PORNO NON EST PRO BONO PUBLICO: Obscenity as a Public Nuisance in California

*By Roger Oglesby**

It is doubtful that Sir Charles Sydlye recognized the significance of his actions when in, 1663, he stood naked upon a balcony in a London tavern and threw bottles filled with urine into the crowd below, while giving a speech punctuated with profanity.

For one thing, Sir Charles was drunk. For another, it is unlikely that he had the prescience to foresee the ungainly body of Anglo-American law that would mark his frolic as its genesis. For Sir Charles, it was merely an embarrassing incident that cost him a fine and a week in jail. But for the common law of England, it was a fateful event. *Sir Charles Sydlye's Case*[1] is generally considered to be the first pure obscenity case in Anglo-American law.[2]

This note will focus on one of the most recent twists in the winding path between *Sir Charles Sydlye's Case* and modern obscenity controls—a June, 1976 California Supreme Court decision, *People ex rel. Busch v. Projection Room Theater*.[3] *Busch* added a new weapon to the anti-obscenity arsenal in California: nuisance abatement. The caliber of this weapon has not yet been determined.

First, this note touches briefly on relevant United States Supreme Court decisions that set the stage for *Busch*. This involves a short review of the general approach that the Court has taken to obscenity regulation in the First Amendment context and a discussion of the vagueness difficulties inherent in that approach. A look at the *Busch* decision itself follows, and the two California Supreme Court majority opinions[4] filed in the case are compared.

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* Member, second-year class.

1. 83 Eng. Rep. 1146 (1663) (also reported as Le Roy v. Sr. Charles Sydlye, 82 Eng. Rep. 1036 (1663).

2. F. SCHAUER, THE LAW OF OBSCENITY 4 (1976) [hereinafter cited as SCHAUER].

3. 17 Cal: 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theater, 97 S. Ct. 320 (1976).

4. The opinions, written by Justice Richardson, will be referred to throughout this note as the majority opinions, though the second Richardson opinion spoke for a majority

Justice Tobriner's dissent is used as a vehicle for analyzing the final *Busch* holding and its weaknesses. Next, there is a short discussion of the "balancing of interests" aspect of nuisance law and how the court dealt—or failed to deal—with this factor in *Busch*. Finally, there follows a discussion of the potential scope of the *Busch* decision, concluding with an argument against extending its rationale to recognition of nuisance actions by private individuals against alleged obscenity.

I. Modern Obscenity Law

A. Exclusion by Definition

It was not until 1957 that the United States Supreme Court squarely confronted the issue of whether obscene material[5] could be constitutionally suppressed by the state and federal governments. In *Roth v. United States*,[6] Justice Brennan, writing for a majority of the Court, framed the issue as "whether obscenity is utterance within the area of protected speech and press."[7] Thus stated, the issue became one of exclusion from First Amendment[8] protection by definition. The Court refused to apply the traditional "clear and present danger" test developed in the context of political speech.[9] Nor did the majority invoke the balancing approach that has been used in other areas of First Amendment dispute,[10] despite Justice Harlan's protestations that in failing to do so the majority was painting with too broad a brush[11] and was thus "beg[ging] the very question before us."[12] Rather, relying on dicta in *Chaplinsky v. New Hampshire*[13] and drawing upon the

of the court on all issues only because of the special concurrence of Justice Mosk on the blanket injunction issue. See notes 63 & 65 *infra*.

5. "Obscenity" will be used throughout this note to refer to that class of sexually oriented material that has been held constitutionally unprotected under the line of Supreme Court cases beginning with Roth v. United States, 354 U.S. 476 (1957). It includes that class of expression some term "pornography."

6. 354 U.S. 476 (1957).

7. *Id.* at 481.

8. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

9. 354 U.S. at 486-87.

10. *Id.* at 484-87. For examples of application of the balancing approach to First Amendment controversies, see Brandenburg v. Ohio, 395 U.S. 444 (1969) (free speech interests balanced against state's interest in preventing lawless activity); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (free speech interests balanced against state's interest in promoting efficiency of its employees' public services); United States v. Robel, 389 U.S. 258 (1967) (freedom of association interests balanced against national defense interests).

11. 354 U.S. at 496 (Harlan, J., concurring and dissenting).

12. *Id.* at 497.

13. 315 U.S. 568 (1942) ("fighting words" held to be no essential part of any exposition of ideas and the First Amendment interest in their protection thus outweighed by the social interest in order and morality). The *Roth* majority quoted this language from Chaplinsky: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

holding in *Beauharnais v. Illinois*[14] that libel was beyond the pale of the First Amendment, the *Roth* majority held that obscenity is, by definition, "not within the area of constitutionally protected speech or press."[15]

The standard laid down by the *Roth* majority was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[16] This was not merely a threshold inquiry; it was stated as the dispositive test. Expression that fell within this definition was doomed to absolute exclusion from First Amendment protection. The only limitation imposed upon the broad sweep of this standard arose out of the following language in Justice Brennan's opinion: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amendment], unless excludable because they encroach upon the limited area of more important interests."[17] This language did not appear as part of the *Roth* standard, however, and it was not until nine years later that this "social importance" or "value" factor was incorporated as a decisive element of the Court's obscenity standard.[18]

B. The Vagueness Dilemma

Roth touched off a storm of confusion and strong criticism.[19] Its standard provoked heated debate and a plethora of litigation over what was in fact obscene and thus constitutionally unprotected expression.[20] Even the

problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*" 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

14. 343 U.S. 250 (1952). Justice Douglas, dissenting strenuously in *Roth*, argued that "[t]he First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence." 354 U.S. at 514 (Douglas, J., dissenting). He characterized *Beauharnais* as the only instance in the history of the Supreme Court in which the Court had "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." *Id.* The definitional approach used against libel in *Beauharnais* was later disapproved in New York Times Co. v. Sullivan, 376 U.S. 254, 268-69 (1964).

15. 354 U.S. at 485.

16. *Id.* at 489.

17. *Id.* at 484.

18. See notes 25-28 and accompanying text *infra*.

19. *See, e.g.*, Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; 1957 U. ILL. L. F. 499; 60 W. VA. L. REV. 89 (1957). *See also* I. BRANT, THE BILL OF RIGHTS 491-92 (1965); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 487 (1970).

20. SCHAUER, *supra* note 2, at 39-40. *Roth* was hailed by the proponents of censorship as a victory for their cause. C. REMBAR, THE END OF OBSCENITY 57 (1968)

justices of the Supreme Court responsible for instituting the standard could not agree on what it meant in application.[21] At the height of the constitutional chaos, Justice Stewart, concurring in *Jacobellis v. Ohio*,[22] wrote:

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*,[23] that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[24]

The issue most debated in the wake of *Roth* was the extent to which expression that could claim some "redeeming social value" was immune from obscenity prosecution.[25] In 1966 the Court met this question head on in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[26] in which the plurality opinion held that expression could not be found obscene unless it was "*utterly* without redeeming social value."[27] Opponents of censorship hailed the *Memoirs* decision as a conclusive victory, for what written expression could be held to be utterly without redeeming social value?[28] But their jubilation was

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[hereinafter cited as REMBAR]. However, subsequent appeals made it clear that the Supreme Court had not intended to give district attorneys carte blanche to prosecute offenders against the public morality. *See* Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1373 n.40 (1966) and cases cited therein [hereinafter cited as *Dirty Books*.]. What was not to become clear for some time was exactly what the Supreme Court *had* intended.

21. *See Dirty Books*, *supra* note 20, at 1373-77.

22. 378 U.S. 184 (1964).

23. Alberts v. California, an appeal from the Appellate Department of the Superior Court of Los Angeles County, was consolidated with Roth v. United States, 354 U.S. 476 (1957), for purposes of decision. *Id.* at 476. (explanatory footnote).

24. 378 U.S. at 197 (Stewart, J., concurring).

25. Justices Brennan and Goldberg asserted in *Jacobellis* that material could not be held obscene unless it was *utterly* without social importance. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). The rest of the Court, however, did not express an opinion on this issue.

26. 383 U.S. 413 (1966) (the book was commonly known as FANNY HILL).

27. *Id.* at 419. Only three justices joined the controlling opinion that set down this standard in *Memoirs*. However, two others, Justices Black and Douglas, concurred on broader grounds. A sixth, Justice Stewart, concurred on grounds that only "hard-core pornography" may be suppressed. Thus, as the Court recognized in Marks v. United States, 45 U.S.L.W. 4233 (U.S. Mar. 1, 1977) (No. 75-708), "[t]he view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards," including the "utterly without redeeming social value" element. *Id.* at 4234-35.

28. It was in the wake of *Memoirs* that Charles Rembar, who had defended the book involved before the Supreme Court, wrote *The End of Obscenity*. REMBAR, *supra* note 20. He closed the book with these words: "So far as writing is concerned, I have said there is no longer any law of obscenity. I would go farther and add, so far as writing

premature; obscenity prosecutions continued, and the confusion over what constituted obscenity was unabated.[29] Certainly, disagreement among Supreme Court justices increased, if anything. Between *Memoirs* in 1966 and *Miller v. California*[30] in 1973, the Court reversed or affirmed obscenity convictions per curiam and without full opinions.[31] The Court was badly split and seemed to be entirely incapable of agreeing on a uniform rationale for its decisions.[32]

Finally, in 1973, a five-member majority[33] was mustered, and in *Miller* the Court articulated a new obscenity standard:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[34]

The Court held that the "contemporary community standards" by which the prurience and patent offensiveness of allegedly obscene material are to be judged need not be national in scope, but it did not specify precisely what their scope should be.[35] Element (c) of the standard took the

is concerned, that not only in our law but in our culture, obscenity will soon be gone." *Id.* at 493.

29. *See* Lockhart, *Escape from the Chill of Uncertainty*, 9 GA. L. REV. 533, 544 (1975) [hereinafter cited as Lockhart].

30. 413 U.S. 15 (1973).

31. The case that set the trend was Redrup v. New York, 386 U.S. 767 (1967), involving magazines containing pictures of women with exposed breasts and short stories concerning various sexual episodes. The per curiam decisions following *Redrup* are catalogued and discussed in Huffman v. United States, 470 F.2d 386, 395-401 (D.C. Cir. 1971). The 31 per curiam reversals of obscenity convictions are listed in a footnote in Justice Brennan's dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting).

