditionally been within the state's authority to regulate and oversee those matters which affect the public health, safety or morality, and here lies the heart of the opinion—the state must have the power over the exhibition of films and distribution of books in order to insure that the public is protected from moral corruption.

The Ramifications of Busch

The Busch ruling has now cleared the way for the use of civil public nuisance statutes to regulate obscenity. This type of proceeding has several advantages over criminal proceedings, making it attractive both to prosecutors and to the proprietors of adult establishments. For the prosecutor, it is preferable because an injunction is a quicker and more efficient way of halting the display of specific materials than is a criminal penalty. The equitable remedy takes effect immediately to prevent further display of the books or films. In contrast, a criminal penalty is directed toward the proprietor as a punishment for exhibiting the matter, addressing the material adjudged harmful only indirectly. Further, the nuisance abatement procedure leaves the prosecutor with two back-up measures. If the injunction is violated, he can ask the court for contempt penalties. He also has the discretion of charging the exhibitor with violation of the criminal obscenity law. Finally, the prosecutor will be more likely to prevail in a civil proceeding. The standard of proof is lower in a civil action than in a criminal action: "beyond a reasonable doubt" is diminished to "preponderance

16. Id. at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.
17. See notes 105-108, 160-62 & accompanying text infra. The court also pointed out that Harmer dealt with plaintiffs who were private citizens rather than public officials. District or city attorneys have standing to sue under CAL. CODE CIV. PROC. § 731 (West 1955). Thus, while the private citizen must allege special damages, the district or city attorney satisfies the standing requirement merely by alleging general damage to the public. 17 Cal. 3d at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.
18. For a general discussion of the advantages and disadvantages of public nuisance as applied to adult theatres and bookstores, see Note, 10 U.S.F. L. REV. 115 (1975).
of the evidence."

And since the action is in equity, the prosecutor need prove his case only to the judge and not to a jury. The job of proving the obscenity of the material is thus simplified, since the prosecutor need prove less under a lower standard of proof and he need convince only one individual and not the whole jury.

The proprietors of adult establishments will also realize some advantages. If they have a chance to come into court and litigate the issue of the obscenity of a particular film or book in a civil proceeding prior to the filing of a criminal complaint, they will be able to determine what they can and cannot legally exhibit without incurring criminal penalties. Also, the procedural rules which have been prescribed by the courts reduce the chances of an unwarranted prior restraint. Exhibitors can rely on the fact that they cannot be enjoined from displaying materials until those materials have been adjudged obscene.

Still, the Busch decision is troublesome in some respects. Procedurally, use of an equity approach takes away from the exhibitor of adult materials some of the safeguards he would have had as a criminal defendant. Although it might be argued that it is reasonable to sacrifice some procedural safeguards for the opportunity to avoid criminal penalties, still the proprietor is governed by a lower standard of proof in a civil case than in a criminal case. This means that there is a slightly greater risk that materials which would have been found protected by the first amendment in a criminal court will go unprotected in a court of equity. In addition, the proprietor loses the right to a jury trial on the issue of obscenity. This would seem to fly in the face of Miller v. California's implicit assumption that it would be a jury that would formulate the community standards by which to judge the obscenity of a book or film.

The Busch decision is also troublesome insofar as it is questionable whether obscene exhibitions can properly be said to come under the jurisdiction of the civil public nuisance statutes. It is not clear that the public nuisance abatement statute was designed to cover this kind of situation. Justice Tobriner in his dissenting opinion suggested that public nuisance abatement was intended as an extraordinary remedy, reserved for those situations in which the public interest is immediate

20. For a discussion of prior restraint and its problems, see notes 24-44 & accompanying text infra.
21. 413 U.S. 15 (1973). See notes 54-66 & accompanying text infra. It is notable that the Miller case expanded the role of the jury in a unique way. Traditionally it is the judge who gives the law to the jury to apply. But in obscenity trials following Miller, it is the jury that in effect makes the law as it formulates the applicable community standards.
and its protection cannot be deferred until other remedies can be employed. Further, it would appear from the history of public nuisance cases that the statutes were written with the intention of dealing with those conditions which offend the five senses, such as noxious odors or excessive noise. Finally, the court's assertions aside, it is questionable whether the exhibition of obscene materials "behind closed doors" to consenting adults is in fact a public nuisance; is the public truly injured if such exhibitions are allowed to continue? These problem areas in the Busch decision will be discussed below. Before turning to these areas, however, it is necessary to discuss the manner in which Busch seeks to protect first amendment interests.

Procedure: Busch and Prior Restraint

Any system of prior restraint ... comes to this Court bearing a heavy presumption against its constitutional validity. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits of expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech after they break the law than to throttle them and all others beforehand.

The problem of avoiding prior restraints is one of the most troublesome that the courts have encountered when they have sought to enjoin obscene displays. The civil abatement procedure runs the grave risk that materials protected by the first amendment may be swept away with the unprotected. The California court in Busch examined the procedural pitfalls into which other courts have fallen and read into the California public nuisance abatement law requirements designed to circumvent this problem.

The United States Supreme Court has, in a series of cases, set down guidelines to save civil proceedings in this area from constitutional infirmity. First, the censor must have the burden of proving that the materials are unprotected rather than the exhibitor having to prove them protected. Under California's public nuisance abatement law, the district or city attorney who brings the action must have the action has this burden. The

22. 17 Cal. 3d at 63, 550 P.2d at 613, 130 Cal. Rptr. at 341.
23. See notes 96-102 & accompanying text infra.
26. Id.
exhibitor cannot be required to show cause why the injunction should not issue.\textsuperscript{28}

The second procedural requirement established by the Supreme Court is that there must be an adversary judicial hearing prior to the imposition of any restraint upon the exhibition of questionable material.\textsuperscript{29} Thus, until the material has been judicially found to be obscene, it enjoys the same protection under the first amendment as any other expression.\textsuperscript{30} The \textit{Busch} court has made it clear that no injunction can issue until the material has been found unprotected in an adversary setting.\textsuperscript{31} Thus, the exhibitor has ample opportunity to present his side of the case and to defend the materials against a charge of obscenity.\textsuperscript{32} Although the public nuisance abatement statute does not provide for such a hearing, the court felt "obliged to construe and interpret legislation in a manner which will uphold its validity."\textsuperscript{33}

The third procedural safeguard set by the Supreme Court is that there must be assurance of a prompt, final decision by a court.\textsuperscript{34} The \textit{Busch} requirement of a full adversary hearing before a court\textsuperscript{35} satisfies this requirement.

Finally, the order must be framed as narrowly and precisely as the needs of the case allow.\textsuperscript{36} A common ground for reversal in many cases considering this issue has been that the injunction has closed down the premises altogether.\textsuperscript{37} A blanket injunction of this variety is too broad because it "does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon his

\textsuperscript{28} Cf. Monterey Club v. Superior Court, 48 Cal. App. 2d 131, 119 P.2d 349 (1941) (observing that requiring the defendant to show cause in a public nuisance abatement action would be similar to requiring a criminal defendant to prove his own innocence).


\textsuperscript{31} 17 Cal. 3d at 59, 550 P.2d at 610, 130 Cal. Rptr. at 338.

