POSSESSING POLLUTION

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INTRODUCTION: CONSTITUTIONAL AVOIDANCE

On April 22, 1957, government attorney Roger Fisher appeared before the Supreme Court in defense[1] of the federal obscenity statute,[2] which criminalizes the distribution of obscene materials through the mails. Although the power of the federal and state governments to regulate obscenity had been assumed for nearly 170 years,[3] Second Circuit Judge Jerome Frank's concurrence in *United States v. Roth*[4] had critically appraised the precarious historical,[5] jurisprudential,[6] and sociological[7] foundation on which this presumption rested. Judge Frank concluded that although he was bound to uphold Samuel Roth's conviction as a member of an inferior court,[8] the Supreme Court's "clear and present danger" precedent[9] strongly implied the unconstitutionality of the federal obscenity statute.[10]

Most commentators expected that the Court would apply some variation of

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1. Roth v. United States, 354 U.S. 476, 478 (1957).

2. 18 U.S.C. §1461 (2000).

3. OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES (Leon Friedman ed.,1983) [hereinafter COMPLETE ORAL ARGUMENTS].

4. 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring).

5. *See id.* at 806–9.

6. *See id.* at 803–4. Two years earlier, William B. Lockhart and Robert C. McClure canvassed the constitutional dicta with which the *Roth* Court would ultimately justify its holding. *See* William B. Lockhart & Robert C. McClure, *Literature, The Law of Obscenity, and The Constitution*, 38 MINN. L. REV. 295, 352–57 (1954). Lockhart and McClure concluded that the references in *Chaplinsky v. New Hampshire* to the "lewd and obscene," 315 U.S. 568, 572 (1942), most likely referred to provocative solicitation. *Id.* at 353 n.381. Generally, the authors call the various dicta "vague," "meaningless," and "misleading." *Id.* at 356.

7. *See Roth*, 237 F.2d at 811–17.

8. *Id.* at 804, 806.

9. *See id.* at 802 for Judge Frank's application of the Supreme Court's "clear and present danger" precedent.

10. *Id.* at 804 ("I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation.").

the "clear and present danger" test when it considered Roth's case on appeal.[11] They did not anticipate the dominant role that Justice Felix Frankfurter would assume at oral argument.[12] Frankfurter had mistrusted "clear and present danger" analysis since 1943, when the Court used it to overrule his previous holding that public schools could require students to participate in a flag-salute ceremony.[13] Indeed, Harry Kalven went so far as to call Frankfurter "the chief critic of the test."[14]

Nevertheless, the government prepared to defend the federal obscenity statute with respect to "clear and present" analysis, which Justice William O. Douglas immediately invoked at oral argument.[15] Douglas doggedly interrogated Fisher about the nature of the dangers posed by obscenity: "Clear and present danger that [one] be shocked; or what? Clear and present danger of *what*?"[16] Fisher asserted that the federal statute averted four distinct social injuries,[17] and proceeded to describe the deleterious "immediate" and "long-range conduct induced by a breaking down of morals."[18] A skeptical Justice Douglas suggested that Fisher "sound[ed] . . . like Mr. Comstock, Anthony Comsto—"; Frankfurter interjected, "Don't be frightened by that!"[19]

Justice Frankfurter's spirited defense of Fisher concealed his awareness of the weaknesses in Fisher's argument. Frankfurter steered the government away from the "clear and present danger" analysis he so mistrusted. He asked Fisher why the government's case had "to be shoved into that category," and noted that the federal obscenity statute existed for half a century "before the phrase clear and present danger . . . dropped from Mr. Justice Holmes's pen."[20] Instead, Frankfurter pursued an analogy to criminal libel statutes,[21] which the Court had sanctioned in *Beauharnais v. Illinois*.[22] Writing for the majority in *Beauharnais*, Frankfurter held that criminal libel was excluded from First Amendment coverage[23] and "thus did not call for an application of the 'clear and present

11. *See generally* Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, *supra* note 6, at 390 n.541 (surveying contemporaneous opinions regarding what test would be employed by the Supreme Court in *Roth*).

12. For a transcript of the oral argument in Roth v. United States, 354 U.S. 476 (1957), see COMPLETE ORAL ARGUMENTS, *supra* note 3, at 9–35. *See generally* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 298-318 (1992).

13. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *See also* DE GRAZIA, *supra* note 12, at 308.

14. HARRY KALVEN, JR., A WORTHY TRADITION 181 (1988). *See also* Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, *supra* note 6, at 366 n.435.

15. COMPLETE ORAL ARGUMENTS, *supra* note 3, at 23.

16. *Id.* at 24 (emphasis added).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 26.

21. *Id.* at 27.

22. 343 U.S. 250 (1952).

23. *Id.* at 266. For a distinction between First Amendment "coverage" and "protection," see

danger' test."[24] Frankfurter believed that obscenity, like libel and "fighting words," was categorically excluded from First Amendment coverage, and that the government's decision to regulate it deserved great deference.

Surprisingly, Fisher resisted Frankfurter's line of reasoning. It would have been "easy," he claimed, "for the Government to . . . say 'once something is obscene, it's beyond the realm of protection. The First Amendment has no concern with it.'"[25] That, Fisher maintained, "would have been an *unhealthy analysis* for the Government to make."[26] Although Justice Frankfurter proceeded to rebuke him for "dodging the [constitutional] question,"[27] Fisher insisted upon "clear and present danger" analysis throughout his presentation.[28]

Both parties, then, openly defied Frankfurter's strategy and invoked the "clear and present danger" test without hesitation. Nevertheless, writing for the Court in *Roth v. Untied States*,[29] Justice Brennan replicated Frankfurter's approach at oral argument and placed obscenity beyond the coverage of the First Amendment. The Court relied upon dicta in *Chaplinsky v. New Hampshire*, which proposed that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . ."[30] In response to the argument that obscene materials do not

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Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 905 n.33 (1979).

24. DE GRAZIA, *supra* note 12, at 312.

25. COMPLETE ORAL ARGUMENTS, *supra* note 3, at 28.

26. *Id.* (emphasis added).

27. *Id.*

28. *See id.* at 29 ("It would have been an easier, much easier matter to say, obscenity has always been considered outside the Constitution; it raises no First Amendment problems, and sit down. We don't—we think that there are problems that must be considered."); 30 ("I don't think that the edge of the First Amendment is razor sharp.").

29. 354 U.S. 476 (1957). Three circumstantial features of *Roth* and its companion case Alberts v. California strongly conspired in favor of the Government's case. Richard S. Randall finds it significant that "[w]hen the Supreme Court dealt definitively with obscenity for the first time, in 1957, it chose . . . two cases involving cheap pornographic books and magazines rather than works with literary claims." RICHARD S. RANDALL, FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED 57 (1989). Moreover, the petitioners were convicted under different federal and state laws, which placed them in the unfortunate position of making directly antagonistic arguments: Roth's lawyer claimed that the federal obscenity statute abrogated power reserved exclusively to the States under the Ninth and Tenth Amendments, while Alberts' lawyer argued that the federal statute preempted state legislation as to mail-order businesses. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 24 n.74; DE GRAZIA, *supra* note 12, at 299 n.2. Finally, the Government submitted a box of sealed exhibits to the Court, which consisted "of the most offensive pictures and publications previously seized and condemned by the authorities," and which it did not disclose to petitioners' counsel. COMPLETE ORAL ARGUMENTS, *supra* note 3, at 10. The exhibits demonstrably influenced the Justices at oral argument, and Leon Friedman concludes that this "unprecedented" bit of gamesmanship "probably had a substantial effect on the outcome of the case." *Id. See also* DE GRAZIA, *supra* note 12, at 302; William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 26 (1960).

30. *Roth*, 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72

create a "clear and present danger of antisocial conduct," Justice Brennan relied on the "complete answer" provided by *Beauharnais*: "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances."[31] The Court thus "rejected *both* the petitioner's and the government's First Amendment standards,"[32] disposing of the "clear and present danger" test with "one quick thrust."[33]

Kalven promptly dismissed the *Roth* Court's endorsement of the "two-level speech theory" as "a strained effort to trap a problem."[34] This approach relieves the government of its burden of justifying regulation in light of some legally cognizable harm. Indeed, Justice Brennan's opinion does not consider the

(1942)). Edward de Grazia suggests that although the Court's opinion in *Chaplinsky* was authored by Justice Murphy, Justice Frankfurter played a "leading role in 'settling' the obscenity question through [that] dicta." DE GRAZIA, *supra* note 12, at 291. De Grazia is generally quite critical of Justice Frankfurter, and claims that Frankfurter "cherished" the "freedom-depreciating dictum of *Chaplinsky v. New Hampshire*." *Id.* at 416. He describes the *Roth* Court as "a bench under the sway of Frankfurter's policy of judicial restraint," *id.* at 305; derides the *Roth* opinion as "neo-Frankfurtian," *id.* at 324; and speculates that Brennan, who arrived at the Court in 1956, was still very much under the influence of his former Harvard Law School professor, *id.* at 291.

31. *Roth*, 354 U.S. at 486–87 (quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)).

32. HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 26 (1969) (emphasis added) [hereinafter OBSCENITY AND PUBLIC MORALITY].

33. Kalven, *supra* note 29, at 10. The Court's categorical approach to the constitutional question emphatically contradicted its own practice. In only one of fourteen cases between 1940 and 1954 did the Court fail to apply the "clear and present danger" test in a content-based First Amendment case: *Beauharnais v. Illinois*. *See* Lockhart & McClure, *Literature, The Law of Obscenity, and The Constitution*, *supra* note 6, at 363–64; *Roth*, 354 U.S. at 514 (Douglas, J., dissenting) ("With the exception of *Beauharnais v. Illinois*, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment." (internal citation omitted)). Lockhart and McClure seemed to consider *Chaplinsky* a case in which the statute at issue regulated "the *manner* or *means* of . . . expression." Lockhart & McClure, *Literature, The Law of Obscenity, and The Constitution*, *supra* note 6, at 363–64. The *Roth* Court chose to follow a line of precedent that was clearly anomalous, as well as out of touch with state court practice, *see, e.g.*, Commonwealth v. Feigenbaum, 70 A.2d 389, 390 (Pa. Super. Ct. 1950), including state court decisions in which obscenity statutes were *upheld*, *see, e.g.*, Commonwealth v. Isenstadt, 62 N.E.2d 840, 848 (Mass. 1945).

34. Kalven, *supra* note 29, at 10–11. Kalven's seminal article in the inaugural issue of the *Supreme Court Review* laid the theoretical foundation for the Court's highly speech-protective approach, which culminated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The *Memoirs* plurality's holding that obscene material must be "utterly without redeeming social value," *id.* at 418, echoed Kalven's observation that "[i]f the obscene is constitutionally subject to ban because it is worthless, it must follow that the obscene can include only that which is worthless." Kalven, *supra* note 29, at 13. *See also* Edward de Grazia, *How Justice Brennan Freed Novels and Movies during the Sixties*, 8 CARDOZO STUD. LAW & LIT. 259, 261–62 (1996).

ostensible state interests in obscenity regulation.[35] The Court would continue to ignore this fundamental question for twelve years.

Despite the Court's prolonged silence, the history of obscenity law reveals an intense regard for public morality. Nineteenth- and twentieth-century lawmakers assumed that the state had a legitimate paternalistic interest in preventing moral harm to its citizens.[36] Moreover, these legislators and judges consistently described moral harm in terms of purity, pollution, and contamination from foreigners as reflected in urban decay.[37]

This Article traces the origins and influence of the metaphor of moral pollution in obscenity law. I argue that this inherited vocabulary profoundly shaped obscenity law at its transitional moment. In *Stanley v. Georgia*,[38] the Court held that the state may not constitutionally criminalize the possession of obscene materials in the home,[39] thereby placing obscenity law under tremendous doctrinal pressure.[40] At this critical juncture, in an attempt to refashion the harms underlying obscenity regulation, conservative commentators recalled the rhetorical tradition associated with the metaphor of moral pollution. Their genius was to modernize the Victorian language of moral harm with a uniquely contemporary flourish.[41] Environmentalism, a nascent political and ethical movement, provided these commentators, and ultimately the Burger Court, with the rhetorical means to convert paternalistic regulation into public interest legislation.[42]

Part I of this Article explores the genesis of the language of moral harm, as

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35. CLOR, OBSCENITY AND PUBLIC MORALITY, *supra* note 32, at 40. *See* Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2271 n.18 (1994). Frederick Schauer has attempted to meet Kalven's criticism of the two-level theory by positing a different explanation for the theory itself. Unlike Kalven who, writing in 1960, understandably credited the Court's explanation for its behavior and understood social value as the predicate on which the two-level theory was founded, Schauer describes the theory as an attempt to distinguish between constitutional "speech" from speech as ordinarily understood. "Because 'speech' has a specialized constitutional definition, the term 'two-level theory of speech' is fundamentally misleading . . . . This misconception results from a confusion of constitutional 'speech' and ordinary 'speech.' Properly interpreted, the cases merely establish two categories of utterance—'speech' and non-speech." Schauer, *supra* note 23, at 910. Building on the work of John Finnis, *see* Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967), Schauer concludes that constitutional "speech" does not include hard-core pornography that functions as a sexual surrogate and lacks communicative content. Schauer, *supra* note 23, at 921–23. Thus, Schauer considers the state interest in obscenity law practically inconsequential. For criticism of Schauer's "non-speech" theory, see Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1585–95 (1988).

36. *See infra* Part I.

37. *See id.*

38. 394 U.S. 557 (1969).

39. *Id.* at 568.

40. *See infra* Part II.

41. *See infra* Part III.

