Obscenity Law: A Public Policy Analysis

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OBSCENITY LAW: A PUBLIC POLICY ANALYSIS

Martin Shapiro†

I. INTRODUCTION

THE PROTOTYPE OF AMERICAN DOMESTIC POLICY-MAKING, at least since the New Deal, has been innovation followed by supplementation. Policy and new programs have appeared nearly synonymous. It has been assumed that programs once initiated would be continued and expanded, and that the policy struggle would be waged over the tempo and scope of the expansion. To be sure in the last few years a new conservative coalition of politicians, social scientists, localists, and conservationists (in the broadest and most primitive sense of the word) have begun to challenge the liberal assumption that more is better. But even the Mies school of public policy (“Less is more”) has rarely proposed that the highways, housing projects, and schools we have built be torn down. Instead they usually argue that the goals of the traditional programs can be better met by new programs that funnel a greater proportion of new dollars and decisions into private or local channels, have a lesser impact on the urban and rural environment, and generally take fuller account of the risks of unanticipated consequences. While Mr. Moynihan may wish to dismantle the welfare program and Mr. Bickel the public schools, on the whole the new right too is oriented to new programs mixed with defenses of the status quo based either on the invisible hand or the confession that we don’t know what else to do. Even this latter position (social science conservatism) tends to presuppose that it would be worth doing something if we knew what to do.

All of this is preliminary to pointing out that the area of governmental policy toward obscene expression is a rather peculiar one—because for some years the principal thrust of the debate has not been about adopting new policies but whether or not to get rid of ones we have always had. Where policy and innovation are synonymous, the elements of policy-making tend to stand out clearly. Unless the real world problem were fairly clear and pressing, there would be no demand for innovation. The sources of the demands allow us to identify the interests involved. And the new proposals themselves suggest at least some of the alternatives available and something

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of the goals sought. Where, as in the obscenity area, we have a policy simply because we have always had one, it is not clear what the problem is, what social interests are affected, or what goal the policy is designed to achieve, let alone what alternative policies are available to achieve whatever it is we are after.

To put the point somewhat differently, rational models of policy analysis tend to assume a clean slate. The policy-maker identifies a problem, specifies his goals, canvasses alternatives, and chooses a policy (i.e., an alternative in some degree better than doing nothing). Even incremental models, while imposing cost and other constraints on rationality, neglect or underemphasize the dynamic power of the status quo, treating it only as a base of maneuver. Where policy is embodied in law, we may frequently encounter prescriptive duties as well as prescriptive rights in the Burkian sense. A long continued policy imposing constraints may serve as its own rationale. After a certain survival time it may act to prevent either rational or incremental re-evaluation or to obscure or interdict the collection of information on problems and goals that would be a prerequisite to such re-evaluation. The prescriptive thrust of traditional obscenity regulation is very great and tends to strongly inhibit new policy initiatives.

No matter how strong the prescriptive inertia, however, the literature tells us that the search for policy alternatives, even the alternative of simply abandoning the existing policy, will begin when there is trouble. We began to have trouble in the early 1930's when a new wave of literature which took sex as a central theme, and adopted a newer and more direct style toward the theme, (after all it had been a principal theme of James and Hardy, too) ran afoul of the old obscenity laws. The trouble then was Joyce, Lawrence, and Miller. And since the trouble began, we have been simultaneously involved with trying to fix the long-established policy and trying to decide what the policy-making process ought to be like.

For obscenity is not only a peculiar policy area because of the long-standing and unquestioned status of the program, but because it involves courts and the Constitution. It used to be a commonplace that every problem of American domestic policy was translated into a constitutional problem. After 1937 it became a commonplace that the Court did not interfere in economic affairs. Post 1954, we began to live between the two commonplaces. Large areas of domestic policy have been

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1The newly formed states inherited the English common law of obscene libel to the extent that they inherited common law at all. All of the states subsequently passed obscenity statutes.

2In the words of a popular soldier's ditty: We're here because we're here because we're here because we're here.
reconstituted, or rather have been raised to the level of conscious policy-making through constitutionalization by the Court—race relations, crime, elections, and most recently welfare. On the other hand, the Court has so far stayed out of most of the economic areas. On the other hand, yet, we are currently enjoying a new vogue of constitutionalism—with demands for ecological, women’s rights, and other amendments. Whether consciously or unconsciously, operationally these are demands that the courts be reintroduced into policy-making processes that they were ejected from or opted out of in the pre-World War II period. In any event most problems of public policy can be discussed without major attention to the question of what role the courts—and more particularly the Supreme Court—ought to play in the making of public policy. In a few areas, among them obscenity, this question is crucial, and in practice becomes deeply entangled with substantive questions of policy. Precisely because policy, the Constitution, and the Court become deeply entangled in practice, it might be well to at least partially separate them for purposes of analysis.