\textsuperscript{32} In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975), the Court indicated that any preliminary injunction imposed prior to judicial review would be valid only if imposed for a brief and specific period to preserve the status quo. For instance, if an injunction is needed to prevent destruction of the subject matter, it may be approved. \textit{Accord}, Grove Press, Inc. v. Flask, 326 F. Supp. 574, 579 (N.D. Ohio 1970). The court in \textit{Busch} did not address this point.

\textsuperscript{33} 17 Cal. 3d at 60, 550 P.2d at 610-611, 130 Cal. Rptr. at 338-339.

\textsuperscript{34} Freedman v. Maryland, 380 U.S. 51, 59 (1965).

\textsuperscript{35} 17 Cal. 3d at 60, 550 P.2d at 610, 130 Cal. Rptr. at 338.

\textsuperscript{36} Carroll v. President & Comm’rs of Princess Anne, 393 U.S. 175, 184 (1968).

freedom to vend publications." A blanket injunction prevents the premises from being operated legitimately to exhibit protected materials. Finally, a statute authorizing the shutdown as a public nuisance of any place which exhibits obscene materials could be applicable even to private houses. This is clearly impermissible.

Accordingly, Busch held that injunctive relief must be "proper and suitable," to the facts of the case. "Proper and suitable" essentially means that the injunction must be directed towards specific materials. The court stated that the closure of the premises would result in an unwarranted prior restraint. The injunction must apply only to those materials which have been adjudged obscene and thus are not protected by the first amendment.

In summary, the California court has followed closely the guidelines set out by the United States Supreme Court and has established a system which enables the courts to issue injunctions against the exhibition of obscene materials without violating the first amendment. The burden is on the complainant to prove the material obscene. A full adversary hearing before a court on the issue of obscenity is required before an injunction can issue. Finally, the court has required that the injunction be drawn as narrowly and specifically as possible.

Neither the United States Supreme Court nor the California court, however, has addressed two other issues which may ultimately have great impact on how effectively the first amendment is in fact protected—the lower standard of proof and the absence of a jury in an equity case. It is necessary to ask how helpful this system of avoiding improper prior restraints can be when the nature of the proceeding makes it easier for the prosecutor to win his case.

Procedure: Standard of Proof and Juries

Civil proceedings by the state against the display of obscene materials are quickly becoming one of the most popular methods of dealing with obscenity. Busch has opened the door for such proceedings to take the place of criminal prosecutions. Rarely, however, have the courts examined the criminal law origins of the offense. Even less fre-

41. 17 Cal. 3d at 57, 550 P.2d at 609, 130 Cal. Rptr. at 337 (quoting Guttenger v. Calaveras Cement Co., 105 Cal. App. 2d 382, 390, 233 P.2d 914, 919 (1951)).
42. 17 Cal. 3d at 57, 550 P.2d at 609, 130 Cal. Rptr. at 337.
43. Id. at 58, 550 P.2d at 609-10, 130 Cal. Rptr. at 337-38.
44. Id. at 59, 550 P.2d 610, 130 Cal. Rptr. at 338.
quently, if ever, have the courts insisted that the procedural safeguards which characterize criminal cases be applied to civil cases of this nature. While the defendant in an equity action does not risk punishment upon a finding that the material is obscene, he may run a greater risk that the material will be found unprotected because of the lower standard of proof and the absence of a jury.

Standard of Proof

Few courts treating the abatement of obscene exhibitions have raised the possibility that "preponderance of the evidence" might be an insufficient standard by which to measure the evidence when first amendment rights are at stake. This omission indicates implicit approval of the lower standard.

Justice Brennan, concurring in McKinney v. Alabama, suggested that the states should be required to prove the obscenity of a work beyond a reasonable doubt, even though the judgment was to be had in a civil proceeding. The first amendment guarantee of freedom of expression, Brennan reasoned, has a "'transcending value.'" When an individual has at stake an interest of transcending value, [the] margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder . . . of [the existence of the fact] beyond a reasonable doubt.

The standard of reasonable doubt offers an added margin of protection between legitimate expressions and the impositions of penalties. It diminishes the hazard of erroneous suppression of speech which falls close to the line separating the protected from the unprotected. Particularly in the area of obscenity, where the distinction between the permissible and the prohibited is inherently vague, the state should

45. In Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975), the Supreme Court recognized the quasi-criminal nature of such proceedings. Applying the doctrine of federal discretionary abstention in criminal cases enunciated in Younger v. Harris, 401 U.S. 37 (1971), to a state public nuisance abatement proceeding similar to that in Busch, the Court said, "[W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials."


48. Id. at 684 (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

49. Id.


be required to meet this higher standard of proof. The potential for mistaken factfinding is too great a burden on first amendment freedoms when the result of such a factfinding error may be to enjoin legitimate and protected expressions.52

Furthermore, Brennan averred, because preponderance of the evidence standard increases the potential for penalizing legitimate expression, the risk of self-censorship becomes too great.53 This “chilling effect” on expression goes to the heart of the first amendment: when the public swallows its words for fear of crossing a grey and indistinct line, the integrity of any free expression has been seriously compromised. While this danger, of course, still exists when the standard of proof is raised to a reasonable doubt, the risk is minimized.

The majority in Busch did not address the issue of standard of proof. It is a serious issue and should have been considered, for when the likelihood of error is high, all precautions taken to prevent unwarranted prior restraint are diminished in value.

Trial by Jury

In his Busch dissent, Justice Tobriner asserted:

By permitting a city attorney who objects to certain material to wield this remedy . . . the majority endangers freedom of expression to an extent never before contemplated in this state. Hereafter, the public’s right to read books or magazines, to view plays or motion pictures, can be permanently curtailed if a city attorney can find a single judge who believes the material is obscene.54

When the United States Supreme Court articulated its latest in a series of legal definitions of obscenity, implicit in its opinion was the notion that the trier of fact would be a jury and not a judge. In Miller v. California,55 Chief Justice Burger favored the use of a jury to apply community standards in reaching a decision as to whether a particular work is obscene. In this way, a work will be judged by its “impact on an average person.”56

54. 17 Cal. 3d at 63, 550 P.2d at 613, 130 Cal. Rptr. at 341 (Tobriner, J., dissenting).
55. 413 U.S. 15, 24 (1973). The Court defined obscenity as follows: “works which, taken as a whole, appeal to a prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

“The basic guidelines for the trier of fact [include] whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest. . . .”
56. Id. at 33 (citing Mishkin v. New York, 383 U.S. 502, 508-09 (1966)).
The whole thrust of the *Miller* approach is to allow the tastes of the community to surface. As the Court observed in *Hamling v. United States*, a later case interpreting the *Miller* standard, it is the juror who is best suited to draw on the standards of the community in deciding what materials would offend the general tastes of the area. It was precisely because the Court had such difficulty in formulating standards of obscenity to apply across the country that it decided in *Miller* to return the decision to the members of the community in which the action is brought. The Court's delegation of this formulation to the jury is defeated if the jury is removed from the decision process and a judge is substituted in an equity proceeding.