32. *See* Lockhart, *supra* note 29, at 544. *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-84 (1973) (Brennan, J., dissenting).

33. Burger, C.J., and White, Blackmun, Powell, and Rehnquist, JJ.

34. 413 U.S. at 24. California has yet to adopt the *Miller* "value" standard. The language of California Penal Code section 311 (West Supp. 1977), which defines obscenity, is that of the opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1966). Thus, California retains the *Memoirs* "utterly without redeeming social value" standard rather than the *Miller* "serious literary, artistic, political or scientific value" standard. See text accompanying notes 25-27 *supra*. The California Supreme Court held the state's obscenity statutes constitutional as set out in the Penal Code and "authoritatively construed" by the courts in Bloom v. Municipal Court, 16 Cal. 3d 71, 545 P.2d 229, 127 Cal. Rptr. 317 (1976).

35. 413 U.S. at 30-34. *See* Lockhart, *supra* note 29, at 548-52. This issue was discussed subsequently in Jenkins v. Georgia, 418 U.S. 153, 157 (1974), and Hamling v. United States, 418 U.S. 87, 103-10 (1974), but the only principle that the Court made absolutely clear was that it was *not* going to define the "community" whose standards are to be applied. See text accompanying notes 117-18 *infra*.

place of the "utterly without redeeming social value" element of *Memoirs*.[36] What the Court intended to include in the categories of "literary, artistic, political, or scientific" and, more important, what was meant by "serious" are questions yet to be resolved. Nor is it entirely clear what was meant by the phrase "specifically defined by the applicable state law" in element (b). But the Court did specify that the applicable state law was to be considered "as written or authoritatively construed."[37]

Justice Brennan, the author of the *Roth* opinion, dissented in *Miller* and *Paris Adult Theatre I. v. Slaton*,[38] as well as the other three obscenity cases decided the same day.[39] Echoing the dissenting arguments of Justices Douglas and Black in *Roth*,[40] Justice Brennan wrote:

> Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech. . . . By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.[41]

Of the nine justices sitting on the nation's highest bench when *Roth* was decided, only Justice Brennan remains on the Court. After fifteen years of grappling with the definitional approach to obscenity that he had first articulated, Justice Brennan reached the conclusion that the struggle was hopeless.

> In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults,[42] the First and Fourteenth Amendments prohibit the State and Federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents.[43]

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36. 413 U.S. at 24-25.

37. *Id.* at 24.

38. 413 U.S. 49 (1973).

39. The other three obscenity cases decided that day are Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973); and United States v. Orito, 413 U.S. 139 (1973).

40. 354 U.S. at 512 (Douglas, J., dissenting).

41. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting).

42. Justice Brennan specifically reserved judgment on the issue of obscenity controls in cases involving juveniles or unconsenting adults. 413 U.S. at 114 n.29 (Brennan, J., dissenting).

43. *Id.* at 112-13 (citations omitted).

Justice Brennan, then—along with Justices Stewart and Marshall, who concurred in his dissent[44]—has had enough of the *Roth-Memoirs-Miller* chaos. But the majority of the United States Supreme Court still adheres to the exclusion-by-definition approach, as does the California Supreme Court.

II. California's New Approach

A. The *Busch* Holding

The California Supreme Court most recently reaffirmed its commitment to the exclusion-by-definition approach in *People ex rel. Busch v. Projection Room Theater*,[45] in which it endorsed a new vehicle for controlling obscenity. In *Busch*, five civil actions were brought by the Los Angeles city attorney and the Los Angeles County district attorney against defendants allegedly operating bookstores or motion picture theaters in which obscene materials were being exhibited. The actions, seeking injunctive relief, were brought under both the general nuisance statutes[46] and the state Red Light Abatement Law.[47] Defendants filed general demurrers, and the

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44. It appears that Justice Stevens, who was not on the Court at the time of *Miller*, may agree that the exclusion-by-definition approach to obscenity is futile. In a separate opinion, concurring in part and dissenting in part, in Marks v. United States, 45 U.S.L.W. 4233 (U.S. Mar. 1, 1977) (No. 75-708), Justice Stevens wrote: "[T]he present constitutional standards, both substantive and procedural, which apply to [obscenity] prosecutions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." 45 U.S.L.W. at 4236.

45. 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976), *cert. denied sub nom.* Van de Kamp v. Projection Room Theater, 97 S. Ct. 320 (1976).

46. Definitions of "nuisance" are found in both the California Penal Code and the California Civil Code:

"*Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property* by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance." CAL. PENAL CODE § 370 (West 1970) (emphasis added).

"*Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property*, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." CAL. CIV. CODE § 3479 (West 1970) (emphasis added).

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." CAL. CIV. CODE § 3480 (West 1970).

Compare the punctuation in the italicized portions, which was highly significant to the *Busch* dissenters. See notes 79-87 and accompanying text *infra*.

47. CAL. PENAL CODE §§ 11225-11235 (West 1970).

trial court sustained the demurrers without leave to amend.[48] Judgments of dismissal were entered and plaintiffs appealed.

With respect to the Red Light Abatement Law, the supreme court sustained the trial court decision, holding that the term "lewdness"[49] in the Red Light Abatement Law "is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances,"[50] but not the exhibition of obscene magazines or films. In a classic example of deference to legislative intent, the supreme court said:

> If the Legislature had desired or intended by [the Red Light Abatement Law] to regulate the showing of pornographic films, pictures or drawings, such subject matter could have been included in [the statute] when it was recently amended in 1969, as it did when it chose to enumerate "illegal gambling as defined by state law or local ordinance. . . ."[51]

However, with respect to the general public nuisance statutes, the court held:

> California's public nuisance definition, including as it does indecency, comports fully with the state's power to regulate as recently declared both by the federal Supreme Court and by ourselves and fortifies our conclusion that public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."[52]

In so holding, the court specifically disapproved a substantial portion of *Harmer v. Tonylyn Productions, Inc.*[53] In *Harmer*, the court of appeal held that California's public nuisance statutes did not encompass the showing of an obscene film within a theater open only to those willing to pay to see such entertainment:

> The film involved was shown only in a closed theatre. . . . Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors or air pollution or to the unwelcome presence of animals. In the statute's terms, the alleged nuisance at the bench did not . . . "affect at the same time an entire community or neighborhood. . . ."[54]

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48. 17 Cal. 3d at 42, 550 P.2d at 600, 130 Cal. Rptr. at 328.

49. Under the Red Light Abatement Law, "[e]very building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution" constitutes a nuisance. CAL. PENAL CODE § 11225 (West 1970).

50. 17 Cal. 3d at 61, 550 P.2d at 611, 130 Cal. Rptr. at 339.

51. *Id.*, 550 P.2d at 611-12, 130 Cal. Rptr. at 339-40. As the majority in *Busch* pointed out, the Red Light Abatement Law affords remedies "not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year." *Id.* at 60, 550 P.2d at 611, 130 Cal. Rptr. at 339. Thus, the impact of *Busch* would have been far more drastic had the court endorsed plaintiffs' Red Light Abatement action. It is worth noting, however, that the court expressed its belief that the applicability of the Red Light Abatement Law was "not free from doubt." *Id.* at 62, 550 P.2d at 612, 130 Cal. Rptr. at 340.

52. *Id.* at 53, 550 P.2d at 606, 130 Cal. Rptr. at 334 (emphasis added).

53. 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972).

54. *Id.* at 943, 100 Cal. Rptr. at 576-77 (citations omitted). The statutory language is from California Civil Code section 3480 (West 1970), *quoted in* note 46 *supra*.

Justice Richardson, writing for the *Busch* majority, characterized this as a faulty analysis of the "nature of the state's interests in regulating the exhibition of obscene matter."[55] Citing *Paris Adult Theatre I v. Slaton*,[56] the majority held that obscene materials constitute a public nuisance not because of any sensory assault upon the unwilling viewer, but because of their "tendency to injure the community or to jeopardize the maintenance of a decent society."[57]

B. The Question of Prior Restraint

Having thus determined that obscenity, as a threat to the maintenance of a "decent society," was subject to regulation under the state's broad general nuisance statutes, the California Supreme Court was faced with yet another issue of constitutional proportions: Should a civil determination that a defendant was dealing in obscene materials warrant clamping a padlock on his or her place of business? This was an issue not easily laid to rest, as is apparent from a perusal of the two supreme court majority opinions handed down in the *Busch* case. The first was issued March 4, 1976.[58] The court filed a modified opinion on June 1, 1976.[59] The modification was substantial.

In the first *Busch* opinion, after holding that suppressing obscenity "by means of an injunction proper and suitable to the facts of each case"[60] was proper under the general nuisance statutes, a majority of four,[61] with Justice Richardson writing, said:

> We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials. Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us,[62] we leave the question open for further consideration.[63]

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55. 17 Cal. 3d at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.

56. 413 U.S. 49 (1973).

57. 17 Cal. 3d at 53, 550 P.2d at 606, 130 Cal. Rptr. at 334.

58. 546 P.2d 733, 128 Cal. Rptr. 229 (1976).

59. See note 45 *supra*. This was the final opinion in the case and the one on which this note focuses.

60. 546 P.2d at 742, 128 Cal. Rptr. at 238.

61. McComb, Sullivan, Clark, and Richardson, JJ.

62. The issue of whether the material involved in *Busch* was in fact obscene was not reached by the supreme court. Since the appeal was from a judgment sustaining a demurrer, the court assumed for purposes of its decision that the material was obscene. 546 P.2d at 736-37, 128 Cal. Rptr. at 232-33.

63. 546 P.2d at 743, 128 Cal. Rptr. at 239 (citations omitted). Justice Clark, with Justice McComb concurring, objected to the court's about-face on this issue in the second decision and quoted this segment of the first *Busch* opinion, in full and with citations, in

In the second *Busch* opinion, this language was deleted. In its place is, *inter alia*, the following:

> We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. . . . While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.[64]

It is on this issue only—whether a theater or bookstore may be closed after a civil determination that it is dealing in some obscene materials—that the first and second *Busch* decisions differ. In the second decision, Chief Justice Wright joined the majority opinion and Justice Mosk concurred on this issue alone.[65] Had the first *Busch* opinion been allowed to stand, trial courts would have been free to decide for themselves whether "padlocking" sanctions were constitutionally permissible. However, under United States Supreme Court decisions, there seems to be little doubt that sanctions against a business as a whole that would necessarily remove materials not found to be obscene from the market would constitute an impermissible prior restraint.