42. *See infra* Part IV.

reflected in the legislative history surrounding early obscenity legislation and the judicial opinions of English and American courts. These texts reveal a profound concern for the ruination of public morals, as well as a unique manner of invoking such harm. Part II discusses the *Stanley* decision's dramatic destabilization of the theories of harm on which obscenity law was predicated. Part III examines ways in which commentators modernized the language of moral harm in an attempt to ameliorate the doctrinal tensions occasioned by *Stanley*. Part IV traces the impact of this renewal on the quintet of 1973 cases in which the Court rescued obscenity law, including *Miller v. California*[43] and *Paris Adult Theatre I v. Slaton*.[44] Finally, Part V considers the continuing influence and inequity of the pollution metaphor in subsequent jurisprudence involving adult speech.[45] Although I accept the inevitability of metaphor in legal discourse, I urge a more critical examination of doctrine constructed upon figurative concepts of harm.

I.

MORAL POLLUTION: THE INHERITED VOCABULARY

A. Nineteenth-Century Origins

The Poisoning of Holywell Street

Despite periodic intervention on behalf of public morality, English society was historically quite tolerant of obscene materials. The earliest reported prosecution for obscenity resulted in the punishment of a young Kent nobleman for public intoxication and nudity.[46] The publication of obscene literature was considered "a 'spiritual' [offense] . . . cognizable only in the ecclesiastical courts"[47] until 1727, after which it constituted a common law misdemeanor.[48]

The first organized campaign against obscene literature in England was

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43. 413 U.S. 15 (1973).

44. 413 U.S. 49 (1973).

45. *See infra* Part V.

46. Sir Charles Sydlyes Case, (1663) 83 Eng. Rep. 1146 (K.B.). With typical color, Justice Douglas described the facts as such:

> Sir Charles had made a public appearance on a London balcony while nude, intoxicated, and talkative. He delivered a lengthy speech to the assembled crowd, uttered profanity, and hurled bottles containing what was later described as an "offensive liquor" upon the crowd. The proximate source of the "offensive liquor" appears to have been Sir Charles.

Memoirs v. Massachusetts, 383 U.S. 413, 428 n.4 (1966). Leo A. Alpert writes, "A flimsier, more appallingly pointless foundation for the superstructure of law that was later erected could hardly have been deliberately laid." Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 43 (1938).

47. MORRIS L. ERNST & WILLIAM SEAGLE, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR 110–11 (1928). *See* Regina v. Read, (1707) 88 Eng. Rep. 953 (Q.B.).

48. *See* Rex v. Curl, (1727) 93 Eng. Rep. 849 (K. B.).

directed towards a street—Holywell Street, "the centre of . . . traffic in early Victorian times,"[49] teeming with pornographic bookstores.[50] Concerned about the proliferation of obscene materials in London, the Secretary of the Society for the Suppression of Vice recruited Lord John Campbell to sponsor obscenity legislation.[51] Fortuitously, "at this time a bill against the indiscriminate sale of poisons was being considered in the House of Lords. Lord Campbell's imagination at once connected the two events analogically."[52] He had stumbled upon the perfect metaphor. In introducing the Obscene Publications Act[53] a few days later, Lord Campbell inveighed against "a sale of poison more deadly than prussic acid, strychnine or arsenic—the sale of obscene publications and indecent books."[54]

If the poisoning of Holywell Street was the impetus for Lord Campbell's Act, its beautification was the principal measure of the Act's success. The Act was enforced only against the Holywell Street bookshops.[55] Lord Campbell rejoiced in his diary: "Holywell Street, which had long set law and decency at defiance, has capitulated after several assaults. Half of the shops are shut up; and the remainder deal in nothing but moral and religious books!"[56] The Act encouraged even the Parisian authorities, Campbell wrote, to "purif[y] the Palais Royal and the Rue Vivienne."[57]

Despite his assurance that the Act was intended to regulate only the most noxious literature,[58] Lord Campbell could not control the metaphor he had unleashed. The scope of the Obscene Publications Act was promptly broadened. In 1868, Henry Scott purchased an anti-Catholic pamphlet published by the Protestant Electoral Union and was prosecuted under Lord Campbell's Act.[59] The pamphlet circulated on street corners, where, Lord Chief Justice Cockburn observed, "the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains."[60] Thus it was

49. ERNST & SEAGLE, *supra* note 47, at 112.

50. The Obscene Publications Act, 1857, *available at* http://www.bbc.co.uk/dna/h2g2/A679016 (last visited Feb. 23, 2006). *See also* ERNST & SEAGLE, *supra* note 47, at 111–12.

51. *See* ERNST & SEAGLE, *supra* note 47, at 115.

52. *Id.*

53. Obscene Publications Act, 1857, 20 & 21 Vict., c. 83 (Eng.) (repealed by Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3(8)).

54. ERNST & SEAGLE, *supra* note 47, at 116.

55. *Id.* at 127–28.

56. *Id.*

57. *Id.* at 128.

58. *See id.* at 119.

59. *See* Charles Rembar, *The Outrageously Immoral Fact, in* CENSORSHIP AND FREEDOM OF EXPRESSION: ESSAYS ON OBSCENITY AND THE LAW 27, 32 (Harry M. Clor ed., 1971) [hereinafter CENSORSHIP AND FREEDOM OF EXPRESSION]; Alpert, *supra* note 46, at 52–53.

60. Regina v. Hicklin, (1868) 3 L.R.Q. B. 360, 372.

determined that *The Confessional Unmasked*, "more libelous than obscene,"[61] properly fell within the scope of the Act.[62]

American Efficiency

The English campaign against obscene literature heartened American reformers. Although the Tariff Act of 1842 empowered Federal Customs to confiscate obscene "prints,"[63] organizations like the New York Society for the Suppression of Vice, founded by Anthony Comstock five years after *Hicklin*,[64] urged more comprehensive regulation. As if he too had experienced Lord Campbell's great imaginative "explosion,"[65] Comstock frequently invoked the specter of "poison" and "sewers" in raging against the evils of pornography.[66] He believed that masturbation caused death,[67] and considered the passage of federal obscenity legislation absolutely vital to public moral health.

Comstock staged a merciless campaign in support of the Postal Act of 1873,[68] during which he smeared his opponents as "lechers and defilers of youth and American womanhood."[69] He engineered the bill's passage on the final day of Congress's session, and then took an unsalaried position as special agent of the Post Office.[70] In addition to criminalizing the publication of obscene materials sent through the mails, the Act targeted contraceptive equipment and educational literature.[71]

Though Comstock may have "added little except American efficiency to the

61. Rembar, *supra* note 59, at 32.

62. The landmark test of obscenity established in *Hicklin* is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." 3 L.R.Q.B. at 371.

63. Tariff Act of 1842, ch. 270, § 28, 5 Stat. 566 (repealed 1846). Charles Rembar suggests that Congress, "in its customary xenophobic mood," passed the Act "to guard against infection from abroad." Rembar, *supra* note 59, at 31. *See also* ERNST & SEAGLE, *supra* note 47, at 80. For other examples of xenophobic rhetoric in obscenity doctrine, *see infra* notes 82, 177, 212 and accompanying text.

64. Alpert, *supra* note 46, at 57; William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 269 (1993).

65. ERNST & SEAGLE, *supra* note 47, at 115.

66. *See, e.g.*, ANTHONY COMSTOCK, FRAUDS EXPOSED 388–89 (1880); ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 174, 175, 179, 182, 206, 242 (Robert Bremner ed., Belknap Press of Harvard Univ. Press 1967) (1883) [hereinafter TRAPS FOR THE YOUNG].

67. *See, e.g.*, TRAPS FOR THE YOUNG, *supra* note 66, at 136. *See generally* THOMAS W. LAQUEUR, SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION (2003).

68. Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598 (current version at 18 U.S.C. §1461 (2000)). For a history of the statute, see Dan Greenberg & Thomas H. Tobiason, *The New Legal Puritanism of Catharine MacKinnon*, 54 OHIO ST. L.J. 1375, 1376–78 (1993).

69. Alpert, *supra* note 46, at 65.

70. *See id.* Like Lord Campbell, Comstock described his elation in his diary: "Oh how can I express the joy of my Soul or speak the mercy of God!" Rembar, *supra* note 59, at 32.

71. *See* Act of Mar. 3, 1873.

discoveries of Victorianism,"[72] one marvels at such competence: by his own account, Comstock destroyed "over fifty tons of vile books; 28,425 pounds of stereotype plates for printing such books; 3,984,063 obscene pictures; 16,900 negatives for printing such pictures."[73] Most relevantly, Comstock imported the metaphor of moral pollution that proved so influential in England. The rhetorical emphasis on poison and pollution would influence even the most progressive jurists of the next century.

B. Twentieth-Century Enlightenment?: Joyce's Celtic Spring

Although the metaphor of moral pollution developed in a decidedly censorious climate, its presence in *United States v. One Book Called "Ulysses"*[74]—perhaps the most cosmopolitan obscenity decision of the first half of the twentieth century—testifies to its pervasive authority. Judge John M. Woolsey had issued two highly speech-protective opinions in 1931,[75] and his opinion in *One Book Called "Ulysses"* is widely regarded as a historical turning point in obscenity law. Nevertheless, even Judge Woolsey voiced anxieties about moral pollution and foreign contamination.

Customs censors seized a copy of Joyce's book as it entered a United States port from Europe, declaring it non-importable obscenity under section 305 of the Tariff Act of 1930.[76] They intended to confiscate and destroy it.[77] After setting forth the proper role of the judge as factfinder in such cases,[78] Judge Woolsey

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72. ERNST & SEAGLE, *supra* note 47, at 105.

73. Alpert, *supra* note 46, at 57 (internal citation omitted).

74. 5 F. Supp. 182 (S.D.N.Y. 1933). For a discussion of the circumstances surrounding the *Ulysses* trial, see Carmelo Medina Casado, *Legal Prudery: The Case of* Ulysses, 26 J. MOD. LITERATURE 90, 93 (2002). The publishing firm Random House provoked the trial "by importing a copy of *Ulysses* to be seized by the customs authorities." This copy "included reviews . . . pasted into it with the purpose of using them as evidence in defense of [*Ulysses*'] literary importance." *Id.*

75. *See* United States v. One Obscene Book Entitled "Married Love," 48 F.2d 821 (S.D.N.Y. 1931); United States v. One Book, Entitled "Contraception," 51 F.2d 525 (S.D.N.Y. 1931). Judge Woolsey's predisposition was well known at the time. During the trial, he observed, "My own feeling . . . is entirely against censorship. I am entirely opposed to it. I think things should take their chance in the market place. Otherwise you have bootlegging, everybody sees about as much as though the traffic was openly permitted, and the profits all go to persons illegally engaged." *Court Undecided on 'Ulysses' Ban*, N.Y. TIMES, Nov. 26, 1933, at 16. Woolsey must have been influenced by the dramatic failure of the most prominent contemporaneous example of public morals regulation—Prohibition. Three decades later, Morris Ernst, co-counsel for Random House, described Woolsey as "one of those rare jurists who was a rounded . . . human being who, unlike members of the bench and bar, read widely in fields remote from his professional interest." *See* Casado, *supra* note 74, at 94 n.17.

76. *One Book Called "Ulysses"*, 5 F. Supp. at 184. *See also Court Lifts Ban on 'Ulysses' Here*, N.Y. TIMES, Dec. 7, 1933, at 21.

77. *One Book Called "Ulysses"*, 5 F. Supp. at 182.

78. In *One Book Called "Ulysses"*, Judge Woolsey discussed the "inherent tendency of the trier of facts, however fair he may intend to be, to make his reagent too much subservient to his own idiosyncrasies." *Id.* at 184. Incredibly, he attempted to mitigate this tendency towards subjectivity by comparing his "impressions with two friends . . . whose opinion on literature and

discussed his extensive study of the book. He acknowledged the moral harmfulness of obscenity that constitutes "dirt for dirt's sake."[79] However, Woolsey held that "in 'Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist."[80] He famously concluded, "whilst in many places the effect of 'Ulysses' on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac."[81]

Though Woolsey's open-mindedness to the book's artistic merit is unquestionable, two rhetorical features of his opinion reveal a more ambivalent author. Woolsey consistently justified the book in light of its foreignness: at one point, he urged that "it must always be remembered that [Joyce's] locale was Celtic and his season spring."[82] He defined "average sex instincts" as "what the French would call *l'homme moyen sensuel*."[83] Although such flourishes seem relatively benign in the context of the opinion, contemporaneous obscenity opinions frequently referenced foreign populations in order to reach less enlightened conclusions.[84]

Moreover, in a moment reminiscent of Lord Campbell's conflation of prussic acid and pornography, Woolsey defends *Ulysses* with this curious admonition: "If one does not wish to *associate with such folk as Joyce describes*, that is one's own choice. In order to avoid *indirect contact with them* one may not wish to read 'Ulysses.'"[85] In Woolsey's account, readers of *Ulysses* seem to encounter not only Joyce's fictional characters, but their human prototypes as well. This remarkable slippage between the real and the representative reoccurs throughout obscenity doctrine, and characterizes the metaphor of moral pollution.[86]

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on life" he highly valued. *Id.*

79. *See id.*

80. *Id.* at 183.

81. *Id.* at 185. The dual features of attraction and repulsion in obscenity law have been noted by several commentators. *See, e.g.*, Jeff Rosen, *'Miller' Time*, THE NEW REPUBLIC, Oct. 1, 1990, at 17 (quoting Dean Kathleen Sullivan that "[t]o be prurient and offensive, a work has to turn you on and gross you out at the same time"). This duality also characterizes cultural conceptions of "filth." *See generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997); Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 729, 768 (1994).

82. *One Book Called "Ulysses"*, 5 F. Supp. at 184.

83. *Id.*

84. *See, e.g.*, People v. London, 63 N.Y.S.2d 227, 231 (Magis. Ct. Mid Manhattan 1946) (condemning the "peculiar type of human animal that flourishes in the lush regions of Hollywood and Southern California"). *See also* William E. Nelson, *supra* note 64, at 270 n.16.

85. *One Book Called "Ulysses"*, 5 F. Supp. at 184 (emphasis added).