*Miller* and *Hamling* were both criminal cases in which the defendants faced penalties harsher than injunctions if the materials they distributed were found obscene. Undoubtedly, the need for a jury trial under these circumstances is more compelling than it is when the proceeding is equitable in nature. Nonetheless, in a quasi-criminal public nuisance proceeding such as *Busch*, the line between protected and unprotected expression is subjectively drawn at best. Thus, the right to a jury trial is an important means of assuring that there will be an appropriate determination of the issue. The question of what is obscene is preferably left to the jury because, as was said in a Second Circuit case, it is the jury that can "most nearly satisf[y] the moral demands of the community . . . . '[O]bscenity' is a function of many variables, and the verdict of the jury is . . . really a small bit of legislation *ad hoc*, like the standard of care." A judge making the decision on his own, no matter how objective he endeavors to be, must inevitably make the determination on the basis of his own subjective notions of decency. He is "distant to the interplay of the diverse cultural, religious, intellectual, and economic backgrounds commonly present in a jury room" and cannot bring to bear on his decision all the varying attitudes of the community in which his court sits. Thus, the entire *Miller* reliance on community standards as developed by a miniature community in the jury room is emasculated in an equity proceeding. Substituted is a single judge's notion of what can or should be tolerated in the community.

At least one case since the *Miller* decision has required a jury trial on the issue of obscenity when the work was to be enjoined. The

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58. *Id.* at 105.
59. 413 U.S. at 30.
60. United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).
62. McNary v. Carlton, 527 S.W.2d 343 (Mo. 1975); see 1024 Peachtree Corp. v.
Missouri Supreme Court recognized that in injunctive proceedings the use of a jury is irregular. But, said the court, “judges do not ordinarily act as fact-finders as to the propensities of a ‘reasonable’ person in tort law. In ‘obscenity’ cases, we believe we should ‘rely on the jury system’ [as mandated by Miller].” The Missouri court set up a system whereby an advisory jury would render a special verdict on the issue of obscenity. If the jury finds that the work is not obscene, its decision is binding on the court, and injunctive relief will be denied. If, however, the jury finds that the work is obscene, the court must make an independent judgment of whether the material is constitutionally protected, thus making doubly sure that no material is unconstitutionally suppressed. Thus, the system works much like the criminal process—a finding of “not guilty” is conclusive, but a guilty verdict can be set aside by the judge.

The majority report of the President’s Commission on Obscenity and Pornography has also recommended that a jury trial be instituted in these cases in its model legislation. The Hill-Link minority report concurred on this point, arguing that a jury has a “special aptitude for expressing the view of the average person,” and, “[a}s the trier of fact, it is the exclusive judge of the common conscience of the community.

Militating against the inclusion of a jury trial are cases decided prior to Miller, holding that a jury trial on the issue of obscenity in an equitable proceeding is not guaranteed by the Constitution. The seventh amendment preserves the right to a civil jury trial only where the right existed at common law, and generally, courts have not endeavored to expand its meaning to include equitable cases which are criminal in origin.

Slaton, 228 Ga. 102, 184 S.E.2d 144 (1971), where the court permitted a preliminary injunction to issue only until such time as a jury could decide the issue of obscenity.  
63. McNary v. Carlton, 527 S.W.2d 343 (Mo. 1975).  
64. Id. at 348.  
In light of tradition, it is clear that the decisions denying the right to a jury trial are sound—courts of equity have never commonly employed juries. The majority of courts which have considered the injunction of obscene displays in the aftermath of *Miller* have not reconsidered the use of juries in these proceedings. Similarly, the court in *Busch* did not address this issue. But the *Miller* standard, combined with the increasing use of civil proceedings to reach what had previously been treated as a criminal offense, demands a reconsideration of the use of juries and a recognition of the right to a jury trial on the issue of obscenity in this specific variety of equitable proceeding.

**Obscenity and Public Nuisance**

**Public Nuisance Defined**

At common law, a public nuisance was defined as any public exhibition which tended to corrupt the morals or disturb the general good order or welfare of society. Nuisances which involved offenses to the moral sensibilities of the community were considered *malum in se*, and were enjoinable "irrespective of their location and results." Thus, at common law, there was no need to prove injury to the community if the nuisance was in fact an offense to its moral decency.

When California enacted statutes to cover the field of public nuisance, the statutory definitions superseded those at common law. Separate provisions were made for criminal public nuisance and civil public nuisance, only the latter being subject to equitable remedies. Criminal and civil nuisances were distinguishable not only by the nature of the remedies but also by the frequency with which each was called into action. Equity courts were used much more sparingly than were criminal courts.

The Civil Code definition of public nuisance includes "[a]nything which is injurious to health, or is indecent or offensive to the senses . . . ." Similarly, the penal code definition includes "[a]nything which is injurious to health, or is indecent, or offensive to the senses. . . ." The two definitions differ in that the criminal definition in-

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67. "Under this head are included . . . obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and disorderly members of society." H. Wood, THE LAW OF NUISANCES § 68 (3d ed. 1893). Cf. State v. Turner, 198 S.C. 487, 18 S.E.2d 372 (1942).
68. J. Joyce, NUISANCES § 15 (1906).
69. People v. Lim, 18 Cal. 2d 872, 118 P.2d 472 (1941); Kreling v. Superior Court, 18 Cal. 2d 884, 886, 118 P.2d 470, 471 (1941).
70. See People v. Lim, 18 Cal. 2d 872, 878-80, 118 P.2d 472, 475-76 (1941).
71. Cf. id. at 880, 118 P.2d at 476.
73. CAL. PEN. CODE § 370 (West 1970).
cludes a vital comma after the word "indecent," while the civil version does not.

Although the Busch court was primarily concerned with the proper use of the civil public nuisance abatement statute, it applied the penal definition of public nuisance to obscenity. Assuming that the penal and civil definitions of public nuisance were exactly the same and therefore interchangeable, the court cited the penal definition and concluded that "the proscribed act may be anything which alternatively is . . . indecent, or offensive to the senses. . . ." Under this interpretation, an exhibition which is indecent (i.e., offensive to the morals of the community), is enjoinable as a public nuisance even though the senses of the community have not been assaulted.

Justice Tobriner, dissenting, saw a subtle but significant importance in the comma which appears in the penal definition, but not in the civil definition of public nuisance. The distinction is that in the penal statute indecency and offensiveness would appear to be listed in the alternative, while in the civil statute it would appear that both indecency and offensiveness pertain to the senses. Justice Tobriner thus remarked that "if we must choose which section is correct, we should honor the definition in the Civil Code."

The distinction made by Justice Tobriner is supported by People v. Seccombe where the court saw civil public nuisances falling into four distinct categories, including "(a) injurious to the health," and "(b) indecent or offensive to the senses." The fact that the Seccombe court felt the word "indecent" modified the word "senses" becomes meaningful when it is noted that the public nuisance abatement statute refers specifically to the civil definition of public nuisance.

The different approaches followed by the majority and the dissent to reach the meaning of public nuisance lead to diametrically opposed conclusions. If the penal and civil definitions are indeed interchangeable, then indecency in and of itself is enjoinable. But if the civil definition does require that the injury be to the senses, it is not clear that obscene displays in adult theatres and bookstores behind closed doors would fall under that category.