In *Freedman v. Maryland*,[66] in which a state motion picture censorship statute was challenged, the Court held that prior restraints are not unconstitutional per se, but that " '[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' . . . '[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' . . . "[67] Subsequently, in *Southeastern Promotions, Ltd. v. Conrad*,[68] in

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a separate opinion in the report of the final *Busch* decision. 17 Cal. 3d at 62-63, 550 P.2d at 612-13, 130 Cal. Rptr. at 340-41.

64. 17 Cal. 3d at 59, 550 P.2d at 610, 130 Cal. Rptr. at 338.

65. The court split 5-2 on the central issue—whether obscenity falls within the ambit of the general nuisance statutes. However, Justices Clark and McComb dissented on the blanket injunction issue (see note 63 *supra*), while Justice Mosk concurred in the majority decision on this issue. In his brief concurrence on the blanket injunction issue, Justice Mosk added that he believed closing bookstores or theaters on public nuisance grounds would violate the California Constitution, article I, section 2, as well as the First and Fourteenth Amendments to the United States Constitution. 17 Cal. 3d at 62, 550 P.2d at 612, 130 Cal. Rptr. at 340 (Mosk, J., concurring and dissenting).

66. 380 U.S. 51 (1965).

67. *Id.* at 57 (citations omitted).

68. 420 U.S. 546 (1975).

which a decision by a municipal board to deny the use of a theater for presentation of the musical "Hair" was challenged, the Court reaffirmed these circumscriptions, promulgated in *Freedman*, on any system of prior restraint:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.[69]

Were trial courts empowered to issue padlock orders against theaters or bookstores on the basis of a judicial finding that some of the books or films being disseminated were obscene, other books or films available in such theaters or bookstores would be effectively suppressed without the benefit of a judicial determination as to their obscenity *vel non*. Such a padlock order would constitute a prior restraint without the *Freedman-Southeastern Promotions* safeguards. For all practical purposes, a padlock order would be a final restraint as to books and films not found to be obscene, but being disseminated alongside materials that have been held obscene in a *Busch* proceeding.[70] In *Freedman* the Court held: "The teaching of our cases is

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69. *Id.* at 560.

70. In its first *Busch* opinion, the California Supreme Court cited State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 229 N.W.2d 389 (1975), in stating that padlock orders have been held not to constitute prior restraints in some jurisdictions. That decision, however, was reversed by the Michigan Supreme Court. 396 Mich. 244, 240 N.W.2d 460 (1976). In reversing, the Michigan high court held that the court of appeals had erroneously endorsed the use of the state's Red Light Abatement Law against obscenity. This disposition made it unnecessary for the supreme court to reach the prior restraint question, and it specifically declined to do so. However, the court noted that "[s]everal state courts, reviewing the use of statutes (other than red light abatement acts) to enjoin the sale of books or exhibition of films found to be obscene, have found injunctive remedies unconstitutional when used to suppress materials not found to be obscene." 396 Mich. at 251 n.15, 240 N.W.2d at 464 n.15. The Michigan court then quoted this language from Sanders v. State, 231 Ga. 608, 613, 203 S.E.2d 153, 157 (1974): "One obscene book on the premises does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions." 396 Mich. at 251 n.15, 240 N.W.2d at 463-64 n.15.

In State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court held a padlock provision in that state's nuisance abatement statute unconstitutional, quoting from Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So. 2d 480, 491-92 (La. 1973): ". . .[U]nder our statute there can be no expression of any kind—good or bad—emanating either from the premises or from the devices on the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence. Of

that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[71]

Had the California Supreme Court not modified its first *Busch* opinion, padlock orders very likely would have issued from some trial courts. By stating clearly in its second opinion that such orders are constitutionally impermissible, the court greatly limited the impact of the *Busch* decision. In thus modifying its stand on the issue of prior restraint, the court has limited the application of the *Busch* injunctive sanctions to specific materials judicially held to be obscene. It is in this context that the first opinion has warranted mention here.

C. The *Busch* Dissent

Justice Tobriner's dissent in *Busch*, with Justice Mosk concurring, centered on three basic contentions:

1) The legislature did not intend for the general public nuisance statutes to be used as a vehicle for regulating obscenity;

2) Conduct subject to injunction under the general nuisance statutes must constitute an assault on the senses (based on his "comma" theory); and

3) The use of the general nuisance statutes to control obscenity is particularly obnoxious to First Amendment interests in the absence of a jury determination, because of the wide diversity of opinion as to what is obscene and the consequent, unavoidable constitutional infirmities in the realm of vagueness and overbreadth.

1. Legislative Intent

The deference afforded legislative intent in judicial interpretation of statutes is exemplified in the *Busch* majority's treatment of the Red Light Abatement Law issue.[72] Justice Tobriner contended, however, that the majority ignored expressions of legislative intent in its interpretation of the general nuisance statutes.[73] He pointed out that in 1974, Assembly Bill

all the constitutional violations on the face of these statutes, the prior restraint imposed under R.S. 13:4717 is the most offensive.

"This particular section of the Revised Statutes does restrict expression not yet found to be an offense and not yet uttered. It is a classic example of prior restraint of speech and expression and is violative of federal and state constitutions." 219 Kan. at 74, 547 P.2d at 769-70. *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

71. 380 U.S. at 58.

72. See text accompanying note 51 *supra*.

73. Justice Tobriner also made the argument that the majority holding in *Busch* flies in the face of popular will in that it implements a judicial procedure rejected by the voters in the 1972 statewide initiative, Proposition 19. 17 Cal. 3d at 70, 550 P.2d at 617,

4340,[74] which would have provided for injunctive action against obscene material, was defeated by the Assembly Committee on Criminal Justice.[75] "Defeated," however, appears to be a misleading choice of terminology. "Died in committee" would seem to be a better characterization of the ultimate fate of A.B. 4340. There is no indication in the Assembly Final History[76] that a vote was ever taken on A.B. 4340 at any level. The measure was "held under submission" in the Criminal Justice Committee and was still languishing there when the legislature adjourned.[77] The weight that can be given, in terms of legislative intent, to a six-member Assembly committee's failure to act on any given measure is slight.

Furthermore, the context in which the injunctive remedy against obscenity was proposed must be considered. A.B. 4340 would have changed California obscenity statutes in several respects, including a substantial modification in the definition of obscene matter[78] and a provision imputing knowledge of the contents of any allegedly obscene material to the distributor thereof after service of process in an injunctive proceeding.[79] The Committee on Criminal Justice may have failed to act on A.B. 4340 for any number of reasons, including, but by no means limited to, opposition to the injunctive remedy the bill would have authorized.[80] On balance, this portion

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130 Cal. Rptr. at 345 (Tobriner, J., dissenting). However—putting aside the issue of whether the courts are or should be bound by the "popular will" in this context—Justice Tobriner failed to mention that the injunctive procedure rejected in the 1972 election was part of a broad and repressive anti-obscenity measure. While it cannot be said with certainty that the anti-obscenity injunctive procedure was not a factor in voter rejection of Proposition 19, it is unlikely that it played a major role in the outcome of the vote. Proposition 19, *inter alia*, would have totally abolished the "utterly without redeeming social importance" standard in Penal Code section 311, without putting any alternative "value" standard in its place. It also would have made the "contemporary standards" by which challenged material is to be judged, with respect to prurient appeal, local rather than statewide.

74. A.B. 4340, Cal. Legis., 1973-74 Reg. Sess. (1974).

75. 17 Cal. 3d at 70-71, 550 P.2d at 617-18, 130 Cal. Rptr. at 345-46 (Tobriner, J., dissenting).

76. CALIFORNIA LEGISLATURE, ASSEMBLY FINAL HISTORY 2108 (1974).

77. *Id.*

78. A.B. 4340 would have changed California's definition of obscenity, in Penal Code section 311, to comply with the standards of Miller v. California, 413 U.S. 15 (1973) (see text accompanying note 34 *supra*). A.B. 4340, Cal. Legis., 1973-74 Reg. Sess. § 311 (1974).

79. A.B. 4340, Cal. Legis., 1973-74 Reg. Sess. § 311.3(*d*) (1974).

80. Another bill amending California's obscenity statutes was introduced in the legislature in 1975. S.B. 886, Cal. Legis., 1975-76 Reg. Sess. (1976). Senate Bill 886 also would have provided, *inter alia*, for an injunctive remedy against obscene materials. In fact, under S.B. 886, a civil action on the obscenity issue would have been a prerequisite to any criminal proceeding. This measure was passed, 21-3, by the California Senate, but was turned down by the Assembly Committee on Criminal Justice, the same committee in which A.B. 4340 met its lingering death. S.B. 886 also would have made a number of changes in the obscenity statutes in addition to the injunctive proceeding, and,

of Justice Tobriner's dissent seems relatively weak by comparison with the thrust of his opinion as a whole.

2. The Comma Theory

Justice Tobriner made another argument in his dissent in *Busch* that is somewhat more persuasive, although it relied heavily on the placement of a single comma in Penal Code section 370.

His contention was that a nuisance, as defined in Civil Code section 3479,[81] must be indecent or offensive to the senses. This is significant in that the activity against which an injunction was being sought in *Busch* was the exhibition of a motion picture within a theater open only to those willing to pay admission—a willing audience.[82] There was nothing about the theater itself to offend the five senses as such. Justice Tobriner contended that the phrase "to the senses" was intended to modify "indecent" as well as "offensive" in Civil Code section 3479. In making this argument, he contrasted Civil Code section 3479 with Penal Code section 370. The latter statute defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses . . . ."[83] The language is identical to that of Civil Code section 3479,[84] but the comma that appears after "indecent" in the Penal Code section is absent in the Civil Code section. Justice Tobriner argued that this comma evinced a legislative intent to include within Penal Code section 370 conduct that is 1) indecent or 2) offensive to the senses—whereas the same phrase in Civil Code section 3479 was intended to embrace only conduct that is "indecent . . . to the senses."[85]

The *Busch* majority avoided the comma discrepancy by equating the definitions in Penal Code section 370 and Civil Code section 3479[86] and then relying on the definition in Penal Code section 370 throughout its opinion. It seems relatively clear, however, that the *Busch* decision had to rest on Civil Code sections 3479 and 3480.[87] The statutory authority for an

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as in the case of A.B. 4340, it is impossible to determine why the Criminal Justice Committee chose not to pass the bill out for a vote on the Assembly floor. See CALIFORNIA LEGISLATURE, SENATE FINAL HISTORY 438 (1976).