II. WHO IS BEING GORED, HOW, WHERE, AND WHEN?

In turning first to the policy as opposed to the process, it would appear immediately obvious that our obscenity program is prophylactic rather than positive. It is aimed at preventing something rather than creating something—but what? The obscenity statutes traditionally do not say—either by specifying what particular health in the society they are trying to protect or what particular bug they are trying to destroy. As in many other instances in common law countries, the legislatures simply adopt the traditional common law language and then allow the next courts to determine what the last legislature meant, by determining what the courts before that meant. For most of the statutes simply make “obscene” publication a crime with no further explanation. A melange of judicial and academic commentary indicates that the bug that the legislature must have meant, when it said it meant what the previous courts had meant, was lustful thought—that is, thought about sex, inspired by verbal or pictorial representation. The health that it appears to have been defending was the sexual morals of the citizenry.

Thus in terms of pure policy analysis the situation is fairly clear. The policy-makers had specified the goal or optimal state of affairs—one in which no impure sexual thoughts occurred—that is presumably any sexual thoughts not directly inspired by and connected with the marriage bed. The policy of banning suggestive written and pictorial works was a necessary, if not sufficient, step to achieving that goal. This prescriptive goal and policy were obviously initially based on the interest of the state in the preservation
of Christian morality. So long as there was no trouble, this traditional goal was not questioned and the policy remained entrenched. Once trouble occurred, however, and policy choices had to be justified anew, the ancient goal came into question.

This point is clearer if we switch from the language of goals to that of interests. In social science oriented policy analysis, “interests” are equated to inputs which fuel the black box of policy-making. Legal scholars are more inclined to treat “interests” on the output side. The orthodox legal question of “what interests does, or should the law serve?” is really the question, “what goals should the law pursue?” When the trouble came the lawyers saw it as involving a weighing of conflicting interests, and in doing so lumped together a number of problems, some of which actually involve opportunity costs, others, choices of goals, and others yet predicted outcomes of proposed alternatives.

Sticking for the moment to the terminology of interests, we can briefly survey these problems. First the question is put de novo, can the modern secular state legitimately claim the power to further the interests of Christian morality? If not, could the state claim a legitimate interest in public morality on non-Christian grounds? If not, were there other social interests which could justify regulation of erotic expression? If so, were traditional obscenity laws or new forms of statutes appropriate to serve those interests? And finally, how were the social interests in the regulation of erotic expression, however they were defined, to be balanced against the social interest in free expression?

If the prescriptive duty were to be maintained in the face of the very great decline in the appeal of enforcing Christianity by statute, some secular interest had to be discovered to replace the earlier religious one. The Straussian school of political philosophy stepped into the breach with the Greek equation of good man and good state. The state cannot achieve

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4Most of the opportunity cost referred to in this paper are costs to the attainment of perfect freedom of speech incurred by choosing to pursue the various goals associated with obscenity legislation rather than pursuing freedom. I have chosen the rather broad term opportunity costs rather than one or more of the more precise terms for specified forms of opportunity costs used by economists because I am not sure at this point that it is worth carrying the analogy too far in an area where the impossibility of quantification prohibits all but the crudest calculations. I have deliberately avoided the term “trade offs” because whatever its technical meaning to economists, it is likely to suggest “ad hoc balancing” to students of constitutional law. By sticking to cost notions, the analysis is usable either by ad hoc balancers or their opponents since the policy-maker may decide in advance that a zero level of opportunity costs to freedom of speech is the only acceptable level that may be incurred in pursuit of other goals. See Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962).

goodness unless the citizens become good. The state, therefore, has a compelling interest in the virtue of its citizens. The state goal of morality in the individual is thus justified even aside from religion. The predicted outcome of obscenity regulation is the elimination of bad thoughts. The argument runs: since society invests large resources in education on the assumption that reading good books leads to good thoughts, it must also assume that not reading bad ones will reduce the quantum of bad thoughts. Opportunity cost problems are solved either by denying they exist, since virtue, not free expression, is the goal of the state, or by a standard split-the-difference compromise in which the proposed statutes are to allow some room for free expression while suppressing enough speech to make some headway toward virtue.

The Strausians, of course, have no difficulty with the prescriptive thrust of obscenity policy, since they continue the prescription. When the trouble started the Supreme Court originally attempted analysis based solely on prescription. Without seeking to define the social interest (i.e., the social goals aimed at) in obscenity law at all, the Justices simply acknowledged that we had always had such laws and, therefore, assumed that they must be both a valid expression of policy goals and a reasonably accurate prediction of the outcomes of a policy alternative. The Court then reduced the opportunity costs of the policy to zero by asserting that obscene speech was utterly without redeeming social importance and thus not included in the goal of freedom of speech.