86. For examples of similar slippages, see Lord Campbell's conflation of the harms associated with poison and indecent literature, *supra* text accompanying notes 53–54; the classification of prostitutes as "sewage," *infra* note 212 and accompanying text; the *Kaplan* Court's description of a book as "a purveyor of perverted sex for its own sake," *infra* note 253 and accompanying text; and the treatment of sex offenders as pollutants themselves, *infra* note 278 and accompanying text.

The Second Circuit emulated Judge Woolsey's approach and affirmed his holding as to the book's merit.[87] Unfortunately, Woolsey's casual endorsement of moral harm as a legitimate basis for regulation was much more typical of the age than his progressive approach to literature. The first half of the 1950s witnessed a spate of obscenity legislation[88] and the establishment of official censorship boards in major American cities.[89] By the time *Roth* was decided in 1957, only New Mexico lacked a general state obscenity statute.[90] New York's criminal obscenity law, which prohibited any "obscene, lewd, lascivious, filthy, indecent, or disgusting book,"[91] was interpreted by one state court to proscribe the "publication of a book which contravenes the moral law and which tends to subvert respect for decency and morality."[92] Another New York court described Henry Miller's "Tropic of Cancer," held to be obscene under the same statute, as "[n]o glory, no beauty, no stars—just mud."[93] A one-man censorship board in

87. United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934). The opinion, written by Chief Judge Augustus Hand, accepts moral harm as the proper focus of the inquiry. *See id.* at 707 (asking whether the disputed passages "are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake"). Judge Learned Hand provided the second vote to affirm. The opinion's rejection of the *Hicklin* test was a personal victory for Learned Hand, who famously noted his dissatisfaction twenty-one years earlier in *United States v. Kennerly*, 209 F. 119, 120–21 (S.D.N.Y. 1913). He announced the complete rejection of *Hicklin* in *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936). For a discussion of Judge Hand's role in the formulation of the "clear and present danger" analysis rejected in *Roth*, see Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975). Dissenting from the panel decision, Chief Judge Manton decried Joyce's lack of "professional chastity" and "heartless" pursuit of "art for art's sake." *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 711 (Manton, C.J., dissenting).

88. *See* Lockhart & McClure, *supra* note 67 at 305–06.

89. *See id.* at 311 n.103.

90. Roth v. United States, 354 U.S. 476, 485 n.16 (1957).

91. N.Y. PENAL LAW § 1141 (1944). In their survey of state obscenity legislation, Lockhart and McClure noted the "long string of synonyms" that characterized many state laws. Perhaps a measure of the state's sincerity in fighting obscenity, Utah's statute set the bar with a seven-word description. Only four of forty-seven states were satisfied with one-word descriptions. *See* Lockhart & McClure, *supra* note 67, at 323 n.192. For one example of the tendency of censors to lapse into this type of rhetorical repetitiveness, see *infra* note 140.

92. People v. Dial Press, 48 N.Y.S.2d 480, 481 (1944).

93. People v. Fritch, 192 N.E.2d 713, 718 (N.Y. 1963). In holding "Tropic of Cancer" obscene under § 1305 of the Tariff Act of 1930, the Ninth Circuit observed that "the author as a character in the book carries the reader *as though he himself* is living in disgrace, degradation, poverty, mean crime, and prostitution of mind and body." United States v. Besig, 208 F.2d 142, 145 (9th Cir. 1953) (emphasis added). The court also called the book "sticky slime." *Id.* Martha Grace Duncan traces the historical association between criminals and slime, concluding that "human beings almost universally regard softness and wetness as dirtier than hardness and dryness." Duncan, *supra* note 81, at 739. *See also* MILLER, *supra* note 79, at 38 (listing the oppositions that characterize disgust-based rhetoric, including "dry vs. wet" and "fluid vs. viscid"); MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 47 (1966).

Memphis banned all of Ingrid Bergman's movies because it judged her soul "black as the soot of hell."[94]

As discussed above,[95] the *Roth* Court simply placed obscenity beyond the coverage of the First Amendment, and thus avoided an uncomfortable evaluation of the ostensible state interests underlying federal obscenity law. As commentators noted at the time, the concept of moral harm was imbued with religious significance and constitutionally suspect.[96] Moreover, the metaphor of moral pollution so frequently employed by proponents of obscenity law was ambiguous with respect to one critical question: whom or what was the state protecting, vulnerable children, consenting adults, or the "traditional ordered moral fabric of society?"[97] Lord Chief Justice Cockburn's defense of the "minds of those hitherto pure"[98] justifies state morals legislation on purely paternalistic grounds,[99] while Lord Campbell's fixation on urban decay seems more public-minded. *Stanley v. Georgia* would test the limits of the state's right to prevent the poisoning of individual and public morality.

II.

POLLUTION WITHIN THE CASTLE

A. The Boundaries of Paternalism

More than a decade after the *Roth* Court categorically excluded obscenity from First Amendment coverage, Justice Harlan lamented the Justices' inability

94. RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM 34–35 (1996).

95. *See supra* notes 29–33 and accompanying text.

96. For the classic examination of the religious origins of obscenity law, see Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 3 COLUM. L. REV. 391 (1963). *See also* Lockhart & McClure, *supra* note 6, at 335, 380-81; RANDALL, *supra* note 29, at 45; Nicholas Wolfson, *Eroticism, Obscenity, Pornography, and Free Speech*, 60 BROOK. L. REV. 1037, 1044-47 (1995); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 57 (1974). *See generally* Richard F. Hettlinger, *Sex, Religion and Censorship*, *in* CENSORSHIP AND FREEDOM OF EXPRESSION: ESSAYS ON OBSCENITY AND THE LAW, *supra* note 59. For contemporaneous evidence of the connection between obscenity law and religious motivation, see *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 259-60 (N.Y. 1951).

97. Wolfson, *supra* note 96, at 1038.

98. Regina v. Hicklin, (1868) 3 L.R.Q. B. 360, 372.

99. Much libertarian scholarship that acknowledges moral harm as the principal justification for obscenity law rejects this rationale for censoring speech out of hand. *See, e.g.*, Gey, *supra* note 35. In a recent essay, Andrew Koppelman takes the moral harm concept quite seriously. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005). Although he believes that moral harm is "a meaningful concept . . . that some literature can produce," *id.* at 1639, Koppelman ultimately concludes that the law is an inappropriate tool for regulating this type of harm. In this Article I do not take a position as to the coherence of moral harm as a philosophical or legal concept, but simply document how the Court modified its way of speaking about moral harm at a critical doctrinal moment.

to solve "the intractable obscenity problem."[100] As a result of the two-level theory adopted by the Court, the fundamental question became how to describe obscene materials as a distinct "genus" of speech.[101] The Court's definition of obscenity endured several revisions,[102] and in 1966, a plurality suggested that the State was required to satisfy three independent criteria.[103]

Stanley v. Georgia offered the Court a reprieve from the definitional issue. Under the authority of a warrant to investigate alleged bookmaking activities, police entered and searched the home of Robert Stanley.[104] Although they found no gambling paraphernalia, the officers seized three cans of eight-millimeter film from a desk drawer in Stanley's upstairs bedroom.[105] After viewing the films with a projector found in a nearby living room closet, the police concluded that they were obscene under state law and arrested Stanley for possession of obscene matter.[106]

While Stanley's lawyer refused to concede that the films were obscene at oral argument,[107] Justice Marshall's opinion for six members of the Court assumed that they were.[108] But the obscenity *vel non* of the films was inconsequential. Marshall characterized the state interest in preventing moral harm as pure paternalism: "If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?"[109] He concluded that it could not: mere private possession of obscenity may not be criminalized in accordance with the First and Fourteenth Amendments.[110] Although the State's attorney asserted that Stanley was preparing to exhibit the films during a dinner party,[111] the case

100. Ginsberg v. New York, 390 U.S. 676, 704 (1968). Justice Harlan would modify his tone slightly in a 1971 letter to a friend, writing, the "obscenity problem [is] almost intractable, and . . . its ultimate solution must be found in a renaissance of societal values." *See* HIXSON, *supra* note 94, at ix.

101. *See* United States v. Roth, 354 U.S. 476, 497 (1957) (Harlan, J., concurring). *See also* United States v. Dellapia, 433 F.2d 1252, 1254 (2d Cir. 1970) ("*Roth*'s instruction that the harmfulness of obscenity need not be demonstrated before it is banned created an enclave outside the first amendment for 'obscene' speech. It is not surprising that the battle lines were quickly transferred to the definitional question of what was 'obscene.'").

102. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises v. Day, 370 U.S. 478 (1962).

103. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (holding the state must establish that "the dominant theme of the material taken as a whole appeals to a prurient interest in sex; the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and the material is utterly without redeeming social value").

104. Stanley v. Georgia, 394 U.S. 557, 558 (1969).

105. *Id.*; *see also* COMPLETE ORAL ARGUMENTS, *supra* note 3, at 310, 312.

106. *Stanley*, 394 U.S. at 558.

107. COMPLETE ORAL ARGUMENTS, *supra* note 3, at 309.

108. *Stanley*, 394 U.S. at 559 n2.

109. *Id.* at 560. Justice Marshall writes at another point in the opinion, "Georgia asserts the right to protect the individual's mind from the effects of obscenity." *Id.* at 565.

110. *Id.* at 559.

111. COMPLETE ORAL ARGUMENTS, *supra* note 3, at 322. Stanley emphatically denied this,

clearly did not involve commercial distribution or unwilling exposure. Thus, the Court emphatically concluded: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[112]

Over the next few years, the Burger Court narrowly circumscribed *Stanley* to its facts, describing it as "hardly more than a reaffirmation that 'a man's home is his castle.'"[113] But in truth, the First Amendment claim predominates in *Stanley*. Justice Marshall's holding is predicated on the "right to receive information and ideas," which "takes on an *added* dimension" in the defendant's own home.[114] Marshall cited *Martin v. City of Struthers*,[115] in which the Court held unconstitutional the conviction of a door-to-door distributor of religious leaflets.[116] Finally, Marshall distinguished the Court's holding in *Stanley* from most criminal possession statutes, which implicate "[n]o First Amendment rights."[117]

Justice Stewart's more limited concurrence provides additional evidence of the majority opinion's strong First Amendment foundation.[118] The concurring justices—Stewart, Brennan,[119] and White—would have decided the case on narrower search and seizure grounds, holding that the police exceeded the scope of authority granted by the warrant.[120] Stewart's concurrence exposes as disingenuous the Burger Court's subsequent characterization of *Stanley* as a mere Fourth Amendment decision.[121]

The *Stanley* Court also engaged in the first comprehensive discussion of the state interests underlying obscenity law. Marshall began with the government's

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and the circumstantial evidence seems to favor him: although there "were biscuits in the kitchen," the cans of films were in a desk drawer in the defendant's upstairs bedroom, and neither screen nor projector was prepared for use. *See id.* at 312.

112. *Stanley*, 394 U.S. at 565.

113. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973). *See infra* Part IV.

114. *Stanley*, 394 U.S. at 564 (emphasis added).

115. 319 U.S. 141 (1943).

116. *See id.* at 149. *See also* Al Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203, 211.

117. *Stanley*, 394 U.S. at 568 n.11. Thus, Marshall anticipated and distinguished Chief Justice Burger's many references to illicit drugs in subsequent cases. *See, e.g.*, *Paris Adult Theatre I*, 413 U.S. at 67–68; Miller v. California, 413 U.S. 15, 36 (1973); United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 128 (1973).

118. *See Stanley*, 394 U.S. at 569 (Stewart, J., concurring).

119. Justice Brennan came to regret his vote in *Stanley* and belatedly endorsed the majority opinion. *See Paris Adult Theatre I*, 413 U.S. at 85–86 n.9 (Brennan, J., dissenting). *See infra* notes 242–246 and accompanying text.

120. *Stanley*, 394 U.S. at 571 (Stewart, J., concurring) ("[T]he warrant gave [the police] no authority to seize the films.").

121. *See also* Tuchman, *supra* note 35, at 2274 n.36 (concluding that "[a]lthough *Stanley* could have been decided on narrow Fourth Amendment grounds . . . the majority purposefully moved the issue into the wider ambit of the Fourteenth Amendment"); *The Supreme Court, 1968 Term—Constitutional Law*, 83 HARV. L. REV. 60, 151 (1969) ("Interpretation of *Stanley* simply as a privacy decision . . . is belied by the Court's description of privacy as an 'added' consideration and its formulation of the opinion in clear first amendment terms. The principal underpinning of the opinion is really the 'right to receive' obscene material.").

purported interest in preventing moral harm, which he trivialized as nothing "more than the assertion that the State has the right to control the moral content of a person's thoughts."[122] Although *Stanley* endorsed the state's interest in promoting public morality, the state could not "constitutionally premise legislation on the desirability of controlling a person's private thoughts."[123] Justice Marshall thus decisively rejected the moral harm justification for obscenity law in its purely paternalistic form.

The majority was no more amenable to the State's other purported interests. "Given the present state of knowledge," Marshall wrote, obscenity regulation could not be premised on the connection between obscene materials and antisocial conduct.[124] Moreover, the Court dismissed the asserted need to criminalize possession of obscenity as a "necessary incident" to laws forbidding distribution.[125] Because it would encroach on the citizen's First Amendment "right to read or observe what he pleases,"[126] such a drastic enforcement mechanism could not be tolerated.[127]

In the opinion's final paragraph, Justice Marshall attempted to buttress the Court's decision in *Roth*, which, he concluded, was "not impaired by today's holding."[128] His observation seems a practical concession to the majority's more conservative members; surely Marshall appreciated the opinion's dramatic theoretical and doctrinal destabilization of *Roth*.[129] Indeed, in focusing on the sufficiency of the state's paternalistic interest in preventing moral harm, which Marshall "seemed to reject outright,"[130] *Stanley* departed from the two-level

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122. *Stanley*, 394 U.S. at 565. In support of this conclusion, Justice Marshall cited Louis Henkin's aforementioned study of the religious foundations of obscenity law, *see id.* at 565 n.8 (quoting Henkin, *supra* note 96, at 395), as well as the Court's decision in Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959), which held that the state may not constitutionally criminalize the dissemination of thematic obscenity, *see id.* at 566.