81. See note 46 *supra*.

82. See text accompanying notes 53-57 *supra*.

83. CAL. PENAL CODE § 370 (West Supp. 1977).

84. See note 46 *supra*.

85. 17 Cal. 3d at 65, 550 P.2d at 614, 130 Cal. Rptr. at 342 (Tobriner, J., dissenting).

86. "We . . . note preliminarily the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480, taken in conjunction." 17 Cal. 3d at 49, 550 P.2d at 603, 130 Cal. Rptr. at 331.

87. If the majority had believed that an abatement action would lie solely on the basis of Penal Code section 370, in the absence of statutory authority for the remedy itself, surely it would not have invited the comma dispute by including references to Civil Code sections 3479 and 3480 in its opinion. On the issue of civil actions brought by pub-

abatement action brought by a district attorney or city attorney is found in Code of Civil Procedure section 731,[88] which, as Justice Tobriner pointed out, refers specifically to Civil Code sections 3479 and 3480.[89] There is no statutory authority for an abatement action under Penal Code section 370, which, given its context, would appear to pertain only to criminal prosecutions.[90]

3. Vagueness and the Jury's Role

The vice of vagueness has already been discussed.[91] As Justice Tobriner pointed out, "the concept of obscenity is an inherently vague one, and no legislative or judicial efforts that even arguably comport with the First Amendment could define the term with sufficient precision to enable businesspersons confidently to determine whether their products or exhibitions would be ruled obscene."[92] Justice Tobriner reached this conclusion on the following grounds:

> The problem of defining obscenity is intractable because we have no community view of that which appeals to the prurient interest and lacks social value, but rather a host of distinct views within each community. And even if these distinct views could be said metaphysically to coalesce to form some community standard, no trier of fact could confidently ascertain what that standard was.[93]

Furthermore, the vagueness infirmity inherent in regulation of obscenity was compounded, in Justice Tobriner's view, by the importation of obscenity doctrine into public nuisance proceedings.

> In a public nuisance proceeding, however, no jury is impanelled to determine whether a particular work is obscene under contemporary

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lic officials in the absence of statutory authority, see Safer v. Superior Court, 15 Cal. 3d 230, 540 P.2d 14, 124 Cal. Rptr. 174 (1975).

88. "A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city." CAL. CIV. PROC. CODE § 731 (West 1955).

89. 17 Cal. 3d at 64-65, 550 P.2d at 614, 130 Cal. Rptr. at 342 (Tobriner, J., dissenting).

90. CAL. PENAL CODE §§ 372, 373a (West 1970).

91. See notes 19-44 and accompanying text *supra*.

92. 17 Cal. 3d at 72, 550 P.2d at 619, 130 Cal. Rptr. at 347 (Tobriner, J., dissenting). *Accord*, Bloom v. Municipal Court, 16 Cal. 3d 71, 86-91, 545 P.2d 229, 239-42, 127 Cal. Rptr. 317, 327-30 (1976) (Tobriner, J., dissenting). *See also id.* at 84-86, 545 P.2d at 37-38, 127 Cal. Rptr. at 325-26 (Wright, C.J., concurring).

93. 17 Cal. 3d at 72, 550 P.2d at 619, 130 Cal. Rptr. at 347 (Tobriner, J., dissenting).

> community standards; that crucial determination—upon which the censorship of a book, a magazine, a play or a motion picture turns—is left instead to a single judicial officer. In a criminal obscenity proceeding, the requirement that a jury be drawn from a cross-section of the community will normally provide at least some promise that the varying tastes and sensibilities that exist in every community will play some role in the determination of whether a work is obscene or not. By authorizing a single judge—distant to the interplay of the diverse cultural, religious, intellectual and economic backgrounds commonly present in a jury room—to make the determination of obscenity on the basis of an undeniably subjective standard, the majority inevitably confines constitutional protection only to those works that, in the personal view of a single judge, are not offensive.[94]

Thus, Justice Tobriner concluded that the *Busch* majority's interpretation of California's general public nuisance statutes contravenes the First Amendment because of the chilling effect on protected expression. Justice Tobriner's analysis of the jury role in obscenity proceedings is probing and incisive. There is one aspect of the issue, however, with which he did not deal.

D. Obscenity *Vel Non*: Who Should Decide?

1. Jail Without a Jury?

If an obscenity prosecution is brought under California Penal Code section 372, defendants are constitutionally entitled to a jury trial.[95] However, in a public nuisance action such as that endorsed by the *Busch* majority, there is no jury trial right,[96] since defendants do not face incarceration in such a proceeding. However, if defendants violated a *Busch* injunction—issued after a single judge's determination, by a preponderance of the evidence, that certain materials were obscene and therefore constituted a public nuisance—they would be subject to prosecution for contempt of court, a misdemeanor under California Penal Code section 166.[97] And it is unlikely, though there is some doubt, that defendants charged with contempt for

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94. *Id.* at 73, 550 P.2d at 619-20, 130 Cal. Rptr. at 347-48 (Tobriner, J., dissenting).

95. CAL. PEN. CODE § 372 (West 1970); CAL. CONST. art. I, § 16; *Ex parte* Wong You Ting, 106 Cal. 296, 39 P. 627 (1895).

96. An advisory jury may be impanelled in an equity proceeding, but its verdict is not binding on the judge. CAL. RULES OF COURT, Rules 231, 519 (West 1977).

97. There also is provision for contempt proceedings in the California Code of Civil Procedure, section 1209 (West Supp. 1977) and sections 1210-22 (West 1972). Under this scheme there is no right to jury trial; however, punishment is limited to a maximum of five days in jail and a $500 fine. CAL. CIV. PROC. CODE § 1218 (West 1972). For a discussion of contempt proceedings under the Code of Civil Procedure, focusing on the extent of procedural safeguards, see Arthur v. Superior Court, 62 Cal. 2d 404, 398 P.2d 777, 42 Cal. Rptr. 441 (1965). *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); Bloom v. Illinois, 391 U.S. 194 (1968).

violation of a *Busch* injunction would be entitled to a de novo jury determination on the issue of obscenity *vel non*.

In most jurisdictions the obscenity issue would be foreclosed by the collateral bar rule,[98] under which defendants in contempt proceedings are not allowed to challenge the validity of the underlying injunction.[99] The traditional exception to this rule is that court orders issued in excess of jurisdiction are open to collateral attack.[100] This is, however, an exception that has been narrowly circumscribed in most jurisdictions, for the simple reason that courts cannot effectively grant equitable relief if they are unable to enforce their own decrees.[101] On the other hand, some courts have treated infirmities in challenged orders as jurisdictional rather than deeming the orders merely erroneous because relief otherwise could not be afforded short of extraordinary remedies.[102] In California, court orders have been held to have been issued in excess of jurisdiction on constitutional grounds of overbreadth[103] and lack of notice.[104] In fact, the California courts have defined "in excess of jurisdiction" so broadly that it has been said they have rejected the collateral bar rule entirely.[105] Nonetheless, it is apparent that in some instances injunctions are beyond collateral attack even in California.[106]

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98. *See* Note, *Gag Orders on the Press*, 4 HASTINGS CONST. L.Q. 187 (1977) [hereinafter cited as *Gag Orders*].

99. Walker v. Birmingham, 388 U.S. 307 (1967); United States v. United Mine Workers, 330 U.S. 258 (1947).

100. *See* Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 86-87 (1948) [hereinafter cited as Cox].

101. *See* Tefft, *Neither Above the Law Nor Below It*, 1967 SUP. CT. REV. 181, 190-92.

102. *See* Cox, *supra* note 100, at 98.

103. *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

104. United Farm Workers v. Superior Court, 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975). In *Berry*, the California Supreme Court attempted to reconcile its decision with the U.S. Supreme Court's decision in *Walker* (see note 99 and accompanying text *supra*). 68 Cal. 2d at 150, 436 P.2d at 282, 65 Cal. Rptr. at 282. But its opinion in *United Farm Workers* made it clear that the *Berry* holding and the *Walker* opinion were essentially incompatible: "[T]he United States Supreme Court . . . announced in *Walker v. City of Birmingham* . . . that persons seeking to challenge the constitutional validity of an ex parte injunction must seek judicial redress before contemplating disobedience of the order. But the rule in California is otherwise. In this state a person affected by an injunctive order which exceeds the jurisdiction of the issuing court has the choice of complying with the order and bringing a judicial challenge, or disobeying it and subsequently attacking its validity when he is charged with contempt." 14 Cal. 3d at 907 n.3, 537 P.2d at 1240 n.3, 122 Cal. Rptr. at 880 n.3 (citations omitted).

105. *Gag Orders*, *supra* note 98, at 204.

106. *See, e.g.*, Signal Oil and Gas Co., 49 Cal. 2d 764, 322 P.2d 1 (1958) *approved in In re Berry*, 68 Cal. 2d at 147-48, 436 P.2d at 280-81, 65 Cal. Rptr. at 280-81.

It is not entirely clear, then, whether a *Busch* injunction, which normally would be subject neither to overbreadth nor to lack of notice challenges, would be subject to collateral attack during contempt proceedings.[107] However, if a *Busch* injunction were subject to such attack, it would lose much of its vitality as a means of obscenity regulation. Hung juries are relatively common in criminal obscenity prosecutions,[108] and a losing defendant in a *Busch* action might well be inclined to ignore the ensuing injunction if he or she were allowed to relitigate the obscenity issue before a jury in contempt proceedings. On the other hand, if the issue of obscenity *vel non* were not subject to relitigation during contempt proceedings, a defendant in a public nuisance obscenity action could face incarceration, via subsequent contempt proceedings, for the "crime" of violating a single judge's sense of decency.