74. CAL. CODE CIV. PROC. § 731 (West 1955).
75. 17 Cal. 3d at 49, 550 P.2d at 603, 130 Cal. Rptr. at 331.
76. Id.
77. Id. at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.
78. Id. at 65, 550 P.2d at 614, 130 Cal. Rptr. at 342 (Tobriner, J., dissenting).
79. Id.
82. CAL. CODE CIV. PROC. § 731 (West 1955).
The majority in *Busch* relies heavily on *Weis v. Superior Court* to support its finding that an offense to the public decency is a public nuisance under the Civil Code. In *Weis* the court approved an injunction against the operator of an amusement center open to the general public, which featured nude dancing. The court held that performances of this variety were offensive to the public decency and were enjoinable under the common law definition of public nuisance.

The *Busch* majority, however, overlooked important features which distinguish *Weis* from cases such as *Busch*. The court in *Weis*, although it cited California Civil Code section 3479, actually relied on the common law definition of public nuisance, which, as noted above, included offenses against public decency. Subsequent cases have held, however, that the common law definition is no longer applicable under California law.

Also, in *Weis*, admission to the exhibition was conducted in such a way that the general public could be exposed to the nudity by surprise. Unlike the "X-rated" bookstores and theatres of the 1970's, the "Sultan's Harem" exhibition in *Weis* displayed no warning to the public that the entertainment was "adults only" in nature. Thus, the sense of the unsuspecting public could have been assaulted.

The majority also cited *People v. Lim* as support for both its reading of *Weis* and its conclusion in *Busch*. In *Lim*, the court upheld a district attorney's complaint seeking an injunction against a gambling house on the grounds that by "encouraging dissolute habits . . . and corrupting the public morals," it was a public nuisance. The *Busch* majority assumed that the court's action in *Lim*, supported its interpretation of the meaning of public nuisance. A careful reading, however, suggests that the *Lim* court held that the complaint alleged sufficient facts to withstand a demurrer not because of the gambling house's effect on the public's morals, but because such an establishment draws together "[c]rowds of disorderly people who disturb the peace and . . . may . . . impair the free enjoyment of life and property and give rise to the hazards designated in the statute." In other words, *Lim's* holding is based not on the "indecency" of the gambling house, but
rather on the physical disturbance its operation tended to cause. This reading of *Lim* supports neither the *Weis* nor the *Busch* conclusion.\(^{92}\)

Further California case law on the subject of regulation of morals through civil public nuisance is sparse. A sampling of other public nuisance abatement cases indicates that, in the past, courts have commonly looked for evidence of tangible physical injury to the public.\(^{93}\) The previous case law thus appears to support the Tobriner view that public injury is that which is indecent or offensive *to the senses* and not that which is indecent only in the moral sense of the word. Justice Tobriner persuasively argued that public nuisance abatement was intended as an extraordinary remedy, designed to deal with immediate perils to the public welfare, such as noxious odors and riots.\(^{94}\) These immediate perils involve some degree of physical injury.

It is suggested, then, that the California civil nuisance law as it stood at the time of the *Busch* decision did not encompass the abatement of pornographic exhibitions behind closed doors. The question becomes whether the court had the authority to expand the meaning of public nuisance to include adult theatres and bookstores. As was stated in a court of appeal opinion:

The general rule is that where the Legislature has not enacted statutes specifying that an activity contrary to public policy constitutes a public nuisance which may be enjoined in an action on behalf of the state, the courts will not ordain such jurisdiction for themselves.\(^{95}\)

Thus, while the legislature is fully empowered to include under public nuisance abatement jurisdiction those matters of public policy which were enjoinable at common law,\(^{96}\) when it has not done so, "[c]ourts of equity enjoy no roving commission to define public nuisances."\(^{97}\) This

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92. In fact, *Lim* would seem to throw the whole matter of regulating morals back at the legislature. That is, courts of equity should have jurisdiction over standards of public morality only when the legislature has specifically delineated those areas. *See* 18 Cal. 2d at 879, 118 P.2d at 476.

93. *See*, e.g., Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) (esthetically unpleasing billboards could not be considered public nuisances); People v. Oliver, 86 Cal. App. 2d 885, 195 P.2d 926 (1948) (littered yard was a public nuisance because it presented a fire hazard, but not because it was unsightly); Dean v. Powell Undertaking Co., 55 Cal. App. 545, 550, 203 P. 1015, 1017 (1921) (undertaking parlor was not a nuisance because there was no showing of discomfort "through the medium of the senses" as opposed to the "delicacy of taste or a refined fancy") (quoting Westcott v. Middleton, 43 N.J. Eq. 478, 486, 11 A. 490, 494 (Ch. 1887)).


96. People v. Lim, 18 Cal. 2d 872, 877, 118 P.2d 472, 476 (1941).

is particularly so when those policy considerations are generally enforced by the criminal law.

Furthermore, when a statute has been construed by a judicial decision and the legislature does not subsequently change the rule of law, the courts have frequently held that the legislature has impliedly approved that judicial construction. Following the decision in *Harmer v. Tonylyn Productions, Inc.* in 1972 that the showing of pornographic films did not constitute a civil public nuisance, a measure was placed on the November ballot which, if approved, would have amended the obscenity law under the Penal Code. The proposition would, among other things, have given the courts the authority to enjoin the exhibition of obscene books, films, and other media. The ballot measure was defeated by a margin of two to one. Two years later, a bill was introduced into the California State Assembly which would have accomplished the same purpose as the ballot measure. It died in committee.

From the foregoing, it is indicated that both the public and the legislature had tacitly approved the rule of *Harmer*. The *Busch* major-

101. Chapter 7.9 of Proposition 19 on the November 1972 ballot, if passed, would have specifically given the courts jurisdiction to enjoin the sale, distribution, or showing of particular printed materials and films in actions brought by district attorneys. It also provided for trial on the issues and for the seizure and destruction of the materials in the event an injunction was issued. People ex rel. Busch v. Projection Room Theatre, 17 Cal. 3d 42, 70 n.4, 550 P.2d 600, 618, 130 Cal. Rptr. 328, 346 (1976) (Tobriner, J., dissenting).
102. Id. It is only fair to point out that this proposition offered several other amendments to the obscenity law which received the lion’s share of the publicity.
103. A.B. 4340 (1974). This bill, *inter alia*, would have added Penal Code § 311.3, reading in part as follows: “(a) The superior court has jurisdiction to enjoin the sale, distribution or exhibition of obscene books, articles or films, as hereinafter specified: (1) The district attorney, county counsel, city attorney or city prosecutor of any county, city or town, in which a person, firm or corporation sells, distributes or exhibits or is about to sell, distribute or exhibit or has in his possession with intent to sell, distribute or exhibit any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, film, figure, image or any written or printed matter of an indecent character which is obscene as defined in Section 311, may maintain an action for an injunction against such person, firm or corporation in the superior court to prevent the sale or further sale or the distribution or the further distribution or exhibition or further exhibition of such matter. (2) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within 14 days after the joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.”
104. A.B. 4340 was reported out of the Criminal Justice Committee on November 30, 1974 without action. CALIFORNIA LEGISLATURE, FINAL CALENDAR OF LEGISLATIVE BUSINESS 1973-74, pt. 2, at 2108 (1975).
ity overstepped its authority to read into California law civil measures which could not find approval among the voters or the legislators. It is suggested that the court should have remained within the legislatively approved confines of public nuisance law.