A final solution along the prescriptive thrust line was the argument—rarely made independently, but frequently mixed in with others—that even if the Christian goal of the state had been attenuated, it still had a major interest in declaring by statute its condemnation of evil. This declarative aspect of obscenity statute leads us down an important byway of policy analysis. The heading of the section is “Who is being gored,” a variant, of course, on who gets what. Policy analysis will normally treat statutes as merely formal outputs, looking beyond them to actual social impact in determining what alternative has actually been adopted, whether it is achieving anticipated results, and even what goals have actually been given preference. A special case must, however, be recognized in which

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6 W. Berns, supra note 5.
7 H. Clor, supra note 5.
8 R. Kuh, Foolish Figleaves: Pornography In and Out of Court (1967), sometimes appears to espouse the traditional morality school and sometimes to hinge his case on pure prescription, arguing that since the obscenity laws exist they must be made workable. His statutory proposals embody an almost pure split-the-difference cost solution in which adults may read nearly anything, in return for a very strict control of all pictorial material and advertising.
statutes are declarative-cathartic, their sole purpose being to put the state on record as being for or against something. Such statutes are not intended to allocate governmental resources either because the goal is not deemed worth any cost or because the effective alternatives are deemed to be appropriate to the private rather than the public sphere of action. A statute declaring an official "Eat More Peanuts Week" is an example. Obscenity laws may be treated simply as declaring "Read Fewer Dirty Books" years. Of course, even the purely hortatory resources of government have some limits, if we assume that the declarations are designed to be heard and heeded. But frequently the intention is more cathartic than declamatory. There may be a widely held public interest in simply going on record as being against sin, and passing a statute provides the record.

The difficulty is, of course, that since the means of going on record is a statute, and statutes are usually directives to undertake action alternatives, what was meant as merely a formal output by the policy-maker may be turned into a real output by the administrator. In the process costs may be incurred which the policy-maker did not intend and which, if known in advance, would have led to the refusal to adopt the formal policy.

Thus while the transposition of obscenity laws into declarative-cathartic statutes might be a good way to bow to the prescriptive thrust, and at the same time reduce costs and eliminate the pursuit of low preference goals, such a policy tactic will only be successful if accompanied by a device preventing administrators from moving toward action. When we take up the special problem of courts, we will discover that courts can be especially useful in effectuating declarative-cathartic policies by inventing doctrinal devices that preserve the statute but prohibit administrative action and that some of the Supreme Court's activities have been aimed at precisely this solution to the problems of obscenity policy.

A major attempt to redefine the goals of obscenity policy, while acknowledging its prescriptive thrust, has centered about various interests other than those in general Christian, or Aristotelian, morality. First there is the parental interest in the tutelage of their children. If the obscenity statutes were aimed at the sale of erotic materials to minors, then they would be justified as aimed at the goal of parental control through an action whose anticipated result would be the reduction of the flow of non-parentally approved materials to children. No substantive moral content related to sex as sin appears in the goal. Presumably parents could provide their own children with whatever erotic philosophy they desired and pass on to them whatever materials were in accord with their personal sexual views.9

9This is one of the several approaches which Kuh has adopted. Id.
Second there is the community’s aesthetic interests or put negatively and individually, the interest in being protected from offensive or shocking sights and sounds. Here again we touch base with a common law category of no fixed meaning—nuisance. Our legal tradition has always acknowledged a power in the state to protect the innocent bystander from phenomena which assault his sensibilities. Our legal tradition is, of course, sufficiently flexible to change the substance of the state’s power as sensibilities change. The prescriptive thrust of obscenity regulation might be diverted to a policy of prohibiting the display of erotic materials in such a way as to offend and shock the unintentional viewer. The goal is defined either as individual security (from affront) or community aesthetics. The alternative of banishing the material from public view presents high expectations of achieving the goal. Opportunity costs are relatively low and centered on the distribution rather than on the substance of free expression. The advertising of a work might have to be less erotic than the work itself.

Finally, the trouble might lead to the open acknowledgement that the goal of traditional obscenity regulation no longer was highly valued, that the alternative chosen, which after all was thought control, was beyond the range of alternatives deemed acceptable by the policy-maker, and that the opportunity costs in terms of such valued goals as freedom, beauty, and intellectual development were excessively high. In short, there is no social interest in preventing men from thinking about sex. The prescriptive thrust of the obscenity tradition would be met head on.

A variant on this latter piece of policy-analysis runs as follows. The goal of obscenity regulation ought not to be defined as preventing sexual thoughts. Instead the prophylaxis ought to be aimed at sexual fantasies. The goal is thus shifted from religious and moral to psychological values. Only materials presented in such a way as to incite sexual fantasies, rather than that which deals more circumspectly with erotic themes, are to be defined as obscene. The goal is now mental health which has a high contemporary value. Opportunity costs are either a split-the-difference compromise or reduced to zero depending on the aesthetic theory adopted. The major problem is in the predicted value of the alternative, since it is not entirely clear that sexual fantasies are inimical to mental health, nor that those prone to sexual