2. *The United States Supreme Court and the Jury Issue*

In *Bantam Books, Inc. v. Sullivan*,[109] the Court expressed a strong preference for criminal prosecutions as the proper mode of determining whether materials are obscene—specifically because the criminal trial is so "hedged about" with procedural safeguards.[110] In *Kingsley Books, Inc. v. Brown*,[111] Justice Brennan, dissenting, believed that "the absence in this New York obscenity statute of a right to jury trial is a fatal defect."[112] He went on to say:

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene.[113]

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107. *See* Maita v. Whitmore, 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975). In *Maita*, the district court held that an injunction issued under the Red Light Abatement Law was *not* subject to collateral attack during contempt proceedings. However, defendants in the contempt proceedings had appealed the underlying order prior to the contempt prosecution, and this factor could account for the court's refusal to countenance subsequent collateral attack.

108. *See, e.g.*, THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO 56 (June 1971); Lockhart, *supra* note 29, at 535 n.14.

109. 372 U.S. 58 (1963).

110. *Id.* at 69-70.

111. 354 U.S. 436 (1957) (upholding a New York statute authorizing injunctive relief against obscene materials).

112. *Id.* at 447 (Brennan, J., dissenting).

113. *Id.* at 448. *Accord*, McKinney v. Alabama, 424 U.S. 669, 683-89 (1976) (separate opinion of Brennan, J.).

This view, however, has never been shared by a majority of the Court. In *Alexander v. Virginia*,[114] the Court held, in a two-page per curiam opinion, that a jury trial was not constitutionally required—at least not in that particular state civil proceeding and under the particular statute there involved.[115] Whether this holding can be extended to cover all state civil proceedings against obscenity, regardless of the statute involved, is not entirely clear.[116] *Alexander* was decided only four days after *Miller* and *Paris Adult Theatre*. There was some confusion, in the immediate wake of the latter two decisions, as to how trial courts were to define the "community" by whose "contemporary standards" allegedly obscene materials were to be judged.[117] A year later, however, the Supreme Court confronted this issue head-on in *Hamling v. United States*.[118] In that case petitioners contended that they had been convicted under federal obscenity statutes by a jury improperly instructed with respect to the "community" by whose standards the materials in question were to be judged. In holding that the trial court need not define the community to be used as a gauge, the Court stated:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. . . .
>
> Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the juror to ascertain the sense of the "average person, applying contemporary community standards" without the benefit of expert evidence, clearly indicates that 18 U.S.C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller*.[119]

In thus refusing to define "community," the Supreme Court has relied on the ability of jurors to define that term for themselves. Implicit in this holding is a recognition that jurors, since they theoretically represent a cross-section of the community in which the determination is being made, are best able to ascertain whether challenged materials offend "contemporary community standards." To deprive the defendant in an obscenity action of the broad social, political, economic, geographic, and educational experience of a jury is to define the community more narrowly than seems appropriate under the language of *Hamling*.

A judge, of course, is not oblivious to the standards of the community in which he lives. But a judge is necessarily limited in his ability to assess community standards by his experience in that community and by the size of

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114. 413 U.S. 836 (1973).

115. "A trial by jury is not constitutionally required in this state civil proceeding pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as amended." *Id.* at 836.

116. Note, *Defects in Indiana's Pornographic Nuisance Act*, 49 IND. L.J. 320, 327-28 (1974).

117. *See* Lockhart, *supra* note 29, at 549.

118. 418 U.S. 87 (1974).

119. *Id.* at 104-05.

the vicinage with which he is familiar. In *Kingsley Pictures Corp. v. Regents*,[120] Justice Black, concurring, pointed out that "judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation."[121] He went on to express the opinion, borne out by the post-*Memoirs* line of cases,[122] that the Supreme Court was being called upon to "appraise each movie on a case-by-case basis," which inevitably leads to each justice exercising "his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral."[123]

This raises obvious uncertainty problems. Given the subjective morality element of such a decision, who can predict, in the case of borderline materials, whether a judge will find any particular book or movie obscene in any given case?[124] This is not to impugn the integrity of California's trial judges, but merely to point out how elusive and individualized judgments on such matters as "prurient interest" and "patent offensiveness" can be.[125]

120. 360 U.S. 684 (1959).

121. *Id.* at 690 (Black, J., concurring).

122. See text accompanying notes 30-32 *supra*.

123. 360 U.S. at 690-91 (Black, J., concurring).

124. *E.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). It could be argued in response that a jury's decision is also extremely difficult to predict. As long as obscenity litigation is allowed to continue, however, someone or somebody must make the initial determination at trial as to whether given material is obscene. In view of the majoritarian nature of the "contemporary community standards" criterion, a jury is at least more likely to reach a conclusion that reflects its peers' attitudes with respect to "prurient appeal" and "patent offensiveness" than is a single judge. Furthermore, a jury trial provides for counterchecks on the "social value" factor (see notes 25-36 and accompanying text *supra*) not available in a non-jury proceeding. If a judge finds that materials are not obscene, the case need never go to the jury. People v. Harris, 192 Cal. App. 2d Supp. 887, 894, 13 Cal. Rptr. 642, 647 (1961). If the judge decides otherwise, the jury serves as a First Amendment backstop to ensure that protected expression does not fall victim to the moral sensibilities of a jurist less concerned with free speech interests than with protecting the masses from presumptively corrupting influences.

125. In oral arguments before the Court in Memoirs v. Massachusetts, 383 U.S. 413 (1966), the following colloquy took place between Justice Black and the attorney arguing that the book was obscene:

> MR. JUSTICE BLACK: I'd like to ask you a question now about findings of the [trial] court. How many judges do they have?
> MR. COWIN: On Superior Court, your Honor, there are in excess of forty.
> MR. JUSTICE BLACK: How many do you know?
> MR. COWIN: I know perhaps half of them.
> MR. JUSTICE BLACK: Do you think we could reasonably expect to get the same kind of finding from all forty judges?
> MR. COWIN: Not a chance.
> MR. JUSTICE BLACK: Why?
> MR. COWIN: Because the reactions to the material would simply be too different.
> MR. JUSTICE BLACK: Reactions of the person, individual person?

Commentators have pointed out that First Amendment interests sometimes are better protected in a single-judge proceeding than in a jury trial.[126] A judge mindful of the finely drawn line between "speech unconditionally guaranteed and speech which may legitimately be regulated"[127] might find a book or movie to be protected by the First Amendment in a case in which a jury less concerned with civil liberties would find the same material obscene. But this is hardly reason to prefer a judge's decision over a jury determination in every case. Expression is presumptively protected by the First Amendment and maintains that status until a judicial determination to the contrary is made.[128] This is one of the precepts that have led the Supreme Court to refer on occasion to expression as having a "preferred" position.[129] It seems to follow, then, that a defendant in an obscenity proceeding should have the option of being tried before a judge or jury—in the interest of providing First Amendment freedoms with the most stringent of procedural safeguards.

III. Balancing and the Scales of Nuisance Law

A. The Harm

Under the *Roth-Memoirs-Miller* exclusion-by-definition approach, it was not, of course, necessary for the California Supreme Court to identify, in *Busch*, the state interest to be protected by obscenity controls per se. However, a balancing of interests enters the picture again when those controls take the form of nuisance abatement. Dean Prosser pointed out that an interference with a protected interest "must not only be substantial, but it must also be unreasonable" to constitute a nuisance.[130] Before a determina-

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MR. COWIN: Yes, your Honor.

MR. JUSTICE BLACK: Then how can we rely, how can we adopt a test that makes us rely on the findings of judges when we know there are likely to be no two of them alike?

MR. COWIN: We cannot rely on the findings, your Honor. That I agree with. If it's a question, we'll rely on the United States Supreme Court to be the final determining factor of whether or not the tests have been met. I say we have to. This is the court of last resort.

MR. JUSTICE BLACK: Well, you're right. But the problem still arises how the Court is going to do all this censorship and do anything else.

MR. COWIN: I agree.

REMBAR, *supra* note 20, at 464.

126. *See, e.g.*, Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 526-32 (1970). Professor Monaghan argues that juries cannot be expected to be sensitive to First Amendment interests in every instance and that judges are less inclined to be affected by passion and prejudice.

127. Speiser v. Randall, 357 U.S. 513, 525 (1958).

128. Roaden v. Kentucky, 413 U.S. 496, 503-05 (1973).

129. *E.g.*, Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

130. W. PROSSER, LAW OF TORTS 580 (4th ed. 1971) [hereinafter cited as PROSSER].

tion of nuisance *vel non* can be made, the court must balance the interests of plaintiff and defendant.[131]

> The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.[132]

Thus it becomes necessary, in applying nuisance law to obscenity, to confront the question evaded in the First Amendment context via the exclusion-by-definition approach: What is the *harm* in obscenity? Or, more specifically addressing the *Busch* situation: How can obscenity behind closed doors constitute such a substantial and unreasonable interference with a protected interest that it should be subject to abatement as a public nuisance?

A public nuisance in California is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[133] The annoyance or damage sought to be enjoined in *Busch* clearly was not sensory in nature.[134] Rather, as the majority pointed out, the injury inflicted upon the public was an offense against "a community's moral sensibilities."[135] Quoting a 1916 court of appeal decision, *Weis v. Superior Court*,[136] the *Busch* majority stated that " 'any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance.' "[137] The California Supreme Court thus has recognized

131. *Id.* at 580-81. Prosser points out that "[c]ertain public nuisances are designated specifically by statute. Within constitutional limitations, the declaration of the legislature is conclusive, and will preclude any inquiry into their unreasonable character." *Id.* at 583. However, with respect to a *Busch* public nuisance, it would be greatly stretching the scope of "specific designation" to contend that the legislature, by including the term "indecent" in Civil Code section 3479, intended to foreclose inquiry into the harm inherent in any assertedly indecent conduct or material.

132. *Id.* at 580.

133. CAL. CIV. CODE § 3480 (West 1970).

134. See text accompanying note 57 *supra*.

135. 17 Cal. 3d at 51, 550 P.2d at 604-05, 130 Cal. Rptr. at 332-33. A word of caution is in order here. The United States Supreme Court has held that a state may not constitutionally proscribe allegedly obscene material only because it is repugnant to the "moral standards, the religious precepts and the legal code of its citizenry." Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959). Immoral expression can, of course, be suppressed if it is found to be obscene. But it cannot be found obscene merely because it is immoral.