Civil Remedies in Other Jurisdictions

Outside of California, civil remedies against the exhibition of obscene materials—usually injunctive—have been widely adopted. Unlike California, the states in which these remedies have been used generally have enacted statutes either providing for injunctive relief in obscenity cases or declaring obscene exhibitions to be public nuisances. Thus it is important to examine how other states have used civil procedures to regulate obscenity and to discuss the nature of the state's interest in regulating obscene displays.

The United States Supreme Court has generally accepted the use of civil proceedings to reach obscene exhibitions. *Paris Adult Theatre I v. Slaton* is one of the landmark cases approving the injunction of obscene exhibitions. Chief Justice Burger wrote for the majority that, "assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment," injunctive proceedings are perfectly acceptable. The Court based its opinion on a broad interpretation of the state police power:

> [T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . . These 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.

At the bottom of the opinion is a strong belief in the right of a state "to maintain a decent society."

The United States Supreme Court has been reluctant to interfere with the states' exercise of their police power in the area of obscenity when first amendment rights have not been directly violated. The approach to be used by the state—whether civil, criminal, or a combination of the two—is a matter "within the legislature's range of choice."

105. 413 U.S. 49 (1973).
106. *Id.* at 55. Although Georgia has no statute authorizing injunctive relief in obscenity cases, a separate section in the penal code declares that violation of the penal obscenity law constitutes a public nuisance. *Ga. Code Ann.* § 26-2103 (Harrison 1972). The Georgia court has allowed the abatement of this kind of nuisance. *See, e.g., Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712 (1971).*
107. 413 U.S. at 57-58.
108. *Id.* at 69 (quoting *Jacobellis v. Ohio, 378 U.S. 184, 199 (1964).*
stention,\textsuperscript{110} declined to examine the first amendment objections to an Ohio statutory scheme\textsuperscript{111} which provides for the abatement as a public nuisance of adult theatres.\textsuperscript{112} A federal district court, considering the Ohio statutes in an earlier case, had upheld the scheme against a charge of overbreadth, admitting, however, that “a nuisance statute is . . . an imprecise tool with which to administer the regulation of obscenity . . . .”\textsuperscript{113} While the Supreme Court abstained from interfering with the ongoing state injunctive proceeding, it did give its implicit approval to an Ohio decision upholding the statute’s public nuisance approach.\textsuperscript{114}

When injunctive proceedings against obscene displays have been brought on the basis of general public nuisance statutes (as in Busch), the courts have been more reluctant to approve of the approach than they have been when the proceeding was specifically authorized by statute. In Grove Press, Inc. v. City of Philadelphia,\textsuperscript{115} the distributor of “I Am Curious (Yellow)” sought an injunction to prevent the city attorney from obtaining a preliminary injunction against the exhibition of the film as a public nuisance.\textsuperscript{116} The federal appeals court noted that as a standard for regulating First Amendment rights, neither “injury to the public,” nor “unreasonableness,” standing alone, is sufficiently narrow or precise to pass constitutional muster. . . . What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under “a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.”\textsuperscript{117}

A later Pennsylvania case dealing with the same public nuisance statute and an injunctive proceeding against “Deep Throat” and “The

\begin{footnotes}
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\item 115. 418 F.2d 82 (3d Cir. 1969).
\item 116. The Pennsylvania public nuisance statute is as follows: “Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor or of the second degree.

“Where the nuisance is in existence at the time of the conviction . . . the court, in its discretion, may direct either the defendant or the sheriff of the county at the expense of the defendant to abate the same.” \textit{Penn. Stat. Ann.}, tit. 18 § 6504 (Purdon 1973).
\end{itemize}
\end{footnotes}
Devil in Miss Jones" under a general public nuisance statute, also found that an obscenity injunction could not be based on the general public nuisance statute. While the Pennsylvania statute is more general than the California statute, insofar as it does not provide any definition of public nuisance, the two are similar in that they do not, like many other states, directly address the abatement of obscene exhibitions. In both instances, the district attorneys start with the general concept of public nuisance, which has been traditionally employed to counter tangible physical injuries to the public. They try to apply that concept to a matter traditionally left to the criminal law, which directly addresses the dissemination of obscenity. The Supreme Court has looked carefully at attempts to employ a general common law statute when first amendment interests have not been intentionally addressed by the statute.

Other jurisdictions have generally treated "red light abatement" statutes in much the same way as the California court in Busch did. When actions have been brought under these kinds of statutes, the courts have commonly read terms such as "lewdness" or "obscenity" to refer to live sex acts or prostitution and not to the exhibition of films or books. Thus, such statutes have rarely been used to regulate adult theatres and bookstores.

But Is It Public?

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons

119. E.g., Maler v. City of Ketchikan, 403 P.2d 34 (Alaska 1965) (power line which threatened the public safety); Rosehill Cemetery Co. v. City of Chicago, 352 Ill. 11, 185 N.E. 170 (1933) (aesthetic objection to the operation of cemetery in the neighborhood rejected); Dulaney v. Fitzgerald, 227 Ky. 566, 13 S.W.2d 767 (1929) (circus operated in a residential neighborhood threatened the enjoyment of private property by drawing crowds, etc.); Westcott v. Middleton, 43 N.J. Eq. 478, 11 A. 490 (1887) (undertaking parlor caused imagined and not physical injury); Wade v. Fuller, 12 Utah 2d 299, 365 P.2d 802 (1961) (drive-in restaurant drew crowds of noisy people and caused traffic jams). Contra, Farrell v. Cook, 16 Neb. 483, 20 N.W. 720 (1884) (breeding horses in full public view likened to maintaining a brothel); State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932) (dance hall subversive to public order and morals); Jones v. State, 38 Okla. 218, 132 P. 319 (1912) (turf club likened to a common gambling house).
120. See notes 10-12 & accompanying text supra.
121. E.g., People v. Goldman, 7 Ill. App. 3d 253, 287 N.E.2d 177 (1972) (applying Ill. Rev. Stat. ch. 100 1/2, § 1 (1971)), which allows for the abatement as a public nuisance of buildings "used for purposes of lewdness, assignation, or prostitution"; State ex rel. Cahalan v. Diversified Theatrical Corp., 396 Mich. 244, 240 N.W.2d 460 (1976). Contra, General Corp. v. State ex rel. Sweeton, 294 Ala. 657, 320 So. 2d 668 (1975), where the court held a red light abatement statute applicable to the exhibition of films under the common law concept of public nuisance.
It was vigorously argued in *Busch* (as in many other cases) that the "behind closed doors" exhibition of films, books, and other materials could not properly be categorized as a public nuisance, since only those who chose to be exposed to the displays were affected by their content.\(^{123}\)

The court in *Busch* was ostensibly analyzing the nature of a public nuisance. In so doing, however, the majority mingled the broad public interest which has supported the regulation of obscenity in a constitutional context with the more narrow public interest which characterizes the law of public nuisance. The court relied largely on constitutionally based arguments to support its conclusion that the public interest in regulating obscenity is such that its exhibition can properly be classified as a public nuisance. This confusion between constitutional and nuisance interests led the court to give a much broader sweep to the nuisance interest than it is normally entitled to receive.