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10Traditional aesthetic theory would differentiate art from voyeurism on the basis of whether the material preserved the “aesthetic” or phychical distance of the reader-viewer or served to inspire in him the vicarious enjoyment of the situation portrayed. Thus the prohibition of materials which created sexual fantasies would incur no cost to artistic expression since such materials deliberately break down aesthetic distance. Newer aesthetics may be abandoning aesthetic distance in favor of direct manipulation of the reader-viewer’s psyche. If so, the abandonment of morality in favor of the repression of sexual fantasies would impose some, but presumably lesser costs, on today’s artists.
fantasies will cease to have them if certain types of erotic materials are kept out of their reach. The major advantage of this mode of analysis is that it acknowledges the prescriptive thrust of the obscenity tradition while reducing the scope of regulation very considerably. Because the shock and fantasy rationales are both hinged to shifting from moral to psychological health and security as a goal, they are frequently combined. In combination they form the "hard core pornography" test or definition of obscenity.\textsuperscript{11}

III. WHO WANTS WHAT?

The above discussion assumes that policy-analysis can and ought to proceed in terms of goals, costs and the predicted outcomes of proposed alternatives. It may be more illuminating initially to ask, particularly where a long standing unreexamined policy exists, who really wants what? Of course we all know better than to speak in terms of the mythical average voter, but policy-makers are still likely to find it useful to think in equally mythical and roughly comparable terms. If the obscenity laws were to be ended tomorrow, what would happen, who would be initially offended enough to be politically activated and how broad would be the response to activation? I think the following guesses lie in the minds of most policy makers.

The under-the-counter trade in the filthiest materials would increase substantially. This would alarm the few marginal groups that actually hunt smut, but their alarm would not activate substantial public support.

Open distribution through conventional trade circles of highly erotic, but serious or quasi-serious, artistic or scientific work would increase substantially.\textsuperscript{12} Aside from the smut hunters, few persons would care. There would be a fairly high incidence of accidents—that is, of innocent persons purchasing material that they found distasteful on closer inspection. Such accidents are randomized and self-limiting both in the sense that advertising will tend to warn innocent readers away and the reader can stop reading at the first instant of offense. The pattern of random minor accidents is unlikely to result in substantial political activation.

Merchandisers of the filthiest materials would aggressively seek to exploit the adolescent market. As a result considerable outcry would arise from parents and would elicit very broad response in the general community.

The same merchandisers would aggressively seek to exploit the adult market through highly specific, erotic advertising, display, and free sample


\textsuperscript{12}In fact as obscenity standards have been relaxed, this has occurred.
methods. Such methods would elicit relatively large political responses, partly because they would inevitably raise the adolescent problem just discussed, partly because they would shock and offend large numbers of persons, partly because they would bring to the surface continuing individual commitments to the goal of public morality which would remain sub-political if the sinning remained discreet, and partly because, particularly when massed in urban environments, they constitute an eyesore and contribute to urban blight.

Finally, and particularly in the initial stages after the termination of traditional policy, a large number of marginal incidents would occur particularly in relation to motion picture and theatrical presentations. Such presentations are more public than printed materials, their advertising is likely to be more public, they have a greater shock potential, and some real persons are doing the sinning—they move from the description of sin to sinful action. It is not clear whether these marginal incidents would sufficiently offend contemporary community attitudes to elicit political activation. Particularly at these margins, policy-makers are generally aware of the difference between the level of political activation necessary to compel enforcement of an existing statute and that necessary to initiate new policies, so that they are not likely to interpret instances of prosecution as manifestations of broad public arousal.

I believe that, quite apart from normative policy-analysis, most policy-makers today would assess the termination of traditional obscenity regulation, if accompanied by relatively strict regulation of the adolescent and public nuisance aspects of the problem, and restraints on theatrical and motion picture presentation, as a politically viable policy, once the termination was accomplished.

IV. POLICY-MAKING AND THE CONSTITUTION

It is quite another matter to accomplish the termination. For what we have earlier seen as the prescriptive thrust of obscenity statutes is reinforced by their declarative-cathartic aspect. The statutes declare that the state is against sin. To repeal them might seem to be a declaration in favor of sin—not a popular sort of declaration, especially for elected legislatures. It is here that the Constitution enters.

Many readers will no doubt be wondering why it did not enter much earlier. For the last twenty years, most of this country's obscenity policy has been set by a series of Supreme Court decisions on constitutional issues. Contemporary treatments of obscenity policy are typically and almost
inevitably constitutional discourses stringing together the dozen or so leading cases. I have not chosen to do that here, partly because it has been done so well elsewhere,13 and partly because such treatment almost inevitably concentrates upon the extreme logical complexity, confusion, and contradictions of the current state of the constitutional doctrine. A more abstract level of policy-analysis actually gives a clearer picture of what is happening in the Court as well as elsewhere.