136. 30 Cal. App. 730, 159 P. 464 (1916).

137. 17 Cal. 3d at 51, 550 P.2d at 605, 130 Cal. Rptr. at 333.

morality as an interest of the community deserving protection under the state's general nuisance law. And in *Busch* it has concluded, as the United States Supreme Court has held a state may,[138] that obscenity tends to corrupt.[139] Some may take issue with this characterization of the *Busch* holding, for the *Busch* majority purported to discover a mode of proceeding against obscenity that had lain dormant in California's general nuisance statutes for years. However, in the interest of facilitating analysis, it is more realistic to recognize that the court has, in fact, read obscenity into Civil Code section 3479, via Penal Code section 370.

In expanding upon the interest being protected in *Busch*, the majority quoted balancing language from *People v. Luros*:[140]

138. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). In *Paris Adult Theatre*, Chief Justice Burger addressed the issue of the state's interest in regulating obscenity in these terms: "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 57-58. The Court's language in *Miller* and *Paris Adult Theatre I* led some to conclude that the Court had covertly adopted a balancing approach to obscenity in general. *See, e.g.*, Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374, 378-79 n.27 (1973). Subsequent decisions made it clear, however, that the exclusion-by-definition approach has not in any sense been abandoned. Thus, Chief Justice Burger's discussion with respect to the state's interest is the purest of dicta in the First Amendment context, with the ultimate question before the courts continuing to be whether material is obscene by definition, not whether it is injurious. However, Chief Justice Burger's language becomes more significant when viewed in the context of the public nuisance action, in that it can be construed as a recognition of legitimate interests that the state may wish to protect through its nuisance statutes.

139. The courts have long referred to the presumed tendency of obscenity to deprave and corrupt. In his concurring opinion in *Roth*, Chief Justice Warren noted that obscenity had been construed by the California courts to mean "having a substantial tendency to corrupt by arousing lustful desires." 354 U.S. at 494 (Warren, C.J., concurring). However, in 1970, the Commission on Obscenity and Pornography, after extensive investigation of this presumption, reported: "Research to date thus provides no substantial basis for the belief that erotic materials constitute a primary or significant cause of the development of character deficits or that they operate as a significant determinative factor in causing crime and delinquency." COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 243 (1970). Furthermore, the commission noted that: "On the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." *Id.* at 53. Nonetheless, the majority in *Paris Adult Theatre I* held that it is reasonable for a state legislature to determine that adverse effects do flow from obscenity, asserting that "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." 413 U.S. at 61.

140. 4 Cal. 3d 84, 480 P.2d 633, 92 Cal. Rptr. 833 (1971). This was a criminal obscenity prosecution under California Penal Code § 311.2 (West Supp. 1977).

> [I]n the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights. . . . States retain broad power to regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power.[141]

B. Usurping the Legislative Role

Apparently, then, the *Busch* majority has accepted the propositions that 1) obscenity tends to corrupt public morals, 2) the state's interest in preserving current moral precepts is sufficient to override any First Amendment objections that may be raised to definitional suppression of obscenity, and 3) the interest in preserving current moral precepts is sufficient to invoke the extraordinary remedy of a public nuisance action, despite the absence of any mention of obscenity in California's general nuisance statutes.

The last of these propositions contravenes *People v. Lim*,[142] which was cited in *Busch* both by the majority and by Justice Tobriner, dissenting.[143] In *Lim*, the district attorney of Monterey County brought a public nuisance action to restrain defendants from operating a gambling establishment. The court held that gambling could not be enjoined as a public nuisance per se in the absence of legislative authorization.[144] In *Lim*, however, the district attorney's complaint alleged that the gambling establishment at issue "draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property."[145]

The issue before the court in *Lim* was whether the trial court had properly sustained general and special demurrers to the complaint. The court held that the complaint was sufficient as against the demurrers, but only because "[c]rowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute"[146]—not because gambling could be characterized as a nuisance per se.

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141. 17 Cal. 3d at 52, 550 P.2d at 605, 130 Cal. Rptr. at 333.

142. 18 Cal. 2d 872, 118 P.2d 472 (1941).

143. The majority cited *Lim* for its mention of Weis v. Superior Court, 30 Cal. App. 730, 159 P. 464 (1916) (see text accompanying note 136 *supra*). Justice Tobriner, on the other hand, cited *Lim* for its holding that "the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within the [sic] equity's jurisdiction, should be left with the Legislature." 17 Cal. 3d at 63-64, 550 P.2d at 613, 130 Cal. Rptr. at 341 (Tobriner, J., dissenting).

144. 18 Cal. 2d at 878-80, 118 P.2d at 475-76.

145. *Id.* at 882, 118 P.2d at 477.

146. *Id.*

In *Lim*, the court noted that "the authorities are divided as to whether the expansion of the field of public nuisances in which equity will grant injunctions must be accomplished by an act of the legislature."[147] The court then came down squarely on the side of requiring legislative action:

> We think the proper rule, therefore, and the one to which this state is committed is expressed in the following language from *State v. Ehrlick* . . . :[148] "It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance . . . or to vest in the courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves."[149]

The court went on to say that, specifically with regard to "standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction,"[150] the legislature should bear the responsibility for establishing those standards. Referring to the elusive character of the concept of nuisance, the court said: "In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."[151]

The dangers of vagueness and uncertainty recognized by the court in *Lim* did not, however, seem to concern the *Busch* majority greatly. Citing *Lim* for its mention of *Weis* as an example of activity[152] that had been deemed "indecent" under the nuisance statutes and discerning "no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live' performances on the other,"[153] the majority carved out a new action against obscenity—stacking one area of the law deeply tangled in vagueness dilemmas upon another equally enmeshed in uncertainty. In so doing, it has at best ignored the spirit of *Lim*; at worst, it has overruled *Lim* while purporting to follow it. Dean Prosser wrote: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' "[154] In *Busch*, the California Supreme Court added yet another thicket to that jungle.

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147. *Id.* at 878, 118 P.2d at 475.
148. 65 W. Va. 700, 64 S.E. 935 (1909).
149. *Id.* at 879, 118 P.2d at 476.
150. *Id.* at 879-80, 118 P.2d at 476.
151. *Id.* at 880, 118 P.2d at 476.
152. *Weis* involved an exhibit at the 1915 Panama-California International Exposition in which women were performing nude. 30 Cal. App. at 731, 159 P. at 464.
153. 17 Cal. 3d at 50, 550 P.2d at 604, 130 Cal. Rptr. at 332.
154. PROSSER, *supra* note 130, at 571.

IV. The Potential Scope of *Busch*

A. The Immediate Danger

Realistically, it is unlikely that the California Supreme Court's expansion of the term "indecent" in Civil Code section 3479 will result in a torrent of public nuisance obscenity litigation. However, the potential for a sharp increase in such actions cannot be denied. Under California Code of Civil Procedure section 731, "such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."[155] Boards of supervisors and city councils are unlikely, depending on personal inclinations and extent of legal training, to be as attuned to the constitutional aspects of obscenity litigation as district attorneys and city attorneys. Furthermore, supervisors and council members are directly accountable to constituencies that may not have the vaguest notion of the constitutional intricacies involved in the law of obscenity. And a vociferous, morally outraged minority can exert extremely influential pressure on boards of supervisors and city councils, especially on a subject as emotionally volatile as obscenity.

In the case of direction from the board of supervisors or the legislative authority of a town or city, the language of Code of Civil Procedure section 731 is imperative: "[S]uch district attorney, or city attorney, . . . must bring such action. . . ."[156] Prosecutorial discretion serves as a welcome buffer in the realm of obscenity regulation. For a variety of reasons, ranging from economic realities to ethical principles, prosecutors probably will not bring many *Busch* actions. But if and when the voters discover that their representatives on boards of supervisors and city councils have the authority to force litigation against allegedly obscene materials, the prosecutorial discretion buffer will lose its vitality—and the result could, in fact, be a deluge of *Busch* actions.

When the *Busch* decision came down, there was some concern in the prosecutorial community about the prospect of city attorneys bringing *Busch* actions.[157] A number of city attorneys since have agreed not to bring *Busch* actions without first conferring with district attorneys.[158] However, these are informal agreements, and the statutory authority of Code of Civil Procedure section 731 is unaffected.

B. The Private Action Danger

There is another danger inherent in the *Busch* decision, which arises from a logical extension of the majority's reasoning. Now that public moral-

155. CAL. CIV. PROC. CODE § 731 (West 1955).

156. *Id.*

157. Interview with Al Knudson, California deputy attorney general, in San Francisco (Feb. 3, 1977).

158. *Id.*

ity has been recognized as a legitimate interest deserving the protection of California's nuisance statutes,[159] zealous private citizens concerned about declining morality might seek to bring nuisance actions themselves. An action against an activity that constitutes a public nuisance may be brought by a private citizen in either of two ways. A private citizen may have standing to bring a public nuisance action if he or she can show particular or special injury different in kind from that of the general public;[160] or an individual may bring a nuisance action if the activity complained of can be characterized as both a public and a private nuisance.[161]

The first of these courses was attempted in the case that was overruled in part in *Busch, Harmer v. Tonylyn Productions, Inc.*[162] In *Tonylyn*, six individuals sought to enjoin the exhibition, in a closed theater, of an allegedly obscene motion picture. The action was brought under the general public nuisance statutes and the Red Light Abatement Law. The court of appeal, in a three-page opinion, held that a film shown in a closed theater could not be characterized as a public nuisance under Civil Code section 3479[163] and added, without explanation, that plaintiffs had not alleged the special injury required to confer standing upon them. It also held that the Red Light Abatement Law was not applicable to obscenity per se. The *Busch* majority specifically disapproved the first of these three holdings and endorsed the third.[164] The question of standing for a private citizen was not considered in *Busch*.

1. Damage Different in Kind

Dean Prosser's characterization of the law of nuisance as a jungle[165] is borne out by a perusal of California case law. The reasoning of the various decisions, and often the holdings themselves, can be extremely difficult, if not impossible, to reconcile.[166] It is unclear exactly what sort of special

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159. See text accompanying notes 57 & 134-139 *supra*.