Courts considering the regulation of obscenity in a constitutional context have generally rejected the argument that exhibitions which take place behind closed doors are outside the public concern. Chief Justice Burger in *Paris Adult Theatre I v. Slaton* "categorically disapprove[d]"\(^ {124}\) the "consenting adults" argument, citing a string of civil rights cases in which the Court had treated movie theatres as public and thus subject to regulation.\(^ {125}\) Burger argued that, traffic in pornography being commerce, it falls under the state's police power, and the state is empowered to regulate it to protect the public environment:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole . . . .\(^ {126}\)

Thus, underlying Burger's opinion is the implicit assumption that what is at stake is less the moral fiber of those who voluntarily expose themselves to illicit erotica\(^ {127}\) than the ethical tone of the entire community.

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125. *Id.* at 65. Actually, this argument, albeit compelling, is deceptive. A clear distinction can be drawn between the theatre which refuses to admit blacks and the theatre which is open to all those adults who choose to enter. In the former cases, the operative factor was the discrimination against an entire class of persons. This discrimination is clearly a public—and a constitutional—concern of great importance. Adult theatres and bookstores are hardly analogous, their operation involving none of the illegal discrimination of the civil rights cases. The public interest in cases such as *Paris Adult Theatre*—if any—is of a radically different character.
126. *Id.* at 69.
127. But see note 146 & accompanying text infra.
When free commerce in obscenity is permitted, the public as a whole suffers, not from exposure to the materials but from the toleration of its commerce within their midst.\textsuperscript{128}

If the state has the authority to regulate or even ban commerce in pornography, what becomes of the right of the patron to receive the materials? The Court in \textit{Stanley v. Georgia}\textsuperscript{129} observed:

It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, \textit{regardless of their social worth} is fundamental to our free society.\textsuperscript{130}

A few years after the \textit{Stanley} decision, the Court stepped back from its broad-sweeping dictum, as if for the first time realizing the true implication of its words. In the companion cases of \textit{United States v. Reidel}\textsuperscript{131} and \textit{United States v. Thirty-Seven Photographs},\textsuperscript{132} the Court interpreted the \textit{Stanley} case as being grounded on the individual's right to be free from unwarranted government intrusion into the privacy of his home.\textsuperscript{133} The Court held that since \textit{Stanley} was not based on a right to receive information, it could not be used to support a corresponding right to distribute information.\textsuperscript{134}

When the California court examined this matter in 1971, Justice Tobriner pointedly remarked:

The rights of adults to possess, study, and enjoy all ideas in the privacy of their homes would mean little if the state could effectively foreclose all legal means of access to a designated category of material by penalizing anyone who distributed it.\textsuperscript{135}

Justice Tobriner was, however, in the minority. The court held that public distribution was properly the subject of state regulation, even if private possession of the same material was not. More recently, in \textit{Paris Adult Theatre I}, Justice Burger disputed the notion that ours is a society of "[t]otally unlimited play for [the] free will"\textsuperscript{136} of the patron of adult establishments. The state, exercising its police power,

\textsuperscript{129} 394 U.S. 557 (1969).
\textsuperscript{130} \textit{Id.} at 564 (emphasis added) (citation omitted).
\textsuperscript{131} 402 U.S. 351 (1971).
\textsuperscript{132} 402 U.S. 353 (1971).
\textsuperscript{135} \textit{People v. Luros}, 4 Cal. 3d 84, 98, 480 F.2d 633, 643, 92 Cal. Rptr. 833, 838 (1971) (Tobriner, J., dissenting).
\textsuperscript{136} 413 U.S. 49, 64 (1973).
has the authority to "protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."\textsuperscript{137}

The state's power to protect the vulnerable from exposure to pornography is nowhere more clearly illustrated than in those cases which deal with the protection of minors. States have frequently taken special precautions to insure that children are denied access to materials which might prove harmful to them in their tender years.\textsuperscript{138}

The courts have recognized, however, that materials which may have a deleterious effect upon children may not have the same effect on adults. Thus, while generally approving such measures, courts have scrutinized them closely to assure that in protecting youth, the state does not "burn the house to roast the pig."\textsuperscript{139} This approach gives rise to the proposition that while some materials may be regulated as to the scope of their distribution, they may not be suppressed altogether.\textsuperscript{140} Those cases which have held that the dissemination of materials may not be totally prohibited have generally dealt with materials which are not legally obscene. The argument can be made, however, that an unsuspecting adult population could be protected, as are children, through measures less pervasive than wholesale suppression. For example, the uninformed, when warned that a film depicts sexual conduct explicitly or that merchandise in a bookstore is of a potentially offensive nature, ought not be taken seriously when they complain of unwanted exposure. Such regulation by the state would serve to preserve the free choice of those who would patronize such establishments with their eyes open while protecting the sensibilities of the unwary.

Justice Tobriner took up the consenting adults argument in his \textit{Busch} dissent, observing that the public nuisance statutes were intended to reach public conduct which interfered with the rights of a substantial number of people.\textsuperscript{141} Exhibitions within the confines of theatres or bookstores, he remarked, amount to private behavior which does not "obtrude upon those who never see them."\textsuperscript{142}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} An illustration of such a law is found in Georgia, where a special section has been added to the penal code to deal with the distribution of obscene materials to minors. After a declaratory judgment has been rendered that the material is unfit for distribution to minors, one who does so distribute the materials is subject to criminal prosecution. \textsc{Ga. Code Ann. §§ 26-9901a to 07a} (1972).


\textsuperscript{140} Jacobellis v. Ohio, 378 U.S. 184, 195 (1964); cf. Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1300 (7th Cir. 1973) (failure to limit application to children was not necessarily fatal because the exhibition was at a drive-in theatre).

\textsuperscript{141} \textit{id.} at 64-66, 550 P.2d at 613-15, 130 Cal. Rptr. at 341-43 (Tobriner, J., dissenting).

\textsuperscript{142} \textit{id.} at 66, 550 P.2d at 615, 130 Cal. Rptr. at 343.
briner conceded that a considerable number of people may be distressed by the knowledge that such establishments are operating within their community, but he rejected the notion that this discomfort was substantial enough to bring the public nuisance laws into play: "So attenuated a discomfort...is far too meager to command the protection of the public nuisance statutes." Justice Tobriner's approach is the same as that accepted in California prior to the *Busch* decision. In *Harmer v. Tonylyn Productions, Inc.*, the court had refused to enjoin the exhibition of a film as a public nuisance because, "[t]he nuisance was not one which is inflicted or imposed on the public."

The closed theatres and bookstores which were the subjects of *Busch* may be contrasted with drive-in theatres and street-corner newsracks. A display in full view of members of the public, whether consenting or not, is distinctively and unarguably public in nature. Numerous cases have held that drive-in theatres may be restrained from showing adult films when they will be visible from public highways or from residential areas. Such exhibitions have been held to be public nuisances because they impose pictures upon people without their consent, are distracting, cause traffic hazards, and so on.