Nevertheless the Constitution is important here. First it symbolizes and brings to the level of political activation what I have earlier characterized as the opportunity costs, that is, another social goal, freedom of expression, and the damage to that goal done by obscenity regulation. Moreover, long standing constitutional doctrines suggest something about the priority ordering of goals and acceptable methods of estimating opportunity costs. Both the wording of the first amendment and the opinions of the Supreme Court indicate that:

1. freedom of speech is to be preferred over most other social goals;
2. thought control is not a valued goal;
3. costs in the form of restrictions on thought are not acceptable costs—only costs in the form of restrictions on action are acceptable;
4. if the pursuit of a valued goal potentially involves costs to free speech, that policy alternative must be adopted which involves the least cost to speech—least cost being defined as no cost where a no cost alternative is available;
5. certain immediate and specific costs to speech are to be deemed to outweigh future and speculative costs to other goals (discounting probability calculations).14

In addition the Constitution provides a declarative-cathartic element of its own. It does our hearts good to declare against sin, but it also sets the patriotic pulses pounding to declare for the Constitution and freedom of speech. More generally the first amendment provides a prescriptive counterweight against the prescription of obscenity law. The first amendment too has been there for a long time and is, therefore, a worthy policy that we are bound to enforce.


In the wake of the New Deal, policy-analysis typically dealt with the Constitution as a set of constraints or outer limits on the alternatives that the policy maker might adopt—totally eliminating some, introducing high uncertainty costs into others, and for others yet resulting in higher potential administrative costs in the form of litigational costs, even if the alternative chosen should eventually be held constitutional. Such an analysis is still frequently valid, but very partial. In many instances the Constitution will provide a major ideological input to the policy-making process. It will provide the impetus and direction for policy change, at least after trouble has triggered the search for change.

V. OBSCENITY POLICY AND THE SUPREME COURT

The extent to which the Constitution provides this energizing input typically depends on the particular policy-making process in play and even more particularly on the role of the Supreme Court in that process. Because policy analysis is so difficult, depending as it does on an ability to comparatively evaluate goals, predict outcomes of alternatives, and compare costs that cannot be expressed in commensurable units, such analysis typically turns inward and becomes analysis of the policy-making process.\(^5\) Precisely for this reason I have attempted to stick to pure policy analysis even if only at the crude level of legal interests. Yet the interaction of state legislatures and the Supreme Court is so obviously crucial to obscenity policy outcomes that the policy-making process cannot be completely completely ignored.

It was the obscenity statutes which were common to, and long-standing in, all the states which provided the prescriptive thrust to which the Supreme Court bowed when it first entered the field. For its first reaction was to approve the traditional goal of morality through a policy of thought control and to officially estimate the opportunity cost to the freedom of speech goal as zero.\(^6\) In effect the Court avoided the enormous institutional cost to itself of declaring all fifty state obscenity statutes unconstitutional and creating a sudden policy void by avoiding a correct opportunity cost estimate, and refusing to follow the Court's own frequently declared goal priorities. For correct cost assessment plus the maintenance of the Court's own

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\(^5\)See Y. DROR, PUBLIC POLICY-MAKING REEXAMINED (1968).

\(^6\)Roth v. United States, 354 U.S. 476 (1957). The court ruled that material which appealed to "lustful thought" was obscene and might be banned. It thus specifically endorsed thought control as a method of attaining some goal. It did not state what the goal was, but by condemning "lustful thought" it endorsed sub silentio the traditional Christian goals of the statutes. The Court also ruled that obscene speech was not protected by the first amendment. Thus the banning of obscene speech by definition involved no cost to first amendment freedoms.
traditionally stated goal preferences would have led to an elimination of the entire obscenity regulation policy. Indeed the prescriptive force of the statutes is so great that the Court has never quite admitted that it will no longer accept the morality goal—thought control alternative—zero opportunity cost position.

Nevertheless the Court has, in fact, been busily redefining goals and reassessing costs. It had raised and disposed of the cost problem initially by indicating that since obscenity, as a category of speech, was utterly without social importance, the regulation of obscenity was a zero opportunity cost problem. It then neatly turned this argument on its head by holding that the morality goal might be pursued by the thought control alternative only when the opportunity costs were in fact zero—that is, when the materials actually at issue were utterly without redeeming social importance. In other words, if the state clings prescriptively to a morality-thought control goal alternative combination, the burden of proof is on it to prove zero opportunity costs to the preferred goal of freedom of speech.

The Court has also moved to a redefinition of goals. It has invited the states to redefine their goals as the protection of juveniles, or rather parental tutelage. Some states have responded by passing special obscenity statutes aimed only at traffic with juveniles. I think it is easier to conceive the policy problem here in terms of parental tutelage than protection of minors. First of all, if we are protecting juveniles, we remain essentially with a morality-thought control package with high opportunity costs to the freedom of the juvenile. The state is still aiming at the morality of the citizenry (as the twig is bent), and it is doing so by controlling the thought of a group of the citizenry. And to put the cost matter in constitutional terms, there is no reason to believe that first amendment rights are confined to adults, so that the opportunity costs of juvenile obscenity statutes are reduced from those of general obscenity statutes only in the proportion that adults are to the total population—this is far from zero costs.

On the other hand, if we begin from parental tutelage, we have a goal—the integrity of the family—which enjoys a higher constitutional preference than individual morality, and we may be able to bring opportunity costs back to zero. For the goal of freedom of speech is basically defined as a freedom from government intervention or supervision, not a positive, complete, autonomous and unlimited capacity against the world to send and receive.