123. *Stanley*, 394 U.S. at 566.

124. *Id.* at 567. The *Stanley* Court reasoned that

> the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

Id. For a survey of contemporaneous empirical research, see *id.* at 566 n.9.

125. *Id.* at 567–68.

126. *Id.* at 568.

127. The Court did authorize such an approach to the criminalization of child pornography. *See* Osborne v. Ohio, 495 U.S. 103, 109–11 (1990). *Cf.* Susan G. Caughlan, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187 (1987) (observing this trend in child pornography law before *Osborne* was decided).

128. *Stanley*, 394 U.S. at 568.

129. *See* Katz, *supra* note 116, at 203–04 (asserting that *Stanley* "weakens, if it does not destroy" *Roth*, and predicting that *Stanley* "may well prove an example of destruction by distinction").

130. Katz, *supra* note 116, at 209–10. *See also* Albert Fredericks, *Adult Use Zoning: New York City's Journey on the Well-Travelled Road from Suppression to Regulation of Sexually Oriented Expression*, 46 BUFF. L. REV. 433, 439 (1998) (stating that *Stanley* "clearly reflects a diminished regard" for the traditional moral justification for obscenity law).

approach charted by *Chaplinsky*, *Beauharnais*, and *Roth*.[131]

B. To Oregon?

In the wake of *Stanley*, many commentators predicted the death of obscenity law.[132] The right to receive obscene materials implied a correlative right to distribute.[133] At most, obscenity regulation would be limited to the protection of children and captive audiences,[134] and states revised their statutes in anticipation of the Court's ultimate destination.[135]

Indeed, the Court's disapproval of the state's paternalistic interest in preventing moral harm prompted some courts to extend *Stanley* to commercial environments.[136] In one such case,[137] federal district judge Bailey Aldrich held that the "constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it."[138] The court's conclusion was predicated on the extent to which *Stanley* had undermined the theory of harm tacitly endorsed by *Roth*:

> Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to such conduct," rejected in *Roth*, was stated in

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131. *See supra* notes 29–33 and accompanying text.

132. *See* FREDERICK SCHAUER, THE LAW OF OBSCENITY 64–65 n.33 (1976) (canvassing post-*Stanley* scholarship).

133. *See* Katz, *supra* note 116, at 212–13.

134. For an example of such an approach, see HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 324 (1968) (cited in *Stanley*, 394 U.S. at 567 n.10). *See also* United States v. Reidel, 402 U.S. 351, 357 (1971) ("It is urged . . . that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of any age. . . . This may prove to be the desirable and eventual legislative course.").

135. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 95 n.13 (1973) (Brennan, J., dissenting) (citing revision of Oregon statute so as "to prohibit only the distribution of obscene materials to juveniles or unconsenting adults").

136. *See, e.g.*, United States v. Dellapia, 433 F.2d 1252, 1255 (2d Cir. 1970) (holding that a "new chapter [in the Court's obscenity jurisprudence] was written in *Stanley*"), *overruled by* United States v. Gantzer, 810 F.2d 349 (2d Cir. 1987). Judge Kaufman noted the suggestion that *Stanley* signaled a fundamental shift away from the two-level speech theory "to a more traditional balancing-of-interest approach." *Id.* at 1255 n.10. *See also* Arnold H. Lubasch, *Private Mailing of Smut Upheld*, N.Y. TIMES, Oct. 21, 1970, at 1 (observing that Dellapia's conviction "cost him his job with the Navy").

137. Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *vacated*, 401 U.S. 216 (1971). *See also* DE GRAZIA, *supra* note 12, at 566 n.2; Fred P. Graham, *Smut and Sex on Trial Again in Supreme Court*, N.Y. TIMES, Oct. 25, 1970, at E8 ("if the affluent Mr. Stanley had a right to savor his skinflicks at home, the adult citizen with only $2.50 in his pocket had a right to see 'Curious' in a discreetly advertised public showing."). In finding the same film to be obscene in a different opinion, one newspaper claimed that Massachusetts Superior Court Chief Justice G. Joseph Tauro "fear[ed] a pollution of literature and entertainment worse than the water pollution of Lake Erie." Editorial, *See What is Obscene?*, CHRISTIAN SCI. MONITOR, Nov. 18, 1969, at 22.

138. *Karalexis*, 306 F. Supp. at 1366–67.

> *Stanley* to have been rejected in the area of "public *distribution*." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful. *Had the Court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.*[139]

If obscenity law were to be justified in terms of moral harm, the contamination would need to be characterized as communal. *Stanley* forced proponents of obscenity regulation to formulate a concept of moral harm as *public* injury. At this crucial historical moment, in an attempt to buck what seemed an inevitable trend of liberalization, conservative scholars and the Burger Court relived Lord Campbell's epiphany. They redeployed the metaphor of moral pollution, which had proven so instrumental for nineteenth-century advocates, to devastating effect.

III.

THE MODERNIZATION OF METAPHOR

A. The War on Pollution

The *Stanley* Court's radical break with precedent inspired conservative activists to rethink their approach to the obscenity problem. They had been briefly heartened by the defeat of Justice Abe Fortas's nomination to become Chief Justice in October 1968,[140] and by President Nixon's appointment of four

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139. *Id.* at 1366 (emphasis added). Similarly, Richard S. Randall observes:

> [*Stanley*] cast doubt on the relative importance of harm. If obscenity were so harmful to individuals or society that its public consumption by consenting adults in an adult theater, for example, should be proscribed, why is it less so in the home, particularly since most persons who believe pornography to be socially damaging believe that its effects are indirect and long-term?

RANDALL, *supra* note 29, at 242.

140. *See* HIXSON, *supra* note 94, at 96. The confirmation of Fortas, who had submitted an *amicus* brief in *United States v. Roth* on behalf of Greenleaf Publishing Co., *see* 354 U.S. 476, 478 (1957), seemed all but assured before the intervention of Senators James O. Eastland and Strom Thurmond. The Court's obscenity rulings developed into the focal point of the Senate Judiciary Committee hearings, during which Thurmond screened a "Fortas Obscene Film Festival" for reporters. *See* DE GRAZIA, *supra* note 12, at 538. In response to one film, Thurmond asked a witness if he agreed that "it is obscene, it is foul, it is putrid, it is filthy, it is repulsive, it is objectionable, it is obnoxious, and it should cause a flush of shame to the cheeks of the members of the Supreme Court who affirmed decisions that allow such material as this to go through the mails?" *Id.* at 543; *see supra* note 89. Fortas became the "scapegoat for a prior political agenda," and ultimately resigned his seat on the Court in May 1969. *See* HIXSON, *supra* note 94, at 94, 96. He later claimed to have resigned to spare his former teacher and mentor Justice Douglas from impeachment. *See* DE GRAZIA, *supra* note 12, at 546 n.2. Justice Brennan remembered Fortas as a "scholarly, gentle, quiet-spoken and unfailingly courteous man [who] exemplified the judicial role

new members to the Court by 1972.[141] But *Stanley* had devastated the theoretical assumptions underlying *Roth* and its progeny, and these commentators needed to articulate a more compelling and public-minded interest to justify obscenity regulation.[142]

Less than nine months after *Stanley* was decided, Congress passed the National Environmental Policy Act of 1969, which declared it the "continuing responsibility of the Federal Government" to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."[143] President Nixon signed the bill on New Year's Day, making it his "first official act of the decade."[144] This dramatic statement of policy was part of a more general "war" on pollution.[145] Throughout the late 1960s and 1970s, widespread ethical sentiment regarding the nation's duty to reduce environmental pollution "coalesced into a political consensus."[146] The country celebrated its first Earth Day on April 22, 1970,[147] and the Environmental Protection Agency was founded later that year.[148] Between 1969 and 1978, Congress passed eight major pollution control statutes.[149]

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at its best." *Id.* at 550.

141. Warren Burger replaced Earl Warren as Chief Justice in 1969; Justices Blackmun, Powell, and Rehnquist replaced Justices Fortas, Black, and Harlan during the period 1970–72. *See* HIXSON, *supra* note 94, at 98, 100. *See also* Fred P. Graham, *Nixon Appointees May Change Supreme Court, Returning Today*, N.Y. TIMES, Oct. 2, 1972, at 16 (predicting that "[t]he most dramatic legal changes are likely to come in the area of obscenity"). New York State Senator John J. Marchi suggested that Chief Justice Burger's appointment provided "hope that the worst aspects of the decisions of recent years regarding pornography will be remedied, if not completely reversed." *See* Alfonso A. Narvaez, *Marchi, Assailing Pornography, Says He'll End Mental Pollution*, N.Y. TIMES, Sept. 4, 1969, at 42. Marchi, the Republican-Conservative candidate for Mayor, alleged that John Lindsay had utterly failed to halt "the tide of pornography, filth and smut which has swept across New York City in recent years." *Id.* If elected, Marchi promised to "clean up mental pollution in our city immediately upon taking office." *Id.*

142. For a sense of the widespread contemporaneous pessimism among anti-obscenity advocates, see C. Herman Pritchett, *Foreword* to OBSCENITY AND PUBLIC MORALITY, *supra* note 32, at x, xii (1969); Walter Berns, *Pornography vs. Democracy: The Case for Censorship*, 22 PUB. INT., 3, 4 (1971) (describing "the complete rout" of anti-obscenity advocates in the modern Supreme Court).

143. National Environmental Policy Act of 1969 §101, 42 U.S.C. § 4331(b)(2) (2005).

144. *See* Jack Lewis, The Birth of EPA, EPA J., Nov. 1985, *available at* http://www.epa.gov/history/topics/epa/15c.htm.

145. *See* Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 20 n.5 (1986).

146. *Id.* at 21.

147. *Id.* at 27. *See also* Gaylord Nelson, How the First Earth Day Came About, *available at* http://earthday.envirolink.org/history.html; Gladwill Hill, *Activity Ranges from Oratory to Legislation*, N.Y. TIMES, Apr. 23, 1970, at 1.

148. *See* Lewis, *supra* note 144.

149. *See* Sagoff, *supra* note 145, at 24–25 n.13 (listing these statutes). *See also* Peter L. Strauss, *Administrative Law Stories:* Citizens to Preserve Overton Park v. Volpe (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 05-85, 2004), *available at* http://ssrn.com/abstract=650482. Strauss notes that this period "saw an explosion of new national legislation on social and environmental issues," *id.* at 2, as well as the birth of new movements in legal academia to address pollution issues.

The core philosophical concerns of environmentalists paralleled those of anti-obscenity activists. Environmentalists condemned "selfish, short-sighted, and greedy"[150] economic behavior; public morality scholars decried the nihilism and irresponsibility of the sexual liberation movement.[151] Both groups of activists sought to mitigate the externalities imposed by "consenting" users on the public generally,[152] and on "particularly sensitive citizens" specifically.[153] Indeed, the profound tension between individualism and community, perhaps the essential dilemma that confronts liberal democratic societies, underlies both environmental and obscenity regulation.[154]

B. Poisoning the Wellsprings

Conservative public morality scholars immediately recognized the aptness of the pollution metaphor. Although one finds the occasional reference prior to the events of 1969–70,[155] the metaphor's proliferation in newspapers[156] and academic publications corresponds remarkably well to this period. Harry Clor[157] produced two seminal defenses of obscenity regulation between 1969 and 1971. In *Obscenity and Public Morality: Censorship in a Liberal Society*, Clor periodically gestures toward the impact of obscene materials on the "moral"

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150. *See* Sagoff, *supra* note 145, at 21.

151. *See, e.g.*, Irving Kristol, *Pornography, Obscenity and the Case for Censorship*, N.Y. TIMES, Mar. 28, 1971, at 25 ("We have had many such 'sexual revolutions' in the past . . . and we shall doubtless have others in the future."). *See also* Sagoff, *supra* note 143, at 22 n.8 (quoting one Earth Day speaker's claim that "environmental rape is a fact of our national life").

152. *See* Sagoff, *supra* note 143, at 32–34.

153. *See id.* at 28 n.32 (quoting the Senate Subcommittee on Air and Water Pollution); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) (suggesting that obscenity law protects "the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition"); *supra* text accompanying note 60; *infra* text accompanying notes 176, 232–233.

154. *See* Sagoff, *supra* note 143, at 42 n.70; *see generally* CLOR, OBSCENITY AND PUBLIC MORALITY, *supra* note 32.

155. *See, e.g.*, RICHARD KUH, FOOLISH FIGLEAVES? 282–83 (1967) ("Sexual morality, and obscenity's impact upon it, is a traditional and appropriate concern of society . . . . [O]ur states appropriately grapple with moral, as well as with air and water, pollution.").

156. The *Christian Science Monitor* was particularly fond of the association between pornography and pollution. *See, e.g.*, David Mutch, *Pornography: Legal Tide is Turning*, CHRISTIAN SCI. MONITOR, Sept. 7, 1972, at 14 (quoting Committee for Decent Literature attorney Richard Bertsch as asking, "Isn't obscenity just moral pollution?"); Walter Trohan, *Worst Pollutant Sullies Minds*, CHRISTIAN SCI. MONITOR, Aug. 31, 1970, at 16 (observing that "[i]t is a curious thing that in a nation lathering itself into various frenzies over pollution, there has been little or no concern about the greatest pollutant . . . pornography"); *Swing against Oversex*, CHRISTIAN SCI. MONITOR, Mar. 28, 1970, at 16 (noting that "[p]ressures to shut off that newly pervasive pollution which is inundating the United States—pornography—are building up, slowly," and that "Americans are tiring of the smut tide"); *What is Obscene?*, *supra* note 137 (suggesting that obscenity threatens "a pollution of literature and entertainment worse than the water pollution of Lake Erie").