It is notable, however, that even in the area of drive-in theatres, public nuisance statutes will not reach all displays. A city ordinance which prohibited the screening of all films which depicted human nudity was invalidated by the Supreme Court in *Erznoznik v. City of Jacksonville*:

Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

...[T]he burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

In summary, then, it is clear that the courts have recognized a strong public interest in the regulation of obscenity even when its ex-

143. *Id.*
144. 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972).
145. *Id.* at 943, 100 Cal. Rptr. at 577. Similarly, in State v. Brooks, ___ Ore. __, 550 P.2d 440 (1976), the court overturned a conviction for public indecency for a nude performance in an "adults only" theatre, observing that the patrons were forewarned about the content of the performance and should not have been shocked.
149. *Id.* at 209-11 (citation omitted) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
hibition takes place behind closed doors. This is the position which the Busch court has taken. Nonetheless, there are strong reasons for drawing a legal distinction between the treatment of those exhibitions which are thrust upon an unwilling public and those which are viewed only by persons who seek them out. A compelling argument can be made that these latter exhibitions which are not forced upon unwilling members of the public are not sufficiently public in nature to be included within the scope of public nuisance statutes.

**Effects of Pornography and the State Interest**

A matter that ought not be overlooked in any discussion of the public interest and obscenity law is the question of what impact the dissemination of pornography has on the individual and society. Although a subject of long and heated debate, little empirical evidence has been gathered on the effects of obscenity in the United States. In 1967, the President's Commission on Obscenity and Pornography was established by the federal government to study the pornography industry. The commission found four general classes into which assertions about, and objections to, obscenity fell:

- (a) Erotica is an offense against community standards of good taste;
- (b) exposure to erotica is harmful for individuals;
- (c) the existence of erotica has harmful consequences for society; and
- (d) exposure to erotica is harmless or beneficial for individuals.

The commission divided its study of responses to erotica into an examination of behavioral responses and of attitudinal responses. Their findings did not support the conclusion that exposure to pornography in any way harms or alters sexual behavior. What they did find is that exposure tends to produce short-term sexual arousal and that continued exposure frequently leads to satiation. The results of an earlier study published in 1962 by the Minnesota Law Review lend credence to the conclusion of the commission. No support was found for

> [t]he old analogy . . . to the decline of Rome . . . [in which] it is implied that obscenity, for some reason, exerts some undefined yet powerful . . . influence on those who contemplate it . . .

Further, the commission found no evidence of a causal relation between exposure to obscenity and the incidence of sex crimes or de-

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151. **COMMISSION**, supra note 65, at 142.
152. *Id.* at 194.
153. *Id.* at 193-94.
linquency. It declined, however, to say that such a connection could be absolutely disproved.\textsuperscript{155}

The commission found little effect on individual attitudes regarding either sexuality or sexual morality.\textsuperscript{156} The 1962 study, on the other hand, concluded that attitudes toward sexual behavior might well be influenced by frequent exposure to pornography.\textsuperscript{157} The direction of the attitude change, however—whether toward more liberal or more conservative attitudes—depends to a large extent on "the nature and the strength of the preexisting attitudes that the viewer holds."\textsuperscript{158} The commission agreed with this conclusion insofar as it found that increased exposure to pornography tended to liberalize attitudes towards pornography itself, as distinct from the attitudes towards particular forms of sexual behavior.\textsuperscript{159}

The thornier question, though, is the first point raised by the commission—the offense to community standards of decency. Here the debate turns on the question of how far a free society should go to protect itself from what it conceives to be threatening expression. The debaters generally divide into two camps—those who, relying on the first amendment, fear the state's intrusion into the free viewing and reading habits of the public and those who fear that the ultimate effect of free dissemination of pornography will be to undermine the good moral tone of society.\textsuperscript{160} Justice Brennan falls into the first group. In his \textit{Paris Adult Theatre I} dissent, he observed that if the state can regulate the traffic of obscene materials on the assumption, unproved by empirical evidence, that such materials lead to antisocial behavior, it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films.\textsuperscript{161}

\textsuperscript{155} \textit{Commission}, supra note 65, at 242-43.
\textsuperscript{156} \textit{Id.} at 214.
\textsuperscript{157} \textit{Sex Censorship}, supra note 154, at 1038-39.
\textsuperscript{158} \textit{Id.} at 1039.
\textsuperscript{159} \textit{Commission}, supra note 65, at 214.
\textsuperscript{160} "What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals." P. \textit{Devlin}, The Enforcement of Morals 9 (1965). \textit{See also} Elias, Sex Publications and Moral Corruption: The Supreme Court Dilemma, 9 \textit{Wm. & Mary L. Rev.} 302 (1967).
\textsuperscript{161} 413 U.S. 49, 110 (Brennan, J., dissenting). Similarly, Justice Douglas argued that while he was personally offended by much of this material, "[l]ife in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct. "'Obscenity' at most is the expression of offensive ideas." \textit{Id.} at 71 (Douglas, J.,
In the same case, Chief Justice Burger, writing for the majority, rejected the notion that states must await substantive proof of the deleterious effect of obscenity. He preferred to defer to the states' judgment as to how they will deal with the moral tone of the community.

States are told by some that they must await a "laissez-faire" market solution to the obscenity-pornography problem.

The States, of course, may follow such a "laissez-faire" policy... but nothing in the Constitution compels the States to do so.

... [W]e reject the claim that the State... is here attempting to control the minds or thoughts of those who patronize theatres. ... [T]he mere fact that, as a consequence [of preventing unlimited display or distribution of obscene materials], some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests.162

In practice, those who share Brennan's fears of extensive state regulation have had to content themselves with procedural safeguards.163 When the courts' and public's general good sense and belief in free expression fail to prevent serious inroads into the availability of materials, only procedures designed to give the greatest possible leeway to protected expression remain to maintain the vitality of free choice in a free society. The courts have consistently balanced the states' police power against the interest in being able to receive pornographic materials and have generally found the latter insufficient to merit protection. Whether obscenity is regulated in the civil courts or is treated as a crime, the ultimate outcome remains the same—it will not be protected by the courts. The courts have concluded, despite strong arguments to the contrary, that the injury is real enough to be regulated.

dissenting). More recently, Justice Stevens has apparently aligned himself in this camp. See Marks v. United States, 45 U.S.L.W. 4233, 4235-36 (U.S. March 1, 1977) (Stevens, J., concurring & dissenting).

162. 413 U.S. at 64-67 (citations omitted). Justice Harlan has voiced a similar sentiment: "We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. ...

"... Clearly, the state legislature has made the judgment that printed words can 'deprave or corrupt' the reader—that words can incite antisocial or immoral action. ...

"... The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." Roth v. United States, 354 U.S. 476, 501-02 (1957) (Harlan, J., concurring & dissenting). For further argument on the deleterious effect of free commerce in pornography, see J. KILPATRICK. THE SMUT PEDDLERS 201-41 (1973); R. KUH, FOOLISH FIGLEAVES?: PORNOGRAPHY IN—AND OUT OF—COURT 269-316 (1967).