17Throughout this essay I treat the Court as a whole. In fact the individual justices have widely differing views on obscenity policy. If my purpose here were to explain the policy-making behavior of the Court, the interactions of these differences would have to be charted. I choose instead to concentrate on general policy analysis.

Again, in constitutional terms, the juvenile may have first amendment rights against the state, but not against his parents. We have never defined our constitutional goal as giving juveniles a capacity to speak and hear against the instructions of their parents. Juvenile obscenity legislation thus pursues a goal which is at least on our priority list, by a policy alternative that is reasonably related to the goal, and one which involves proportionally reduced or, I would argue, zero opportunity costs to freedom of speech.\(^1\)

The Court has also sought to move the states toward an aesthetic or personal security goal, urging upon them obscenity statutes which forbid "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."\(^2\) Here again the redefinition of goal is not only a movement away from morality-thought control, but an attempt to move to a zero opportunity cost policy. The first amendment involves freedom to speak and to listen, but not a total capacity to deliver our message to everyone, nor a duty on the part of everyone to listen. Thus the prevention of the projection of speech onto an audience which does not wish to receive it would involve zero opportunity costs to the first amendment. This analysis is, however, incomplete. The real world situation is likely to be one of a mixed audience, some of which wishes to receive and some of which does not. Obscenity regulation of the nuisance (aesthetics and shock) variety thus reduces the opportunity costs proportionally \((i.e., \text{commensurate to the proportion of unwilling receivers in the total audience})\) but does not reduce them to zero. This does, however, appear to be a genuine "least cost" alternative\(^3\) so long as personal security and community aesthetics are placed high enough on the priority goal list to justify any costs to freedom of speech.\(^4\)

Moreover, in many instances least cost will, in fact, be reduced to no cost. The Court's "hard core pornography standard" requires both a shock

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\(^2\)Redrup v. New York, 386 U.S. 767, 769 (1967). The brief per curiam opinion is a startlingly frank self-analysis by the Court and a very explicit set of directions to the state legislatures as to what policies they should adopt.

\(^3\)Constitutional scholars will immediately recognize this as a translation of the "least means" or "narrowly drawn" statute test used in first amendment jurisprudence. See M. Shapiro, supra note 14, at 140. See also Strong, Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond, 1969. Sup. Ct. Rev. 41 for a similar "tight nexus" test.

\(^4\)Nuisance regulation may be constitutionally justified without resort to balancing of interests approaches under the traditionally approved first amendment sub-rule of "reasonable regulation of time, place and manner." Nuisance regulations would presumably not go to the substance of the speech, but only to the time, place and manner of its delivery.
offense and no redeeming social importance. Thus, with the possible exception of street display or other instances when the audience is absolutely captive, the Court is presumably unwilling to pursue the personal security goal if any costs to freedom of speech are involved, that is if any material of social importance would have to be suppressed to avoid shock. Indeed the hard core pornography standard generally reverses the cost problem. The moral goal may not be pursued unless there is no opportunity cost to the speech goal, and the speech involved is treated as creating acceptable opportunity costs to the personal security goal.

We have already noted that the "hard core pornography standard"—which is the Court's basic position today—also shifts from a morality to a mental health goal. And finally it is the device by which the Court allows the legislatures their declaration-catharsis while blocking administrative action, for convictions are so hard to obtain under the hard core pornography standard that administrative action is discouraged.  

Finally the Court has begun to try to withdraw morality-thought control from the constitutionally sanctioned goal and alternative lists. In Stanley v. Georgia it recently struck down a state statute which made it a criminal offense to be in private possession of obscene matter. While the Court's holding is as foggy as most of its other efforts in the field, it seems to rest in part on a right to receive (to hear as well as to speak) under the first amendment. Goal alternative analysis might run as follows. The banning of mere private possession without links to juveniles or distribution that has some probability of offending and shocking some part of the populace is not a policy alternative designed to accomplish either family integrity or personal security goals and is, therefore, an improperly chosen alternative. Or, purely pesonal morality is not an approved goal of the state. On the other hand, it is possible to read the decision as involving only opportunity costs, the costs to freedom of expression and privacy being high enough to brand the policy chosen too expensive even if the goal of morality is still on the accepted list.

The crucial problem for policy-analysis has been the Court movement toward a "pandering" standard, a movement which now seems to be stirring legislative response. The pandering notion focuses not on the material distributed but the mode of advertising and circumstances surrounding the

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22The Court's scienter rulings, not discussed here, have been another method of discouragement directed at an administrator who sought to enforce the law because it was there, and without regard to its essentially declarative-cathartic nature. See R. Kuh, supra note 8, at 111-115.

sale. If the behavior of the seller constitutes a pandering to or exploitation of the prurient interest of the public, such action is constitutionally punishable. The test was initially announced in the context of a case involving "borderline" materials in which the Court held that the circumstances of advertising and sale might help to determine on which side of the line the material fell. Subsequently the test seems to have taken on a life of its own quite apart from borderline materials.