157. Koppelman describes Clor as "the most articulate philosophical defender of legal regulation of obscenity." Koppelman, *supra* note 99, at 1641.

and "cultural environment."[158] However, such references pale beside the vivid rhetoric in Clor's essay, "Obscenity and the Freedom of Expression," published just two years later.[159] Clor attempted to concretize the public harm of obscenity as reflected in urban life: he invokes the "clustered" "'adult book shops' now flourishing in many of our larger cities," as well as "the many New York 'exploitation film' theaters just off Times Square."[160]

Another essay in Clor's compilation compared defenders of obscenity law to "[t]hose who fight air pollution, who battle for shoreline beautification, who would tear down highway billboards, [and] who urge limitations upon industrial incursions into our woodlands."[161] Writing in 1971, Robert Bork was more explicit: "pornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution."[162] Even traditional First Amendment stalwarts like Morris Ernst and the *New York Times* resorted to the pollution metaphor to express disgust with the state of the nation's cultural and moral health.[163]

Perhaps the watershed moment in this rhetorical movement occurred in 1971. That winter, *The Public Interest*, a quarterly journal published by National Affairs, dedicated over sixty pages to the obscenity problem in an issue entitled "On Pornography."[164] Two prominent articles—a keynote piece by Walter

158. CLOR, OBSCENITY AND PUBLIC MORALITY, *supra* note 32, at 172.

159. *See* Harry M. Clor, *Obscenity and the Freedom of Expression*, *in* CENSORSHIP AND FREEDOM OF EXPRESSION, *supra* note 59, at 97.

160. *Id.* at 99.

161. Richard H. Kuh, *Censorship* With *Freedom of Expression*, *in* CENSORSHIP AND FREEDOM OF EXPRESSION, *supra* note 59, at 131, 135. Kuh continues, "San Francisco's topless-bottomless joints may entertain boisterous conventioneers or lonely traveling men, but they hardly beautify that city, which is otherwise such a jewel." *Id.*

162. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971). *See also* Michael Kinsley, *Bork's Narrow First Amendment . . .* , WASH. POST, Sept. 17, 1987, at A27 (quoting Bork as stating in 1978 that pornography "may have public consequences far more unpleasant than industrial pollution").

163. *See Beyond the (Garbage) Pale*, N.Y. TIMES, Apr. 1, 1969 at 46 (condemning "gutter language," "Swedish imports," and the "explicit portrayal on the stage of sexual intercourse"); Irving Spiegel, *Censors' Foe Sees Need for Limits to Freedom*, N.Y. TIMES, Jan. 5, 1970 at 46 (describing the reservations of Morris Ernst, general counsel of the ACLU and "long-time opponent of censorship," about the proliferation of "'sex and sadism' both on 'the streets and on the stage'").

164. 22 PUB. INT. 1 (1971). Irving Kristol, whom Chief Justice Burger cites in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973), was the founder and co-editor of *The Public Interest*. Kristol, who was also the Professor of Urban Values at New York University, *see* PUB. INT., Wint. 1971, at 77, published an extensive defense of obscenity law in March 1971. The article was accompanied by a nearly full-page photograph of Times Square magazine racks. Kristol wrote, "Times Square has become little more than a hideous market for the sale and distribution of printed filth." Kristol, *supra* note 151, at 24. Times Square was a popular rhetorical focal point at this time. *See* Mailbag, *The Pornography Debate Goes On*, N.Y. TIMES, Dec. 12, 1976, at D8 (containing a reader's letter that lamented the suffering of the "poor folk trapped on West 46th Street"); *Paris Adult Theatre I*, 413 U.S. at 67 (1973) (stating that a "'live' performance of a man and woman locked in sexual embrace at high noon in Times Square" is not "automatically protected by the Constitution"); Clor, *Obscenity and the Freedom of Expression*, *supra* note 159, at

Berns[165] and a "concurring opinion" by Alexander Bickel[166]—demonstrably influenced the Supreme Court's deliberations in the 1973 obscenity cases.[167] Both made liberal use of pollution rhetoric and environmental analogies.

Berns's article constitutes the central defense of obscenity law in "On Pornography." After his resigned account of the Court's obscenity jurisprudence and the contemporaneous cultural environment,[168] Berns attacked nihilist libertarians who no longer distinguished "art [from] trash."[169] Lest the reader neglect his comparison, Berns inveighed against the modern American university with this colorful anecdote:

> Several years ago Cornell paid $800 to a man to conduct (lead? orchestrate? create?) a "happening" on campus as part of a Festival of Contemporary Art. This happening consisted of the following: a group of students was led to the *city dump* where they selected the charred remains of an old automobile, spread it with several hundred pounds of strawberry jam, removed their shirts and blouses, and then danced around it, stopping occasionally to lick the jam.[170]

The threat of widespread moral contamination was thus embodied by the anonymous organizer of a visit to a trash heap, and his cult of delirious young disciples.

The brevity of Alexander Bickel's contribution to "On Pornography" masks its influence: his classic statement of the harm to public morals profoundly shaped Chief Justice Burger's judgment about obscene materials.[171] Even if one were to accept the *Stanley* Court's protection of obscenity within the home, Bickel wrote, there remains "one problem of large proportions":

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future . . . . [I]f [a man] demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—

99; Marshall Cohen, *Dissenting and Concurring Opinions, Pt. IV*, PUB. INT., Wint. 1971, at 4322 PUB. INT. 43 (1971) ("Times Square can go."); *Uncovering and Limiting Smut*, CHRISTIAN SCI. MONITOR, Oct. 27, 1970, at 14 (asking if the *Stanley* opinion protects "pornography in store windows—as right now in Times Square, New York City"); *infra* note 265 and accompanying text. *The Public Interest* "passed away" on April 25, 2005. *See* Charles Krauthammer, *Our Own Cool Hand Luke*, WASH. POST, Apr. 29, 2005 at A23.

165. Berns, *supra* note 142.

166. Alexander Bickel, *Dissenting and Concurring Opinions*, (pt. 1) 22 PUB. INT. 25 (1971). Bickel clerked for Justice Frankfurter during the 1952 term.

167. *See infra* Part IV.

168. *See* Berns, *supra* note 142, at 9 ("At this point, if one ignores the *Ginzburg* aberration and the recent children's cases, the censors seem to have given up, and we have—well, anything that anyone will pay to see or read." (footnote omitted)). *See also id.* at 4–5.

169. *Id.* at 17.

170. *Id.* at 19 (emphasis added). The story recalls the Adoration of the Golden Calf, the supreme Biblical example of iconoclasm and apostasy. *See generally* DAVID FREEDBERG, THE POWER OF IMAGES: STUDIES IN THE HISTORY AND THEORY OF RESPONSE (1989).

171. *See infra* notes 203–212 and accompanying text.

> discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.[172]

Bickel's theory of moral harm does not resemble the pure paternalism encouraged by the State of Georgia in *Stanley*. Rather, Bickel claimed that even the most private and self-contained experiences have dramatic social consequences. Bickel described the harm to public morals as a physical nuisance reflected in the general "tone of the society."[173]

Though it has been roundly criticized,[174] the conservative case for obscenity regulation successfully exploited anxieties about decaying cities, vulnerable youth, and environmental pollution. The argument approached its rhetorical zenith in President Nixon's response to the Presidential Commission on Obscenity and Pornography. Nixon vehemently denounced the Commission after a twelve-member majority recommended the repeal of all legislation prohibiting the distribution of sexual content to consenting adults.[175] "If the level of filth rises in the adult community," Nixon cautioned, "the young . . . cannot help but also be inundated."[176] In language reminiscent of Lord Campbell and Robert Bork, Nixon dramatically warned that "warped and brutal portrayals of sex . . . could poison the wellsprings of American and Western culture and civilization" and that "the pollution of our civilization with smut and filth is as serious a

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172. Bickel, *supra* note 166, at 25–26.

173. *See id*; ALEXANDER BICKEL, THE MORALITY OF CONSENT 73–76 (1975) (characterizing obscenity as a type of public nuisance).

174. In response to Bickel's defense of obscenity law, David A.J. Richards writes:

> At bottom, this argument rests on the crude moral confusion between an obtrusive offense and the offense derived from the mere knowledge of something. It must be rejected not only because it is intellectually indefensible, but also because its conclusions are morally outrageous. It would dilute the moral force of liberty into the empty and vapid idea that people be allowed to do that to which no one has any serious objection. It would elevate every form of popular prejudice, bigotry, and intolerance, *without more*, into a moral basis for law."

Richards, *supra* note 96, at 86. Edward de Grazia compares Bickel's theory to "views found not only in primitive and archaic cultures, including those of the ancient Greeks and Jews, but—most chillingly—in some modern ones, including that of Nazi Germany." DE GRAZIA, *supra* note 12, at 568. Richard S. Randall questions how the individual moral effects of obscenity are "transposed almost intact, uncountered and undiluted, to the social environment." RANDALL, *supra* note 29, at 123.

175. The Commission's recommendations are discussed in Clor, *Obscenity and the Freedom of Expression*, *supra* note 159, at 119. *See generally* REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

176. DE GRAZIA, *supra* note 12, at 560. Thus the *Hicklin* justification for "reduc[ing] the adult population . . . to reading only what is fit for children" began to reemerge. Butler v. Michigan, 352 U.S. 380, 383 (1957). *See supra* notes 60, 151, 231–232 and accompanying text.

situation . . . as the pollution of our once pure air and water."[177] The modern metaphor of moral pollution ably captured the old xenophobic anxieties about foreign contamination.[178] But could it contain the spread of *Stanley*?

IV.

TAKING OUT THE TRASH

A. The Beginning of the End

Although the full impact of a rejuvenated theory of moral harm would not be felt until 1973, the Court had begun to dismantle *Stanley* two years earlier.[179] In *United States v. Reidel*,[180] the Court held that the state could constitutionally proscribe the distribution of obscene materials to consenting adults.[181] In a clever bit of revisionism, Justice White asserted that *Stanley* "neither overruled *nor disturbed* the holding in *Roth*."[182] Whatever the scope of the right alluded to in *Stanley*, it did not protect commercial distribution.

In light of the Court's historical aversion to commercial pornographers,[183]

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177. DE GRAZIA, *supra* note 12, at 560. *See also Nixon Rejects Report on Smut; Scores It As 'Morally Bankrupt'*, CHI. TRIB., Oct. 25, 1970, at 26; Charles H. Keating Jr., *Now a Blank Check for Pornographers?*, CHI. TRIB., Oct. 4, 1970, at A2 ("At a time when the spread of pornography has reached epidemic proportions and when the moral fiber of our nation seems to be rapidly unraveling, the desperate need is for enlightened and intelligent control of the poisons which threaten us."). The pollution metaphor was used by those opposed to regulation as well. *See, e.g.*, Nicholas von Hoffman, *Dirty Books: Why Not?*, WASH. POST, Oct. 30, 1970, at D1 ("If we wish to pollute our adult selves by going to dirty movies and reading filthy books, it's our pleasure and our business."). Around the same time, Nixon's successor Ronald Reagan conducted a passionate anti-obscenity campaign as Governor of California, in which he too exploited the pollution metaphor. Reagan defended a ballot measure aimed to stanch the "spread of filth" as "a parent who is deeply concerned about the tragic pollution of our sociological climate by the commercial interests who are flooding us with pornography." *See Reagan Backs Anti-Obscenity Vote Initiative*, L.A. TIMES, Oct. 7, 1972, at 7. *See also Gov. Reagan's '68 Message*, L.A. TIMES, Jan. 11, 1968, at A4 (warning that "[c]rime in the streets, death on the highway, pollution of air and water, publication of pornography and confiscation of the earnings of our citizens for wasteful public programs will take no election-year holiday").

178. *See supra* notes 82–84 and accompanying text; *infra* note 277.

179. On October 12, 1970, the same day it noted probable jurisdiction in *Thirty-Seven Photographs* and *Reidel*, the Court accepted an original suit brought by "the State of Ohio to stop two chemical companies from discharging poisonous mercury into Lake Erie." *Court to Rule on Smut Sent in Mail or Imported*, N.Y. TIMES, Oct. 13, 1970, at 26. *See also* 400 U.S. 810, 817 (1970) (noting probable jurisdiction in *Thirty-Seven Photographs*).

180. 402 U.S. 351 (1971).

181. *Id.* at 352.

182. *Id.* at 354.

183. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966) (holding that an intent to pander or exploit the prurient interest of distributed materials could support an obscenity conviction). Both Justices Brennan and Fortas regretted their votes to affirm Ralph Ginzburg's conviction: Brennan called the decision his "worst mistake," DE GRAZIA, *supra* note 12, at 503, while Fortas later confessed to Justice Douglas in private correspondence that he was subconsciously "affected by [Ginzburg's] slimy qualities," HIXSON, *supra* note 94, at 69.

this limitation was predictable. The decision in *United States v. Thirty-Seven Photographs*,[184] however, exposed a pattern: the Court was beginning to restrict *Stanley* to its facts. Milton Luros returned to the United States from Europe with thirty-seven allegedly obscene photographs packed in his luggage.[185] Although a trial court had enjoined the application of section 305 of the Tariff Act as to importation for private use,[186] the Court reversed. *Stanley*, Justice White declared, protected only the "private user . . . in his home," and "a port of entry is not a traveler's home."[187] Beyond this supremely unhelpful tautology, the majority opinion offered little in the way of a principled distinction. As Justice Marshall emphasized in dissent, the majority utterly failed to scrutinize the State's interest in this particular method of regulation.[188]

Upon closer examination, the precedential authority of White's opinion is even more dubious. The plurality's dictum with respect to importation for private use was endorsed by only four justices. Justice Harlan concurred in light of the defendant's alleged intention to distribute the photographs commercially,[189] and he explicitly denied Luros's standing to challenge the overbreadth of section 305 as to purely private importers.[190] Justice Stewart went even further by expressing his doubt that the plurality's "private use" dicta could be reconciled with *Stanley*.[191] Thus, five justices were unwilling to approve Justice White's rejection of *Stanley* in the context of a proper private

184. 402 U.S. 363 (1971).

185. *Id.* at 365.