163. See notes 24-44 & accompanying text supra.
Conclusions

The President's Commission of Obscenity and Pornography recommended in its 1970 report that all criminal penalties for the exhibition of obscene materials to consenting adults be repealed. They argued that only minors and nonconsenting adults who may be subjected to public displays of such materials need be protected. Adherents of this position have, however, met with little success; the commission itself recognized that while these recommendations might be ideal in light of its finding that pornography has no deleterious effect on the individual or on the community, still many or all states would continue to enforce laws against the dissemination of obscenity. Clearly California is one of these states, as reaffirmed by the Busch decision. Thus, despite the commission's findings, the threshold question of whether or not obscenity laws are valid is rarely addressed by the courts today. The focal point of controversy has become a somewhat narrower one: how may obscenity be regulated most effectively so as to strike a balance between the alleged harm resulting from the distribution and exhibition of "X-rated" materials and the potential danger of compromising first amendment rights?

Busch has judicially approved an obscenity procedure which has been widely accepted across the United States. In so doing, the Busch court prescribed procedural steps designed to assure that the first amendment would not be violated by an illegitimate prior restraint. But serious questions still remain. It is not clear that the proceeding approved in the case was contemplated or authorized by the legislature. Rather, it would appear that the public nuisance abatement procedure was intended to reach an altogether different type of offense—an immediate assault upon the five senses. Thus, the Busch majority's reliance on section 731 of the Code of Civil Procedure was

164. Commission, supra note 65, at 51.
165. The Commission's proposed legislation provides that "[m]aterial is placed upon 'public display' if it is placed by the defendant on or in a billboard, viewing screen, theatre marquee, newsstand, displaying rack, window, showcase, display case or similar place so that matter bringing it within the definition [of obscenity] is easily visible from a public thoroughfare or from the property of others." Id. at 67.
167. See notes 24-44 & accompanying text supra.
168. See notes 67-104 & accompanying text supra.
ill-considered. In addition, the court did not address important considerations relating to the standard of proof or the use of a jury.\textsuperscript{169}

It is suggested that it is not necessary to sacrifice the use of injunctive relief in obscenity regulation in order to eliminate the problem posed by the questionable use of the civil abatement procedure and to afford defendants greater constitutional protection. It is recommended that the legislature amend the penal code\textsuperscript{170} by enacting a statute which generally approves of the \textit{Busch} procedure but which makes a few significant modifications. It is suggested that the penal obscenity law, rather than the civil nuisance law, be amended, in order to remove nuisance from the consideration of obscenity altogether. Obscenity has traditionally been treated as a criminal offense, and a penal code provision generally authorizing the \textit{Busch} procedure in the criminal law context will establish a cohesive obscenity law for California.

More specifically, it is suggested that before any criminal action can be instituted, the district or city attorney should be required to seek a declaratory judgment that specific materials are obscene and an injunction against their exhibition. In this way, the exhibitor will be put on notice as to what he can legally exhibit or distribute before he is subjected to criminal penalties. It would also relieve the prosecution of the burden of proving scienter in a future criminal prosecution,\textsuperscript{171} because once the distributor has been judicially notified that further exhibition of specific materials is forbidden, he will have no cause to complain that he was ignorant of the contents of those materials or their legally obscene character. Furthermore, the violation of an injunction would subject the exhibitor to penalties for contempt of court.\textsuperscript{172}

The above procedure has been used in a few states.\textsuperscript{173} Other states have made the choice between injunctive relief and criminal prosecution a matter of prosecutorial discretion, as in \textit{Busch}.\textsuperscript{174} Typically,

\begin{itemize}
\item \textsuperscript{169} See notes 46-66 & accompanying text \textit{supra}. Since the cases involved an appeal from an order granting a demurrer, those issues were not presented.
\item \textsuperscript{171} \textit{Commission, supra} note 65, at 68.
\item \textsuperscript{172} See, e.g., \textit{Okla. Stats. Ann. tit. 21, § 1040.22 (West Supp. 1976)}.
\item \textsuperscript{173} See generally, \textit{Mass. Gen. Laws Ann. ch. 272, § 281 (West 1970)} (stating that declaratory and injunctive proceedings are “condition[s] precedent to the institution of any [criminal] proceedings . . . for dissemination of obscene books”); \textit{Miss. Code Ann. § 99-31-19 (1972)} (“Any mailable matter . . . following the entry of a judgment that it is obscene . . . is subject to [criminal prosecution]”). The commission report also recommended that “criminal prosecutions shall be brought prior to the obtaining of a declaration . . . only in cases of material which is unquestionably within the applicable definitional provision. In all other cases, the provisions of this Act shall be used prior to prosecution . . . .” \textit{Commission, supra} note 65, at 69.
\end{itemize}
the choice is given to the prosecutor either by a statutory statement that
the injunctive procedure is discretionary or by a separate statute which
declares obscenity to be a public nuisance as well as a criminal of-

"This approach to the problem is less satisfactory inasmuch
as it leaves the exhibitor uncertain as to what legal sanctions he may
face. He is left in doubt as to whether his materials will be protected
(since he will be reluctant to call attention to himself by seeking de-
claratory relief), and he is also left wondering whether he might face
criminal prosecution or the less risky civil proceeding. Entrusting this
choice between criminal and civil actions to prosecutorial discretion al-

A second area that should be covered by the proposed statutory
amendment relates to the Supreme Court's mandate that an adjudica-
tion declaring a book or film to be obscene not be held ex parte.176
Busch has followed this lead by reading into the public nuisance abate-
ment law the requirement that an adversary hearing on the issue of
obscenity be held before an injunction can issue.177 It is recommended
that the legislature directly incorporate this requirement into the com-
prehensive penal code amendment.

A third area that should be treated by the suggested amendment
involves the problems which arise because the definition of obscenity
is inherently uncertain. Because of the potential for mistaken fact-
finding, it is further suggested that a penal code amendment require
the district or city attorney to prove the obscenity of the material be-
yond a reasonable doubt. Where the integrity of the first amendment
is involved, protected expression should be given all possible leeway.
This provision would recognize that need. For the same reason, it is
also recommended that provision be made for a jury trial on the issue
of obscenity. Several states have incorporated the jury trial into their
civil obscenity laws.178 The President's Commission on Obscenity and
Pornography, recognizing that the question of obscenity has historically
been entrusted to the jury, has also suggested that the jury trial be pro-
vided as a matter of right.179 The jury trial will assure that a broad
crosssection of the community's tastes and values is represented in ob-
scenity litigation. The added precaution provided by the Missouri
court—giving the trial court the power to find material constitutionally
protected even after a jury has found it obscene180—is also desirable.

176. See notes 29-33 & accompanying text supra.
177. 17 Cal. 3d at 59, 550 P.2d at 610, 130 Cal. Rptr. at 338.
180. McNary v. Carlton, 527 S.W.2d 343 (Mo. 1975).
With these modifications of the *Busch* decision, the integrity of the first amendment will be protected to the greatest extent possible in a society in which the tastes and standards of the community dictate against the toleration of obscenity in its midst.

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