160. CAL. CIV. CODE § 3493 (West 1970).

161. Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350, 355 (1971); PROSSER, *supra* note 130, at 586-91.

162. 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (1972).

163. See text accompanying note 54 *supra*.

164. See text accompanying notes 49-57 *supra*.

165. See text accompanying note 153 *supra*.

166. *Compare* Johnson v. V. D. Reduction Co., 175 Cal. 63, 164 P. 1119 (1917) *with* Donahue v. Stockton Gas and Elec. Co., 6 Cal. App. 276, 92 P. 196 (1907). In the former case, a hogyard from which odor and stench emanated was held to be a public nuisance abatable by a private citizen because he was specially injured in that he lived less than a mile from the hogyard. In the latter, the court specifically held that plaintiff's action would not lie by reason of pollution of the atmosphere suffered in common by a large part of the community, even though plaintiff's property was adjacent to defendant's plant, but that plaintiff did have standing by reason of direct damage (poisoning of soil and water) to his land. Also, *compare* Wade v. Campbell, 200 Cal. App. 2d 54, 19 Cal. Rptr. 173 (1962) *with* Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82 (1900). In the former case, the court held: "While the conditions [a dairy emitting noxious odors and excessive

injury would have to be alleged by a private citizen seeking standing to bring a public nuisance action under *Busch*. It is certain, however, that such standing need not be predicated on an interference with a property right.[167]

The nature of the injury to be alleged would seem logically to be that recognized in *Busch* itself; that is, injury to the interest in preserving moral standards. There are a number of ways in which private plaintiffs might allege that they are suffering injury, in this context, special to themselves. If, for example, plaintiffs' children have only one playground on which to expend their youthful energies, its proximity to an adult bookstore might provide the basis for an allegation of special injury. Given the court's recognition in *Busch* of the supposed corrupting influence of obscene materials, even in the absence of direct exposure to those materials, parents might allege that the very presence of an adult bookstore is injurious to their children—and thus an interference with their child-rearing rights and duties. Furthermore, parents faced with the dilemma of keeping their children cooped up in an apartment or allowing them to be exposed to the corrupting emanations from such a bookstore might allege that they are being subjected to constant mental strain, perhaps even involving physiological repercussions. Countless similar allegations could be framed by an imaginative litigant. It seems arguable, in fact, that the mere proximity of a plaintiff's residence to an alleged public nuisance might, in itself, constitute sufficient special injury to give him or her standing in a *Busch* action.[168]

2. *The Private Nuisance Approach*

Private actions under the *Busch* rationale, however, need not necessarily be limited to instances in which special injury can be alleged. If a plaintiff can show that a public nuisance is also a private nuisance as to him or her, the action will lie despite the absence of damage different in kind

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dust, the operation of which resulted in large fly and mosquito populations in the area] created and maintained by defendants on their property are sufficient to constitute a continuing and public nuisance affecting a considerable number of persons in the community, the plaintiffs, as near residents and property owners, were specially injured thereby." 200 Cal. App. 2d at 60, 19 Cal. Rptr. at 176-77. In the latter case, the court held that plaintiff could maintain a nuisance action even though he could show no special damage different in kind from the public generally because the public nuisance complained of was also a private nuisance as to him. The court apparently rested its holding on this ground because plaintiff was unable to show special damage despite the fact that he lived "nearer [to a creamery emitting vile and noxious odors and gases] than any other resident of the neighborhood." 128 Cal. at 495, 61 P. at 82.

167. Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350, 356 (1971).

168. See note 165 *supra*. *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding municipal zoning controls on location of adult entertainment as being reasonable time, place and manner restrictions; denied theater owners' standing to assert vagueness and overbreadth attacks).

from that of the general public.[169] In order to establish the existence of a private nuisance, plaintiff must allege an interference with an "interest sufficient to be dignified as a property right."[170]

Furthermore, to state a valid cause of action in private nuisance, plaintiff must allege a substantial and unreasonable interference with the use and enjoyment of land—that is, with the interest claimed in the land.[171] This interference need not, however, involve direct damage to the land.[172] Among the cases recognizing the existence of a private nuisance in the absence of direct damage to land is *Brown v. Arbuckle*.[173] In that case, a funeral parlor in a residential area was held to constitute a nuisance in fact in that:

> [T]he establishment of a mortuary and fneral parlor on defendant's property would greatly reduce the sale and rental value of plaintiff's property; that such an establishment would interfere greatly with the comfortable enjoyment of his property and would be a constant mental irritant to the plaintiff and members of his family and would cause them to suffer physical disturbances.[174]

The physical disturbances alleged apparently were merely the physiological repercussions of the "constant mental irrita[tion]."[175] *Dean v. Powell Undertaking Co.*[176] was distinguished as a case involving an allegation that a funeral parlor was a nuisance per se: "The court [in *Dean*] correctly found that a nuisance *per se* did not exist. However, there was nothing in the evidence or findings to show that the undertaking establishment was a nuisance in fact."[177]

As Civil Code section 3479[178] had not been interpreted to include funeral parlors as nuisances per se, it was incumbent upon plaintiffs to allege facts that were embraced by section 3479. This difficulty would not face a plaintiff in a private nuisance action against allegedly obscene materials, since the *Busch* majority has held that obscenity per se does come within

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169. Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350, 355.

170. *Id.* at 125, 99 Cal. Rptr. at 356.

171. *Id.* at 126, 99 Cal. Rptr. at 357.

172. Examples cited in *Venuto* of actionable private nuisances involving no direct damage to land nor prevention of its use are smoke from an asphalt mixing plant, noise and offensive odors from the operation of a refreshment stand, noise and excessive dust from a rock quarry, smoke from a donkey-engine, discoloration of the plaintiff's building, and poisonous dust carried by the wind to plaintiff's land. *Id.*

173. 88 Cal. App. 2d 258, 198 P.2d 550 (1948).

174. *Id.* at 263, 198 P.2d at 553.

175. "Medical testimony was received to the effect that the mental strain caused . . . [by the presence of the funeral parlor] would reasonably result in direct physical disturbances." *Id.*

176. 55 Cal. App. 545, 203 P. 1015 (1921).

177. 88 Cal. App. 2d at 263-64, 198 P.2d at 553.

178. See note 46 *supra*.

section 3479. *Dean* was cited by Justice Tobriner in his dissent in *Busch* for the proposition that a nuisance must be indecent or offensive to the senses.[179] The court in *Brown* apparently did not agree. Nor, obviously, did the majority in *Busch*.[180] The injuries recognized in *Brown* as sufficient to entitle the plaintiff to maintain a private nuisance action included: 1) diminution in the sale and rental values of property, 2) constant mental irritation, and 3) the physiological repercussions of that mental irritation. Presumably, plaintiffs alleging that a *Busch* public nuisance is also a private nuisance as to them could urge similar allegations of injury.

3. The Argument Against a Private Action

The danger of a private civil action against the dissemination of allegedly obscene materials is not so much that plaintiffs in such actions would win injunctions as that a multiplicity of actions would discourage publishers, producers, and distributors from having anything to do with so-called "borderline" materials. Only three years ago the United States Supreme Court held that the film "Carnal Knowledge" was not obscene.[181] The fact that such litigation reached the highest court of this nation attests to the fact that the borderline is indeed wide, reaching far into the realm of protected expression.[182] Some may scoff at the idea that purveyors of borderline or even almost certainly obscene materials will be deterred by the threat of litigation, for, indisputably, dealing in such materials is profitable. If, however, a paperback distributor were faced with several separate actions in different jurisdictions, the economic burdens of litigation might become excessive and the chilling effect would take hold. The ramifications of such an eventuality are at least threefold: Not only would a businessman be effectively deprived of his stock in trade, but, more importantly, artistic development and other forms of presumptively protected expression would suffer; and, in the final analysis, respect for the courts is bound to be

179. See text accompanying notes 81-85 *supra*.

180. See text accompanying notes 52-57 *supra*.

181. Jenkins v. Georgia, 418 U.S. 153 (1974).

182. As the Supreme Court noted in its opinion in *Jenkins*, "Carnal Knowledge" appeared on many lists of 1971's "Ten Best" movies, and Ann Margret was nominated for an Academy Award for her performance. *Id.* at 158 & n.5. The movie was "basically a story of two young college men, roommates and lifelong friends forever preoccupied with their sex lives." *Id.* at 158. But there was "no exhibition whatever of the actors' genitals, lewd or otherwise." Nonetheless, the Georgia Supreme Court had upheld the trial court's finding that "Carnal Knowledge" was obscene. Justice Gunter dissented in that decision, citing reviews from Saturday Review, the Washington Post, the New York Daily News, Time, the Atlanta Constitution, and the Atlanta Journal and noting that none had given "the slightest indication that the film was obscene-pornographic." He quoted this language from the Atlanta Journal review: "It is a movie that will be controversial in the heaviest sense of the word, but it is still one of the best that we have had in a long time." Jenkins v. State, 230 Ga. 726, 731-32, 199 S.E.2d 183, 186-87 (1973) (Gunter, J., dissenting).

impaired. Consider the words of Justice Tobriner, writing for a unanimous California Supreme Court holding that "Tropic of Cancer" was not obscene:

> Man's drive for self-expression, which over the centuries has built his monuments, does not stay within set bounds; the creations which yesterday were the detested and the obscene become the classics of today. The quicksilver of creativity will not be solidified by legal pronouncement; it will necessarily flow into new and sometimes frightening fields. If, indeed, courts try to forbid new and exotic expression they will surely and fortunately fail. The new forms of expression, even though formally banned, will, as they always have, remain alive in man's consciousness. The court-made excommunication, if it is too wide or if it interferes with true creativity, will be rejected like incantations of forgotten witch-doctors. Courts must therefore move here with utmost caution; they tread in a field where a lack of restraint can only invite defeat and only impair man's most precious potentiality: his capacity for self-expression.[183]

In his dissent in *Busch*, Justice Tobriner wrote: "Hereafter, the public's right to read books or magazines, to view plays or motion pictures, can be permanently curtailed if a city attorney can find a *single judge* who believes the material is obscene."[184] The chilling impact on First Amendment interests would be far greater if "city attorney" were replaced by "private citizen" in that statement. How, then, can the California courts turn back the threat of private actions without coming into conflict with the principles of *Busch*? To answer that question, it is first necessary to distinguish clearly—as the courts sometimes have not—between public nuisance and private nuisance. Though they share a common name, and though they are grounded in the same statute in California,[185] public nuisance and private nuisance are distinctly separate causes of action, with distinctly separate origins.