186. *Id.* at 375. There was some question as to whether Luros ultimately intended to use the photographs for commercial purposes. *See id.* at 366, 377–78 (Harlan, J., concurring). Unlike *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973), which presented an example of purely private use, the facts in *Thirty-Seven Photographs* were convoluted. The following excerpt captures the Court's conflation of the two issues:

> Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution.

Thirty-Seven Photographs, 402 U.S. at 376.

187. 402 U.S. at 376.

188. United States v. Reidel, 402 U.S. 351, 360–61 (1971) (Marshall, J., concurring in part and dissenting in part).

189. *Thirty-Seven Photographs*, 402 U.S. at 377–78 (Harlan, J., concurring).

190. *Id.* at 378 (declaring the overbreadth challenge to be outweighed by principles of constitutional avoidance).

191. *Id.* at 379. Justice Stewart writes:

> The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad, returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia*.

Id. (internal citation omitted).

use challenge. Subsequent decisions conveniently ignored this doctrinal messiness and treated White's opinion as thoroughly controlling.[192]

Dissenting in both cases, Justice Black lamented the plurality's inability to meaningfully distinguish Robert Stanley's home from Milton Luros's suitcase.[193] Both border searches and police searches of private homes occur frequently, and private possession and importation are equally inoffensive.[194] In a prescient forecast of the Court's ultimate evisceration of *Stanley*, Justice Black quipped that in the future, *Stanley* "will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[195] And the Court had yet to truly exploit the rhetorical gains of the past few years.

B. Garbage Floating in the Harbor

Although William Brennan was one of the four justices who endorsed the *Thirty-Seven Photographs* plurality opinion in full,[196] he was willing to explore more sensitive gradations between public exploitation and private enjoyment of obscenity. In fact, when *Miller v. California*[197] first came before the Court in 1972, Brennan drafted an opinion that forcefully distinguished distribution of obscenity to consenting adults from incidental exposure to unwilling viewers, and expressed regret over his failure to join Marshall's *Stanley* majority.[198] After the Court decided to rehear *Miller* as part of a group of obscenity cases in the 1973 term,[199] Brennan remained cautiously optimistic.[200] He believed that *Paris Adult Theatre I v. Slaton*[201] provided an ideal opportunity to extend the *Stanley* privacy argument to consenting adult viewers.[202]

Chief Justice Burger had also drafted an opinion in May 1972, and although Brennan thought him amenable to the distinctions he wished to pursue,[203] the

192. *See, e.g.*, United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 128–29 (1973) (holding that *Stanley* does not "permit importation of admittedly obscene material simply because it is imported for private use only").

193. *Thirty-Seven Photographs*, 402 U.S. at 381 (Black, J., dissenting).

194. *Id.*

195. *Id.* at 382.

196. *See supra* note 184 and accompanying text.

197. 413 U.S. 15 (1973).

198. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 202 (1979). The reader should note that the veracity of some of the details in this book has been challenged. *See, e.g.*, Anthony Lewis, *Supreme Court Confidential*, N.Y. REV. BOOKS, Feb. 7, 1980, http://www.nybooks.com/articles/7533; Bob Woodward et al., *The Evidence of 'The Brethren': An Exchange*, N.Y. REV. BOOKS, June 12, 1980, http://www.nybooks.com/articles/7362.

199. *See Summary of Actions Taken by Supreme Court on Various Cases*, N.Y. TIMES, Jun. 27, 1972, at 25.

200. WOODWARD & ARMSTRONG, *supra* note 198, at 204.

201. 413 U.S. 49 (1973).

202. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 247–48.

203. *Id.* at 201.

Chief's track record was not encouraging. In *Rabe v. Washington*,[204] a per curium decision issued that term, Burger wrote separately: employing familiar language, he asserted that "[p]ublic displays of explicit materials . . . are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit."[205] Burger felt a visceral aversion toward obscenity, and often found his legal analysis colored by intense disgust.[206]

After rehearing and oral argument[207] in the fall of 1972, Brennan and Burger continued to maneuver behind the scenes.[208] The Chief Justice enthusiastically recommended Alexander Bickel's brief "concurring opinion" from *The Public Interest* to his colleagues[209] and law clerks.[210] Indeed, Burger relied on his clerks through the many rounds of drafting. He was notably intemperate,[211] and in one draft opinion compared obscenity to "garbage floating in the harbor of Hong Kong."[212] Burger's rhetoric combined Lord Campbell's hospitality and Richard Nixon's charm. It was no longer Celtic springtime.

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204. 405 U.S. 313 (1972).

205. *Id.* at 317 (Burger, C.J., concurring).

206. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 245.

207. Attorney Burton Marks introduced himself to the Court by declaring "[w]e are back again . . . to discuss . . . the continuing saga of life in the pits." HIXSON, *supra* note 94, at 122. Marks's performance at oral argument was quite colorful, and Woodward and Armstrong implicitly suggest he did not endear himself to the more conservative justices. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 247. Marks launched into the *Miller* argument by criticizing the justices for their collective lack of experience in litigating under the inchoate standards they had perpetuated. *See* COMPLETE ORAL ARGUMENTS, *supra* note 3, at 337–38. He then described the *Reidel* opinion as standing for "the unusual proposition that speech is not speech." *Id.* at 345. Finally, in response to the question "do you think that *Roth* should be overruled," Marks responded, "I think it should be overruled. I think that the First Amendment should bar criminal prosecutions in the absence of direct knowledge—I can't; I don't know." *Id.* at 346. The *Miller* oral argument also featured some dialogue about California's experimentation with nuisance law, which presaged future regulatory approaches to the obscenity problem. *See id.* at 350–51; *infra* notes 261–274 and accompanying text.

208. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 245.

209. *See* HIXSON, *supra* note 94, at 120.

210. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 246.

211. *See id.* at 250. Burger's reactionary attitude through the drafting process parallels what Mona Lynch described as the "almost visceral repulsion and disgust reaction to an imagined toxic threat" that characterized the Congressional debates about sex offender legislation in 1996. Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 557 (2002).

212. WOODWARD & ARMSTRONG, *supra* note 198, at 250. Burger's clerk modified this language to read, "[n]or do modern societies leave disposal of garbage and sewage up to the individual 'free will,' but impose regulation to protect both public health and the appearance of public places." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973). In the 1830s, French public health official Alexandre Parent-Duchatelet literally associated prostitutes with sewage "in his multi-volume 'scientific' report on the problem of prostitution." *See* Lynch, *supra* note 211, at 540.

C. The Disposal of Stanley

Consensus

On June 21, 1973, the Court issued five obscenity decisions.[213] Chief Justice Burger wrote each majority opinion. In *Miller v. California*, Burger proudly announced that "today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."[214] In the most significant departure from precedent, the *Miller* Court held that the state may proscribe prurient, patently offensive material that "lacks serious literary, artistic, political, or scientific value."[215] The Court thus rejected the highly speech-protective approach first suggested by Harry Kalven and later adopted by the *Memoirs* plurality.[216]

The *Miller* Court provided an illuminating dictionary definition in conjunction with the legal definition it established.[217] Dissatisfied with *Roth*'s unprofitable definition of obscenity as "material which deals with sex in a manner appealing to prurient interest,"[218] Burger emphasized the word's etymology and common usage. Derived from "*caenum*, filth," obscenity is "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."[219] Burger proceeded to distinguish obscenity from pornography, defined as explicit representations of sex that do not necessarily provoke disgust and revulsion.[220] Even the dissenters were not immune to using the language of moral pollution.[221]

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213. *See* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

214. *Miller*, 413 U.S. at 29.

215. *Id.* at 24.

216. *See supra* notes 34, 103 and accompanying text.

217. *See Miller*, 413 U.S. at 18–19 n.2.

218. *Id.*

219. *Id.* In addition to the Oxford English Dictionary definition, the Court also provides the Webster's Third New International Dictionary definition: "1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." *Id.*

220. *Cf.* RANDALL, *supra* note 29, at 37; NUSSBAUM, *supra* note 79, at 135.

221. Justice Douglas, who felt compelled to write separate dissents in four of the five 1973 cases, claimed in *Miller* that although "the materials before us may be garbage . . . so is much of what is said in political campaigns, in the daily press, on TV, or over the radio." 413 U.S. at 45 (Douglas, J., dissenting). In *12 200-Ft. Reels*, Douglas concluded that "[m]ost of the items that come this way denounced as 'obscene' are in my view trash . . . . But what may be trash to me may be prized by others." United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting). *Cf.* Tom Braden, *Pornography and the 1st Amendment*, WASH. POST, Jul. 14, 1973, at A19 (celebrating Justice Douglas's *Paris* dissent). Judge Irving Kaufman, who extended *Stanley* to private commercial transactions of obscene materials in 1970, also

Obscenity and the Federal-Aid Highway Act of 1968

The majority opinion in *Paris Adult Theatre I v. Slaton* provided the Court's most comprehensive discussion of the state interest in preventing moral harm to consenting adults since *Stanley v. Georgia*.[222] The theater itself shared a single "conventional, inoffensive . . . entrance, without any pictures, but with signs indicating that [it exhibited] 'Atlanta's Finest Mature Feature Films.'"[223] Indeed, Chief Justice Burger extensively catalogued the innocuous surroundings: the theater did not contain graphic exterior solicitations, and there was no evidence that minors were ever admitted.[224] Nevertheless, the walls of the theater were not strong enough to contain the poison within.

The pollution metaphor, revived by conservative commentators in the wake of *Stanley*'s fundamental challenge to the concept of moral harm, was exploited by the *Paris* majority with devastating success. First, the Court considered the various state interests "at stake in stemming the tide of commercialized obscenity."[225] "These include," Burger wrote, "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."[226] The Chief Justice clearly had Bickel's "concurring opinion" in mind, and he cited it almost imme-

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accepted the pollution metaphor. In *United States v. Dellapia* he wrote: "We are increasingly aware of polluted air, rivers, and streets, and we resent their assault upon our senses. When there is inflicted upon one a sexually offensive public display, his right to be let alone is impaired . . . . By our decision we do not sanction 'the public affront.'" 433 F.2d 1252, 1256–57 (2nd Cir. 1970) (citations omitted). For an example of "liberal" anti-censorship journalism that makes use of the pollution metaphor, see John P. Roche, *Pornographic Pollution*, WASH. POST, Feb. 21, 1971, at 55.

222. *See supra* notes 122–127 and accompanying text.

223. *Paris Adult Theatre I*, 413 U.S. at 52.

224. *See id.* The theater's signs were also described by Justice Brennan in dissent. *See id.* at 76. At the oral argument in *Kaplan v. California*, the State's attorney attempted to convert the bookshop's exterior warning signs into evidence of interior malfeasance in the following colloquy:

Q: "Does the record indicate what the surrounding environment was of the store?"

A: " . . . The answer is yes, to some extent. The record shows, for instance, that there is some kind of a sign in front of the store, I believe, that minors cannot enter."

Q: "Minors can enter?"

A: "Cannot."

Q: "Cannot."

A: "Cannot enter the store. . . ."

Q: "Were there displays? Did he have his wares on display?"

A: "Inside the store he did."

See COMPLETE ORAL ARGUMENTS, *supra* note 3, at 364. At another point in the argument, counsel claimed that "[j]ust walking down the street here in Washington, if you walk past an adult bookstore, there is somebody usually out in front—it happened to me last night—that says, 'Come on in and see what we've got.'" He was immediately forced to concede that there was not "one iota of that in the record in Los Angeles." *See id.* at 369-70.

225. *Paris Adult Theatre I*, 413 U.S. at 57.

226. *Id.* at 58.

diately following this passage.[227] One notes, however, the subtle way in which Burger accentuated the concrete public nature of the interest by adding references to "the total community environment" and "great city centers."[228] The Chief Justice also cited *Kovacs v. Cooper*,[229] which limited *Martin v. City of Struthers* and upheld the right of municipalities to bar sound trucks in defense of the helpless "unwilling listener."[230]

The metaphor of moral pollution arose in a second passage, in which the *Paris* Court came quite close to resurrecting the *Hicklin* rationale for obscenity law. In lieu of Burger's original reference to "garbage floating in the harbor of Hong Kong,"[231] the majority opinion read:

> Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual "free will," but impose regulation to protect both public health and the appearance of public places.[232]

The Court's defense of obscenity legislation in light of the state's interest in "protect[ing] the weak . . . from the exercise of their own volition" profoundly undercut *Stanley*'s rejection of the pure paternalism argument. Furthermore, the majority's rhetorical invocation of *Hicklin* abuts Burger's observation about waste disposal, just as federal pollution control law was validated in light of "particularly sensitive citizens."[233] The paragraph concludes with a citation to Irving Kristol,[234] founder of *The Public Interest* and a prominent conservative commentator.[235]

The *Paris* Court's final notable use of the pollution metaphor was quite unconventional and thus all the more revealing. In response to the petitioner's

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227. *Id.* at 59.

228. *Id.* at 58.

229. *Id.* at 60 (citing Kovacs v. Cooper, 336 U.S. 77, 86–88 (1949)).

230. *Kovacs*, 336 U.S. at 86. Of course, the imposition in *Kovacs* was fundamentally more obtrusive than the moral contamination threatened by obscene materials, making Burger's citation all the more remarkable.

231. *See supra* note 212 and accompanying text.

232. *Paris Adult Theatre I*, 413 U.S. at 64.

233. *See supra* note 153 and accompanying text.

234. *Paris Adult Theatre I*, 413 U.S. at 64 (citing IRVING. KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 37 (1972)). Chief Justice Burger builds upon Kristol's observation that civil libertarians who insist upon a "laissez-faire" approach to the obscenity problem "have never otherwise had a kind word to say for laissez-faire." *Id.* (quoting KRISTOL). Burger added that these people were especially skeptical of laissez-faire "in solving *urban, commercial, and environmental pollution problems*." *Id.* (emphasis added).