To an extent it overlaps the shock test. Some sex advertising that pandered would undoubtedly thrust offensive "samples" on the innocent passerby. On the other hand, some pandering would not, e.g., the placement in a window of a neatly lettered small sign reading "Unspeakably vile pictures sold within." It is necessary, therefore, to specify the separate goal that the anti-pandering policy is designed to reach. Assuming that the pandering test is an independent policy, not simply an evidentiary rule for administering the cost accounting of the utterly without redeeming social importance notion, it is not easy to identify such a goal. The anti-pandering policy standing alone makes it a crime to do the best possible job of selling to people something they want and it is legal for them to have. Sale of identical material is legal if unaccompanied by promotion.

It soon becomes apparent that the anti-pandering policy is not a matter of re-evaluating goals but of re-allocating opportunity costs among goals. The goal of Christian moral purity, i.e. reducing the quantum of sexual thoughts and confining them to the marriage bed, is maintained. We now, however, recognize the high opportunity costs to freedom of speech involved in censoring the erotic materials themselves. However, at a greatly reduced cost to the substance of expression we can substantially reduce the circulation rate, and thus the total quantum of sexual thoughts by placing constraints on merchandizing techniques that would otherwise markedly increase total distribution. Thus the pandering test helps the old goal but makes a split-the-difference compromise on costs.

VI. RECENT SUPREME COURT DECISIONS

It is possible to test this policy analysis against the recent cluster of Supreme Court decisions on obscenity. Because the Stanley case seemed to rest on a "right to receive," it might reasonably have been concluded that there was also a right to send obscenity for purely voluntary and personal

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3This analysis may, of course, miss the realistic meat of the matter which may well be that the Court too wanted to do some declarative-cathartic posturing and say to the world: Look, we too, are disgusted by dirty book peddlers.
consumption. Such a development would have eliminated the morality goal and the thought control means of attaining it. The Court firmly rejected this development of Stanley in United States v. Reidel, which ringingly reaffirmed Roth and the continued place of morality on the list of approved goals. Reidel seeks to treat Stanley as if it were strictly an opportunity costs decision that found the privacy costs too high to justify the morality benefits. Justice Harlan was so embarrassed by the existence of a right to receive accompanied by a no right to send that he wrote a separate opinion insisting that the words "right to receive" as used in Stanley had absolutely no connection with any meaning that an English speaking person conceivably might have assigned them. The prescriptive policy thrust is still very strong. United States v. Thirty Seven Photographs, approving the seizure of obscene materials in a customs search, pursues exactly the same line of policy analysis.

Thirty Seven Photographs and Blount v. Rizzi reaffirm the Court's Freedman v. Maryland approval of prior restraints of obscenity so long as they require a prompt judicial test of the obscenity issue at the initiative of the government. These two cases do move the approval of prior restraint beyond the realm of motion pictures and theatres into that of printed matter, but they involve plenary federal powers of customs and post. The states would appear to be on safer prior restraint ground in confining themselves to the performing arts. Blount strikes down a prior restraint on procedural grounds and Thirty Seven Photographs desperately rewrites a statute to bring it up to the Freedman standards. The moral seems to be that the Court means the Freedman standards seriously, but is more than willing to cooperate with prior restraint schemes that can be made to include them. Nothing in New York Times Co. v. United States would lead one to revise this conclusion.

Two other rather ill assorted recent cases give us some interesting instruction about the shock goal. Rowan v. United States Post Office Department approves a federal mailing provision authorizing the stoppage of mail at the request of an addressee who "in his sole discretion believes [it] to be eroticly arousing or sexually provocative." The Court speaks

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28Id. at 358.
31380 U.S. 51 (1965); see note 40 infra.
3229 L. Ed. 2d 822 (1971).
of the “very basic right to be free from sights, sounds and tangible matter we do not want.” So where an unwilling audience is involved, the Court is willing to approve the censorship of not only obscene materials but of any materials that are even arguably erotic and that the recipient finds objectionable. For it is obvious that absent an unwilling audience provision and its attendant anti-shock goal, a statute aimed simply at “erotically arousing or sexually provocative material” would be unconstitutional as vague and overbroad even under the Roth test.

The second case is Cohen v. California, in which the Court overturned the disturbing the peace conviction of a young man who wore a jacket in a courthouse corridor which proclaimed across its back, “Fuck the Draft.” The Court stressed that

[W]e are often “captives” outside the sanctuary of the home and subject to objectionable speech. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependant upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Rowan and Cohen between them seem to signal a period in which the Court will cooperate with government authorities in pragmatically working out a series of anti-shock or nuisance policies that realistically correspond to the conditions of modern life and provide varying degrees of protection to individual sensibilities depending upon just how far into the world the sensitive decide to venture.