Public nuisance originated in the English common law as an infringement of the rights of the Crown, and by the time of Edward III it had been extended to invasions of public rights.[186] Near the end of the nineteenth century, public nuisance was defined by a leading writer on criminal law as any "act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."[187] This broad catch-all was used to reach such harms[188] as interference with a market, smoke from a

183. Zeitlin v. Arnebergh, 59 Cal. 2d 901, 922-23, 383 P.2d 152, 166, 31 Cal. Rptr. 800, 814 (1963).

184. 17 Cal. 3d at 63, 550 P.2d at 613, 130 Cal. Rptr. at 341 (emphasis in original).

185. CAL. CIV. CODE § 3479 (West 1970) (see note 46 *supra*).

186. RESTATEMENT (SECOND) OF TORTS § 821B, Comment a at 16 (Tent. Draft No. 16, 1970).

187. *Id.* at 16-17.

188. The term "nuisance" is derived from the French word for "harm." RESTATEMENT (SECOND) OF TORTS, Explanatory Notes, ch. 40, at 6 (Tent. Draft No. 16, 1970).

limepit, and diversion of water from a mill.[189] The single thread that seemed to tie public nuisance actions together as a distinct realm of the common law was the nature of the interest being invaded or threatened. That interest was always public in nature.[190]

The private nuisance action, on the other hand, developed as an entirely separate branch of the law, designed to remedy interferences with the private use and enjoyment of plaintiffs' land—or interest in land.[191] Private nuisance is distinguishable from trespass in that it does not necessarily involve interference with possession of land.[192] In terms of the interests being protected, however, private nuisance seems more akin to trespass than to public nuisance.[193] Contrasting private nuisance with public nuisance, Dean Prosser had this to say:

> These two lines of development, the one narrowly restricted to the invasion of interests in the use or enjoyment of land, and the other extending to virtually any form of annoyance or inconvenience interfering with common public rights, have led to the prevailing uncertainty as to what a nuisance is. A private nuisance is a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes, the normal remedy is in the hands of the state. The two have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names.[194]

Furthermore, a public nuisance action brought by a private individual seems more akin to a private nuisance action than to a public nuisance action brought by a public official. This is so because of the nature of the legally protected interest involved in a public nuisance action brought by a private individual. If the activity complained of is not also a private nuisance, the individual plaintiff, to gain standing to bring a public nuisance action, must show injury different in kind, not merely degree, from that of the general public.[195] In other words, the plaintiff must show that a different interest—

189. PROSSER, *supra* note 130, at 572.

190. *Id.* at 585.

191. *Id.* at 591. *See* Lind v. City of San Luis Obispo, 109 Cal. 340, 344, 42 P. 437, 438 (1895).

192. RESTATEMENT (SECOND) OF TORTS § 821D, Comment e at 43 (Tent. Draft No. 16, 1970).

193. *See* RESTATEMENT (SECOND) OF TORTS § 821D, Comments e & f at 43-44 (Tent. Draft No. 16, 1970).

194. PROSSER, *supra* note 130, at 572-73.

195. Brown v. Rea, 150 Cal. 171, 88 P. 713 (1907); Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971); Voorheis v. Tidewater S. Ry., 41 Cal. .App. 315, 182 P. 797 (1919); Donahue v. Stockton Gas and Elec. Co., 6 Cal. App. 276, 92 P. 196 (1907); CAL. CIV. CODE § 3493 (West 1970).

private to him or her—has been invaded. Thus, both a private nuisance action and a public nuisance action brought by a private individual require an invasion of a legally protected *private* interest. A public nuisance action brought by a public official, on the other hand, requires an invasion of a legally protected *public* interest.

With these distinctions in mind, it is easier to perceive limitations that a court might logically impose on the *Busch* decision. In the *Busch* context, the interest being protected is public morality—that is, a public interest. This interest has long been recognized in California as one deserving the protection of public nuisance law.[196] It is the sort of interest, however, that is to be protected in the courts only by public officials, in the absence of special injury.[197]

Houses of prostitution are classic examples of public nuisances predicated on an invasion of a legally protected public interest. In the case of a public nuisance action brought by a private individual against a house of prostitution, Prosser had this to say: "[T]here is no difficulty in finding a different kind of damage. . . . where there is any substantial interference with the plaintiff's use and enjoyment of his own land, as where a bawdy house, which disturbs the public morals, also makes life disagreeable in the house next door."[198] As for a private nuisance action against a house of prostitution, "[c]onduct which is . . . destructive of the general welfare, as in the case of a house of prostitution, is nearly always a private nuisance when it interferes with the enjoyment of the plaintiff's property."[199]

In the California case of *Farmer v. Behmer*,[200] a private individual was granted injunctive relief against a house of prostitution because "[t]he premises had by the conduct of their occupants become 'indecent and offensive to the senses,' and, as found by the court, 'an obstruction to the free use of property' of plaintiff so as to 'interfere with' its 'comfortable enjoyment' and the 'comfortable enjoyment of life' while residing on it, and was and is a nuisance."[201] Thus, a house of prostitution, though it is a per se invasion of a legally protected public interest, must be shown to be a nuisance in fact as to a private individual seeking relief in the courts.

In the case of a theater such as that involved in *Busch*—in the absence, at least, of anything offensive about the exterior of the premises—the only

196. *See, e.g.*, Pon v. Wittman, 147 Cal. 280, 81 P. 984 (1905); Weis v. Superior Court, 30 Cal. App. 730, 159 P. 464 (1916); Farmer v. Behmer, 9 Cal. App. 733, 100 P. 901 (1909).

197. Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 123, 99 Cal. Rptr. 350, 355 (1971).

198. PROSSER, *supra* note 130, at 588-89.

199. *Id.* at 598.

200. 9 Cal. App. 773, 100 P. 901 (1909).

201. *Id.* at 778, 100 P. at 902-03. The court here seems to be talking about both special injury in the public nuisance context and private nuisance.

interest being invaded under a strict reading of *Busch* is public in nature. If, as in *Farmer,* the proprietors or occupants by their conduct invaded more than the interest in preserving public morality, they could be held answerable in a private action. But the existence of the theater itself, its movies being shown behind closed doors, would not necessarily constitute an invasion of a private interest sufficient to support either a private nuisance action or a public nuisance action brought by a private individual.

The threat of the private action against allegedly obscene materials is not illusory. In *Harmer v. A Motion Picture Entitled "The Devil in Miss Jones,"*[202] the Second District Court of Appeal held, in an unpublished opinion, that plaintiffs had failed to allege facts sufficient to support just such a private action. The trial court in that case, prior to the supreme court's *Busch* decision, had sustained defendants' general demurrer and dismissed without leave to amend. The court of appeal, however, in the wake of *Busch*, remanded with instructions to allow plaintiffs to file an amended complaint, saying: "Nothing in the complaint suggests that the plaintiffs cannot amend to show special injury sufficient to justify the maintenance of a private suit to abate a public nuisance or a controversy with a potential for substantial injury to them justifying their maintenance of a declaratory relief action."[203]

V. Conclusion

In reading obscenity into the state's general nuisance statutes, the California Supreme Court has assumed a legislative role and compounded the vagueness difficulties inherent in the exclusion-by-definition approach to obscenity regulation. Without the benefit of legislative debate and representative decisionmaking, the court has created a cause of action under which expression can be suppressed without a trial by jury and without proof beyond a reasonable doubt that it is obscene. *Busch* was improvidently decided and should be overruled.

However, if the supreme court chooses to stand by its decision in *Busch*, it should be limited in application to its specific facts. District attorneys and city attorneys now have authority to bring public nuisance actions against allegedly obscene materials. Boards of supervisors and city councils, through district attorneys and city attorneys, also are empowered by statute to initiate proceedings. There is a greater danger to First Amendment interests here because of the susceptibility of local representative bodies to pressure from morally outraged minorities. But essentially the same consid-

202. 2d Civ. No. 43778 (Cal. Ct. App., 2d Dist.) (Sept. 17, 1976).

203. *Id.*, slip op. at 16. Rather than return to the trial court, plaintiffs sought a hearing before the California Supreme Court, which denied their petition. 18 Cal. 3d (advance sheets, vol. 33) (p. 3 of supreme court minutes) (Nov. 12, 1976). A petition for a writ of certiorari was denied by the United States Supreme Court, April 18, 1977. 45 U.S.L.W. 3690 (U.S. Apr. 19, 1977) (No. 76-1110).

erations that make a district attorney or city attorney hesitant to bring an obscenity action on his or her own should operate as a countercheck. However, if actions are allowed to be brought by private citizens, the threat to First Amendment interests could reach truly alarming proportions. The California Supreme Court thus should take the first available opportunity to state clearly that the interest recognized as warranting the protection of the nuisance statutes in *Busch* is purely *public* in nature and that private actions therefore will not lie.

Many will contend that *Busch* is a welcome alternative to criminal obscenity prosecutions—that an injunction is far preferable to a jail cell. The objections to this contention are twofold. First, the civil injunctive alternative is nothing more than a stopgap measure. What is needed is a thorough reappraisal of the basic premises upon which *Roth* and its progeny rest. Extensive research has not indicated any rational grounds for suppressing obscenity, at least in the case of dissemination to consenting adults, and eventually the courts will have to recognize this. Secondly, even if such a reappraisal is not to be—in which case it must be admitted that an injunction is, indeed, far preferable to a jail cell—the civil injunctive approach to obscenity regulation should be carefully defined, with proper constitutional safeguards, by statute.

Problems of vagueness are rampant enough in the realm of obscenity regulation; piling on the vagaries of the jungle surrounding California's general nuisance statutes is a mistake. If there is to be a civil injunctive remedy against obscenity in California, it should be left to the legislature to enact a carefully defined scheme within which that remedy can be applied. The alternative is judicial uncertainty and inevitable repression of new and daring forms of expression that deserve First Amendment protection.