235. *See infra* note 164.

claim that obscenity statutes lacked empirical support,[236] the majority sweepingly asserted that "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions."[237] After a brief discussion of federal securities and antitrust law, the Court continued:

> Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417–20 (1971). Thus, § 18(a) of the Federal-Aid Highway Act of 1968 and the Department of Transportation Act of 1966 have been described by Mr. Justice Black as "a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer . . . ."[238]

The majority's use of pollution control statutes and case law to support a general observation about legislative authority was illuminating and hardly inevitable. *Overton Park* was cited by the Supreme Court in two other opinions during the 1973 term.[239] Both are administrative law decisions, and neither cites *Overton Park* in support of the broad proposition that legislatures may act on unsupportable assumptions.[240] Burger's exceptional use of this precedent was purposeful and further evidences the pervasiveness of the pollution metaphor.[241]

Resisting Seduction

Justice Brennan's *Paris* dissent, which he had optimistically fashioned as a majority opinion one year earlier,[242] belatedly endorsed Marshall's opinion in *Stanley*.[243] He emphatically rejected the majority's revamped theory of moral harm: "virtually all of the interests that might be asserted in defense of

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236. *See Paris Adult Theatre I*, 413 U.S. at 60.

237. *Id.* at 61. David Richards warns that Burger's contention threatens to undermine "the whole idea of rationality in legislation, substituting a notion of tradition that is a mask for ignorance and intolerance." Richards, *supra* note 96, at 90.

238. *Paris Adult Theatre I*, 413 U.S. at 62 (statutory citations omitted).

239. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 627 (1973); Camp v. Pitts, 411 U.S. 138, 141–43 (1973).

240. *See* 412 U.S. at 627 (holding that an FDA declaratory order that a drug is a "new drug" is reviewable under the Administrative Procedure Act); 411 U.S. at 141–43 (establishing the appropriate standard of review for a discretionary decision of the Comptroller of the Currency).

241. For an attempt to tell the history of *Overton Park* from the participants' perspective, see Strauss, *supra* note 149.

242. *See* WOODWARD & ARMSTRONG, *supra* note 198, at 202.

243. *See Paris Adult Theatre I*, 413 U.S. at 85 n.9. Brennan went so far as to note that *Stanley* "calls in question the validity of the two-level approach recognized in *Roth*." *Id.* at 86 n.9.

suppression . . . were also posited in *Stanley v. Georgia*."[244] While he approved of the state's general right to legislate on behalf of the public morals,[245] Justice Brennan concluded that the moral impulse in the First Amendment realm of obscenity was "unfocused and ill defined."[246]

Alas, Brennan's tardy support did not prevent the evisceration of *Stanley*. Chief Justice Burger denigrated the case's significance in each of his opinions.[247] In *United States v. 12 200-Ft. Reels of Super 8MM. Film*,[248] the Court was faced with the pure "private, personal use" case it prematurely tackled in dicta two years earlier.[249] Unsurprisingly, the majority recycled the tautological reasoning in *Thirty-Seven Photographs* and characterized Justice White's plurality opinion as controlling.[250]

Before driving the final nail into *Stanley*'s coffin, the Court engaged in a fascinating discussion of the common law:

> The *seductive plausibility* of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result in one that would *never have been seriously considered in the first instance*. This kind of gestative propensity calls for "line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond." Perspectives may change, but our conclusion is that *Stanley* represents . . . a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today.[251]

Could the Burger Court truly claim that the *Stanley* majority failed to contemplate protecting individuals like Paladini, who sought to import movies and color slides from Mexico for his private use and possession? Indeed, this case presented the least dramatic opportunity to extend *Stanley*, and arguably a plurality of the justices in *Thirty-Seven Photographs* were willing to do so given

244. *Id.* at 107. *See also* United States v. Dellapia, 433 F.2d 1252, 1256 ("Each of these likely public interests was implicit in *Stanley* as well, where the Court found them of no avail to the government.").

245. *Paris Adult Theatre I*, 413 U.S. at 108–9.

246. *Id.* at 109. *See also id.* at 112 ("Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment.").

247. *See, e.g.*, *id.* at 66 (describing *Stanley* as "hardly more than a reaffirmation that 'a man's home is his castle.'" (quoting *Stanley v. Georgia*, 394 U.S. 557, 564)).

248. 413 U.S. 123 (1973).

249. *See id.* at 125. The claimant in *12 200-Ft. Reels* sought to import "movie films, color slides, photographs, and other printed and graphic material into the United States from Mexico" for his private use and possession. *Id. See also supra* note 182 and accompanying text.

250. 413 U.S. at 128–29.

251. *Id.* at 127 (emphasis added).

the proper circumstances.[252] The Court's true concern was not the betrayal of *Stanley*'s original intent, but the "seductive plausibility" of that intent, which it furiously resisted.[253]

Burial and Resurrection

Justice Douglas's dissent in *United States v. Orito* highlighted the absurd implications of the majority's holding. A citizen's right to possess obscene books within the home was protected, but the right to carry those books in one's luggage or hire a trucking company to move one's library to a new home was not.[254] The Burger Court had reduced *Stanley*'s right to receive obscene materials to the ability to "keep whatever [one] can manage to find,"[255] exactly as Justice Black predicted two years earlier.[256]

The Burger Court's evisceration of *Stanley* was made possible by two mutually supportive strategies. The Court disingenuously trivialized the case's deep First Amendment roots. Simultaneously, Chief Justice Burger rehabilitated the concept of moral harm, which *Stanley* had challenged, by creatively exploiting the pollution metaphor. Thus, *Stanley v. Georgia* came to resemble a historical accident.[257] Of course, this did not prevent members of the Court from selectively resurrecting the decision whenever it suited their purposes.[258]

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252. *See supra* notes 184–188 and accompanying text.

253. In *United States v. Orito*, 413 U.S. 139 (1973), the Court held that the federal government could constitutionally criminalize interstate transportation of obscene materials. *See id.* at 141–42 . Chief Justice Burger extended the public accommodations analysis in *Paris Adult Theatre I v. Slaton*, 413 U.S. 19, 66–67 (1973), to common carriers. *See Orito*, 413 U.S. at 142 n.5. *Kaplan v. California*, 413 U.S. 115 (1973), did not discuss *Stanley* in holding that an unillustrated book could be proscribed as obscenity. For present purposes, the most significant feature of the *Kaplan* opinion is Chief Justice Burger's description of the book, *Suite 69*, as "a purveyor of perverted sex for its own sake." *Id.* at 121. This odd characterization recalls Judge Woolsey's slippage between the fictional characters in *Ulysses* and the actual human beings who served as Joyce's models. *See supra* text accompanying notes 85–86.

254. *See Orito*, 413 U.S. at 146 (Douglas, J., dissenting).

255. Katz, *supra* note 116, at 213.

256. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

257. *See* Koppelman, *supra* note 97, at 1655–56.

258. See Bowers v. Hardwick, 478 U.S. 186, 195 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003), in which Justice White, the author of *Reidel* and *Thirty-Seven Photographs*, maintained that *Stanley* "was firmly grounded in the First Amendment." The *Bowers* dissenters (including Justice Marshall, the author of *Stanley*, and Justice Brennan) naturally concluded that "the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home." *Id.* at 207. Of the seven Justices who participated in both *Paris Adult Theatre* and *Bowers*, arguably only Justice Blackmun sustained a consistent position. Ironically, this may be attributable to Blackmun's political evolution, not principled steadfastness. *See generally*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005); William Saletan, *Unbecoming Justice Blackmun*, LEG. AFFAIRS, May/June 2005 at 35.

V.

THE DANGERS OF METAPHOR

Nineteenth- and early twentieth-century crusaders employed pollution rhetoric to convey the intense personal moral threat of obscenity.[259] Lord Chief Justice Cockburn and Anthony Comstock zealously guarded "the minds of those hitherto pure [from] the danger of contamination and pollution."[260] On this view, the state could criminalize the possession of obscene materials to protect the vulnerable individual from himself.

In the face of *Stanley*'s fundamental destabilization of the state's paternalistic interest in preventing moral harm, conservative scholars transformed pollution rhetoric to underscore the public injuriousness of obscenity.[261] Commentators now described the problem as one "precisely analogous to smoke pollution,"[262] discernable in rotting cities and decadent youth culture. Adopting this rhetorical and theoretical perspective, the Burger Court preserved obscenity law by converting it into a civic pollution control measure at a time when there was a broad political consensus for analogous environmental regulation.

In this way, malleable metaphor facilitated the resolution of a critical moment of doctrinal tension. However, the metaphor of moral pollution was not only deployed by the Burger Court to justify a set of legal conclusions. As I now briefly sketch, pollution rhetoric began to influence the Court's second-generation sexual speech jurisprudence.

A. Indulgence

The Burger Court's enthusiastic endorsement of the concept of moral harm as pollution in the 1973 obscenity cases strongly influenced its first encounter with an adult-use zoning ordinance. Although the reformulation of obscenity law encouraged prosecutors and anti-obscenity advocates, criminal prosecutions proved relatively infrequent.[263] According to a 1977 survey, almost thirty percent of prosecutors placed a lower priority on obscenity prosecutions than six years earlier.[264] Municipalities began to experiment with zoning regulations to combat adult bookshops and movie theaters,[265] and courts welcomed the

259. *See supra* Part I.

260. Regina v. Hicklin, (1868) 3 L.R.Q. B. 360, 372.

261. *See supra* Parts III and IV.

262. Bork, *supra* note 162, at 29.

263. Tom Goldstein, *Survey Finds High Court Decision Fails to Spur Convictions on Smut*, N.Y. TIMES, Mar. 20, 1977, at 57.

264. *See id.*; Project, *An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977).

265. *See* Fredericks, *supra* note 130, at 441; David Mutch, *Pornography: Legal Tide is Turning*, CHRISTIAN SCI. MONITOR, Sept. 7, 1972, at 14 (describing "a new effort to fight pornography through civil 'nuisance laws' in the states."). The exhibition of "Deep Throat" led

development.[266]

In *Young v. American Mini Theatres, Inc.*,[267] the Court sustained Detroit's content-based "Anti-Skid Row Ordinance"[268] as an "innovative land-use regulation."[269] Although Justice Stevens admitted that "the classification of a theater as 'adult' is expressly predicated on the character of the motion pictures which it exhibits,"[270] he implausibly maintained that the ordinance was a content-neutral[271] restriction designed primarily to counteract the "secondary effects"' associated with adult establishments.[272] Stevens credited the testimony

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New York City officials to close one midtown movie theater, charging that it violated licensing laws. The enforcement of such regulations was part of "the Lindsay antismut campaign" to "clean up Times Square." Lesley Oelsner, *What's Really 'Deep' is the Logic*, N.Y. TIMES, Dec. 31, 1972, at E6. Alan Dershowitz speculated that the *New York Times*, a "prominent [midtown] resident," "magnified" the "crusade against Times Square pornographic movie houses and book stores." However, Dershowitz also admitted that "pornography pollution" was a "serious [issue] deserving of thoughtful solutions." *See* Alan M. Dershowitz, Letter to the Editor, *Porno-Houses, Drug Scene and the First Amendment*, N.Y. TIMES, Sept. 6, 1972, at 44.

266. *See* Fredericks, *supra* note 130, at 441.

267. 427 U.S. 50 (1976).

268. In 1972, Detroit amended its zoning ordinance, adopted a decade earlier, to restrict the location of adult theaters and bookstores. "Regulated uses" (as defined by the ordinance) could not be located within 1,000 feet of any two other regulated uses or within five-hundred feet of a residential area. *See id.* at 52. "Regulated uses" included: "adult bookstores; cabarets . . . ; establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls." *Id.* at 52 n.3.

269. *Id.* at 73 (Powell, J., concurring).

270. *Id.* at 53.

271. The *Young* majority opinion provides numerous examples of the Court's inability to conceal the content-based nature of the ordinance. At one point, Justice Stevens justified the provision thusly:

> [I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment . . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.

Id. at 70. In dissent, Justice Blackmun admonished the majority for being "swayed in this case by the characterization of the challenged ordinance as merely a 'zoning' regulation, or by the 'adult' nature of the affected material." *Id.* at 96 (Blackmun, J., dissenting). Several commentators have noted the majority's dubious distinctions. *See, e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT 138–39 (1998). *Cf.* Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (noting that the Court's designation, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), of a similar zoning ordinance as content-neutral was "something of a fiction"); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. Rev. 1108, 1120 (2005) (describing the *Renton* Court's finding of content-neutrality as "an impressively bold act of illogic"); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 60 (2000) ("The *Renton* approach confuses whether a law is content based or content neutral with the question of whether a law is justified by a sufficient purpose. The law in *Renton* may have been properly upheld as needed to combat crime and the secondary effects of adult theaters, but it nonetheless was clearly content based.").

272. The Court first used the term "secondary effect" in this case. *See Young*, 427 U.S. at 71 n.34.

of urban planners and real estate experts, who warned that the concentration of such businesses "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."[273] Justice Powell asserted that "[w]ithout stable neighborhoods . . . large sections of a modern city quickly can deteriorate into an urban jungle."[274]

Why was the *Young* majority so willing to mischaracterize Detroit's content-based ordinance as a content-neutral "secondary effects" law? Obscenity doctrine anticipated the regulation of sexual speech as a land-use problem by converting moral pollution into a public nuisance. Having previously justified obscenity law in light of its connection with moral pollution and urban decay, the Justices eagerly indulged evidence of that association. The Court could not neutrally evaluate Detroit's studies because it had already invested in their veracity. "Secondary effects" evidence provided empirical confirmation of a phenomenon that the Court already assumed to be true.[275]

B. Inequity

Moral pollution rhetoric influenced subsequent doctrine in ways more insidious than mere indulgence. Pollution rhetoric has been used throughout history to oppress marginalized communities.[276] Indeed, the extensive account of obscenity law sketched in these pages underscores a disturbing, consistent practice of associating objectionable speech with objectionable persons. The metaphor of moral pollution was frequently abused to manipulate social anxieties about contamination from marginal populations and foreign

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273. *Id.* at 55.

274. *Id.* at 80 (Powell, J., concurring).