VII. POLITICAL VIABILITY

If we add up the juvenile, nuisance, and anti-pandering policy initiatives of the Court, it is fairly easy to see that the evolving policies are largely explainable in terms of the interaction of first amendment approved goals and costs and the politics of prescription and activation. The new policies do not quite abandon the prescriptive morality goal, while nevertheless materially altering policies and expected outcomes in the direction of constitutionally approved goals and cost assessments. On the other hand,
they are carefully tailored to avoid political activation, for their net effect would be that erotic materials would be dispensed inconspicuously to willing adult consumers for private consumption, precisely that state of affairs least likely to arouse the multitudes. The hard core pornography standard is an additional guarantee of quiet, because it insures against a sudden outburst of the most unpleasant materials at the time statutory regulation is relaxed.30

Only one flaw occurs at the operational level and that concerns motion picture and theatrical performance. If the presenter of an erotic show advertises too much to the point, he is guilty of pandering. If he doesn’t, he hasn’t given fair warning to the innocent ticket purchaser who may be badly shocked. Of course the same can be said for books, except that if the reader stops at the beginning of the first bad encounter, he is likely to get only a small shock. Given the difference in media impact, however, the theater seat can become the hot seat in a flash.

One solution, and indeed perhaps the best from the Puritan point of view, would be to leave the theater owner in this damned-if-you do, damned-if-you-don’t position. But since much theater and movie advertisement is word-of-mouth, and so will not require pandering, and the theater owner can, under present policies, urge redeeming social importance against shock and back his play with the often correct claim that the anti-pandering policy prevents him from warning the shockable, some additional theater policy is probably necessary to help in keeping things below the level of political activation. As a result, the Court has encouraged greater levels of prior restraint40 for motion pictures and is likely to follow the same course for live performances. An advance decision by a judge as to whether there is enough shock to justify suppression, will then allow us to use the pandering standard for the play’s advertising. There is, of course, a shock cost potential in that audience innocents may still be shocked by works of social importance. We return here to the cost trade-offs inherent in the “hard core pornography” standard with the additional factor that shock presented in a theater which the viewer must seek out, pay admission to, and enter, is far less of a nuisance than materials impinging on the casual passersby. Thus shock costs are reduced relative to social gain and justify more freedom in the theater than in the display window, but less than in books.

30Because it introduces a probability cost of prosecution that reduces entrepreneurial incentives to rapid expansion of production and sale of precisely those materials which would be most saleable.

40"Prior restraint" is the pre-censorship or licensing of materials as opposed to "subsequent punishment," i.e. prosecution for obscene publication after transmission to the audience has occurred. Traditionally prior restraints have been deemed by the court to be especially offensive to the first amendment, but it has approved such restraint directed at obscene motion pictures. See Freedman v. Maryland, 380 U.S. 51 (1965).
While it is clear that the policy directions the Court has been pursuing are politically viable, it is also clear from the Court's own performance, that it cannot itself frame and administer a full set of policies. The legislatures can. The Court has moved the policy-making process to the point at which legislatures could frame the following policies:

1. Prohibition of the distribution to juveniles of materials which would stimulate sexual thoughts to a degree thought undesirable by the community;
2. Prohibition of the commercial distribution to all but special scientific and expert audiences of hardcore pornography (shock + sexual fantasy + no redeeming social importance);
3. Prohibition of display to captive audiences (innocent viewers who cannot be forewarned or otherwise avoid exposure) of shocking materials (even though they had redeeming social importance);
4. Prohibition of modes of advertising and sale that appeal to prurient interest or pander to a morbid or exaggerated (judged by contemporary community standards) interest in things erotic;
5. Prior restraint or licensing statutes aimed at theatrical and motion picture production, recognizing that the dramatic media have more shock potential than others.

Some legislatures are now moving from prescription and declaration to such policies. It would seem probable that many legislative efforts will be struck down because of faulty drafting which created the possibility of drift back to older goals and cost allocations. However, unless the Court's views of these matters change materially under the impact of seeing the new legislative attempts, there is little question that the states can formulate a new set of obscenity policies which are politically viable and directed to achieving some socially desired goals at moderate opportunity costs to other goals. Whether the interaction of traditional prescription, constitutional tradition, and the Supreme Court has given us the best ordering of goals and allocation of costs is a question beyond the abilities of the current state of policy analysis to answer.41

41Policy analysts will, of course, have noted that, while this paper deals with the opportunity costs of certain alternatives, it says almost nothing of the predicted outcomes of the various alternatives, nor does it engage in even the most impressionistic cost-benefit analysis. In part this is a reflection of the enormous prescriptive thrust of obscenity laws. That thrust forces policy-makers to "do something," at least something declarative, about obscenity without regard to questions of whether the something has any pay-off. In part it reflected the thinness and tentativeness of data on the psychological effects of erotic materials. See Cairns, Paul, & Mishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 MINN. L. REV. 1009 (1962). The major problem, however, is that such analysis would bring us into the whole problem of allocating the sanction resources of our society, a Pandora's box which there is not space to open here.