275. In a future article, I will consider the extent to which the regulatory approach developed during this period inequitably exploited majoritarian control over "public space" and subtly reinforced the very empirical effects it sought to neutralize. *Cf. generally* Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755 (1993); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999). For now, I am content to suggest that the Court's untenable characterization of zoning ordinances in the mid-1970s was a manifestation of judicial confirmation bias resulting from the theory of moral harm authorized in the 1973 obscenity cases. *See* Louis Menand, *Everybody's an Expert*, NEW YORKER, Dec. 5, 2005, at 98.

276. *See* MILLER, *supra* note 79, at 245–51; Lynch, *supra* note 211, at 540 (detailing the "linguistic linking of Jews to the emotion of disgust through the Nazi metaphor of Jews as vermin and as parasitic"). And pollution anxieties have been exploited to justify other legal restrictions that continue to have profoundly inequitable consequences, including felon disenfranchisement, *see The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1313 n.68 (1989) (detailing the extent to which such laws were justified as attempts to preserve the "purity of the ballot box"), prohibitions on interracial sex and marriage, *see* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1989–2007 (1989), and statutory definitions of race, *see id.* at 1975–81 (chronicling the evolution of such laws in Virginia, which culminated in the notorious "one drop" law of 1924).

environments.[277]

Thus, it is unsurprising to discover similar inequity in subsequent secondary effects case law, which derives from obscenity law and is steeped in pollution theory. Following its credulous endorsement of secondary-effects evidence and analysis in *Young*, the Court expanded the doctrine beyond the ambit of municipal zoning. In two cases concerning the regulation of female nude dancing, it upheld the *complete ban*[278] of *constitutionally protected* expression under public nudity ordinances in light of purported secondary effects.[279] The historical association between women and pollution anxieties[280] partly explains the Court's unprecedented extension of this doctrine so far beyond its initial scope.

Indeed, subsequent criminal prosecutions under obscenity law itself, though rare, also evince profound legal inequity. In *Ward v. Illinois*, the Court upheld an Illinois obscenity statute that, as interpreted, conflated rape, necrophilia, and homosexual "necking."[281] Opponents of Robert Mapplethorpe, the first visual artist whose work was prosecuted as obscene, passionately exploited pollution

277. *See supra* note 84 and accompanying text (citing reference by a New York court to the "peculiar type of human animal that flourishes in . . . Hollywood and Southern California," People v. London, 63 N.Y.S.2d 227, 231 (Magis. Ct. Mid Manhattan 1946)); *supra* note 212 and accompanying text (citing Burger's comparison of obscenity to "garbage floating in the harbor of Hong Kong"); *supra* note 272 and accompanying text (citing reference to "undesirable . . . transients" in *Young*, 427 U.S. at 55); Lynch, *supra* note 211, at 540 (chronicling the "British anxiety about the potential influx of 'foreigners' facilitated by the [English Channel] tunnel construction," and the way in which it was expressed "through hysteria about the potential for a rabies invasion of Britain"). Nor is the xenophobic use of pollution rhetoric an exclusively Anglo-American custom. *See* Christopher S. Wren, *China Quandary: Western 'Pollution'*, N.Y. TIMES, Nov. 23, 1983, at A3 (describing the Chinese campaign against Western "spiritual pollution"). Cities were particularly vulnerable targets of invective: anti-obscenity advocates constantly identified moral pollution in urban centers—for instance, on Holywell Street and in Times Square. *See infra* notes 49–50, 55–56 and accompanying text (discussing Holywell Street); *infra* notes 164, 265 and accompanying text (discussing Times Square); Duncan, *supra* note 81, at 792 (noting the historical "assumption that criminality is natural to the cities and alien to the suburbs and the country").

278. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 317–18 (2000) (Stevens, J., dissenting) ("Until now, the "'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech.").

279. *See id.*; Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Amy Adler suggests that latent gender bias influenced the Court's willingness to credit both tenuous claims of content-neutrality and questionable "secondary effects" evidence in the most recent "nude dancing" case. *See* Adler, *Girls! Girls! Girls!*, *supra* note 271, at 1120–21 (discussing putative content-neutrality of ordinance), 1124–27 (criticizing "secondary effects" analysis in *Pap's*). Adler calls for a comprehensive reevaluation of "secondary effects" analysis in light of the doctrine's implicit inequity. *See id.* at 1141 n.164. In addition, the secondary effects doctrine was used by one federal court judge to uphold a public high school dress code. *See* David L. Hudson, Jr., *Secondary-Effects Doctrine*, FIRST AMENDMENT CENTER CTR., http://www.firstamendmentcenter.org/speech/adultent/topic.aspx?topic=secondary_effects_topic (last visited June 22, 2007).

280. *See* Adler, *Girls! Girls! Girls!*, *supra* note 81, at 1142–53.

281. 431 U.S. 767, 771–72 n.3 (1977).

anxieties about disease, race, and sexual orientation.[282] Writing in the *Washington Times* ten months before police seized Mapplethorpe's work from Cincinnati's Contemporary Arts Center, Patrick Buchanan argued that, "[a]s with our rivers and lakes, we need to clear up our culture: for it is a well from which we must all drink. Just as a poisoned land will yield up poisoned fruits, so a polluted culture, left to fester and stink, can destroy a nation's soul." The former Nixon speechwriter might well have been paraphrasing his old boss.[283]

C. Irrationality

Pollution rhetoric also affects society's sense of the appropriate punishment for criminal sexual behavior. Pervasive cultural associations between criminals and pollution encourage penological strategies that quarantine prisoners in spaces that reflect their degraded moral condition.[284] The punishments designed for child pornographers illustrate this correspondence. The Supreme Court recently authorized the indefinite civil confinement of certain sex offenders under Kansas's Sexually Violent Predator Act.[285] Municipalities across the country police the housing of sex offenders following their release from prison. In one instance, the City Council of Jersey City barred such individuals from virtually the entire city.[286] The pervasive connection between pollution anxieties

282. Patrick Buchanan, *How Can We Clean Up Our Art Act?*, WASH. TIMES, June 19, 1989, at D1; DE GRAZIA, *supra* note 12, at 627. Carol Vance suggests that Buchanan's rhetoric is "chillingly reminiscent of Nazi cultural metaphors." *See* RICHARD MEYER, OUTLAW REPRESENTATION: CENSORSHIP & HOMOSEXUALITY IN TWENTIETH-CENTURY AMERICAN ART 220 (2002). Dennis Barrie, director of the Contemporary Arts Center in Cincinnati, was ultimately acquitted in a jury trial. *See* Andy Grundberg, *Critic's Notebook: Cincinnati Trial's Unanswered Question*, N.Y. TIMES, Oct. 18, 1990, at C17. *See generally* MEYER, *supra*, at 206–23; DE GRAZIA, *supra* note 12, at 623; Carol S. Vance, *The War on Culture*, ART IN AMERICA, Sept. 1989, at 39. For a discussion of the historical role played by pollution rhetoric in anti-homosexual politics, see William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014–19 (2005).

283. *See infra* notes 175–77 and accompanying text.

284. *See* Duncan, *supra* note 81, at 784–88. Indeed, the ordinance authorized in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which Justice Powell cited in *Young*, treated criminals as just another source of industrial pollution: the scheme placed in the most undesirable use district "plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper, and rag storage, aviation fields, cemeteries, crematories, *penal and correctional institutions, insane and feeble-minded institutions*, storage of oil and gasoline . . . and manufacturing and industrial operations." *Id.* at 381 (emphasis added). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 73 (1976) (Powell, J., concurring) (citing *Euclid*).

285. *See* Kansas v. Hendricks, 521 U.S. 346, 352–53 (1997).

286. *See* Laura Mansnerus, *Zoning Laws that Bar Pedophiles Raise Concerns for Law Enforcers*, N.Y. TIMES, Nov. 27, 2006, at A1 (suggesting that such laws undermine law enforcement efforts by displacing sex offenders).

and child pornography law[287] surely accounts for this atypical visceral treatment of offenders *themselves* as pollutants.

In March 1994, Mike Diana became the first American artist successfully prosecuted under an obscenity statute.[288] A 24-year-old comic book artist from Largo, Florida, Diana was indicted for publishing, distributing, and advertising *Boiled Angel*, his photocopied anthology of graphic cartoons and stories with a circulation of 300.[289] After prosecutor Stuart Baggish told the jury that they need not tolerate "what is acceptable in the bathhouses of San Francisco and . . . the crack alleys of New York,"[290] they convicted Diana in ninety minutes.[291]

Judge Walter Fullerton held Diana without bail before sentencing, which was unusual given the fact that he had been convicted of misdemeanors.[292] On the fourth day following conviction, Fullerton sentenced Diana to three years probation, a $3,000 fine, and more than 1,200 hours of community service.[293] The terms of Diana's probation required that he undergo psychiatric evaluation at his own expense, complete a course in journalistic ethics, and have no contact with minors.[294] Finally, Diana was forbidden to draw anything that "might" be considered obscene—even for personal use in the privacy of his home—which was subject to unannounced searches by a parole officer.[295]

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287. Writing about the Court's 1982 decision that categorically excluded child pornography from First Amendment coverage, *see* Ferber v. New York, 458 U.S. 757 (1982), conservative columnist George F. Will described such materials as "an extraordinarily repellant and exploitative form of filth." George F. Will, *Filth and the First Amendment*, WASH. POST, July 11, 1982, at C7. The Congressional debates about federal sex offender legislation in 1996 were characterized by a "visceral repulsion and disgust reaction to an imagined toxic threat." *See* Lynch, *supra* note 211, at 557. More troublingly, lawmakers disregarded "statistics indicating that children face much greater risks and dangers within their homes at the hands of family and friends," focusing instead on "the prototypical offender/perpetrator [who] lives outside the homes and neighborhoods of innocent children." *Id.* at 560. Amy Adler claims that child pornography law is marked by a similar irrationality and tendency to reinforce the very problem it seeks to combat. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUMBIA L. REV. 209 (2001).

288. *See* Jason Zinoman, *A Very Naughty Cartoonist as a Paragon of Normalcy*, N.Y. TIMES, July 19, 2005, at E3; Robert K. Elder, *A Passion for Comics*, CHI. TRIB., Nov. 3, 2000, at 3.

289. *See* Anjali Gupta, *Free Speech's Last Breath*, CURRENT, June 13, 2001, at 15; Jack Rosenberger, *Fanzine Cartoonist Forbidden to Draw*, ART IN AMERICA, June 1994, at 31; Peter Kuper, *Boiled Angel in America*, PRINT, May/June 1994, at 110; Laura Griffin, *Testing the Boundaries of Free Speech*, ST. PETERSBURG TIMES, May 19, 1993, at 1A.

290. *See* Sean Henry, *Comic Threat*, MOTHER JONES, Nov./Dec. 1994, at 67. Baggish's admonition recalls Chief Justice Burger's infamous declaration, although he tinkered with the geography. *See* Miller v. California, 413 U.S. 15, 32 (1973) ("the people of Maine or Mississippi [need not] accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

291. *See* Paul J. Grant, *Law or Repression?*, QUALITY, June 1994, at 14.

292. *See* Henry, *supra* note 290, at 67.

293. *See* Gupta, *supra* note 289, at 15.

294. *See id.*; Grant, *supra* note 291, at 14; Rosenberger, *supra* note 283, at 31.

295. *See id.*; Elder, *supra* note 288, at 3. The *Paris* Court's description of *Stanley* as "hardly more than a reaffirmation that 'a man's home is his castle,'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973), may, ultimately, have been overstating things.

In 1997, the Supreme Court denied Diana's petition for certiorari without comment.[296] They had already said enough.

CONCLUSION: LIBERATING LAW

"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[297]

— Judge Benjamin Cardozo

The primary goal of this Article is to explore the way in which commentators and lawmakers modernized an inherited concept of moral harm by transforming the vocabulary used to describe it. Moral pollution rhetoric enabled the Burger Court to preserve obscenity law by substituting malleable metaphor for legal argument. Troublingly, the Court was unable to control the influence of the metaphor of moral harm on subsequent doctrine.

The history of the regulation of obscenity demonstrates the critical importance of judicial skepticism with respect to metaphor.[298] Undoubtedly, figurative expression enables sophisticated thought and "may be an inevitable aspect of language itself."[299] Thus, I do not urge the banishment of moral metaphor from law, as Justice Holmes once did.[300] However, a secondary aim

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296. *See* Gupta, *supra*, note 289, at 15.

297. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926). Similarly, Justice Frankfurter writes:

> The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

298. Although there is surely value to empirical demonstrations of harm, both in providing legislatures with assistance in designing regulation and in offering courts a way to test the reasonableness of legislation, "it would be naïve to think that the public safety argument, which has the appearance of being rooted in empirical rather than moralistic concerns, might not function . . . as a neutral-sounding cover for deeper moral disapprobation." Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1246 (2004).

299. Duncan, *supra* note 81, at 727. *See also* DOUGLAS, *supra* note 93. In her essay *Environment at Risk*, Douglas writes: "we can never ask for a future society in which we can only believe in real, scientifically proved pollution dangers. We *must* talk threateningly about time, money, God and nature if we hope to get anything done. We must believe in the limitations and boundaries of nature which our community projects." Mary Douglas, *Environments at Risk*, *in* IMPLICIT MEANINGS 230, 245–46 (1975).

300. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897). Holmes writes:

> For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

of this Article is to encourage readers to examine more rigorously the casual associations upon which law is developed, and which it reinforces in turn.

Understanding is a form of progress,[301] and identifying conflations of metaphor and argument represents a crucial first step. When the Solicitor General describes purveyors of Internet pornography as "those who wantonly decide to pollute the stream from which we all drink,"[302] the Court ought to recall Cardozo's admonition. The liberation of law from language, and thought from prejudice, depends upon its skepticism.

Id.

301. Martha Grace Duncan goes even further: "'metaphor understood' will seem a poor solution, or no solution at all, but . . . understanding, in itself, *is* change." Duncan, *supra* note 81, at 800.

302. Oral Argument of Theodore B. Olson on Behalf of the Petitioner at 18, Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002) (No. 00-1293).